

Olaf Meyer (ed.)

The Civil Law Consequences of Corruption



Nomos

Key Issues of Civil Law in Corruption Cases in Bulgaria

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A. The Role of Civil Law Remedies in General

It is impossible to defeat corruption with the remedies of a single isolated branch of law. Even though it imposes the most dreaded sanctions, criminal law is impotent to cope with this phenomenon on its own. The efficiency of law derives from its multi-directional and multiform effect. If murder were prohibited by law, but were to be regarded with moral indifference, the number of murders committed would surely have occurred at a higher frequency. There is no way in which a society which regards tax crimes with moral indifference, and even as praiseworthy acts, can cope with tax fraud by solely relying on legal remedies.

As for corruption, the situation is a similar one. If we combat it using criminal law remedies only, such combat is doomed to failure. For this reason, these other branches of law should also be involved in the combat:

- administrative law (through establishing procedures for public procurement assignment);
- labour disciplinary law (through labour law sanctions for the briber and the beneficiary);
- company law (through the rules on Corporate Governance, which are aimed at preventing corruption);
- civil law has its special place in this armada of remedies (although it does not impose sanctions by definition, it is the only one that is able to take the economic sting out of corruption, rendering it ineffective).

Unfortunately, Bulgarian positive law and legal literature have considered corruption only from the criminal law perspective. I am not aware of any proceedings regarding the restitution of a benefit already transferred or a compensation for damages resulting from corruption. There are numerous reasons for this – these are partly attributable to folk psychology, while others derive from an under developed framework of law. A considerably extended version of this report will probably be the first private law writing in this field in Bulgaria.

In sum, civil law plays a humiliatingly minor role – if any role at all – in combating corruption. Unfortunately, in this respect it should be stated that the Republic of Bulgaria, which became a party to the Civil Law Convention on Corruption (1999) in 2003, has done nothing for transposing the principles of the said Convention into domestic law; and the Convention is, by nature, not self-implementing.

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B. Civil Law Definition of Corruption

There is no legal definition of corruption in Bulgarian civil law. The definition attributed to a *bribe* in criminal law (Art. 223c, Art. 301 *et seq.* Penal Code (PC)) is used instead. Bribery occurs where an “official” or “agent” receives a “donation or any other kind of benefit” in order “to do or omit, or for having done or omitted acts in the course of his duty”. The “donation or benefit” is also a bribe in those cases where “the official” has not acted in violation of his duties. As per the meaning of this criminal law definition, the beneficiary does not necessarily have authority vis-à-vis the third person (principal), neither does he have to operate with public finance or to work in the administrative or judicial structure, nor does he have to violate any of his duties ensuing either from his office or from his relationships with the principal. Due to its wide scope, the said definition also covers those cases in which the bribe is not offered for purposes of concluding a contract, but rather for obtaining an administrative permission or a favourable court judgment, or for speeding up a procedure or excluding a party from tendering, etc. This definition is extended through the criminal law provisions on “abuse of confidence” (Art. 271 PC) and “breach of trust by an official” (Art. 282 *et seq.* PC).

The only civil law norm which regulates corruption – doing it quite indirectly – is Art. 40 of the Law on Obligations and Contracts (LOC): “If the agent and the third person come to an agreement to the detriment of the principal...”.

In Bulgaria, the valid definition of “corruption” is that contained in Art. 2 of the Civil Law Convention on Corruption. The predominant part of the measures required under the said Convention has not been incorporated into domestic law. The following characteristics should constitute the definition of “corruption”:

1. requesting/offering, giving/obtaining or promising a benefit;
2. the benefit is an undue one, *i.e.* it would not have been obtained in the course of ordinary exercise of powers;
3. the benefit is given/obtained in return for a specific way of exercising those powers;
4. the benefit is obtained either directly from the person abusing his powers, or indirectly from a person nominated by him; such benefit may, as well, be given either directly by the person concerned, or indirectly by a third person.
 - The benefit is not necessarily given directly by the person concerned.
 - The principal does not necessarily have to be aggrieved.
 - The bribe does not necessarily have to be received for concluding a contract.
 - The agreement between the beneficiary and the briber should not have been disclosed to the principal.

