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Using Civil Remedies in Corruption and Asset Recovery Cases

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Emile van der Does de Willebois & Jean-Pierre Brun
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Civil law remedies are a credible and effective tool for countries interested in recovering stolen assets—both when criminal procedures are unlikely to yield a result or in addition to such measures. They do not replace criminal prosecutions and confiscation but they complement them by attacking the economic base of corrupt activities and by focusing on victims’ interests. While common law offers a wider array of options to exercise proprietary claims on stolen assets, for personal claims both common and civil law systems offer reasonably similar avenues. Jurisdictions should consider increasing their use of legislation and legal concepts dealing with civil measures to recover profits obtained and damages suffered as a result of corrupt activities. Recent success stories involving private civil proceedings illustrate how such a strategic use and combination of available tools can boost asset recovery efforts.

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Following the entry into force of the UN Convention Against Corruption (UNCAC) in 2005 and more recently the Arab Spring and a string of scandals in the financial sector, the topic of corruption and its proceeds has steadily risen up the international policy agenda. The G8, the G20, and many regional and civil society organizations, are all putting forward ideas on how best to tackle it. This article aims to provide a modest contribution to that debate by focusing on an often overlooked avenue for going after corruption. Before doing so however, it is important to be clear about the terms, and specifically about the meaning of the concept of corruption.

I. INTRODUCTION: WHAT IS CORRUPTION AND HOW DO WE RESPOND?

In essence, corruption is an agency problem: one person (the agent), be he an elected politician or a director of a bank, is supposed to be acting in the best interests of someone else (the principal), be it the people of a nation as embodied in the state or the bank’s shareholders as embodied in the bank itself. Instead the agent allows his personal interests to take precedence. The agent is furthering his own interests at the expense of the principal. To be clear, principal-agent in its broad sense is not to be confined to its strict legal meaning, but rather as a sociological description of relationships. Though traditionally defined as “the abuse of public office for private gain,” the distinction between public and private sector corruption is really secondary, concerning only how the power is vested. We therefore agree with recent definitions of corruption as encompassing all forms of abuse of entrusted power. In its internal rules on preventing fraud and corruption, the World Bank defines a corrupt practice as “the offering, giving, receiving or soliciting, directly or indirectly, of anything of value to influence improperly the actions of
another party,"¹ without distinguishing between private or public sector. Similarly, Transparency International defines corruption as "the abuse of entrusted power for private gain."²

The global legal standard for the fight against corruption, the UNCAC, does not contain a definition of corruption itself. Instead, in Chapter 3, the UNCAC lists a whole array of conduct that is considered to be corrupt, including both public and private sector bribery and the embezzlement of both public and private sector funds,³ thus implicitly endorsing the same idea, namely that corruption straddles both the public and the private spheres.

In deciding how to respond to corruption, the course of action most often discussed is criminal action. When confronted with an abuse of power, we almost inevitably first look to the state to take enforcement action against the wrongdoer—typically combining a prison term with the confiscation of the profits from the corrupt act. Such action could entail a criminal case by a state against the corrupt defendant or against his assets, or it could entail action in more than one state if the property to be confiscated is located in a state different from where the corrupt behavior occurred. The default inclination is to take criminal action—possibly because of the corrosive effect to society as a whole. We wish to see the harm done to the community redressed and look to the criminal prosecutor to put things right. However, such a response, though understandable, misses an important component of the effects of corruption. Certainly, trust has been betrayed and the transgressor must be held accountable, but in addition corruption causes tangible damage to society as a whole or to a particular person or category of persons. Someone has suffered concrete damages as a result of corrupt acts and needs to receive compensation for their loss. In response to that loss, we should not be primarily focused on criminal trials but should rather direct our attention towards private civil action and restorative justice.⁴ This article aims to contribute to the current debate on how

   ⁴. In this article, the term “private civil law” is defined as that branch of law within a national system that is not criminal law, nor other branches of law defined mainly by a monopoly of the public authorities as entities that are empowered to commence legal actions. For example, if a prosecutor brings a case for bribery, that is a criminal action (that could end in jail time and monetary penalties). If a country brings a lawsuit for misappropriation of assets against that same wrongdoer, that is a private civil action (that typically ends with an award of
to deal with corruption by shining a light on the hitherto underused tools that private civil law can provide in seeking to redress corrupt behavior. It will do so specifically by providing an insight into how private civil action can repair the financial damage suffered by a victim. It will focus, in other words, on the remedies offered by private law to recover assets and obtain compensation from the wrongdoer.

Of course we do not wish to minimize the importance of criminal prosecutions and confiscation when trying to remedy acts of corruption. Criminal law expresses society’s disapproval of the corrupt act and aims at punishment, while civil law focuses on victims’ interests and aims at compensation and restitution. An effective response to corruption requires the concurrent use of both criminal and civil law remedies. Civil law remedies can complement criminal sanctions by attacking the economic base of corrupt activities both in the public and the private sector. As Tim Daniel and James Maton point out, “asset recovery efforts need flexibility” and thus a range of mechanisms needs to be employed to achieve the desired result. 5 Recent success stories of asset recovery via private civil proceedings can illustrate how.

This article provides a brief overview of the way in which civil actions can contribute to the fight against corruption. Apart from the more philosophical reasons why civil remedies merit attention, there are also more practical issues to be considered. Many criminal law systems do yet not allow for the distribution of the confiscated amount to the victim of the crime. Though this shortcoming may be circumvented in cases of public corruption by a sharing agreement between states, this is not possible in private corruption cases.

In addition, in most grand corruption cases, certainly where serial acts of corruption have been committed over a longer period of time, even if some or all the acts of corruption are proven, it is nearly impossible to trace all their proceeds (i.e., follow funds from their immediate incarnation as the proceeds of a corrupt act onwards along a trail of layered bank accounts and investments). It often happens that some assets beneficially owned or held by the suspect are frozen, but that the paper trail is incomplete (due to non-cooperative jurisdictions or lack of documentation or evidence), preventing the

compensation or the turnover of specified assets and cannot end with jail time). Hence, “civil law” may also be referred to as “private law,” in terms of laws under which non-state actors may commence legal actions. The phrase “civil law” in this context is not intended to mean “civil law” as opposed to “common law,” designating different types of legal systems.

establishment of an evidential link between a specific crime and the assets, which is still required in many systems of law to establish an in rem (or proprietary) claim. In addition, substantial portions of proceeds of corruption are often spent on luxury items which have a high maintenance cost and depreciate quickly. As most criminal law systems do not (yet, we hope) allow for the confiscation of assets which are not related to the crime as replacement value, civil proceedings, by establishing a general claim for damages, can provide a remedy to these problems.

Finally, civil remedies also allow an injured party to seek full damages from third parties whose forfeitable criminal gains may be negligible. A bank, which knowingly assists in the laundering of proceeds, may have only gained 1%–3% per year on the account used for the laundering of the proceeds. In a criminal case that small percentage would be the only forfeitable criminal gain; in a civil case however, certain jurisdictions allow the bank to be sued for the entire damage that is caused.

By identifying challenges and best practices and providing many case examples, it becomes clear that civil law remedies are a credible and effective tool for countries interested in recovering stolen assets in the courts of another country, especially when criminal law avenues are either not available or have a low likelihood of success. First, this article provides an overview of the types of actions available to a victim of corruption seeking redress. Then the article details some of the ways in which the monetary awards to be paid to the victim can be calculated.

II. Types of Actions

A defrauded principal has different options available to him to recoup some of the losses he has suffered. He may have either a proprietary claim to enforce his ownership rights on a particular identifiable asset or a personal claim against a particular person or entity for damages.6 The advantage of the former is that a proprietary claim is enforceable independently of the status of unsecured creditors of the defendant. A particular piece of property attributable to the corrupt act may be available exclusively to the principal and cannot be used to satisfy the claims of other creditors. Thus, if the principal

6. Equitable proprietary claims are available in cases involving abuse of power by an agent where English law (or one of its many derivatives in the British Commonwealth) applies. No property claim can be mounted on the basis of the civilian legal tradition found in continental Europe (and its derivative legal systems), per se. However, as a practical matter and through the application of anti-money-laundering laws or criminal proceedings where the victim may act as a partie civile, a similar result to the common law tracing and proprietary claim remedies can be achieved in civil law countries.
holds a proprietary claim to an asset that is part of an estate in bankruptcy, the principal can enforce his claim against that asset as if there were no bankruptcy. If he holds only a personal claim and the agent is impecunious or bankrupt, his claim will be satisfied in equal measure to all other creditors, and he may obtain only a small part of his full claim. In this situation a proprietary claim is preferable. In other situations, however, personal claims may be useful (e.g., when the corrupt act has caused personal damage independent of an asset or damage surpassing the value of a particular asset).

