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Approaches to the Application of Transnational Public Policy by Arbitrators

Richard H. KREINDLER*

I. INTRODUCTION

Over the last several years, with the increase in the globalization of commerce and the arbitration of cross-border disputes, arbitral tribunals have been increasingly confronted with the issue of public policy: What is it? Where does it come from and where does the arbitrator find it? What is the arbitrator's obligation to discern it? What is his or her obligation to apply it?

By reference to which body of law or rules of law does an arbitrator purport to consider public policy? In his or her decision-making and awards, what is the relative importance of the governing law of the contract as opposed to the law at the place of primary performance? As opposed to the *ordre public* at the seat of the arbitration? As opposed to the mandatory norms at the putative place or places of enforcement, where not the same as the seat?

Increasingly, the body or rules of law as agreed by the parties are different from those at the *situs*, from those at the place of principal or characteristic performance and, in turn, from those at the place(s) of likely enforcement. It is this interrelationship between (potentially) multiple bodies or rules of law which is a particularly noteworthy part of the challenge to modern-day arbitrators in applying "public policy" to transnational disputes, and which is addressed herein in brief.

Various arbitral awards¹ and commentaries² in recent years have sought to come to grips with issues of transnational or international public policy in the face of the

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¹ See, for example, International Chamber of Commerce (ICC) Award No. 4145 (1984), *Establishment of Middle East State v. South Asian Construction Company*, XII Y.B. Com. Arb. 97 (1987); ICC Award No. 6286 (1991), *U.S. Partner v. German and Canadian Partners*, XIX Y.B. Com. Arb. 141, § 22 (1994); ICC Award No. 3916 (1981), referred to in Y. Derains, *Observations following Award in ICC Case No. 4145 (1984)*; Award in ICC Case No. 3916 (1982), *Iranian Party v. Greek Party*, 111 J.D.I. 930 (1984); Award in ICC Case No. 5622 (1988), *Omnium de Traitement et de Valorisation S.A. v. Hilmarton Ltd.*, 1993 Rev. Arb. 327, XIX Y.B. Com. Arb. 105 (1994), award subsequently set aside by Court of Justice of Canton of Geneva, 17 November 1989, 1993 Rev. Arb. 315, XIX Y.B. Com. Arb. 214 (1994), and nullification decision then upheld by Swiss Federal Tribunal.

² See, for example, Ahmed S. Kosheri and Philippe Leboulanger, *L'arbitrage face à la corruption et aux trafics d'influence*, 1984 Rev. Arb. 3; Pierre Mayer, *Le contrat illicite*, 1984 Rev. Arb. 205; Pierre Lalive, *Ordre public transnational (ou réellement international) et arbitrage international*, 1986 Rev. Arb. 329; Bruno Oppetit, *Le paradoxe de la corruption à l'épreuve du droit du commerce international*, 1 J.D.I. 5, 1987; Pierre Mayer, *La règle morale dans l'arbitrage international*, *Etudes Pierre Bellet* (1991), p. 379; Vincent Heuzé, *La morale, l'arbitre et le juge*, 1993 Rev. Arb. 179; Yves Derains, *La lutte contre la corruption—Le point de vue de l'arbitre international*, Contribution au Congrès AIJA, Montreux, 1996; and Jose Rosell and Harvey Prager, *Illicit Commissions and International Arbitration: The Question of Proof*, 15 Arb. Int'l 329, 1999.

increasing globalization of commercial relationships—and in the face of growing tensions as to what is legal and what is illegal in cross-border transactions. The evolution in thinking as regards the arbitrator's rights and duties in connection with public policy has been accompanied by new or amended bodies of national arbitration legislation and the adoption, in whole or in part, of the Model Law on Arbitration of the United Nations Commission on International Trade Law (UNCITRAL) in certain arbitration locales.

Also, a number of States have acceded to multilateral conventions condemning illegal contracts, corruption, bribery of public officials, etc. These accessions have arguably contributed to or confirmed the development of certain national and transnational concepts of public policy in abhorrence of, *inter alia*, illegality of contracts.³

In the face of the foregoing developments, which bodies or rules of law should the arbitrator apply to issues of public policy?

Indeed, principles of competence-competence, arbitrability, separability and public policy overall must be applied and counterbalanced according to the relevant body or rules of law. But which one(s)?