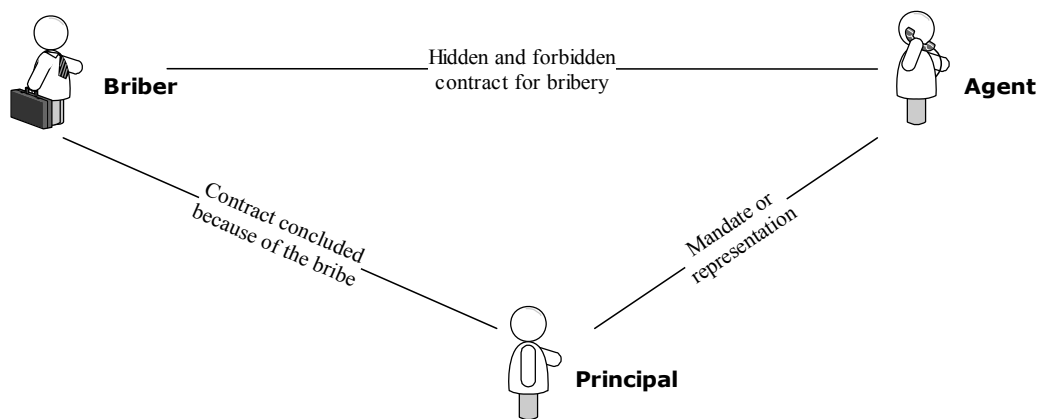
The proposed definition of “corruption” does not cover two other phenomena – nepotism and cronyism. In these situations there is no direct giving or receipt of benefit. Here, the benefit is replaced by the expectation of “loyalty”, the anticipation of “mutual assistance” in other situations, the provision of political or organisational benefits, etc.

Irrelevant in criminal law are also those cases in which the person who has accepted the bribe is not a public official (*e.g.* a physician, a teacher, a professor). However, that does not exclude the civil law importance of these cases.

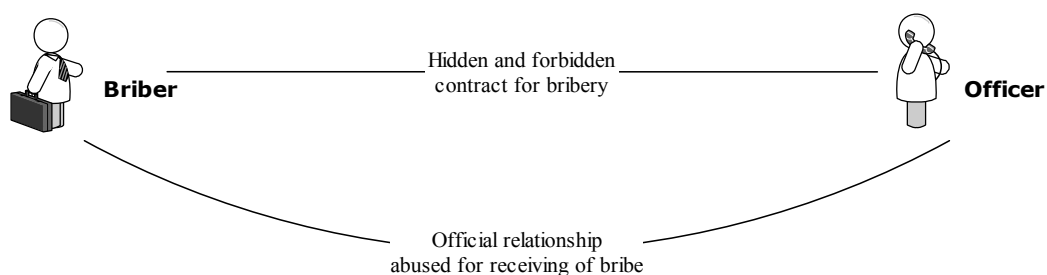
C. Possible Fundamental Schemes of Corruption

Two major schemes of corruption are possible, each of them having three possible complications: 1) the benefit is obtained indirectly by a third person, and not directly by the person abusing his powers; 2) the benefit is given by a third person, and not by the person concerned; and 3) the benefit is obtained by a third person and remains with the third person (the benefit is not further transferred to the agent).