Below we will discuss these civil actions available to a state victim of corruption or a defrauded employer. As we shall see, common law offers a wider array of options to exercise proprietary claims, whereas for personal claims both common and civil law systems offer reasonably similar options.

A. Proprietary Actions

The UNCAC explicitly recognizes states’ obligations to “take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of [a corruption] offence” and to “recognize another State Party’s claim as a legitimate owner of property [so] acquired.”

An owner of an asset should be able to exercise his full rights to that asset, no matter who has possession of it. That is the basic idea underlying proprietary actions under both civil and common law systems. The difference lies in distinctions in the way that ownership is understood. The slightly more differentiated understanding of ownership under common law allows for a wider variety of legal action.

1. The constructive trust

Unlike civil law systems, the common law makes a distinction between the person holding legal title to an asset and the person holding so-called beneficial title to it, the beneficial owner. The latter is the one ultimately in control of the asset, who should ultimately be enjoying the benefit of the asset in question. In many cases, the legal and beneficial owner will be one and the same person (e.g., I am the legal owner of my car and am also the one in full control of it, enjoying its benefits) but in some cases they will not. The prime example is the trustee who holds legal title to a piece of real estate, but may do so for the benefit of certain beneficiaries who may not yet

7. UNCAC, supra note 3, art. 53(a) & (c).
8. See generally DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 553–54 (2012) (discussing the current status of legal and beneficial ownership in courts of equity as opposed to the courts found in most American states).
have come of age. The trustee has a fiduciary duty towards the beneficiaries to take proper care of the asset in question. How this distinction is applied under English law in situations of bribery or fraud is currently unclear. There are two strands of case law on this—one implying a wider extension of the concept of trust than the other. Also, not all common law systems are as conservative in their approach to this area as is English law proper. ⁹

Until recently, under English law, it was generally understood that a defrauded principal who is the victim of embezzlement or whose employee has accepted a bribe, would qualify as the beneficial owner of the traceable proceeds of corruption. As such, he can exercise his right against the person holding legal title and claim back his property. The concept of what constitutes property in situations where a proprietary claim can be asserted is very wide and includes assets that may never have been part of the estate of the victim. The fact that embezzled state funds would qualify as state property, and therefore subject to a proprietary claim, may be easily understood—the funds in question (provided they can be traced ¹⁰) after all were once part of the assets of the state. ¹¹ However the notion of what may be recovered stretches further than that. Even a bribe paid to an official in furtherance of obtaining a certain contract could qualify as property to which the state holds beneficial title ¹²—and thus the state could vindicate, as beneficial owner, the repayment of that bribe.

Since the defrauded principal is considered the owner of the stolen property, his claim extends not only to the property in question but also to any profits that may have derived from it. In addition, it not only extends to the property itself but also to any substitute assets into which the original property may have been converted. The beneficial interest of the defrauded principal remains attached to the asset along the way. It is here that the uniquely common law concept of “tracing” becomes relevant. ¹³ Tracing is the process:

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9. For instance, U.S. and Canadian courts recognize the so-called “remedial” constructive trusts, while English courts do not. Under a remedial constructive trust, the court has jurisdiction to declare property held by a defendant to be beneficially owned by a claimant where to find otherwise would be “unconscionable.”

10. See UNCAC, supra note 3, art. 31(2).

11. See e.g., Chaim Saiman, Restitution and the Production of Legal Doctrine, 65 WASH. & LEE L. REV. 993, 1003–06 (2008) (explaining why and how a victim of embezzlement has a relative proprietary claim under tracing, contract, and property principles).


13. Unique in a private civil law context, that is. For criminal confiscation, civil law jurisdictions do allow for tracing of assets—the following proceeds of crime through their different forms.
[By which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property. Tracing is also distinct from claiming. It identifies the traceable proceeds of the claimant’s property. It enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim.]

The holder of the beneficial interest can follow this trail and exercise his claim even where there have been numerous successive transactions. His interest binds everyone who takes the property or its traceable proceeds except a bona fide purchaser for value without notice of the breach of trust.

For example, in Attorney General v. Reid, Charles Warwick Reid, a lawyer from New Zealand, arrived in Hong Kong to join the Attorney General’s Chambers in 1975 and eventually worked his way up to Principal Crown Counsel and the head of Hong Kong’s Commercial Crime Unit. By 1989, he had acquired control of assets amounting to roughly HK $12.4 million, inexplicably and disproportionately to his earnings. In October 1989, Reid was suspended from duty and arrested by Hong Kong’s Independent Counsel Against Corruption on suspicion of corruption.

The Attorney General of Hong Kong fought a precedent-setting battle all the way up to the Judicial Committee of the Privy Council in London in order to recover the portions of approximately HK $12.4 million of bribe money that had been converted into property after passing through various corporate vehicles and legal owners in New Zealand on Reid’s behalf. The issue at stake was that the Government of Hong Kong maintained that it held a registrable interest in the Reid-owned real properties in New Zealand, as they represented the proceeds of bribery while Reid was in dereliction of his fiduciary duties as a civil servant. The Privy Council judgment took for granted that the New Zealand properties were purchased with Reid’s bribe money.

The Privy Council determined that the assets received by Reid as bribe payments should have been “paid or transferred instanter to the person who suffered from the breach of duty.” This point is of great

14. See Foskett v. McKeown and Others, [2001] 1 A.C. 102 (H.L.) (Eng.) (describing tracing as “neither a claim nor a remedy” but as merely a “process”).
16. See id.
17. See id. (discussing that Hong Kong seeks to register caveats against the three properties in New Zealand).
18. Id.
significance to the legal relationship held between the bribe-receiving fiduciary and the party whose trust has been betrayed; it provides the promise of a meaningful means of redress. Due to the Privy Council ruling, English common law (and many other legal systems) recognized that property acquired—either innocently or criminally—in breach of trust belongs in equity to the *cestui que trust* (i.e., the beneficiary). In other words, persons holding such property do so constructively on trust for the true owner.19 It also held that if the value of the property representing the bribe depreciated, the fiduciary had to pay the injured person the difference between that value and the initial amount of the bribe.20 If the property increased in value, the fiduciary was not entitled to retain the excess since equity would not allow him to make any profit from his breach of duty. While not without its controversies, in many English speaking locales the Constructive Trust Doctrine is now a useful tool for those who seek to prevent the dispersal of corrupt funds and recover the proceeds of corrupt activities, such as bribery.

Similarly, in *Kartika Ratna Thahir v. Pertamina*, Pertamina, an Indonesian state-owned enterprise whose principal business was the exploration, processing, and marketing of oil and natural gas, sought to recover bribes paid to Pertamina executive Haji Thahir by two contractors hoping for better contractual terms and preferential treatment.21 The bribes were deposited by the executive into a bank in Singapore.22 In determining whether Pertamina had a proprietary claim on the funds in the account, the court found that Thahir owed a fiduciary duty to Pertamina and that the bribes received by him were held as a constructive trustee for Pertamina, meaning Pertamina held a proprietary claim to the funds.23

However, as indicated, it is not clear now whether the concept of constructive trust is still to be interpreted so extensively. A court decision rendered just two years ago has cast doubt on the more extensive use of the constructive trust doctrine as laid out above. In essence, *Sinclair Investments (UK) Ltd. v. Versailles Trade Finance Ltd.*, drawing on old case law from the English Court of Appeal, makes a distinction between a fiduciary enriching himself by depriving a claimant of an asset (in which case there is a constructive trust) and

19. There are limitations imposed on this idea to protect innocent third party holders of property who have given value without notice of the underlying breach of trust.
21. See Thahir v. Pertamina, [1994] 3 SLR 257, [2]–[3] (Sing.) (discussing that bribes were paid and deposited into the bank in favor of Haji Thahir, who was employed by Pertamina).
22. See id. at [46].
23. See id. at [57].
a fiduciary enriching himself by doing wrong to a claimant (in which case there is not). The Sinclair case concerned breaches of fiduciary duty by an individual, Mr. Cushnie, who solicited funds from investors and others. The individual investors’ money was invested in a BVI company controlled by Mr. Cushnie called Trading Partners Limited (TPL). TPL held the funds on an express trust for the investors to use it to acquire title to factored trade receivables. TPL applied that money illegitimately to various fraudulent activities including passing the money to a company called Versailles Trade Finance (VTF), another of Mr. Cushnie’s vehicles, in order to artificially inflate the share price of VTF’s holding company, Versailles Group PLC (VGP). Mr. Cushnie sold part of his shares in VGP for millions, but joint administrative receivers were appointed over VGP and VTF shortly thereafter at the insistence of the banks. Sinclair (an investor), on behalf of TPL, brought proceedings asserting a proprietary right over the proceeds of Mr. Cushnie’s sale of his shares in VGP on the basis that the proceeds were held in constructive trust for TPL as a result of Mr. Cushnie’s breach of his fiduciary duties. The importance in this context of ensuring a proprietary right over the proceeds was that given the insolvency of VGP, TPL ranked first amongst a number of creditors with claims to VTF/VGP’s assets.

