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## *Introduction*

CORRUPTION IS A problem of antiquated origin, which has been deplored by the thinkers of every generation.<sup>1</sup> The literature on corruption is extensive, and there is no shortage of material on the history, nature, effects and consequence of corruption. Less prevalent is information on the 'cure' for corruption or on the utility or effectiveness of existing measures against corruption.

Corruption can be defined in several ways, to cover a range of behaviours from 'venality to ideological erosion'.<sup>2</sup> A wide definition of corruption will include the public and private sectors and cover activities consisting of fraud, extortion, embezzlement and abuse of office. This book will focus on public sector corruption which includes bribery, kick-backs, 'gifts' and illicit payments to government officials in their capacity as public servants, in order that the giving party may achieve a stated purpose. Accordingly, this book will adopt a definition of public sector corruption favoured by social scientists which states that corruption is 'behaviour which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence'.<sup>3</sup>

Corruption in the public sector has necessitated concerted efforts to fight it by organisations such as the World Bank, the United Nations, the Organisation for Economic Cooperation and Development (OECD), the Council of Europe, and the European Union (EU). The prevalent view is that corruption undermines democratisation, the rule of law, the

<sup>1</sup> E Hamilton and H Cairns (ed), *The Collected Dialogues of Plato*, (New Jersey, Princeton University Press, 1961); R MacMullen, *Corruption and the Decline of Rome* (Yale, Yale University Press, 1990); N Jacoby, P Nehemkis and R Eells, *Bribery and Extortion in World Business: A Study of Corporate Political Payments Abroad* (London, MacMillan Publishing, 1977) 7-43; SH Alatas, *The Sociology of Corruption: The Nature, Function, Causes and Prevention of Corruption* (New York, Times Books, 1980), 9, 77; L Levy Peck, *Court Patronage and Corruption in Early Stuart England* (London, Routledge, 1990); V Byrce and J Bryce, *Modern Democracies* (New York, MacMillan, 1921).

<sup>2</sup> J Nye, 'Corruption and Political Development: A Cost-Benefit Analysis' (1967) 61 *American Political Science Review* 417, 419.

<sup>3</sup> Nye, 'Corruption and Political Development', *ibid*, 417.

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consolidation of market economies,<sup>4</sup> and is a threat to the international economy. To counter this threat, anti-corruption measures have become increasingly global in outlook. For instance, the OECD was the first inter-governmental institution to seek an international framework for combating corruption in 1994.<sup>5</sup> In 2003, the United Nations adopted a Convention against Corruption,<sup>6</sup> obliging states to criminalise a wide range of corrupt activities. Similarly, the EU has in place legislative measures designed to combat corruption within Member States and its institutions.<sup>7</sup>

In addition to international efforts at combating corruption, many national legal systems have mechanisms and legislation aimed at preventing and punishing corruption. One of the 'tools' in the armoury against corruption in national systems is public procurement regulation. Public procurement is the purchasing by a government of the goods and services it requires to function and maximise public welfare. In doing so, a government will often adopt regulations and procedures to ensure that it obtains these goods, services or 'works' (construction contracts) in a transparent, competitive manner and at the best price or the most economically advantageous price.<sup>8</sup> It is believed that transparency in public procurement will assist in ensuring that public procurement procedures foster competition and obtain value for money.<sup>9</sup> Public procurement may also be subject to secondary criteria and a government may use public procurement to achieve non-procurement-related goals such as the development of a region/industrial sector or encouraging environmentally friendly manufacturing, by favouring relevant firms in public contract awards.<sup>10</sup>

<sup>4</sup> S Rose-Ackerman, *Corruption and Government: Causes, Consequences, Reform* (Cambridge, Cambridge University Press, 1999); T Soreide, *Corruption in Public Procurement: Causes, Consequences, Cures* (Bergen, CMI, 2002); P Nichols, 'Outlawing Transnational Bribery through the World Trade Organisation' (1997) *Law and Policy in International Business* 305, 337; P Nichols, 'Regulating Transnational Bribery in times of Globalization and Fragmentation' (1999) 24 *Yale Journal of International Law* 257; J Noonan, *Bribes* (California, University of California Press, 1987).