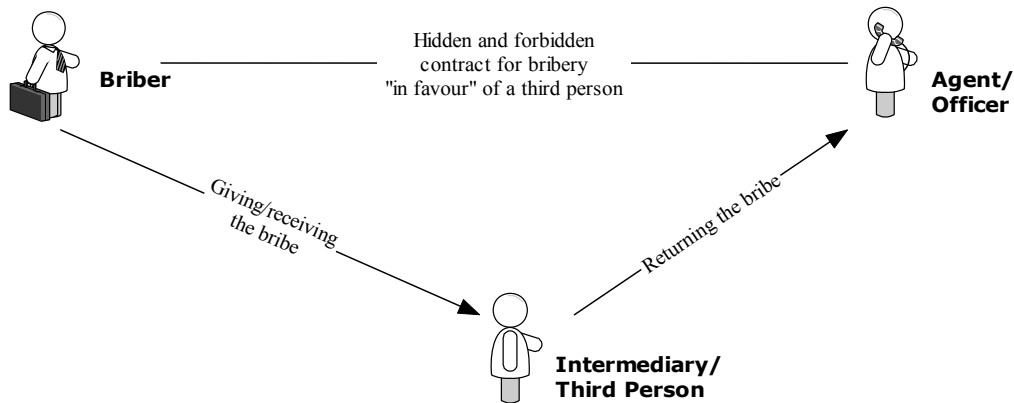
The first scheme of corruption is illustrated as follows:



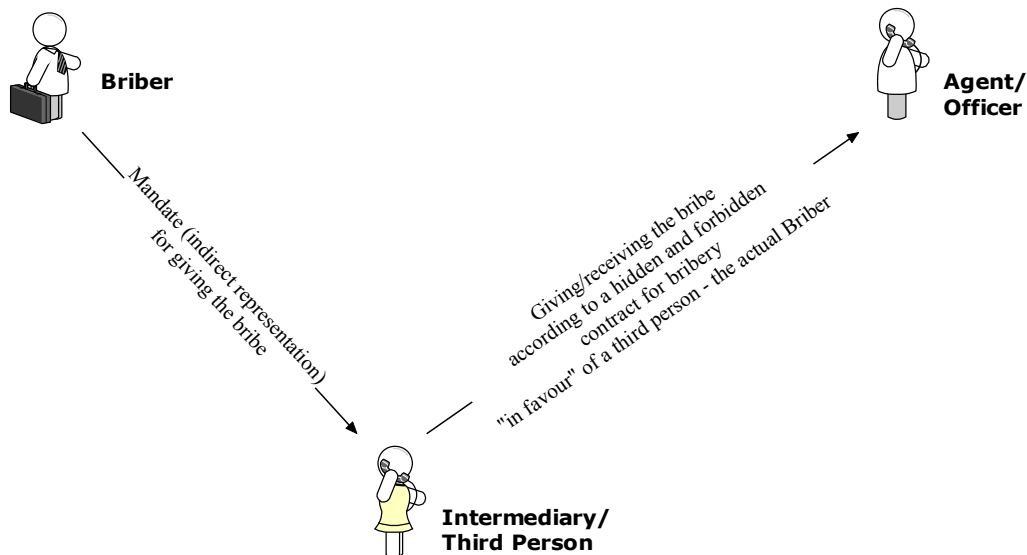
The second scheme can be presented as follows:



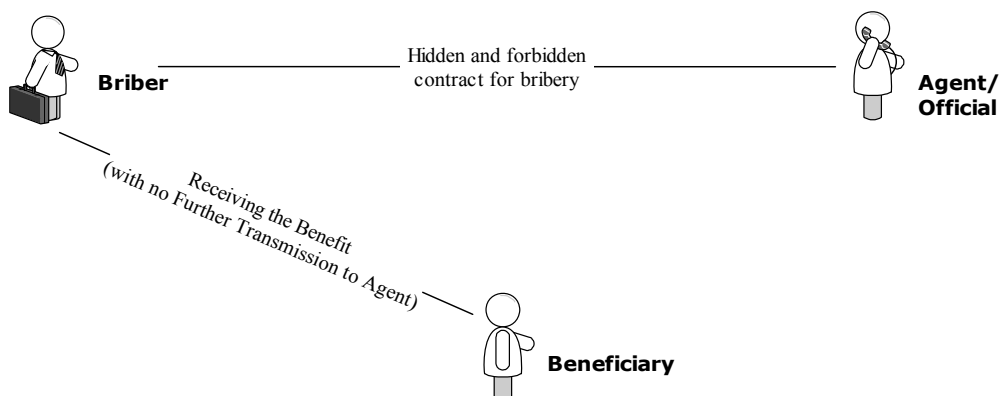
The complications of both schemes are illustrated as follows:



- where the benefit is obtained by a person other than the agent/official, i.e. the benefit is obtained by a third person who later on transfers the benefit to the agent;



- where the benefit is given by a person other than the person concerned; and



- where the benefit is eventually and actually obtained by the third person (the benefit is not transferred further to the agent).

Each one of the above schemes (along with its complications) brings about different civil law treatments of the bribe. These differences will be dealt with in the respective points within the writing.

D. Differences between the Treatment of Corruption in the Public and Private Sector

The public sector has its special procedures (*e.g.* in cases of public procurement assignment). The respective public body can apply them; moreover, it is obligated to apply them in all its acts. In practice, these acts result in restricting *the legal capacity* of the public body (when choosing what type of contract should be concluded) and in a drastic reduction of both its autonomy of will (*Willensautonomie*) (when choosing whether to conclude a contract or not, and whom to conclude it with), and its freedom of contract (*Vertragsfreiheit*) (what clauses the contract will contain).

In principle, private law has no such obligatory procedures. In private relationships, these procedures are partly replaced by Corporate Governance rules, however, the latter are effective only with regard to part of the commercial companies.

E. What Types of Benefits, apart from Monetary Payments, Count as Bribes?

Apart from monetary payments – its most vulgar form – a bribe manifests itself in other more perfidious forms. A bribe can be “any benefit”. Besides, the bribe does not necessarily have to be obtained, it might only have been promised or requested. A bribe is also illustrated in cases of a contract, where the price is a nonmarket one – as either too high or too low compared to the market price. A typical scheme of bribery is the consultancy contract, under which the advice given is either unnecessary or of little value, but the royalty received is of an unusually high amount.

Finally, a bribe also consists in entering into a legal relationship into which the briber would not have entered in ordinary circumstances – *e.g.* the appointment of the beneficiary to a sinecure, or the appointment to an office of a person who is evidently unsuitable or unfit for it, or the conclusion of a labour contract for a job which is not actually needed, etc.

Although the definition does not explicitly state so, the principal’s lack of knowledge of the bribe is a constitutive element thereof. If the principal knows that his agent is giving/receiving bribes and consents to it, that is a particular form of payment for an intermediary service.

F. Onus Probandi

In civil law – inasmuch as corruption is relevant here at all – the general rule of Art. 154(1) of the Civil Procedure Code (CPC) applies: each party has to prove the circumstances on which its claims and objections are grounded.

The criminal circumstance of “bribery” cannot be proved in civil law proceedings; they have to be suspended until the criminal law court has rendered its decision. The law does not provide for presumptions helping to prove corruption. It is only the giving and obtaining of the bribe that is proven in criminal law courts. Neither the reason for giving the bribe, nor the agreement between the parties is proven – they are regarded as being obvious from the specific circumstances (*praesumptio ad hominem*).

G. Validity of Contracts

In most cases of corruption, the legal relationships involve three or more persons – the briber, the agent and the principal. In the complicated forms of corruption (see “Schematic Presentation”), additional relationships arise between the briber, the beneficiary and the third person, who either mediates in giving the bribe, or receives it instead of the agent.

Each of these relationships may have its own fate and may be affected by a specific type of invalidity.

I. Contract between Briber and Agent

Any contract between the briber and the agent is void. The grounds for its voidance result from the conflict with law (Art. 26(1)(1) LOC) and the conflict with *bonos mores* (Art. 26(1)(3) LOC).