The English courts considered the legal principles applicable to the case as if the proceeds were bribes. The Court of Appeal held that a beneficiary of a fiduciary duty, in principle, cannot claim a proprietary interest in respect of an asset (e.g., bribes or secret profit) acquired in breach of such duties unless:

1. The asset is or has been beneficially the property of the principal; or
2. The agent acquired the asset by taking advantage of an opportunity or right which was properly that of the principal.

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25. Id. at [5].
26. See id. at [8].
27. See id. at [14].
28. See id. at [18].
29. See id. at [33]–[34], [37]–[38] (citing to former cases making a distinction between receiving profits as bribes as opposed to profits from other means).
30. See id. at [72]–[74].
In relation to secret profit or bribes, the Court of Appeal held that the claimant is entitled to an equitable account rather than a proprietary interest and declined to follow the Privy Council’s decision in *Attorney-General of Hong Kong v. Reid* in this regard.31

The story does not end there however, and the principle has once again become unclear as a result of the Court of Appeal’s decision in *FHR European Ventures LLP v. Mankarious*. Monte Carlo Grand Hotel Ltd (MCG) owned the share capital of Monte Carlo Grand Hotel SAM, which owned the Monte Carlo Grand Hotel in Monaco. MCG entered into a brokerage agreement with an agent, Mr. Mankarious, acting through Cedar Capital Partners, on behalf of a consortium of purchasers to sell the hotel in return for a fee of €10 million once the deal was completed.32 The consortium bought the hotel for €211.5 million but was unaware that the agent had received a commission of €10 million. The consortium sued the agent for the amount of the payment he received from MCG.33

The Court of Appeal held that the consortium had a proprietary remedy as a result of the agent’s breach of his fiduciary duty. The Court of Appeal held this case was a category two case (pursuant to *Sinclair*) and therefore made in exploitation of an opportunity that was rightfully the beneficiary’s.34 But the judgment in *Sinclair* on its face appeared to have decided that bribes and secret commissions would not give rise to proprietary remedies. The Court of Appeal noted that the decision “throws into clear relief . . . the very considerable difficulties inherent in the analysis in *Sinclair Investments*. . . . This has made the law more complex and uncertain and dependent on very fine factual distinctions.”35 The Court of Appeal suggested that if Parliament does not clarify the law, then only the Supreme Court can provide a coherent and logical legal framework.36

Thus, until such time as the position is clarified by the Supreme Court or Parliament, whether under English law secret commissions or bribes are recoverable on a proprietary basis will be largely dependent on the particular facts of the case. The English Court of Appeal’s decision in Sinclair however, has had no impact on the law of Hong Kong or of many other British Commonwealth jurisdictions. What is uncontroversial however is that where there is a clear prior

31. *See id.* at [75].


33. *See id.* at [5], [12].

34. *See id.* at [83], [116].

35. *Id.* at [116].

36. *See id.*
proprietary right to assets and a defendant disposes of those assets in breach of a fiduciary duty, a constructive trust can be imposed on the proceeds of this particular form of corruption.

For example, in State of Libya v. Capitana Seas Ltd., the state of Libya sought to obtain ownership of a house in London belonging to Capitana Seas Limited, a company ultimately controlled by Saadi Qaddafi, the son of the former ruler of Libya, Muammer Qaddafi. The judge found that he had used state funds to obtain the property and ruled:

I am satisfied, on the evidence which has been put before me, that Saadi Quaddafi is the sole ultimate beneficial owner of the Defendant company [and that] the property was wrongfully and unlawfully purchased with funds belonging to the Claimant. In those circumstances, the beneficial interest in the property is held by the Defendant, for the Claimant, as constructive trustees.37

In the above cases, fiduciary duty is defined very widely:

[A] ‘fiduciary relation’ exists (a) whenever the plaintiff entrusts to the defendant property, including intangible property as, for instance, confidential information, and relies on the defendant to deal with such property for the benefit of the plaintiff or for the purposes authorized by him, and not otherwise . . . and (b) whenever the plaintiff entrusts to the defendant a job to be performed, for instance, the negotiation of a contract on his behalf or for his benefit and relies on the defendant to procure for the plaintiff the best terms available. . . .38

It may, as in some of the examples above, give rise to a constructive trust and thus to a proprietary claim, or it may also provide a basis for personal claims.39

2. Revendication

As noted earlier, the concept of trust is not known by the civilian legal tradition of continental Europe and consequently there is no way in which a victim can exercise his rights as a beneficial owner of an asset held in constructive trust as discussed above. Most civil law systems do, however, provide for an action to claim back one’s property as the owner of that property (in French “action en revendication” and in German “Vindikationsklage”) that can be

39. See discussion supra Part II(A)(1).
exercised against anyone holding that property—though exceptions for bona fide acquirers in certain circumstances may apply. However, those actions tend to be limited in scope to the return of the thing \((\text{res})\) itself \(\text{(i.e., there is no tracing of the asset through changes in its original form)}\) and are sometimes limited in time and do not typically extend to profits generated by the asset.\(^{40}\) Typically, money as such cannot be the subject of a proprietary action under civil law. As one writer noted:

\[
\text{It is almost an axiom of civil law [countries] that money lacks } \text{“}\text{droit de suite} \text{” and “}\text{droit de preference} \text{.” In whatever way money has passed hands, the person who holds title, has, at best, a personal action, not a real one, and thus does not have the position of a “}\text{separatist} \text{” in case of bankruptcy. . . .} \quad \text{\textsuperscript{41}}
\]

While as a general rule that may be the case, there are some cases stretching these limits. In a recent court decision in Quebec,\(^{42}\) a judge ruled that provided that a sum of money could be clearly identified, a real action was available to the claimant. In this case, a party who was the owner of a claim against a third party that had been executed and the proceeds of which were held by the Receiver General of Quebec, sought to revendicate the amount of those funds plus interest,\(^{43}\) seeking application of articles 912 and 953 of the Civil Code of Quebec:

\[
912. \text{The holder of a right of ownership or other real right may take legal action to have his right acknowledged. . . .}
\]

\[
953. \text{The owner of property has a right to revendicate it against the possessor or the person detaining it without right, and}
\]

\(^{40}\) This is not true for all civil law systems, for example in German law.

\(^{41}\) See E.J.H. Schrage e.a. \text{(red)} \text{De rol van geld in het privaatrecht symposium over recht en geld 13} \text{\textsuperscript{3} \text{(2004) \text{(translation by author).}}}

\(^{42}\) Saroglou v. Canada (Receiver General), 2012 QCCS 602 (Can.). It is acknowledged that the legal system of Quebec is mixed common and civil law. The civil (private) law of Quebec was once generally considered to be civil law in nature, whereas public and criminal law was considered to operate according to Common law rules of construction of statutes because Canada is a federal state and natural laws are supposed to be applied uniformly under rules established by the Supreme Court of Canada. However, things are changing. Quebec courts have begun to adopt purely common law inventions like the Mareva (or freeze order) injunction or the Anton Piller order (or private search and seizure order).

\(^{43}\) Id.
may object to any encroachment or to any use not
authorized by him or by law.\textsuperscript{44}

In determining whether a revendication action can be instituted
for a sum of money, the judge agreed with previous case law that,
“Money is a fungible asset, to be able to revendicate title to it, it
should be clearly identifiable. It is not sufficient that it be [merely]
quantifiable”\textsuperscript{45} and concluded that “[i]t appears, therefore, that for an
action in revendication to lie in regard to a sum of money, certain
factual proof must be made concerning the type of accounting and
deposit that has been used,”\textsuperscript{46} thus making it clear that there is no
principled basis to object to a revendication action for funds—
provided they are identifiable.\textsuperscript{47}

Now while there is thus some marginal precedent for a proprietary
action to claim back funds under the civil law tradition, it is in no
way as well developed as the constructive trust doctrine under the
branch of common law known as equity. Also there is certainly no
precedent for any claim of profits generated with the funds in
question. Proprietary claims and remedies will not be available in all
cases. For instance they may not be available in the absence of a
breach of fiduciary duty. A bank has no proprietary claim under
English law to the proceeds of an armed bank robbery, because a
bank robber is in no way an agent of the victim bank. Equally, some
commentators claim that if the proceeds of an abuse of power cannot
be traced because they have been successfully laundered so as to
render it impossible to demonstrate a link between the original funds
and the funds ultimately identified in the defendant’s estate, a
proprietary claim will fail. In that case recourse will have to be made
to a personal claim against persons holding the assets in question or
those who have participated in the corrupt act or the ensuing money
laundering. However, this understates the rules of equitable
proprietary tracing. Tracing is not limited to “following” the proceeds
of corruption in the physical sense. The law of tracing provides a
series of rules of presumption and shifting burdens of proof to allow a
judge to decide who may be the true owner of a property. For
instance, equity (which is, again, the branch of the common law we
are concerned with) says that if a dishonest agent has mixed his

\textsuperscript{44.} Civil Code of Québec, S.Q. 1991, c. 64, arts. 912, 953 (Can.).
\textsuperscript{45.} Saroglou, 2012 QCCS 602, ¶ 44 (translating Justice Clément Gascon’s
comment).
\textsuperscript{46.} Id. ¶ 47.
\textsuperscript{47.} Since in the current case the judge could not determine whether the
funds had in fact been intermingled with other funds, he did not
pronounce a final ruling but sent it back to the judge seized of the
merits of the case.
principal’s assets with those of his own, he is presumed to have dissipated his personal assets first—leaving any remainder deemed to belong to his principal. Moreover, an agent can be sued for an accounting of his use of his principal’s funds. If he fails to account for what he has done with his principal’s property, (a) he is liable personally to restore the same on the basis of an equitable damages award, and (b) what property remains under his control can be impressed with an equitable charge or lien.

