ILLICIT FINANCIAL GAINS IN INTERNATIONAL COMMERCIAL ARBITRATION: THE ARBITRAL TRIBUNAL'S DUTY*

Uluslararası Ticari Tahkimde Yasadışı Mali Kazançlar: Hakem Heyetinin Görevi

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ABSTRACT

The confidentiality of arbitration proceedings is paramount, as it is a fundamental principle that safeguards the privacy of the parties involved. However, this confidentiality that arbitration affords can also, on occasion, serve to obscure criminal activities. This can give rise to considerable risks of illicit financial gain within arbitration. Arbitral tribunals operate without a specific regulatory framework explicitly tailored to address issues that may arise from underlying contract in dispute. This article examines how arbitral tribunals address potential misconduct in two distinct scenarios. The first scenario considers cases where the tribunal's jurisdiction is contested, resulting in a determination that the underlying contract is invalid under the applicable legal framework. In such circumstances, the tribunal is tasked with navigating the implications of this invalidity while upholding the integrity of the arbitration process. The second scenario pertains to instances where the underlying contract is deemed valid yet entangled with illicit financial activities. In this instance, the tribunal is confronted with a pivotal decision: whether to invoke the rules of international public order or to apply mandatory rules from a jurisdiction other than that which governs the contract. If the tribunal uncovers evidence of illicit activities, it may withdraw from the case or declare the contract invalid by invoking principles of international public policy and foreign mandatory regulations. This study examines these potential responses, elucidating the tribunal's role in balancing confidentiality and the

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imperative of addressing and preventing criminal conduct during arbitration proceedings.

Key Words: International commercial arbitration, confidentiality, illicit financial activities, public policy, kompetenz-kompetenz

ÖZ

Tahkim yargılamalarının gizliliği, ilgili tarafların mahremiyetinin korunmasını sağlayan temel bir kural olduğundan büyük **önem** taşımaktadır. Bununla birlikte, tahkimin sağladığı gizlilik, zaman zaman suç faaliyetlerinin tespit edilmesini de engelleyebilmektedir. Bu durum, tahkim bağlamında yasadışı mali kazanç riskine yol açabilmektedir. Bu makale, hakem heyetlerinin böyle bir hususla karşılaşmasını iki durum **özelinde** incelemektedir. İlk durum, hakem heyetinin davaya bakma yetkisine itiraz edildiği ve bunun sonucunda altta yatan esas sözleşmenin uygulanacak hukuk bağlamında geçersiz olmasının ele alınmasıdır. Bu gibi durumlarda, hakem heyeti, tahkim sürecinin bütünlüğünü korurken bu geçersizliğin sonuçlarını yönetmekle görevlendirilmektedir. **İkinci** durum, altta yatan sözleşmenin geçerli kabul edildiği ancak yasadışı mali faaliyetlerle iç içe geçtiği durumlarla ilgilidir. Bu durumda, hakem heyetinin uluslararası kamu düzeni kurallarına mı başvuracağı yoksa sözleşmenin tabi olduğu yargı alanından başka bir yargı alanının emredici kuralları mı uygulanacağı sorusu gündeme gelmektedir. Bu **çalışma**, tahkim yargılamasında yasadışı mali faaliyetlere karşılaşan hakem heyetinin bu süreçte nasıl hareket etmesi gerektiği ve gizlilik ile suçu bildirme yükümlülüğü arasındaki rolü incelenmektedir.

Anahtar Kelimeler: Uluslararası ticari tahkim, gizlilik, yasadışı mali faaliyetler, kamu düzeni, kompetenz-kompetenz

INTRODUCTION

The principal objective of arbitration is to facilitate the expeditious and impartial resolution of disputes outside the realm of state judicial processes, thereby conserving the parties' time and resources that would otherwise be expended on litigation.[1] This naturally prompts the parties to seek alternative avenues for resolution. Arbitration responds to this quest by enabling the parties to the dispute to assume control of the resolution process. Arbitration facilitates dispute resolution by providing a framework of rules that can be adapted to the specific structure of the dispute between the parties.[2] Consequently, there

1 Thomas E. Carbonneau, *The Law and Practice of Arbitration* (Juris 2012) 1; Gary B. Born, *International Commercial Arbitration*, (3rd ed, Wolters Kluwer 2021) 67-69; Jan Paulsson, *The Idea of Arbitration*, (OUP 2013) 2–18.