<sup>5</sup> Recommendations on Bribery in International Business Transactions, 1994.

<sup>6</sup> 43 ILM 37 (2004).

<sup>7</sup> Council Act of 26 July 1995 drawing up a Convention on the Protection of the European Communities Financial Interests [1995] OJ C316/48 and its Protocols [1996] OJ C313/1 and [1997] OJ C151/1; Council Act of 26 May 1997 drawing up on the basis of Art K.3(2)(c) of the Treaty on European Union, the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the EU [1997] OJ C195/1; Action Plan to Combat Organised crime [1997] OJ C251/1.

<sup>8</sup> S Arrowsmith, *The Law of Public and Utilities Procurement*, 2nd edn (London, Sweet & Maxwell, 2005) ch 3; S Schooner, 'Desiderata: Objectives for a System of Government Contract Law' (2002) 11 *Public Procurement Law Review* 103.

<sup>9</sup> Schooner, 'Desiderata', *ibid*.

<sup>10</sup> S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge, Cambridge University Press, 2009); R Caranta and M Trybus, *The Law of Green and Social Procurement in Europe* (Copenhagen, DJØF Publishing, 2010); C McCrudden, *Buying Social Justice* (Oxford, Oxford University Press, 2007).

Corruption control can also be included as a goal of procurement regulation. This is consistent with the other goals of procurement regulation – as the elimination of corruption will facilitate the award of contracts to the most competitive firms and not those preferred for ulterior reasons. However, a focus on corruption control can also detract from achieving the competition and efficiency goals of procurement regulation, as anti-corruption measures may be so intricate as to constitute a financial and procedural burden on the procurement process.<sup>11</sup> Anti-corruption measures included in procurement regulation ensure the absence of corruption within the procurement process and ensure that a government contractor is ethical or honest. Whilst criminal and civil sanctions<sup>12</sup> on corrupt firms and corrupt public officials<sup>13</sup> are an obvious way of combating corruption in public procurement, less obvious are the myriad of administrative rules and regulations intended to ensure transparency and openness in the procurement process and deny the conditions under which corruption takes place. Administrative methods for combating corruption may often be more effective than criminal methods, especially as corrupt practices are often clandestine and can make meeting the burden of proof in a criminal trial difficult for prosecutors. As a result, countries are increasingly using non-criminal devices to combat corruption. One such mechanism for dealing with corrupt firms is to disqualify (or debar) them from bidding on government contracts.

A number of questions are raised by the use of procurement regulation to combat corruption. One may begin by asking whether combating corruption through procurement is desirable or necessary. Procurement regulation is designed to ensure that a government obtains the goods and services it needs at the best price, and procurement procedures should reflect the ideals of procurement regulation such as competition, transparency and efficiency. Where corruption control is imposed as an additional objective of the procurement process, by rules requiring the disqualification of corrupt suppliers, this can have serious practical and conceptual implications, which are not always considered by legislative provisions on disqualification. Some of the problems that arise from the use of disqualifications include determining whether it applies to natural persons, subcontractors, subsidiaries or other persons related to the corrupt firm

<sup>11</sup> F Anechiarico and J Jacobs, 'Purging Corruption from Public Contracting: The "Solutions" are Now Part of the Problem' (1995) *New York Law School Law Review* 143.

<sup>12</sup> S White (ed), *Procurement and Organised Crime: An EU Wide Study* (London, Institute of Advanced Legal Studies, 2000); J Jacobs, C Friel and R Radick, *Gotham Unbound: How New York City was Liberated from the Grip of Organised Crime* (New York, New York University Press, 1999); TMC Asser Institute, *Prevention of and Administrative Action Against Organised Crime: A Comparative Law Study of the Registration of Legal persons and Criminal Audits in Eight EU Member States* (The Hague, TMC Asser Press, 1997).