B. Personal Claims

We will now turn to an examination of the ways in which a victim of corruption can recover damages from a defendant based on a personal claim sounded in breach of contract, tort, or unjust enrichment. Damages are generally understood as “[m]oney claimed by, or ordered to be paid to a person as compensation for loss or injury.” The object of awarding damages is to redress the monetary loss suffered by the victim as a result of an act or omission. The basic rule for the determination of damages in corruption cases provides that the victim must be placed as much as possible in the situation he would have been in but for the commission of the corrupt act. Thus, all expenses or lost profits caused by the corrupt act must be compensated. A plaintiff’s right to compensation may be reduced or disallowed in case he himself is found to be (contributorily) negligent.

In the current context, where a corrupt act has occurred, a plaintiff must demonstrate damage, the breach of a duty owed to the plaintiff by a defendant, and the causal link between the act and the damage. Apart from liability of those who directly initiated or

49. Compensation may cover material damage, loss of profits and non-pecuniary loss. Civil Law Convention on Corruption, art. 3(2), Nov. 4, 1999, E.T.S. No. 174 (entered into force Nov. 1, 2003). Section 38 of the Explanatory Report states that the material damage (damnnum emergens) refers to the actual reduction in the economic situation of the person who has suffered the damage. The loss of profits (lucrum cessans) represents the profit that could reasonably have been expected but that was not gained because of the corrupt act. Id., Explanatory Report, art. 38.
50. See, e.g., id. art. 6.
51. For example, Article 4 of the Convention states:

Each Party shall provide in its internal law for the following conditions to be fulfilled in order for the damage to be compensated:

(i) the defendant has committed or authorised the act of corruption, or failed to take reasonable steps to prevent the act of corruption;
(ii) the plaintiff has suffered damage; and
committed the act in question (i.e., the donor and recipient of the bribe or the government official who embezzled funds), those who somehow facilitated the act (e.g., banks through which the funds have passed, lawyers whose clients’ accounts were used in transferring stolen assets, trust, and company service providers involved in the setting up and management of shell corporations) may, depending on the legal system, also be liable because they either dishonestly assisted a corrupt agent to breach his fiduciary duty of loyalty owed to his principal—or were recklessly indifferent to obvious risks (or were guilty of “blind eye knowledge of the obvious”), or were merely negligent in their due diligence concerning the origin of funds or the purpose of the transaction. However, it is rare when a legal system allows a third party (like a bank) to be successfully sued for negligently assisting in a fraud. Usually, no duty of care is said to exist to unforeseen or unknown third party victims, or the defendant hides behind contractual disclaimers of liability for negligence.

1. Contract

In certain cases of corruption there will be a contractual relationship between the harmed party and the perpetrator of the corrupt act. For bribery the situations that most readily jump to mind is of an employment contract between a principal (harmed party) and his agent (person receiving the bribe) or a contract for the performance of works between a state (harmed party) and a private company (person paying the bribe). Where embezzlement is concerned, the embezzler will often be in some way employed, or performing certain services for the harmed party. The question then is to what extent that contractual relationship can provide the basis for an action for breach of contract and what sort of damages may be awarded as a result. In some cases even a third party beneficiary from a contract can seek to recover damages.

Under the UN Oil for Food Program (OFFP), the UN Security Council established a vehicle for the sale and lifting of Iraqi crude oil

(iii) there is a causal link between the act of corruption and the damage.

_Id._ art. 4(1).

52. The bribe contract itself is, of course, invalid _ob turpem causam._ Cf. Civil Law Convention on Corruption, _supra_ note 49, art. 8 (“Each party shall provide in its internal law for any contract or clause of a contract providing for corruption to be null and void.”). This is also the rule in the list of transnational principles, which states “[c]ontracts based on or involving the payment or transfer of bribes (‘corruption money’, ‘secret commissions’, ‘pots-de-vin’, ‘kickbacks’) are void.” Center of Transnational Law, No. IV.7.2(a) Invalidity of Contract Due to Bribery, TRANS-LEX, _http://www.trans-lex.org/output.php?docid=938000_ (last visited Apr. 22, 2013).
and for direct financial transactions with the Iraqi regime.\(^\text{53}\) The resolution establishing the OFFP, UN Security Council Resolution 986, permitted the regime to sell Iraqi oil under strict conditions designed to ensure that the proceeds were used for humanitarian goods and for the benefit of the Iraqi people.\(^\text{54}\) An escrow account was established at BNP New York in Manhattan, to receive the proceeds of the oil sales and to pay for the humanitarian goods.\(^\text{55}\) The UN and BNP executed an agreement for banking services that governed the management of the escrow account.\(^\text{56}\) In 2008 the Republic of Iraq filed a suit with the U.S. District Court in New York, which is still ongoing.\(^\text{57}\)

In its claim, the Republic of Iraq asserts that the sole purpose of the agreement was to protect the interest of the Republic and the Iraqi people from corrupt and wrongful intentions of the Iraqi regime.\(^\text{58}\) It argues that, among other things, BNP did not disclose that intermediaries were involved in the sale of oil—which is a relevant fact since the presence of an intermediary almost always means the seller (Iraq in this case) is not getting full market value since the intermediary gets part of the gain.\(^\text{59}\) In so doing, it thus furthered its own commercial interests and that of its commercial


54. Id. (stating that the program was intended to be “a temporary measure to provide for the humanitarian needs of the Iraqi people, until the fulfillment by Iraq of the relevant Security Council resolutions”).

55. Iraq (Oil-for-Food), SECURITY COUNCIL REPORT (Apr. 30, 2008), http://www.securitycouncilreport.org/monthly-forecast/2008-05/lookup_c_glKWleMTlTsG_b_4065745.php (stating that the majority of revenue from this program was held in escrow for the purchase of related items like food, medicine, housing, oil production, sanitation, etc.).

56. See id.


58. See generally Republic of Iraq v. ABB AG, No. 08 Civ. 5951(SHS), 2013 WL 441959 (S.D.N.Y. Feb. 6, 2013) (describing the overall litigation, the Iraqi issues raised in the suit, and the initial purpose of the program being to continue Iraq’s economic isolation while relieving the suffering of the Iraqi people caused by those sanctions).

59. See id. at 5 (explaining how Chevron would pay intermediaries a premium above the official selling price that would be paid as a surcharge to the Hussein Regime).
customers—purchasers of oil—to the detriment of the Iraqi people. In addition the Republic of Iraq claimed that BNP breached the terms of Resolution 986, which was incorporated into the agreement and which required full transparency of each transaction.\(^\text{60}\) It did so by concealing material information from its disclosures to the UN, including information on actual purchasers of oil and the fact that surcharges were being paid.\(^\text{61}\) Thus, according to the claim, BNP breached the banking agreement through negligence and intentional conduct, and the Republic of Iraq, as a third party beneficiary of the contract, should therefore be entitled to recover its actual damages from them.

Remedies for invalidity or breach of contract will generally include monetary damages. The absolute invalidity of a contract made for an unlawful purpose is based on the social harm of corruption and the violation of general moral principles rather than on the harm to the aggrieved party (the harm would be an argument for a “voidable”—as opposed to a void—contract). In that case the principal could be left completely without counter-performance. He, however, may wish to enforce the contract (e.g., because execution is already too far advanced). In that case his damages may consist of his paying too much for the contract (because the contract partner included the bribe in his calculations). Rescission or annulment of contract is also possible, particularly in cases of bribery and collusion in bidding.\(^\text{62}\) Article 34 of UNCAC states that, “States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract.”\(^\text{63}\)

The World Duty Free Limited case highlights the void and voidable distinction. In April 1989, the Government of Kenya concluded an agreement with the company “House of Perfume” for the construction, maintenance, and operation of duty-free complexes in two of the country’s airports.\(^\text{64}\) The “World Duty Free Limited” company replaced the “House of Perfume” in May 1990 with an

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60. See id. at 2 (noting that the resolution required Iraq to submit to the Secretary General a plan of distribution and confirmation that the humanitarian goods arrived in Iraq).