2 Stephen B Goldberg, Frank E.A. Sander, Nancy H. Rogers and Sarah Rudolph Cole, *Dispute Resolution: Negotiation, Mediation and Other Processes* (6th ed, Wolters Kluwer 2012) 1–4.

is a growing tendency towards using international arbitration for commercial disputes.[3] The fact that arbitration proceedings provide "justice on a private scale"[4] Moreover, having limited supervision may result in using the arbitration mechanism in criminal activities.[5] In particular, the transfer of substantial financial resources as a consequence of arbitral awards enhances arbitration's appeal as a vehicle for criminal activity. Consequently, this article will investigate the nexus between international commercial arbitration and illicit financial gains, the legal ramifications of financial crimes in arbitration, and the recommended course of action for arbitral tribunals confronted with illicit financial gains during proceedings.

The remainder of this study, which examines illicit financial gains in arbitration, is divided into three sections. The second part will examine the concept of money laundering as an illicit financial gain in the context of national and international legislation, focusing on its intersection with arbitration proceedings. The third part will address the legal consequences of illicit financial gains in arbitration, identify the relevant dispute scenarios, and propose solutions. The final part will discuss the data emerging from the study and offer suggestions for future research.

I. ARBITRATION AND ILLICIT FINANCIAL GAINS

It is widely acknowledged that criminal law and arbitration are two distinct and separate fields of legal practice.[6] Arbitration proceedings are based on the consent of parties, whereas criminal law is a branch of law that has emerged as an extension of the state's sovereignty without the consent of parties consent.[7] The doctrine is predicated on the notion that criminal law matters, which are inherently related to the state's sovereignty, cannot be adjudicated within the framework of arbitration proceedings.[8] Nevertheless, while it is acknowledged that matters about the core of criminal law are beyond the purview of arbitration,

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3 Nigel Blackaby, Constantine Partasides, Alan Redfern, and Martin Hunter, *Redfern and Hunter on International Arbitration* (5th ed, OUP 2009), 1–3.

4 Sergio Puig and Anton Strezhnev, 'Affiliation Bias in Arbitration: An Experimental Approach' (2016) Arizona Legal Studies Discussion Paper No 16-31, 1, 2.

5 Alexis Mourre, 'Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator' (2006) 22 *Arbitration International* 95, 97.

6 Kathrin Betz, *Proving Bribery, Fraud and Money Laundering in International Arbitration* (CUP 2017) 3-4; Mourre (n 5) 95.

7 Loukas A. Mistelis, "Arbitrability - International and Comparative Perspectives" in Loukas A. Mistelis and Stavros L Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer International Law 2009) 3; Karim Youssef, "The Death of Inarbitrability" in Loukas A. Mistelis and Stavros L. Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer International Law 2009) 58.

8 Mourre (n 5) 96.

it is evident that there are instances where the two fields intersect.[9] One such issue is money laundering. In this context, it is necessary to address its dimensions in general and its appearance in arbitration.

A. Global Regulations and Illicit Financial Gains

The concept of money laundering has been defined in several ways. Regarding sovereignty, countries can determine which proceeds from which crimes will be regarded as money laundering in their legal code. Consequently, the scope and legal definition of money laundering may vary from one country to another. Indeed, the concept of money laundering[10] has its origins in the US Money Laundering Control Act of 1986.[11] The Black's Law Dictionary defines money laundering as " taking money illegally and washing or laundering it so it appears to have been gotten legally."[12] whereas the United Nations Convention on Combating Trafficking in Narcotic Drugs and Psychotropic Substances[13] and the Vienna Convention of 1988 defines it as "...The conversion or transfer of property, knowing that such property is derived from any offense or offenses established by subparagraph (a) of this paragraph, or from an act of participation in such offense or offenses, to conceal or disguise the illicit origin of the property or 12 assisting any person who is involved in the commission of such an offense or offenses to evade the legal consequences of his actions." In addition, the Council of Europe's 1991 Directive 91/308 on Prevention of the Use of the Financial System for the Purpose of Money Laundering defines money laundering as follows: " Whereas money laundering must be combated mainly by penal means and within the framework of international cooperation among judicial and law enforcement authorities, as has been undertaken, in the field of drugs, ….and more generally about all criminal activities".[14] The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing

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9 The fundamental issue of corruption, including bribery and fraud, arises in arbitration proceedings. See Tatu Giordani, *Allegations of Criminal Conduct in International Commercial Arbitration* (Master's thesis, University of Helsinki 2017) 1.

10 It is noteworthy that, despite the contemporary prevalence of money laundering, the concept has its roots in the past. The term "money laundering" was first used in the 1920s in America. It is postulated that the term was coined as a result of criminal organizations using faulty washing machines in public laundries. See Peter W Schroth, 'Bank Confidentiality and the War on Money Laundering in the United States' (2016) 42 *American Journal of Comparative Law* 369.

11 H.R. 5077, *Money Laundering Control Act of 1986*.

12 *Money Laundering* https://thelawdictionary.org/money-laundering/ accessed [May 5, 2024].

13 *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* [1988] UNTS 1.