According to Art. 34 LOC, if the contract is void the benefit transferred should be restituted. The rule under Art. 55(1)(1) LOC, which is applicable in this case, provides the same (*condictio sine causa*). However, that is only one half of the resolution, as in the cases of bribery, the PC provides for the confiscation of the object of crime, *i.e.* the confiscation of the bribe.

Therefore, the briber may not claim the bribe from the agent, because a competing and better claim for the right of ownership has arisen – the claim of ownership in favour of the Treasury.

In spite of having not been discussed in court practices so far, the following question is posed: whether the agent may claim what he has transmitted (*i.e.* the equivalent of his efforts) from the principal. “The efforts” of the agent, inasmuch as they do not constitute a piece of property, are not subject to confiscation under Art. 307a PC, *i.e.* from the formal point of view the agent could claim the restitution of the equivalent of his “ef-

forts” from the briber. Even if we disregard the difficulties in proving the equivalent of the said “efforts”, such a claim, in my opinion, either should not be considered at all because of its being inadmissible, or should be disallowed as being ungrounded by virtue of Art. 8(2) LOC and Art. 289 of the Commercial Law (CL) – *nemo auditur turpitudinem suam allegans*.

II. *Contracts between Briber, Agent and Different Kinds of Intermediaries*

1. *Contract between Briber and Agent under Complicated Forms of Corruption*

Regardless of various complications of the corruption schemes, each one of them contains a contract between the briber and the agent. This is so, even in those cases where the principal is undisclosed at the time the contract is concluded, and is subject to subsequent disclosure. In any corruption scheme, the contract between the briber and the agent is void on the grounds that have already been mentioned.

2. *Contracts in Case of an Intermediary Acting as Transmitter of Benefit*

In this case, a (void) contract exists between the briber and the agent. However, the bribery is not committed by the briber himself; it is committed by an intermediary acting under another contract concluded between the agent and the briber.

This contract may be:

- a contract in favour of a third person (the agent), or
- a contract for placing an order, or
- authorisation of a third person who will be rendered performance instead of the beneficiary, or
- entering into a duty/assuming a duty (which either relieves or releases the agent as a debtor), or
- a service contract (where the object of the bribe is actually transmitted).

If the intermediary is aware of the purpose of the said contract, *agere in fraudem legis* is present and the contract is void. However, if the intermediary acts in good faith, the contract is a valid one.

3. *Contracts in Case of Intermediary Acting as Beneficiary instead of the Agent*

In this situation, the (void) contract between the briber and the agent has one of the following two particularities: 1) it is a simulated contract in favour of a third person (the intermediary). Here the third person seemingly receives the benefit, but actually he acts as an intermediary in the receipt of the bribe, or 2) the performance of this contract should be rendered to a person authorised by the creditor (the intermediary) and not to the creditor (the agent).

Here again, as with the preceding situation, *agere in fraudem legis* is present and the contract is void.

4. *Specific Types of Benefits Given to Third Parties*

However, the said consequences for the contract of bribe (*i.e.* its voidance) are placed in doubt in the following situations: when receiving the bribe, where the intermediary has not been given a material good, and where a bilateral contract was concluded with him instead.

Here the validity of the bilateral contract depends on the *bona fide* of the third person. If he is aware of the undisclosed purpose of the contract, *agere in fraudem legis* is present, as well as the voidance ensuing from it. However, in this case, the confiscation does not apply to all that the third person has received, but only to the excess of the market equivalent of his own consideration. And it is this very “nonmarket share” that constitutes the bribe given through the third person.

5. *Contracts in Case of Benefit Received by a Third Person instead of the Agent*

Contracts in favour of third persons (Art. 22 LOC) also exist, under which the briber is a promisor, the agent is a stipulator, and the third party benefits gratuitously from what has been received from the promisor (the briber). Besides, the third person is not aware of the true reason for which he receives the benefit (the corruption scheme).