<sup>13</sup> N Kofele-Kale, *The International Law of Responsibility for Economic Crimes: Holding State Officials Individually Liable for Acts of Fraudulent Enrichment*, 2nd edn (Aldershot, Ashgate, Publishing, 2006) ch 6.

and determining whether a conviction for corruption ought to be a prerequisite to disqualification, bearing in mind that corruption is an activity that thrives in secret, resulting in a dearth of convictions. This leads to the issue of understanding the limits to and efficacy of procurement initiatives in tackling corruption.<sup>14</sup>

Many of these issues, such as determining the limits of disqualification and the issue of convictions, remain unanswered in the few studies on the use of disqualifications in public procurement. In truth, existing work on using government procurement to discourage corruption is limited. Although significant contributions have been made by US authors,<sup>15</sup> there is little literature available on disqualification outside of the US. In relation to the EU, a limited amount of research has been conducted,<sup>16</sup> especially since disqualifications for corruption became mandatory in 2006. There is similarly little research on disqualifications in organisations like the World Bank.<sup>17</sup> Other jurisdictions contain a limited amount of information on procurement disqualifications, but there is not enough information to provide a coherent understanding of all the issues raised by disqualification. In addition, the available literature on disqualifications generally focuses on one jurisdiction, and there is nothing that adopts a multi-jurisdictional approach to understanding the challenges posed by the use of disqualifications in public procurement.

The aim of this book, therefore, is to examine and analyse the legal texts of selected national and multilateral procurement instruments, which provide for the disqualification from public contracts of suppliers who are convicted or otherwise guilty of corruption and provide a legal critique of

<sup>14</sup> Anechiarico and Jacobs, 'Purging Corruption from Public Contracting', above n 11.

<sup>15</sup> F Anechiarico and J Jacobs, *The Pursuit of Absolute Integrity: How Corruption Control makes Government Ineffective* (Chicago, University of Chicago Press, 1996); Jacobs, Friel and Radick, *Gotham Unbound*, above n 12; S Kelman, *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance* (Washington, AEI Press, 1990).

<sup>16</sup> E Piselli, 'The Scope for Excluding Providers who have Committed Criminal Offences under the EU Procurement Directives' (2000) 6 *Public Procurement Law Review* 267; Arrowsmith, *Public & Utilities Procurement*, above n 8, ch 19; S Arrowsmith, 'Implementation of the New EC Procurement Directives and the Alcatel Ruling in England and Wales and Northern Ireland: A Review of the New Legislation and Guidance' (2006) 3 *Public Procurement Law Review* 86; S Williams, 'The Mandatory Exclusions for Corruption in the New EC Procurement Directives' (2006) 31 *European Law Review* 711; T Medina, 'EU Directives as an Anti-Corruption Measure: Excluding Corruption Convicted Tenderers from Public Procurement Contracts' in KV Thai (ed), *International Handbook of Public Procurement*, (Boca Raton, CRC Press, 2008); S Arrowsmith, 'Application of the EC Treaty and directives to horizontal policies: A critical review' in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge, Cambridge University Press, 2009).

<sup>17</sup> S Williams, 'The Debarment of Corrupt Contractors from World Bank-Financed Contracts' (2007) 36 *Public Contract Law Journal* 277; T Canni, 'Debarment is no Longer Private World Bank business: An Examination of the Bank's Distinct Debarment Procedures used for Corporate Procurements and Financed Projects' (2010) 40 *Public Contract Law Journal* 147; S Denning, 'Anti-Corruption Policies: Eligibility and Debarment Procedures and the World Bank and Regional Development Banks' (2010) 44 *International Lawyer* 871.

the provisions in these instruments. The book will highlight and analyse the problems that attend the implementation of a disqualification measure, study and compare the approaches of selected jurisdictions to these problems and examine the solutions that the selected jurisdictions have applied or may apply to these problems, to determine the respective advantages and disadvantages of these approaches. The book aims at developing a coherent framework for understanding the rules pertaining to the use of procurement disqualifications as an instrument for sanctioning corruption.