14 *Council Directive (EC) 91/308/EEC on the Prevention of the Use of the Financial System for the Purpose of Money Laundering* [1991] OJ L166/77.

of Terrorism (also known as the Strasbourg Convention) [15], defines money laundering as " any economic advantage, derived from or obtained, directly or indirectly, from criminal offenses." In this context, it seems reasonable to define black money as money, goods, or values obtained through illicit activities.[16]

The concept of money laundering first emerged at the national level. The regulation and supervision of money laundering at the national level was more straightforward, as it was related to a single legal order. However, with the internationalization of trade, the forms of money laundering have become more complex and multi-layered. Money laundering, which involves the participation of numerous legal systems, has manifested itself in a multitude of ways. This has rendered the prevention of money laundering at the international level an inherently challenging endeavor. The generation of income through illicit means has a profound impact on the economic stability of nations. This is because the income obtained through money laundering has both long-term and short-term effects on society. [17] As a result, countries implement a range of measures to prevent the inclusion of illicitly obtained funds in the global financial system. Consequently, regulations have been established to prevent money laundering within the international financial system.

The initial formulation of the international anti-money laundering regulation can be traced back to the work of the Committee of Experts of the Council of Europe between 1977 and 1980. The Committee of Ministers adopted Recommendation No. R80(10) to the Member States on Measures Against the Transfer and the Safekeeping of Funds of Criminal Origins.[18] This recommendation constituted the inaugural international initiative to prevent money laundering. Subsequently, the Vienna Convention of 1988 established regulatory measures about this matter. In essence, the money laundering provision outlined in the Vienna Convention is primarily concerned with the prevention of proceeds derived from drug trafficking, as explicitly stated in Article 3(1)(b). On November 8, 1990, the Strasbourg Convention determined that the source of money laundering should not be restricted to the drug trade and that other serious crimes should not be overlooked. Subsequently, the concept of "money laundering" was broadened in scope in 2000 with the adoption of the United

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15 European Commission, 'Explanatory Report on the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime' (European Treaty Series – No 141, 1990).

16 David Chaikin, 'Commercial Corruption and Money Laundering: A Preliminary Analysis' (2008) 15(3) Journal of Financial Crime 269-271.

17 Monica Violeta Achim and Sorin Nicolae Borlea, *Economic and Financial Crime* (Springer 2020) 250-255.

18 *Council of Europe Committee of Ministers, 'Measures Against the Transfer and the Safekeeping of Funds of Criminal Origins' (Recommendation No R(80)10).*

Nations Convention against Transnational Organized Crime and the Protocols[19] to it, also known as the Palermo Convention. The Palermo Convention requires state parties to criminalize money laundering and a wide range of other acts. Such offenses include corruption, obstruction of justice, and certain types of organized crime. The most significant regulatory framework about money laundering is the Financial Action Task Force (FATF) 40 Recommendations[20]. The FAFT 40 recommendations, which were initially proposed in 1990, were finalized in 2022. The FAFT is an intergovernmental organization established for the purpose to combat money laundering, the prevention of terrorist financing, and the prevention of the financing of weapons of mass destruction. As of 2022, the organization has 39 member countries, including Türkiye. It is a matter of record that these standards on money laundering are not legally binding. The directives issued by the FAFT are intended to serve as guidelines rather than as legally binding mandates for member states. Nevertheless, they exert a considerable influence on the formulation of anti-money laundering legislation at the national level. Similarly, FAFT Recommendation 3 calls for the criminalization of the offenses delineated in the Vienna and Palermo Conventions. In light of the foregoing, it is evident that the FAFT is complementary to the Vienna and Palermo Conventions. By the FAFT Recommendations, the FAFT requests that member states criminalize information obtained from corruption, fraud, information trafficking, tax crimes, and drug trafficking in the context of money laundering. In the context of European Union members, money laundering is included in the category of "euro crimes." Furthermore, it is addressed in the Treaty on the Functioning of the European Union[21], also referred to as the Lisbon Treaty. Article 83(1) of the Lisbon Treaty explicitly delineates the competence of the European Parliament and the Council in matters about serious crimes with a cross-border dimension, including illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of payment instruments, cybercrime, and organized crime. Indeed, the European Union has been engaged in the fight against money laundering since its inception.

B. The Intersection of Money Laundering and Arbitration

The concept of laundering assets derived from criminal activities more commonly known as money laundering, is the process of converting illicit income obtained through illicit means into other assets. This is achieved by preserving the value of the assets, concealing them in a way that does not attract the attention of legal authorities, increasing their usefulness, or by creating a

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19 *United Nations Convention against Transnational Organized Crime and the Protocols Thereto* [2000] UNTS 349.

20 *The Financial Action Task Force Recommendations* (FATF 2012).