For instance, this scheme is illustrated in the following situations: supporting a third person in need, sponsorship, granting a scholarship to a person who is the agent’s relative, “donation” to charity.

Here again, the contract in favour of the third person is void because of its conflict with the law and with *bonos mores*. The benefit under this contract has been given *sine causa* and is subject to restitution and confiscation, respectively.

However, this case can be criticised for undermining the sense of justice – yet, the third party, who received the consideration, acted in good faith, *i.e.* he was not aware of his participation in a scheme involving corruption. Should he restitute what he has received? These problems become really acute in certain sensitive situations: 1) scholarships granted, 2) money received for medical treatment, 3) support given to orphans, etc. The currently valid norms do not provide a satisfactory resolution. *De lege ferenda* I propose the following rule:

Where the bribe is given to a *bona fide* third person with a view to satisfying important needs of his, or has been used for the public good, is not being awarded in favour of the State, and would not injure public interests, the judge is entitled to disregard those rules which result in an award in favour of the State.

6. *Confiscation of the Consideration Given under the Contract between Briber and Agent*

According to general opinion, it is only what the active party in bribery has given that is subject to seizure in favour of the State. However, what happens to the consideration given by the agent? The relationship between corruption and bribery, in particular, is always a bilateral relationship, and not a unilateral one. Because of its nature, the corrupt agent’s act in itself cannot be seized or restituted. However, it is assumed that its market equivalent should be confiscated.

Otherwise – if only what the active party in bribery has given is seized, and the passive party does not receive the same treatment – the result will be *sui generis* injustice: the active party in the bribery will “keep” what it has received from the passive party, while the passive party will be deprived of what it has been given by the active party in the bribery. Of course, that gives rise to problems regarding the market evaluation of the agent’s act/omission.

III. Contract between Briber and Principal

Unfortunately, in spite of the obligation which Bulgaria has assumed by virtue of the Civil Law Convention on Corruption (effective in Bulgaria since 2003), Bulgarian civil law does not provide for independent grounds for avoidance or voidability of the contract concluded between the briber and the principal. The avoidance of the contract between the briber and the agent does not automatically affect the contract concluded with the principal.

The only feasible way is to have the principal invoke Art. 40 LOC (acts to the detriment of the principal). If the prerequisites for this provision are proven, the concluded contract “is not enforceable against the principal”. In this case pending invalidity is present. The reason for such invalidity is that the agent has no authority to aggrieve the principal. This invalidity does not constitute avoidance, and it can be confirmed by the principal if the latter finds it necessary to do so. The invalidity is effective *ex tunc*, but in any case it is necessary that the principal should invoke it – either through a claim, or through an objection.

The problem is that it is extremely difficult to prove the prerequisites set forth in Art. 40 LOC, and the party invoking this norm is not supported with a lower standard of proof or presumptions. The prerequisites are:

- the contract should have been concluded “to the detriment of the principal”, which in itself is extremely difficult to prove;
- the agent and the person with whom the contract is concluded should have reached “an agreement to the detriment” of the principal. As this requires that intention in both of them be proved, in practice it is impossible to prove this prerequisite, except where a criminal law conviction on a charge of bribery has taken effect.

Owing thereto, it is proposed that the “agreement” should not be regarded as an intentional collusion, and that it suffices if both the agent and the person with whom the contract is concluded had been aware or could not have been unaware that the principal was aggrieved.

The invocation of pending invalidity does not depend on whether the contract has been performed or not. However, the following danger exists: the performance of the contract might be regarded as a confirmation thereof, which might cure the invalidity. In order for the latter to be cured, in the course of performance, the principal should have been aware of the grounds for the invalidity, and should have rendered voluntary performance (by analogy with the confirmation of voidable contracts).

For the time being there is no court practice confirming or rejecting the stated views.