61. Id. at 4–5.

62. Cf. Civil Law Convention on Corruption, supra note 49, art. 8(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.”).

63. UNCAC, supra note 3, art. 34, at 26; see also Civil Law Convention on Corruption, supra note 49, art. 8(2)

64. World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, ¶ 62 (Oct. 4, 2006).
amendment to the agreement.\textsuperscript{65} In August 1995, a lease was concluded between the Kenya Airports Authority and World Duty Free. Mr. Nassir Ibrahim Ali signed these contracts on behalf of the companies.\textsuperscript{66}

On June 16, 2000, World Duty Free Limited requested arbitration of a dispute before the International Centre for the Settlement of Investment Disputes. World Duty Free contended that Kenya had breached the 1989 agreement by illegally expropriating its properties and destroying its rights under the agreement.\textsuperscript{67} Kenya, on the other hand, argued that the agreement was procured through the payment of a bribe to Kenya’s then-President Daniel Arap Moi. Hence, it claimed that it was unenforceable as a matter of public policy.\textsuperscript{68}

The Tribunal first considered whether Mr. Ali had paid a bribe to President Moi and whether the agreement had been procured as a result of a bribe. It then examined the consequences of the bribe on the validity and enforceability of the agreement under both public policy and applicable laws.\textsuperscript{69} The Tribunal found that the payments by Mr. Ali on behalf of the House of Perfume to President Moi were bribes that were given in order to obtain the 1989 agreement.\textsuperscript{70} The Tribunal highlighted that bribery is contrary to the international public policy of most, if not all, states. Thus, it concluded that claims based on contracts of corruption or on contracts obtained by corruption could not be upheld by it.\textsuperscript{71} Citing Lord Mustill’s legal opinion,\textsuperscript{72} the Tribunal accepted that there is a distinction between contracts which are void and those which are voidable. A void contract is the one that is so defective “as to make it entirely ineffectual in the eyes of the law. It is from the outset empty of content.”\textsuperscript{73} In contrast, a voidable contract is intrinsically valid and the injured party “has the option of rescinding the contract, declaring itself free from further obligations, and if necessary going to the court to obtain a decree to that effect.”\textsuperscript{74}

Although in practice the outcome is often the same, there are some differences. Where a contract is void, no action is required to

\begin{itemize}
  \item \textsuperscript{65} \textit{Id.} ¶ 63.
  \item \textsuperscript{66} \textit{Id.} ¶ 126.
  \item \textsuperscript{67} \textit{Id.} ¶¶ 4, 127.
  \item \textsuperscript{68} \textit{Id.} ¶ 128.
  \item \textsuperscript{69} \textit{Id.} ¶ 129.
  \item \textsuperscript{70} \textit{Id.} ¶ 136.
  \item \textsuperscript{71} \textit{Id.} ¶ 157.
  \item \textsuperscript{72} \textit{Id.} ¶¶ 163–64.
  \item \textsuperscript{73} \textit{Id.} ¶ 164.
  \item \textsuperscript{74} \textit{Id.}
\end{itemize}
Using Civil Remedies in Corruption and Asset Recovery Cases

expunge it since its failure is an “automatic” consequence. By contrast, where a contract is voidable, the injured party must take a positive action to set it aside. According to the Tribunal, “Corruption of a state officer by bribery is synonymous with the most heinous crimes because it can cause huge economic damage: its long-term victims can be legion.”  

Therefore, like any other contract, a state contract procured by bribing a state officer is legally unenforceable “as an affront to the public conscience.” The Court concluded that with regards to public policy both under English and Kenyan law, World Duty Free was not legally entitled to maintain any of its claims. It also added that Kenya was legally entitled to avoid the agreement and that it had not lost its right to avoid it by affirmation. The Court also noted the disturbing fact that Kenya had not yet taken any actions to prosecute its former president for corruption or to recover the bribe in civil proceedings.

Depending on the legal system, avoidance can be either retroactive or limited to the application of the contract in the future. Counter-performance and expenses incurred by the contractor—for example, having to redo a tender process or negotiating a new contract—may then also qualify as damages. Under certain circumstances any profits can also be disgorged. Though in principle damages are measured by the plaintiff’s loss, not the defendant’s gain, it is clear that no one can be allowed to profit from a contractual breach where that breach constitutes a wrong. “In a suitable case the damages for breach of contract may be measured by the benefit gained by the wrongdoer from the breach.”

In Attorney General v. Blake, Blake was a member of the United Kingdom’s intelligence service. When he joined MI-6, Blake “expressly agreed in writing that he would not disclose official information, during or after his service, in book form or otherwise. He was employed on that basis.” In 1990 he published his autobiography No Other Choice, in which he disclosed a great deal of information covered by the provision in his contract. The court ruled that, even though the Crown had suffered no damages from Blake’s disclosures,

75. Id. ¶ 173.
76. Id.
77. Id. ¶ 188.
78. Id. ¶ 180.
80. Id.
81. Id.
82. GEORGE BLAKE, NO OTHER CHOICE (1990).
the profits gained from the publication of the book were to be paid to the United Kingdom as his employer. The court stated:

In considering what would be a just response to a breach of Blake’s undertaking the court has to take these considerations into account. The undertaking, if not a fiduciary obligation, was closely akin to a fiduciary obligation, where an account of profits is a standard remedy in the event of breach. Had the information which Blake has now disclosed still been confidential, an account of profits would have been ordered, almost as a matter of course. In the special circumstances of the intelligence services, the same conclusion should follow even though the information is no longer confidential. That would be a just response to the breach. I am reinforced in this view by noting that most of the profits from the book derive indirectly from the extremely serious and damaging breaches of the same undertaking committed by Blake in the 1950s. As already mentioned, but for his notoriety as an infamous spy his autobiography would not have commanded royalties of the magnitude Jonathan Cape [the publisher] agreed to pay.

Disgorgement of profits is sometimes referred to by the somewhat “unhappy” term of restitution. Its objective is to divest the defendant of the benefit he received and prevent unjust enrichment. According to the principle of “unjust enrichment,” one person should not be permitted to unjustly enrich himself at the expense of another, but should be required to make restitution for property or benefits unjustly received. Disgorgement is the forced giving up of illegally obtained profits.

Pursuant to Article 423 of the Swiss Law on Obligations (agency in the interest of the agent “gestion imparfaite”), where agency activities were not carried out with the best interests of the principal in mind, the principal is entitled to appropriate any resulting benefits. The conditions for application of this article are fourfold: (a) a profit (b) caused by (c) an act of interference (d) attributable to an agent acting in bad faith. Clearly a bribe would qualify as a profit and thus the article would entitle the principal to reclaim any bribes from his agent. It is a question of debate whether this would also cover the benefit that the corrupting contractual party derives from

84. Id.
85. See Blake, [2000] UKHL 45 (Lord Nicholls of Birkenhead).
86. DONALD HARRIS, DAVID CAMPBELL & ROGER HALSON, REMEDIES IN CONTRACT AND TORT 231 (2d ed. 2005).
87. CODE DES OBLIGATIONS [CO] [Code of Obligations] March 30, 1911, art. 423 (Switz).
the contract (e.g., the net profit made on the contract). Depending on what rights one deems protected by the article, such profits may be covered. A large conception of what rights are at stake (and thus whether an infringement on that right would constitute an act of interference) would allow for an action based on this article against the corrupting contracting party.88

Quite apart from that, Article 9 of the federal law on unfair competition states that whoever, through an act of unfair competition (which includes bribery), suffers or is likely to suffer prejudice to his business or his economic interests in general, may require the surrender of profits in accordance with the provisions on agency without authority.89 Whilst a logical consequence of the maxim that no one can profit by his own wrong, the disgorgement of profits is not punitive in character—for that there is the criminal law. Still, the possibility of taking away profits gained through an act of corruption may also have a preventive effect on perpetrators of corruption.

Depending on the legal system, it can be possible to successfully submit a claim cumulatively both for damages suffered by the plaintiff and the disgorgement of profits made by the defendant. Thus a state that is the victim of bribery may be able to both claim the profits that a party made as a result of the bribe and the damages that it suffered as a result (e.g., because the execution of the contract was faulty or because a new tender process had to be initiated). Quite apart from that, certain courts, mainly in the common law world (in particular in the United States), can also impose punitive damages on the perpetrator, the effect of which is, as the name suggests, to punish the perpetrator. The possibility of such damages clearly does have a preventive effect:

An award of punitive damages expresses the community’s abhorrence at the defendant’s act. We understand that otherwise upright, decent, law-abiding people are sometimes careless and that their carelessness can result in unintentional injury for which compensation should be required. We react far more strongly to the deliberate or reckless wrongdoer, and an award of punitive damages commutes our indignation into a kind of civil fine, civil punishment. Some of these functions are also performed by the criminal justice system.90


89. LOI FÉDÉRALE CONTRE LA CONCURRENCE DÉLOYALE [LCD] [Law on Unfair Competition] Dec. 19, 1986, art. 9 [Switz.].

Indeed civil law countries tend not to have the concept of punitive damages partly for that reason: they consider punishment to be the realm of criminal, not civil, law.