II. *LEX CONTRACTUS* AS MANIFESTATION OF PARTY AUTONOMY

If the parties to the contract submitted to arbitration agreed by way of a customary choice-of-law clause to apply “the laws of Australia” to their contract, must any alleged or manifest violation of public policy be proven under that law or laws (quite apart from what “the laws of Australia” would mean in a federative legal context)?

Would it suffice to verify conformity with public policy under some other, “connected”, body or rules of law (such as the substantive law of the seat, where it is different than Australia)? Does the nonconformity of the underlying contract with public policy under that other law, let us say the law of Singapore as that of the seat, mandatorily result in the unenforceability of the contract even under the stipulated governing laws of Australia? What about the distinction between public policy respecting the enforceability of the contract (and its arbitration agreement), on the one hand, and public policy respecting the enforceability of the arbitral award, on the other hand?

The substantive rights and duties of the parties (as opposed to the rights and duties of the arbitral tribunal) are governed first and foremost by the substantive law agreed, or otherwise determined, to be applicable to the contract. Invariably, but by no means

³ Among such Conventions which have arguably contributed to a certain generalization of condemnation of corruption, particularly in the public domain, are the 1997 Organisation for Economic Co-operation and Development's (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the 1999 Conventions of the Council of Europe, and the 2000 United Nations Convention against Transnational Organized Crime.

always, the separable agreement to arbitration in that contract is likewise considered to be construed and interpreted against the background of that same agreed body of law. Accordingly, the first (and perhaps only required) step in assessing an allegation or suspicion of the offense to public policy of the main contract, and the consequences for the parties' rights and duties, will normally be that applicable substantive law.

A. THE AGREED LAW, THE CURIAL LAW AND THE PLACE OF PERFORMANCE

Let us suppose that the arbitral tribunal concludes that the main contract—for example, promoting importation of counterfeit compact discs—offends public morals under the agreed laws of Australia. Let us further suppose that such contract does not offend public morals under the substantive laws reigning at the Singapore seat of arbitration or in the third-country place of counterfeiting.

These facts should not prevent the tribunal from making any and all rulings flowing from its finding of an *ordre public* violation under the applicable Australian law. The rulings available to the tribunal might include an order or award denying or upholding its jurisdiction and an award granting or denying relief requested on one or both sides.

Any incompatibility of those rulings under Australian law with a diverging law at the Singapore seat or at the third-country place of “performance” would be irrelevant—unless and to the extent that the rulings violated a mandatory norm. More specifically, in the case of the Singapore seat of arbitration, the violation of a mandatory norm would need to be such as to justify nullification of the resulting award. In the case of the third-country place of performance, the violation of that mandatory norm should be wholly irrelevant unless enforcement of the award were sought in that third country and the norm violation justified denial of enforcement under Article V of the New York Convention⁴ (or such other basis as might apply).

B. THE CONNECTEDNESS OF THE LAW OF PLACE OF PERFORMANCE

When might it suffice to establish a public policy violation under some other, “connected”, body or rules of law? In our prior example, there is no identity or overlap between the country of the applicable substantive law (Australia), the seat (Singapore) and the State in which “performance” occurs (a third country). One could assume, however, a not unusual scenario in international arbitration—namely, that both the agreed substantive law and the agreed seat have nothing to do with the place of characteristic performance of the illegality other than that the parties agreed to them as ostensibly neutral elements.

⁴ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958.

Thus, let us suppose a bilateral contract in which neither party is Australian or Singaporean. The non-Australian and non-Singaporean parties agreed, for example, to Australian substantive law and a Singapore seat in connection with an “intermediary contract” whose nexus is also neither in Australia nor in Singapore, but in Third Country X. Indeed, the contract has everything to do with Country X and nothing to do with Australia or Singapore—other than the “mere” party agreement. It may indeed be that the tribunal also suspects that the parties intentionally agreed to the laws of Australia and a Singapore seat so as to delocalize and distance the contract as much as possible from the reach of the law of Country X and from that country’s express prohibition against such contracts.

How likely is such a scenario? In fact, it is a realistic modification of various elements of many recent well-known awards and court decisions respecting public policy, including *Westacre Investments Inc. v. Jugoimport—SPDR Holding Co. Ltd. and Others (Westacre)*,⁵ *Soleimany v. Soleimany*,⁶ and *Omnium de Traitement et de Valorisation S.A. v. Hilmarton Ltd.*⁷ Such cases have addressed issues not dissimilar to our question: i.e. what happens where the intermediary contract is not illegal under Australian law or Singapore law but it is manifestly illegal or otherwise poses an *ordre public* issue under the law of Third Country X?