In administrative procedures (public procurement assignment and the like), the out-rivalled competitor is entitled to attack the regularity of the administrative procedure. However, that does not suspend performance, i.e. the contract can be concluded. If the said attack is successful, it does not bring about the invalidity of the concluded contract – indemnity can be claimed only. This solution has prevailed following the search for alternatives in various directions, as the strong remedy of suspension of performance has always been abused, and it is not unusual for the purpose of the awarded public procurement to be thwarted. The solution regarding considerations of long duration or periodic nature might be somewhat different, *e.g.* in cases of granting concessions, renting public property, etc.

IV. Third Persons' Rights in Case of Invalidity of the Contract

Where it is established that the contract concluded with the principal “produces no effect” with regard to him, and the principal refuses to confirm this:

- those third persons who have provided causal security in favour of the principal (pledge, mortgage, suretyship) are entitled to bring any objections of the principal against the briber;
- those third persons who have provided such security in favour of the briber are also entitled to bring their objections against the principal.

However, that does not affect the validity of the contract by virtue of which the security was provided. If it is a contract for value, the principal or the briber, respectively, owes to the third person the contractual remuneration.

The same applies where a third person has provided credit to one of the parties. The agreed interest, fees and costs will be incurred. However, the grant of funds may be refused if the credit is related to the invalid contract.

H. Right to Damages

The principal is entitled to seek damages from:

- his agent (on contractual grounds);
- the briber (on specific tort law grounds – culpa in contrahendo).

Those third persons who have provided security or credit in relation to the contract are also entitled to seek damages from those whose acts have resulted in the invalidity of the contract – the briber and the agent who accepted the bribe (Art. 21(2) LOC). However, they may, as well, approach the principal who entrusted the agent with the representation, wherefrom damages have originated.

Those third persons who have been aggrieved by the conclusion and performance of the contract or by its invalidity (competitors in a public procurement procedure, persons suffering damages from the briber's illegal gains, etc.) are entitled to seek damages on tort law grounds from all persons specified above – the briber, the agent and the principal.

In tort law claims, the following should be proved: 1) the act (the giving of the bribe), 2) the damage, 3) the causality, and 4) the fault. Wrongfulness is not subject to verification as it is judged by the court.

In principle, damages comprise both the loss suffered (*damnum emergens*) and the loss of profit (*lucrum cessans*). Immaterial damage is also compensated for. There are no presumptions supporting the proof of damages. The greatest problem relates to proving causality.

Until now there has been no court practice in rendering decisions on these matters.

Where a bribe has been given to a public official, it is the Law on State's and Municipalities' Liability for Damages that applies, and not the general civil legislation. Holding the tortfeasor directly liable under the said Law is ruled out.

The question of the aggrieved person's fault (*contributory negligence*) has not been discussed in court practice, however, such fault can be grounded on the nonobservance of the rules of law or usage applied in the management of the respective enterprise.

In a tort case, all tortfeasors (the briber and the agent) bear joint liability. However, the principal is also held liable – for having entrusted the agent with an activity in the course of which damages have occurred.

I. Enforcement of Civil Law Claims

The barriers to the enforcement of civil law remedies against corruption are as follows:

- the insufficient elucidation of corruption in civil law literature;
- the absence of any court practice in this field;
- the view that corruption is a criminal law problem only;
- the limited and imperfect legal regulations allowing multidirectional interpretation, thus bringing about results that cannot be foreseen;
- In actual fact, the burden of proof of all circumstances is on the aggrieved party; in principle, it is difficult to prove those damages suffered, and sometimes it is not within the realms of possibility to prove the loss of a profit;
- where the bribe constitutes a crime, civil law proceedings have to be suspended until criminal law proceedings on bribery are finalised;
- the civil law procedure is a lengthy one;
- the probability of successful enforcement against a bubble company which has given the bribe is minimal; no creditors' privileges are provided for in case of tort.