2. Tort

A tort is an act or an omission that causes damage to another person that constitutes a legal ground for the payment of damages to the person wronged by the person to whom the act or omission may be attributed.\(^91\) Damages compensate a plaintiff for loss, injury, or harm directly caused by a breach of duty, including criminal wrongdoing, immoral conduct, or pre-contractual fault by the tortfeasor.\(^92\)

In bribery cases, since both parties to the bribery act wrongfully towards the principal, courts have held that both the recipient and the donor of the bribe committed a joint tort and thus the victim is entitled to recover from either party. To be clear: such joint liability does not mean that a victim could recover twice.

It is impossible to give a complete overview of the types of acts that may qualify as a civil wrong.

In the context of corruption cases, civil fraud, tortious interference, conspiracy, breach of trust, breach of fiduciary duty, or breach of agency duty (giving rise to, among other things, claims for an accounting for the use and application of a principal’s property), as well as abuse of power in office are all relevant causes of action. In breach of trust or fiduciary duty cases, equitable damages will often be available to remedy any impossibility to trace assets.

In one illustrative case, the Republic of Korea wished to purchase military equipment and solicited competing bids from manufacturers. Plaintiff Korea Supply Company (KSC) represented one of the manufacturers, MacDonald Dettwiler, and stood to receive a commission of over $30 million if the contract was awarded to that manufacturer.\(^93\) Ultimately, the contract was awarded to Loral (now Lockheed Martin Tactical Systems).\(^94\) KSC contended that even though MacDonald Dettwiler’s bid was lower and its equipment superior, it was not awarded the contract because Loral Corporation

91. See BLACK’S LAW DICTIONARY 1626 (9th ed. 2009). A tort is “[a] civil wrong, other than breach of contract, for which a remedy may be obtained, usu. in the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to one another.” Id.

92. See id. at 445 (damage relates “to monetary compensation for loss or injury to a person or property”).


94. Id.
and its agent had offered bribes and sexual favors to key Korean officials. KSC instituted an action asserting (amongst others) a claim under the tort of interference with prospective economic advantage. Under the common law of the United States, the elements for a successful action are:

1. An economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff;
2. The defendant’s knowledge of the relationship;
3. Intentional acts on the part of the defendant designed to disrupt the relationship;
4. Actual disruption of the relationship; and
5. Economic harm to the plaintiff proximately caused by the acts of the defendant.

The Supreme Court of California found that all those conditions were met and hence KSC did have an action in tort against Loral (Lockheed).

In another case, Misappropriation of Public Funds and Breach of Fiduciary Duty: The Case Against Frederick Chiluba and Others, the Attorney General of Zambia (AGZ) for and on behalf of the Republic of Zambia claimed to recover sums which were transferred by the Ministry of Finance between 1995 and 2001. The money in question was transferred on the basis that it was required to pay debts owed by the government.

The case fell into three distinct parts, two of which are relevant here. The first arose out of the transfer of about U.S. $52 million from Zambia to a bank account operated outside ordinary governmental processes called the Zamtrop Account held at a bank in London (the Zamtrop Conspiracy). The other related to payments of about U.S. $20 million Zambia made pursuant to an alleged arms deal with Bulgaria and paid into accounts in Belgium and Switzerland, at least some of which funds found their way to London (the BK

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95. Id.
96. Id. at 942.
97. Id. at 950.
98. Attorney General of Zambia v. Meer Care & Desai, [2007] EWHC (Ch) 952 (Eng.).
99. Id. at [1].
100. Id. at [2].
The Zamtrop Account was set up as part of the conspiracy to steal. It was operated under a special arrangement to hide what was going on and to inhibit legitimate queries. There was equally no legitimate basis for the payments out under the BK Conspiracy. There were no genuine arms sales to justify the payments nor would the Republic have entered into the arrangements it did if it had been properly advised. This too was merely a vehicle for their fraudulent removal of government money.

The judge found former President Chiluba, his Permanent Secretary, and other high-ranking officials, to have conspired to misappropriate a headline figure of more than U.S. $25 million under the Zamtrop Conspiracy and more than U.S. $21 million under the BK Conspiracy and to have broken their fiduciary duties which they owed to the Republic or (for some of them) to have dishonestly assisted in such breaches.

3. Restitution and unjust enrichment

Apart from tort and contract, unjust enrichment is a separate cause of action that gives rise to a claim against the person unjustly enriched. The focus of this action is on “re-establishing equality as between two parties as a response to a disruption of equilibrium. Its raison d’être is founded in the injustice that lies in one person’s retaining something which he or she ought not to retain, requiring that the scales be righted.” There is no need to show that any loss was suffered. The elements for unjust enrichment are the receipt of a benefit and unjust retention thereof at the expense of another. Civil suits conducted by the Securities and Exchange Commission in the United States to claim disgorgement of proceeds in bribery cases are based on the concept of unjust enrichment. The “at the expense of another element” does not apply, however, when the plaintiff seeks restitution of secret profits generated by the fraud of a faithless agent. A public official is an agent and has an unqualified duty to make restitution of all secret profits.”

101. Id.

102. Id. at [82], [126].

103. Id. at [257].

104. Id. at [1120], [1132].


4. Civil action based on a criminal case

A final word needs to be said on the concurrence of a civil claim with a criminal trial. The criminal act may provide the injured party with a civil remedy, separately actionable. Thus an act of bribery or corruption as a criminal offence may, under other legislation, provide the basis for civil liability.

In the United States for example, if a person has violated the Foreign Corrupt Practices Act (FCPA), such an act may be the trigger for his civil liability towards those injured by his corrupt act, even though the FCPA itself does not provide potential claimants with a possibility of legal redress. An example of this is the situation in which shareholders of a company convicted of FCPA violations sue the officers and directors of the company for breaching their fiduciary duties towards the company, thus acting derivatively on behalf of the company. An FCPA violation can also function as a predicate act to bring a civil suit under the Racketeer Influenced and Corrupt Organizations Act, albeit in an indirect way. Finally U.S. federal or state antitrust laws may provide the basis for civil liability against those who violate the FCPA when there is proof that the act of corruption has a negative effect on competition between companies within the U.S. or the state. In the earlier quoted case of KSC v. Lockheed, the Supreme Court of California confirmed that an FCPA violation constitutes an act of unfair competition (which includes a fraudulent business act or practice) under California’s unfair competition law and thus triggers liability under that law.

In many civil law jurisdictions, the criminal procedure laws allow the victim that is harmed by an offense and has suffered damage to participate in a criminal case as a civil party. Thus, in addition to


109. See id.

110. See *supra* text accompanying notes 93–97.

111. See *Korea Supply*, 63 P.3d at 953.
pursuing damages in the context of a separate civil litigation, the victim can join the criminal proceedings. The affected state must be aware of the ongoing foreign criminal investigation to be able to join the criminal proceedings as a civil party. The affected state’s claim for damages will be adjudicated within the criminal trial, and in some jurisdictions the country will not be obliged to bring a separate civil lawsuit. Becoming a civil party in criminal proceedings is usually faster, simpler, and less expensive. Also, it is possible to maintain frequent contact with the prosecutor and the investigating judge. There are only a few cases of foreign bribery where countries have participated as a *partie civile* parties in criminal proceedings.\(^{112}\)

For example, in 2007, Nigeria became a civil party in a money laundering case initiated in France against Dan Etete, the former Minister of Energy of Nigeria.\(^{113}\) Etete was convicted and received a suspended prison sentence.\(^{114}\) Nigeria as a civil party was awarded €150,000 for non-pecuniary damages.\(^{115}\)

A prior criminal conviction may, as we have seen, make it easier to establish the basis for civil liability. An acquittal will not, as a

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112. In France, according to Article 2 of the French Criminal Procedure Code, a party may obtain civil compensation from a criminal court when the party can show personal and direct damage resulting from the crime.