Each chapter of the book will discuss salient issues that arise from the use of procurement disqualifications. Thus, whilst chapter two gives an introduction to the nature of corruption and anti-corruption measures, chapter three will examine public procurement regulation and anti-corruption policy, as well as examine the reasons underpinning the disqualification regime in the selected jurisdictions. Chapter four examines the issue of what kinds of offences may trigger disqualification in the selected jurisdictions and whether suppliers may be disqualified for foreign offences or offences committed in a foreign jurisdiction. In chapter five, the book will highlight the procedural issues relating to disqualification and examine whether the disqualification process in the jurisdictions is fair and transparent. In chapter six, the book looks at what kinds of entities are used in the disqualification process and which of these is best placed to make appropriate disqualification decisions. In addition, the chapter will consider the scope of disqualification, or whether a disqualification decision taken by one entity is binding on other procuring entities. In chapter seven, the focus is on the nature and extent of the investigative powers of a disqualifying entity and examines the extent to which such entities are under an obligation to uncover or investigate whether a supplier has committed an offence that may lead to its disqualification.

One of the most contentious issues in the disqualification context is examined in chapter eight – this is the extent to which persons related to a supplier may be disqualified for the offences of the supplier and vice versa. Chapter nine examines another contentious issue, which is whether disqualification will affect on-going contracts. In other words, the issue is whether disqualification will lead to the termination of existing contracts, in light of the disruption that such termination may cause to the delivery of public services. In chapter ten, the book focuses on the extent to which a supplier's rehabilitation may mean it avoids or limits its disqualification, and chapter eleven examines the remedies available to a supplier aggrieved by the disqualification process.

The book will examine these issues through a comparative analysis of the disqualification of corrupt suppliers from public procurement in five 'jurisdictions', namely, the European Union (EU), the United Kingdom (UK), the United States (US), South Africa and the World Bank.

In 2004, the EU adopted a procurement directive, which required the public bodies of Member States to disqualify from public contracts suppliers convicted of corruption, among other offences. This represented a departure from previous EU directives, which permitted, but did not require the disqualification of persons convicted of certain offences. The EU regime was chosen for study because of its significance as the organisation that provides the template for the procurement legislation of 27 nations. However, because European law is better understood within the context of implementation by Member States, the UK has been chosen as the Member State for this study.

The US has had the longest experience in using procurement disqualifications, and its disqualification regime is comprehensive and has been subject to much judicial scrutiny, making the US an ideal candidate for study. South Africa is a developing country with a developed procurement regulation system. Like many developing countries, it has a problem with systemic corruption and has adopted the use of disqualifications in public procurement as an anti-corruption measure. The book will examine the manner in which the disqualifications in South Africa are structured and applied, given the contextual challenges faced by South Africa.

The World Bank was the first development bank to utilise disqualifications where corruption was established within Bank-financed procurement and other development banks have subsequently adopted the Bank's disqualification practice,<sup>18</sup> making the Bank an appropriate system to examine in this book. The practice of disqualification within the Bank provides insight into the challenges that are created by disqualification irrespective of the nature of the legal system or limits of its jurisdiction.

It is worth mentioning that in most of the selected jurisdictions, excepting the US, the use of procurement disqualifications is still very much in its infancy, both in terms of the practical application of the rules on disqualification by procuring authorities and in terms of the interpretation of the rules by the courts. It has thus been necessary in many instances to examine the general law or other areas of procurement regulation to determine how procuring authorities and the courts may address some of the issues arising from the use of procurement disqualifications.

<sup>18</sup> Asian Development Bank Procurement Guidelines (Manila, Asian Development Bank, 2010) para 1.14; African Development Bank Group Rules and Procedure for Procurement of Goods and Works (Procurement and Fiduciary Services Department, 2008) para 1.14.