21 Consolidated Version of the Treaty on European Union (2008) OJ C115/13.

legal basis for their ownership. Proceeds derived from criminal activities be incorporated into the financial system in a manner that is legally compliant.[22] It is evident that the phenomenon of money laundering has manifested in diverse forms in conjunction with the advancement of technology and the phenomenon of globalization. Nevertheless, an examination of the various methods employed in money laundering reveals that it typically occurs in three distinct stages. The initial phase is referred to as the placement stage.[23] At this stage, the illicit funds are introduced into the financial system. This is due to the fact that the proceeds of crime are predominantly in the form of cash and are often substantial in amount. The utilization of credit cards, cheques, and other non-cash payment instruments draws attention to the use of large amounts of cash. This is predicated on the notion of obviating any suspicion regarding the source of the funds in question. It is, therefore, necessary to integrate the proceeds of crime into the financial system or export them abroad. The second stage is referred to as "layering."[24] This refers to the process of combining funds obtained through legitimate channels with those obtained through illicit means and subsequently transferring the combined sum through a network of transactions across different jurisdictions. In other words, income is distributed through a multitude of disparate financial transactions to conceal the illicit origin of the funds. In essence, the launderer removes the income from the primary source through intricate transactions, thereby making it challenging to trace. The third stage, integration, involves the incorporation of the laundered asset into the legal economic system through investment or the purchase of specific products.[25] This is because any potential inquiries regarding the source of the funds that have undergone placement and separation are rendered moot by the establishment of a legal foundation. Consequently, it is challenging to ascertain whether the funds in question are indeed illicit. Indeed, those engaged in money laundering activities invest funds derived from legitimate sources. These transactions are conducted by incorporating a multitude of banking institutions into disparate legal frameworks, thereby creating a complex and intricate structure.[26] There are numerous methods of money laundering. These include smurfing, opening accounts with fictitious or false names, cooperating with financial institutions, using companies that operate legally or ostensibly, cash smuggling, using workers,

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22 For more detailed information, see Fabian Teichmann, *Methods of Money Laundering* (Wolters Kluwer 2021).

23 Paul Allan Schott, 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism' <https://documents1.worldbank.org/curated/en/982541468340180508/pdf/634980WP0Refer00Box0361517B0PUBLIC0.pdf> accessed August 11, 2024.

24 Schott (n 23) 8.

25 Ibid.

26 Mitchell McBride, 'Money Laundering' (2020) 57 Am Crim L Rev 1045.

using foreign exchange kiosks, cooperating with foreign financial institutions, false or misleading import or export invoices, insurance policies, and so forth. These activities can manifest themselves in several ways. The proceeds of illicit activities may be laundered through a variety of means, including the use of casinos and other gambling establishments, the involvement of financial institutions in foreign jurisdictions, the utilization of money remitters and travel agencies, the sale of luxury goods such as automobiles, aircraft, boats, and real estate, the conversion of checks into cash, the use of postal remittance services, the black market, and the purchase of art and historical artifacts. Nevertheless, the import/export scheme is the most prominent of these. One of the traditional methods for ensuring the flow of capital is to sell goods at a price above the market rate. In such instances, the relevant parties may include a clause stipulating that any disputes that may arise between them shall be resolved through arbitration. It can thus be seen that commercial arbitration plays a role in money laundering.

The nexus of money laundering and international commercial arbitration is the universalization of trade. The foundations of arbitration proceedings are rooted in antiquity. Arbitration proceedings have been observed to have been employed in commercial contexts from ancient Greek times to those of ancient Egypt. [27] Arbitration has traditionally been utilized in the context of local commercial relations rather than international commercial relations. However, the advent of globalization has led to a notable increase in multinational commercial relations. [28] As a natural consequence, the parties have tended to prefer the resolution of their disputes through arbitrators who are perceived to be impartial. This has resulted in the development of international legislation on arbitration proceedings and the imposition of limits on the review of arbitral awards before state courts. Those engaged in commercial activities have historically preferred to conduct proceedings in a more private manner rather than in a public setting. This has resulted in a high degree of privacy in arbitration proceedings. The primary area where arbitration and money laundering intersect is the freedom that arises from the privacy of arbitration. The fact that arbitration proceedings arise out of the contract between the parties and that the decisions rendered are enforceable has been the main point of the demand for arbitration proceedings.

II. ILLICIT FINANCIAL GAINS IN ARBITRATION PROCEEDINGS AND THE ARBITRAL TRIBUNAL

While arbitrators are entrusted with a role analogous to that of judges in

[27] Christian Bühring-Uhle/Lars Kirchhoff/Gabriele Scherer, *Arbitration and Mediation in International Business* (2nd ed, Kluwer International Law 2006) 176.