114. Id.

115. *Etete Has His Day in Court*, AFRICA INTELLIGENCE.COM (Mar. 25, 2009), http://www.africaintelligence.com/AEM/oil/2009/03/25/etete-has-his-day-in-court,58139822-ART-ignorevalid (providing a report on the arbitration process associated with the Etete money laundering case). There is of course also the interesting development of non-governmental organizations constituting themselves as *partie civile* and initiating investigations on corruption—such as has happened in France, where the *Court de Cassation* ruled that Transparency International France had standing before the court to initiate an investigation against the ruling families of Congo-Brazzaville, Equatorial Guinea and Gabon for embezzlement of public funds, because the collective interest of the organization (the fight against corruption) was deemed at stake; or as happened in Spain when a Spanish NGO used the *acción popular*, according to which any Spanish citizen or NGO can bring a criminal action before an investigating magistrate, to file a complaint against family members and close associates of the President of Equatorial Guinea for the diversion of public funds to the purchase of real estate in Spain (money laundering). However, since that concerns rather the ability to initiate a criminal case rather than the ability to recover assets or damages this rather falls outside the scope of this article. For an interesting discussion on this see Maud Perdriel-Vassière, *How to Turn Article 51 into Reality?*, in *NON-STATE ACTORS IN ASSET RECOVERY* (Daniel Thelesklaf & Pedro Gomes Pereira eds., 2011).
legal matter, prevent a later civil claim. Common law jurisdictions have very different standards of proof between criminal and civil cases. In criminal cases, the standard is proof “beyond a reasonable doubt” whereas for civil matters it tends to be “proof beyond a balance of probabilities.” While the prosecutor may not be able to prove beyond a reasonable doubt, for example, that, for instance, the defendant converted state property to his own use, the state as plaintiff in a private civil lawsuit may be able to prove such fact by a preponderance of the evidence—that is to say that it was more likely than not—that he converted that same property to his own use.

Having thus given a brief overview of the possible causes of action upon which to frame a claim for compensation, we will now proceed to examine more closely how any monetary awards, based on those causes of action, might be calculated.

III. REMEDIES: HOW MUCH TO SUE FOR AND HOW ARE THE DAMAGES CALCULATED?

This section discusses various methods of calculating the value of assets or the amounts of damages to be sought in a civil lawsuit. Some methods of calculation overlap with methods used in similar criminal or other enforcement matters.

A. Most Common Remedies Used to Quantify Illicit Profits, Compensation or Restitution

When civil remedies are employed in asset recovery cases, issues arise with regards to the quantification of the proceeds or the financial consequences of corrupt activities. The approach taken to quantify the benefits or the damages generated by corruption depends on the type of remedy that is used in each particular case. A jurisdiction seeking the disgorgement of illicit profits will need to calculate the gains resulting from corruption; if it wants to be compensated for damages it will need to quantify the financial consequences of corrupt activities. And if it wants to avoid a contract awarded by a bribed official, it will calculate the monetary equivalent of contractual services. These remedies can ensure that the affected government will recover the financial consequences of corrupt activities. But making parties “even” does not guarantee deterrence. This is why other civil remedies including punitive damages and the calculation of a “social damage” are sometimes advocated as advancing the deterrence requirements of anticorruption policies.

1. Disgorgement

The starting point for calculating the benefits of corruption is to look at the gross or net revenues generated by the illicit contract. According to the gross revenue method, all revenues received under the contract obtained by bribery are considered proceeds or benefits of bribery and are subject to disgorgement.117

According to the net proceeds method, the benefits subject to disgorgement are the contract revenues minus certain legitimate costs or expenses incurred by the briber in executing the contract—for example the cost of supplying goods and services.118

Example of the net revenue method (United States)119

\[
\text{Proceeds} = \text{Net revenues (gross revenues from the contract minus costs/expenses)}
\]

In the Sales of Goods and Services Case, in return for bribes amounting to U.S. $5 million, a company obtained projects to build communications networks and control systems for state-owned enterprises. The revenues from the projects were valued at U.S. $100 million. The company paid U.S. $25 million for the goods sold for the projects. The company also disguised the bribes as a legitimate expense in its books and records, and deducted the expense from its taxes.

Calculating the Benefit

The benefit subject to confiscation was calculated using the “net revenue” method:

\[
\begin{align*}
\text{Revenues received from projects: U.S.} & \ \$100,000,000 \\
- \text{Cost of goods sold for projects: U.S.} & \ \$25,000,000 \\
+ \text{Total amount of bribes paid: U.S.} & \ \$5,000,000 \\
\hline
\text{Total benefit derived: U.S.} & \ \$80,000,000
\end{align*}
\]

The additional profit method calculates the profits that would have been made if no bribery had occurred. Thus one would need to look at similar contracts where no bribery occurred to compare them to the contract involving bribery.120

117. Id.
118. Id.
119. Id. at 31.
120. Id. at 32–33.
2. Compensation for damages

The basic rule for the determination of damages is that the victim must be placed as much as possible in the circumstances in which he or she would have been but for the bribe. In the case of government contracts, damages caused by bribery are often the same as increased profits gained by the contractor. Under this method, courts may have to estimate the difference between the price or the quality of goods and services provided by the briber and the price or quality that the customer would have accepted if its agent had not taken the bribe.121

For example, in *Fyffes Group Ltd. v. Templeman*, the claimants involved in the banana trade claimed that from 1992 to 1996, their employee Simon Templeman took bribes amounting to over U.S. $1.4 million from or with the connivance of the rest of the defendants in order to negotiate shipping contracts on terms favorable to the defendants.122 Fyffes sought to recover damages from the employee, the shipping company, and its agents.123 According to the Court, there was no dispute that the bribes had influenced the contractor in agreeing the amount of the freight for each year.124 As a result, all defendants were found jointly liable for the value of the bribe.125 In addition, the shipping company and its agent (the briber) were liable to pay additional compensation for the loss that the claimants had undergone from entering into the contract under unfavorable terms.126

To calculate this liability, the Court found first that Fyffes would have entered into a service agreement with the contractor even if the employee had not been dishonest.127 As a result, “ordinary” profits resulting from the application of quantity or rates of shipment that would have been normally agreed by an honest and public negotiator were not the result of bribery.128 In order to calculate the “unordinary” profit and the damages, the Court took into consideration testimony provided by shipping experts determining the difference between the amounts actually paid by Fyffes and the

121. *Id.* at 33. *See also* Jean-Pierre Brun et al., The International Bank for Reconstruction & Development/The World Bank, Asset Recovery Handbook: A Guide for Practitioners 72–74 (2011) (providing a summary of the process by which financial information is sorted and analyzed after collection).


123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*
amounts that would have been paid, all things being equal, if Fyffes had been represented in the negotiations by an honest and prudent broker.\textsuperscript{129}

This example illustrates how the amount recovered will depend on the type of remedy sought. In disgorgement cases where courts assess the bribers’ ill-gotten gains by using the net revenue method, recovery will be limited to net profits even if they are less than damages generated by the contract entered into as a result of corruption. As a result, disgorgement may not ensure full compensation when services rendered are so deficient that, for instance, a piece of public infrastructure cannot be used or requires further expense to be put right.

By contrast, compensation cases focus on the damages suffered by the affected party. When infrastructure is built in accordance with the technical requirements and at market rates, it is difficult to identify and prove a specific damage and disgorgement of profits earned may ensure a better result.

Jurisdictions may also consider whether their legal framework allows them to combine both remedies, and claim compensation for damages in addition to profits to be disgorged. They may also consider contractual remedies.

3. Contractual restitution

In contractual litigation, the claimant may be entitled to recover all sums paid pursuant to the contract (gross revenue) or revenues after the deduction of the value of expenses and counter performance incurred by the briber (net revenue).\textsuperscript{130} In some jurisdictions courts have held that the government was entitled to recover all contractual fees already paid pursuant to the terms of the contract and that the contractor could not recover unpaid fees or the value of the work done.\textsuperscript{131}

In \textit{S.T. Grand Inc. v. City of New York}, S.T. Grand had entered into a contract with the city of New York worth U.S. $840,000 to clean a reservoir.\textsuperscript{132} Grand had received U.S. $690,000 but it was subsequently exposed that the contract was awarded through the payment of a kickback to a city official.\textsuperscript{133} Grand sued the city for the

\textsuperscript{129} Id.

\textsuperscript{130} OECD/The World Bank, \textit{supra} note 116, at 36.

\textsuperscript{131} See S. T. Grand, Inc. v. City of New York, 208 N.E.2d 105, 108 (N.Y. 1973) (“[W]here work is done pursuant to an illegal municipal contract, no recovery may be had by the vendor, either on the contract or in \textit{quantum meruit}. . . . We have also declared that the municipality can recover from the vendor all amounts paid under the illegal contract.”).

\textsuperscript{132} Id. at 106.

\textsuperscript{133} Id. at 108.
unpaid balance while the city counterclaimed to recover the amount it had already paid. The highest court of New York applied the general rule that “where work is done pursuant to an illegal municipal contract, no recovery may be had by the vendor, either on the contract or in quantum meruit.”[^134] Thus, Grand was ordered to forego the entire amount of the contract, approximately U.S. $840,000.

In other cases however, courts have declined restitution of the full value of a contract obtained through bribes, if the government of the bribed official benefited from the contract. Instead, the government may be awarded the contract price after deducting the value of any benefits it has received.

In *Case of Cameroon Airlines v. Transnet Ltd.*,[^135] the ICC arbitration tribunal held that Cameroon Airlines, a state-owned company, was entitled to restitution of the sums paid under certain maintenance agreements concluded as a result of bribery, minus the “fair value” of the services provided by Transnet.[^136] This “fair value” deductible from the amount paid consisted of the commercial price less the “commission” added by Transnet in order to recoup the bribes paid to Cameroon Airlines’ employees.[^137] The Tribunal held that “where an innocent party to a contract tainted by bribery seeks restitution of that which he has performed South African law requires that it must make or tender restitution of that which it has received or if this is not possible tender a monetary substitution of such benefits instead.”[^138] The UK High Court of Justice annulled the award for procedural reasons, but agreed with the tribunal that Cameroon Airlines was not entitled to the full contract price because Transnet could exclude its own cost of rendering the services from restitution.[^139]

### B. Quantification in Practice and Challenges

Quantifying the proceeds of corruption cases and assessing the damages is one of the most difficult challenges faced by practitioners. In particular, the net revenue frequently used in disgorgement cases brings some particular complications that result from the need to identify deductible costs attributable to a specific corrupt contract. Material purchased or staff hired to fulfill this contract are generally

[^134]: Id.

[^135]: Cameroon Airlines v. Transnet Ltd., [2004] EWHC (Comm) 1829 (Eng.).

[^136]: See id. ¶¶ 80–81.

[^137]: Id. ¶¶ 83–84.

[^138]: Id. ¶¶ 80, 123 (emphasis added).

[^139]: Id. ¶¶ 104–15.
considered variable costs that can be deducted. 140 More problematic are fixed costs, which the company is incurring in any event, such as buildings or permanent staff and management who spend part of their time working on the contract tainted by bribery. 141 While the method of allocating these costs is clearly defined in many businesses there will always be an element of judgment in determining if such fixed costs can be allocated to a specific contract. As a result, Governments or other entities seeking to recover compensation may need to get assistance from accounting experts to be able to present arguments to the court.

Similarly, in contractual compensation litigation, detailed analysis from accounting as well as technical experts may be necessary to determine the “ordinary” market rates or profit margin of goods or services that were inflated by the contractor with the assistance of a corrupt official. 142 In addition, compensation claims may require the calculation of interest income earned by the briber, or lost by the claimant, on amounts awarded as damages. 143 When lengthy periods are considered, the determination of applicable interest rates and periods over which the interest is calculated will be crucial.

More generally, some jurisdictions still lack legislation dealing with civil redress. There are others that may have legislation in place but have never tested it in practice while they consider calculations regarding profits obtained and damages suffered as too complicated. Only a few courts have addressed such issues, and judges generally still have very little experience. Even when countries have both adequate legislation in place and courts used to dealing with quantification issues, it is frequently difficult to identify the proceeds of corruption and calculate the profits due to the secrecy involved in corruption deals, especially when the bribery is revealed years after the contract was awarded.

C. Beyond the Present—Emerging Theories—Punitive Damages and Social Damages

Practitioners should bear in mind that civil remedies can be largely ineffective when they are perceived as a necessary business

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141. Id. at 376 n.4, 378.


143. See e.g., 17 C.F.R. § 201.600 (1999).
expense.\textsuperscript{144} Given the low probability of being caught, a company which engages in corrupt practices and is consistently awarded government contracts may just consider that being ordered to disgorge profits or to compensate damages resulting from one single case is the price to pay for making money later. At the limit it could be viewed as an investment.

As Professor Susan Rose-Ackerman argues that “[t]o act as a deterrent” penalties “would need to be a multiple of actual damages because those who pay bribes are often not caught.”\textsuperscript{145} Multiple damage awards would not only act as an effective deterrent decreasing the numbers of infringements, but would also incentivize private plaintiffs to go to court. The most frequently stated purpose of punitive damages is to punish the defendant for his wrongdoing and to deter him and others from similar misconduct.\textsuperscript{146}

The issues surrounding punitive damages warrant more specific discussion and go beyond the limits of this study. But punitive and treble damages are a settled practice in the United States. By contrast, most European states view damages purely as a “compensatory instrument” and damage multipliers as inconsistent with the principles of compensation. As a result, they tend to and oppose a system that would result in damages that are higher than the loss sustained by the victim.\textsuperscript{147}

In the case of the County of San Bernardino v. Kenneth Walsh, which involved two bribery schemes, the Court of Appeals held that “the proper measure of damages is full disgorgement of any secret profit made by the fiduciary regardless of whether the principal suffered any damage.”\textsuperscript{148} The court also upheld the award of punitive damages, finding it was justified due to the reprehensibility of the defendants’ conduct, the relationship between the punitive damages award, the compensatory damages award and the harm done, and the amount of the award in proportion to each defendant’s net worth.\textsuperscript{149}


\textsuperscript{146} 1 LINDA SCHLUETER, PUNITIVE DAMAGES § 2.2 (6th ed. 2010).


\textsuperscript{148} 69 Cal. Rptr. 3d 848, 856 (Dist. Ct. App. 2007).

\textsuperscript{149} Id. at 858–59.
To ensure full compensation and deterrence when punitive damages are not applicable, other jurisdictions have tried to use the concept of social damages. In some jurisdictions, a social damage may be defined as the loss that is not incurred by specific groups or individuals but by the community as a whole. This could include damages to the environment, to the credibility of the institutions, or to collective rights including health, security, peace, education, good governance, and good public financial management. It is different from damages to collective rights, which belong to a restricted and identifiable group of individuals or legal entities. Social damage can be pecuniary and non-pecuniary.

Costa Rica follows a social damages model.\(^{150}\) In Costa Rica, prosecutors sought compensation for the social damage caused by Alcatel in paying bribes to government officials to secure cellular networks contracts.\(^ {151} \) They filed a claim based on Article 38 of the Costa Rican Criminal Procedural Code that states that civil action for social harm may be brought by the Attorney General’s Office in the case of offenses involving collective or diffuse interests.\(^ {152} \)

In its claim, the Attorney General’s office underlined that the Costa Rican Constitutional Court had previously defined as “collective and diffuse interests,” the “citizen’s collective interest in good public finance management” and “the inhabitant’s right to a healthy environment.”\(^ {153} \) To measure the social damages, the office of the Attorney General hired an external consultant to undertake an estimation of damages using a methodology that combined the following elements:

- The economic consequences of corruption that reduced the investor’s trust in the Costa Rican Government;\(^ {154} \) and
- The political consequences that reduced the credibility of politicians and political parties and thus affecting (increasing) the levels of abstentions in the elections of 2006.\(^ {155} \)


\(^{151}\) See id. at 8–9.

\(^{152}\) See id. at 15–17.

\(^{153}\) Id. at 15.

\(^{154}\) Id. at 17.

\(^{155}\) Id.
To quantify these consequences, experts used a combination of quantitative analysis and survey data on the average citizen’s perception to explain and measure the impact.156 However, establishing causality both for providing evidence of immaterial social damage and measuring this damage proved challenging. For example, it was difficult to define what would have been the level of trust in the Costa Rican government in the absence of Alcatel’s corrupt activities. It was similarly complex to quantify the economic consequences of the loss of trust alleged by prosecutors.157

In addition, a precedent-setting case involving bribery and kickbacks in the purchase of medical equipment for the Social Security System in Costa Rica had previously highlighted the challenges involved in the concept of social damage. In this case, prosecutors had sought compensation for social damages estimated to be around U.S. $89 million, but the court dismissed the evidence.158 The Attorney General finally accepted a settlement by which the claims for social damage were dismissed and Alcatel agreed to pay U.S. $10 million.159

**IV. Conclusion**

This article is meant to contribute to the rapidly expanding debate on corruption and how to deal with it. The citizen’s cry for justice heard all around the world, from the protests in Cairo to the outrage over the off-shore leaks, demands that perpetrators are brought to trial and sentenced, but also that their stolen assets and profits be returned to the victims. We have tried to show how civil action can contribute towards this second objective. To be sure, the amounts of money recovered and repatriated to victim countries so far are low—and not commensurate to the scale of theft of public assets and corruption worldwide. The discipline of asset recovery is still young and experienced practitioners who can assist countries in charting a course through what is always a terribly complex and confusing field are few and far between. However, mounting interest in the topic, the G8 call for transparency and heightened media scrutiny are changing that and are coming together to force action. Let us hope that some of the tools outlined in the paper will provide an avenue to guide such action.

156. *Id.* at 22.
157. *See id.*
158. *Id.* at 24.
159. *Id.* at 10.
Using Civil Remedies in Corruption and Asset Recovery Cases

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