[28] Kyriaki Noussia, *Confidentiality in International Commercial Arbitration - A Comparative Analysis of the Position under English, US, German and French Law* (Springer 2010) 1-3.

state courts[29], their status as non-judges raises questions about the potential remedies that an arbitral tribunal may pursue in the event of a criminal offense. In light of international precedents and practices, it can be posited that there are three potential courses of action for the arbitral tribunal to pursue in such a scenario. In such instances, the arbitral tribunal may choose to withdraw from the proceedings, apply the principles accepted in the international public order, or decide based on mandatory provisions of a law other than the law applicable to the substance of the contract.

A. Withdrawal from Arbitral Proceedings

Arbitrators are at liberty to determine their competence when formulating their awards. This freedom is essential to ensure the efficacy of international arbitration as a method of dispute resolution.[30] and to guarantee that arbitrators are endowed with the same powers as judges.[31] In this context, the principle of Kompetenz-Kompetenz has emerged. In accordance with this principle, arbitrators are required to rely on the authority granted to them by the arbitration agreement in order to determine their own powers. This authority encompasses the ability to determine the existence of the arbitration agreement, the validity of the arbitration agreement, and the scope of the arbitration agreement. [32] In this regard, it is essential to assess the arbitral tribunal's authority to decline arbitration in the event of money laundering in the contract subject to arbitration proceedings. This is due to the absence of explicit stipulations pertaining to the arbitral tribunal's authority to decline jurisdiction in the event of money laundering during the course of proceedings.[33] It seems reasonable to suggest that similar procedures could be applied in cases of bribery and corruption, as well as money laundering, given that the interests safeguarded are similar. This is due to the fact that the circumstances associated with money laundering are fundamentally analogous to those that are considered in the context of bribery and corruption. In a manner analogous to the assessment of arbitral authority

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29 The question of an arbitrator's independence and impartiality is a matter of considerable debate. One view, which is found in the doctrine, is that the judge should emulate the impartiality and independence of a judge. In the event of the judge's impartiality and independence being called into question, it would be reasonable to expect them to act in a manner consistent with the principles.

30 William W Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' (2007) Boston University School of Law Public Law & Theory Papers Series 24.

31 Pierre Mayer, 'Must Justice be a Goal for the Arbitrator?' (2021) 37(2) *Arbitration International 503,* 504.

32 Janet A. Rosen, 'Arbitration Under Private International Law: The Doctrines of Separability and Competence de la Competence' (1993) 17(1) *Fordham Law Journal* 599, 608.

33 Andrew de Lotbiniere McDougall, 'International Arbitration and Money Laundering' (2005) 20(1) *American University International Law Review* 1021-1040.

in the context of bribery and corruption, the arbitrator must determine whether they have jurisdiction over the allegations regarding the invalidity of the articles of association.

The process of corruption in arbitration may prove instructive for the assessment of money laundering in arbitration. The International Chamber of Commerce Case No. 1110 (ICC Case No. 1110)[34] represents a groundbreaking case study on the phenomenon of corruption in the context of arbitration. The 1963 decision provided a definitive clarification on this matter. In the aforementioned arbitration, the arbitrator discovered evidence of corruption. A British company and its intermediary, an Argentine-based company, provided illicit financial incentives to an Argentine public official. The evidence demonstrated a significant correlation between the illicit payment and the contractual agreement. The arbitrator presiding over the case ruled that the award could not be made on the underlying contract of the dispute. This is because the arbitrator highlighted in his award that the parties are entitled to seek the assistance of the courts in resolving the dispute. Indeed, in subsequent proceedings, ICC Case No. 1110 was invoked as a rationale for the proposition that allegations of corruption and bribery are not arbitrable. However, this stance has evolved over time. In the case of National Power Corp. v. Westinghouse[35], the arbitral tribunal underscored the authority of arbitrators to adjudicate matters pertaining to corruption and bribery. This was subsequently followed by the 1998 decision in Westacre Investments Inc. v. Jugoimportant SPDR Holding Co. Ltd.[36] Indeed, it is widely accepted that the arbitral tribunal is vested with the authority to adjudicate allegations of corruption and bribery.

Considering the appropriateness of applying the approach used for addressing corruption and bribery in arbitration proceedings to cases of money laundering, we believe that evaluating the allegations and evidence related to money laundering within the contract at the center of the dispute falls within the arbitral tribunal's jurisdiction. Accordingly, the arbitral tribunal holds the authority to withdraw from the proceedings if it identifies instances of money laundering in the underlying contract.

B. The Public Policy Interference

It would be appropriate to discuss whether the arbitral tribunal may invoke public order to set aside the award if the underlying contract on which the

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[34] ICC Case No 1110 (Collection of ICC Arbitral Awards, Vol IV) 1; (Yearbook Commercial Arbitration, 1996) 47.

[35] *Nat'l Power Corp v Westinghouse* 949 F 2d 653 (3d Cir 1991).

[36] *Westacre Investments Inc. v. Jugoimport-SPDR Holding Co. Ltd*., [1998] 2 Lloyd's Rep. 111, 114 (Q.B.).

dispute is based is affected by corruption and bribery. It is in accordance with both national and international regulations that public policy intervention is a legitimate ground for the rejection of arbitral awards. [37]

While the concept of public order is a robust rationale for setting aside an award, there is ambiguity surrounding its precise definition. The concept of public policy has been a topic of contention at both the national and international levels.[38] Indeed, there is considerable ambiguity surrounding the definition of public policy. The primary foundation of public policy in various countries is the national synthesis of justice and ethics. The fact that these principles and values change at the social level over time and that various countries have different notions of the content of public policy has resulted in a multifaceted and flexible concept of public policy. In essence, the concept of public order can be defined as a set of institutions and rules that ensure the optimal functioning of public services, the security and peace of the state, and the adherence to the principles of morality in the relations of equal interests between individuals. [39]

It is widely acknowledged that the concept of public policy can be understood to have three distinct dimensions.[40] These are national, international, and transnational public policies. National public policy is shaped by the national values that states have agreed to apply to their citizens. [41] Second, there is international public policy. The concept of international public policy can be defined as the consensus on universal norms[42] and generally accepted principles based on common values that must be applied internationally. [43] These are national, international,

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37 Born (n 1) 2926.

38 For detailed information, see Farshad Ghodoosi, *International Dispute Resolution and the Public Policy Exception* (Routledge 2018).

39 Gui J Conde de Silva, *Transnational Public Policy in International Arbitration* (Doctoral thesis, Queen Mary College, University of London 2007) 87; Mark A. Buchanan, 'Public Policy and International Commercial Arbitration' (1988) 26(1) *American Business Law Journal* 511.

40 Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer International Law 1987) 258–260

41 Buchanan (n 38) 513; Veena Anusornsen, *Arbitrability and Public Policy in Regard to the Recognition and Enforcement of Arbitral Awards in International Arbitration: The United States, Europe, Africa, Middle East and Asia* (Master's thesis, Golden Gate University 2012) 10.

42 *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4.10.2006. In this decision, it was stated that acts such as corruption and bribery should be evaluated in the context of international public policy and that contracts based on such acts would be invalid.

43 James D. Fry, 'Desordre Public International under the New York Convention: Wither Truly International Public Policy' (2009) 8(1) *Chinese Journal of International Law* 81.

and transnational public policy. National public policy is shaped on the axis of national values that states have agreed to apply to their citizens. Secondly, there is international public policy. The concept of international public policy can be defined as the consensus on universal standards and generally accepted principles based on common values that must be applied internationally. It is widely accepted that international public policy is founded upon the principles that underpin the state and that its primary objective is to prevent actions that contravene the values of the international legal system from having consequences.[44] International public policy is structured around the principles of lex mercatoria.[45] Indeed, international public policy can be defined as a state policy that prevents the recognition and enforcement of decisions made by foreign arbitrators or judges.[46] In most countries, the obstacle to the recognition of an award is the violation of international public policy. The significance of international public policy in the context of commercial arbitration lies in its role in ensuring the enforceability of arbitrators' awards.[47] It has a more limited scope than national public policy. Article V(2)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)[48] and Article 34(2)(b) of the UNCITRAL Model Law represent manifestations of international public policy in international arbitration.[49] The third type of public order is recognized as transnational public policy (truly international public policy).[50] The concept of transnational public policy is distinct from that of national and international public order. Transnational public policy is a concept that is based on universal values and is protected by the majority of countries, rather than being limited to

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44 *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 02.08.2006.

45 Born (n 1) 2928.

46 Christopher S. Gibson, 'Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law' (2009) 113(1) *Penn State Law Review* 1227.

47 Pierre Mayer, 'International Public Policy, Related Concepts and Legal Regimes' in Lauro Da Gama E Sozua Junior, Maria Ines Sola and Patrich Thieffry (eds), *Navigating the New Contents of International Public Policy – Compliance in Environment and Human Rights* (ICC Institute Dossiers 2023) 92-98.

48 United Nations, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

49 Pietro Ortolani, 'Application for Setting Aside as Exclusive Recourse against Arbitral Award' in Ilias Bantekas, Pietro Ortolani, Shahla Ali, Manuel A. Gomez, and Michael Polkinghorne (eds) *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (CUP 2020) 893.

50 For detailed information, see Jan Kleinheisterkamp's 'The Myth of Transnational Public Policy in International Arbitration' (2023) 71(1) *The American Journal of Comparative Law* 98-141.

the public policy of a single nation.[51] Crimes such as corruption, drug trafficking, terrorism, the smuggling of artworks, and human trafficking are considered to fall within the transnational public policy.[52] While the concept of transnational public policy is not explicitly addressed in the New York Convention, it is widely accepted that arbitrators should take into account this concept, as it encompasses universal values.

In general, the concept of public policy that serves as the basis for the annulment of arbitration awards on public order grounds is that of public policy under domestic law. However, in addition to this, the arbitral tribunal should also take into account the international public order in relation to the interference of the public order in the arbitration award. Corruption is regarded as a matter of international public policy in a number of legal jurisdictions. In addition to international conventions, this position has been reinforced by a series of judicial decisions.[53] In this regard, the reasoning of Judge Lagergren in ICC Case No. 1110 represents a leading example. In the pertinent decision, Judge Lagergren asserted that the consideration of public international law by the arbitrator is crucial for the enforceability of the award rendered as a consequence of the arbitration proceedings and thus formed the basis of his decision.

It is widely acknowledged that corruption and bribery are fundamentally incompatible with the principles of transnational public order.[54] Indeed, the prevention of corruption represents the fundamental tenet of transnational public order. The question, therefore, is whether money laundering can also be considered within the parameters of transnational public order in a manner analogous to corruption. While money laundering and the implementation of pertinent agreements fall within the purview of national and international public order, the question of which acts can be considered in this context is a matter of contention. This is due to the fact that the definition of acts in question possesses a multitude of meanings within the context of disparate legal orders. This inevitably gives rise to a debate as to whether they fall within the scope of transnational public order, which is based on shared values. In light of the foundational principles underlying corruption and money laundering, and the

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51 Pierre Mayer, 'Effect of International Public Policy in International Arbitration' in Julian DM Lew and Loukas A Mistelis (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 61; Conde de Silva (n 38) 109. In fact, although the concept of transnational public policy was first introduced by Pierre Lalive in the ICCA report of 1986, it was universally adopted in a very short period.

52 Mayer (n 51) 62.

53 In *World Duty Free v Kenya*, the arbitral tribunal made it clear that corruption-related situations fall entirely within the scope of international public policy.

54 In ICC Case No. 8891, the arbitral tribunal held that invalidity of the consultancy contract, which was the cause of the corruption, was a matter of transnational public policy.

values they threaten, it becomes evident that they warrant a similar approach. [55] It is our view that money laundering, similar to corruption, falls within the scope of transnational public policy. Consequently, the arbitral tribunal may conclude the proceedings by invoking the concept of transnational public policy.

C. Mandatory Rules of Foreign Law

An arbitral tribunal is empowered - and obliged - to apply mandatory national law ex officio, even if not invoked by the parties.[56] While the money laundering contract is valid and enforceable under the applicable law, it is necessary to address the issue of whether it is enforceable under foreign mandatory rules. Indeed, it is open to question whether arbitrators are empowered to declare the money laundering contract invalid on the grounds of foreign peremptory rules, given that the contract remains valid under the law applicable to the arbitration. [57] Mandatory rules represent the application of the mandatory provisions of the law of the relevant country, reflecting concerns related to public order, even in the absence of an agreed law governing the substance of the contract. In this context, the method of peremptory provisions, as regulated in Article 7 of the Convention on the Law Applicable to Contractual Obligations[58], otherwise known as the Rome Convention of 1980, have been applied by the courts. In consequence, the method of mandatory provisions is the determination of the mandatory provisions reflecting the basic policy and the application of the mandatory provisions, if appropriate, after determining the closest connection between the legal system, the case subject to arbitration, and the application or the consequences of non-application.[59] In this context, there are two situations in which the arbitral tribunal may find itself regarding foreign mandatory provisions. [60] These two situations are distinct and independent of one another.

1. Application of Mandatory Rules to the Extent of *Lex Contractus*

In the first case, the arbitral tribunal considers the prohibition imposed by the mandatory provisions of the law other than the law applicable to the proceedings as a factual fact and then observes the limits of these prohibitions in the context of the lex contractus.[61] Arbitrators may take into account the peremptory provisions while taking the provisions of the lex contractus as a basis. The most illustrative

55 McDougall (n 33) 1044.

56 Born (n 1) 2929

57 McDougall (n 33) 1046.

58 Convention on the Law Applicable to Contractual Obligations [1980] OJ L266/1.

59 McDougall (n 33) 1047.

60 Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 852.

61 McDougall, (n 33) 1047.

example of this is the Hilmarton[62] decision. In the case at hand, the applicable law to the contract is Swiss law, and the seat of arbitration is Switzerland. The claimant was unable to provide sufficient evidence to demonstrate that a bribe was paid during the proceedings. In the case at hand, the claimant advanced a claim of bribery based on the premise of influence peddling. Although the practice of influence peddling was not a criminal offense under Swiss law, it was a criminal offense under Moroccan law. With regard to the question of the validity of the main contract between the parties, the arbitrators reached their decision on the basis of Swiss law without taking into account Moroccan law. Consequently, the arbitrators determined that the contract between the parties was invalid under Swiss law. In its rationale, the arbitral tribunal invoked the provision safeguarding foreign mandatory provisions, specifically the Swiss regulatory framework. The pertinent party initiated legal proceedings against the arbitral award. The Court of First Instance and the Swiss Federal Court both reached a conclusion in line with the arbitral tribunal's decision. They held that the violation of foreign peremptory provisions was contrary to Swiss ethics. However, they also held that the Moroccan rule put forward by the party did not constitute such a peremptory rule. This was because its main purpose was not to fight corruption. [63] With regard to this method, it can be seen that in order for the foreign peremptory rule to be applicable, a provision in the lex contractus providing such an opportunity is required. [64]

2. Direct Application of the Mandatory Rules of Foreign Law

In the second case, the arbitral tribunal directly applies the mandatory provisions of foreign law to the contract, thereby overriding the provisions of the lex contractus. [65] This authority is typically granted to the arbitrator in accordance with the dominant view in the doctrine. [66] It is argued that the arbitrator is given jurisdiction by the states and, therefore, has a responsibility to consider the public order and mandatory provisions of the states. Adopting such an attitude will also serve the function of the arbitration proceedings. This is because the most vital element of the arbitral tribunal's award is its enforceability. Adherence to these regulations will enhance the enforceability of the award. The opposing view in the doctrine is that the direct application of the mandatory provisions of foreign law is contrary to the freedom of will of the parties in the arbitration. This is because, although the parties have determined the applicable

62 Hilmarton Ltd v Omnium de Traitement et de Valorisation SA, ICC Case No 5622.

63 Ibid.

64 Christoffer Coello Hedberg, *International Commercial Arbitration and Money Laundering* (Master's thesis, Uppsala Universitet 2016) 27.

65 McDougall (n 33) 1047.

66 Born (n 1) 2318-2350; McDougall (n 33) 1047.

law, the mandatory provisions of a foreign law are applied against their will. Consequently, the argument has been made that transnational public order should be applied in lieu of the mandatory provisions of foreign law. [67]In instances of corruption, which protects the same legal interest as money laundering, it has been observed that arbitral tribunals frequently refrain from applying foreign directive provisions. Cases where foreign directive provisions are applied are subject to rigorous judicial review.[68] It is, therefore, our contention that the arbitral tribunal should apply the mandatory provisions, as opposed to the lex contractus, in the dispute before it.[69]

CONCLUDING REMARKS

The legal basis of proceeds of crime has diversified in the context of globalization. It is widely acknowledged that arbitration proceedings are selected for the advancement of international trade and the expeditious resolution of disputes between the parties. As part of the distinctive structure of arbitration proceedings, the issue of confidentiality is a pertinent one. This is an attractive proposition for those engaged in money laundering activities. Furthermore, it inevitably intersects with arbitration proceedings. The articles of association do not provide guidance on the actions that an arbitral tribunal may take in the event of money laundering during arbitral proceedings. Given the overlap between money laundering bribery and corruption crimes, suggestions have been made regarding the application of regulations in the context of arbitration proceedings. In this context, the question arises as to whether the arbitral tribunal is able to accept the jurisdiction of the arbitral tribunal over the dispute if the contract is deemed invalid in accordance with the law that is applicable to the main contract during the arbitration proceedings. In accordance with the prevailing opinion among legal scholars, the arbitral tribunal will accept jurisdiction over the dispute in such a case. The primary question is how the arbitral tribunal should proceed in the event that the pertinent arbitration agreement is valid under the law applicable to the underlying contract that is the subject of the arbitration proceedings, yet the underlying contract contains money laundering. In this case, the arbitral tribunal may consider two potential courses of action. The first is the set of rules that govern international public order. The second option is to resolve the dispute in accordance with the mandatory provisions

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67 Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer International Law 2004) 264–265.

68 Ibid at 265.

69 This was the case in Northrop v. Triad 1984. In that case, one of the parties argued that the agreement was invalid based on the mandatory provision prohibiting the Kingdom of Saudi Arabia from using intermediaries in the arms trade. However, the arbitral tribunal rejected the claim as unfounded. See Hedberg (n 63) 28.

of a legal system other than that which governs the substance of the contract. In this context, the arbitral tribunal is empowered to reject the arbitration in the event that it encounters money laundering in the arbitration proceedings and to invalidate the contract by invoking the mandatory provisions of public international order and foreign law.

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