To the extent that Country X is closely connected to the contract, should its public policy be followed by the tribunal deciding under Australian law in Singapore? The proper result appears to be that, unless the illegality under Country X’s law rises to the level of a violation of notions of international public policy which *likewise* offend notions of international public policy in Australian and/or Singaporean law, the illegality at Country X need not concern the tribunal and cannot bind it.⁸

What is not meant here is that a violation of public policy in another country could not easily render a contract immoral under the law of the seat or the law governing the contract. At the same time, the public policy offense resulting from the application of the foreign law should be of an egregious nature in order to supersede both the agreed substantive law and contrary mandatory norms at the seat.

It is of no consequence, by itself, that the law of Country X is factually closely connected to the contract—and that the laws of Australia and Singapore, respectively, are not at all, except for the contract terms. Even where such issues of connectivity

⁵ [1998] 4 All E.R. 570; [1998] 3 W.L.R. 770; [1998] 2 Lloyd’s Rep. 111 (High Ct., Q.B. (Com. Ct.)) (1997).

⁶ [1998] 3 W.L.R. 811; 13 Int’l Arb. Rep. A1 (March 1998) (C.A. 1998).

⁷ [1999] 2 All E.R. (Comm) 146 (QBD) (Com. Ct.).

⁸ See, for example, Award in ICC Case No. 1399 (1967), in which the Tribunal refused to void a contract subject to French law although it was intended to circumvent Mexican customs law (“French law is not concerned with foreign customs laws”). See also ICC Award dated 27 April 1992, upheld by CA Paris, 27 October 1994, *Lebanese Traders Distributors & Consultants LTDC v. Reynolds*, 1994 Rev. Arb. 709, 10 Int’l Arb. Rep. E1 (1995) (refusal to take account of Lebanese customs regulations in distributor termination dispute); and Award in ICC Case No. 6379 (1990), *Italian Principal v. Belgian Distributor*, XVII Y.B. Com. Arb. 212 (1992), 1993 Rev. Dr. Com. Belge 1146 (refusal to apply mandatory Belgian law respecting sales termination agreements in lieu of agreed Italian law); but compare Cass. Com., 7 March 1961, *Laburthe v. Sauveroché*, 1961 Bull. Civ. III, No. 125, in which the French *Cour de Cassation* held void for illegality a contract intended to provide for bribery of a public official outside France, on the grounds that French public policy did not prohibit only bribery of French officials.

might place a role in the national courts,⁹ such consideration has no binding effect in the arbitral sphere. Conflict-of-law rules which might bind the national courts will not bind the arbitral tribunal—for example, at our Singapore seat. Such issues are then governed by specific legislation on international arbitration which should supersede any other conflicts principles.

Thus, the public policy violation at Country X does not mandatorily result in an offense to public policy of the contract under the stipulated governing law or under the curial law—unless it is an egregious violation. Indeed, notably in a country such as France which distinguishes between local public policy and international public policy offenses, even a violation of *local* public policy at the seat as a result of the prohibition in Country X should not mandate a finding of illegality where the parties and subject-matter call for application of international, and not domestic, public policy standards.

III. VIOLATION OF UNIVERSAL PUBLIC POLICY V. LOCAL PUBLIC POLICY

Only a fundamental violation of transcending international public policy “in the Australian sense” under the substantive law and “in the Singaporean sense” under the curial law would call for a finding of illegality based merely on the close connection to Country X and its own mandatory norms:

“If regard is to be had to mandatory provisions ... of a law other than that of the forum or that chosen by the parties, then such provisions can only prevent the chosen law from being applied *if there is a close link between the contract and the country of that law and if they further such aims as are generally accepted by the international community.*” (emphasis added).¹⁰

The recent case at the Swiss Federal Tribunal, *Beverly Overseas S.A. v. Privredna Banka Zagreb*, indeed confirms this approach. If the facts which need to be analysed to determine the compatibility of a Swiss-based international award have no or only few links to Switzerland, then *universal* public policy considerations must be taken into account in addition to Swiss public policy.¹¹

Whether such Swiss award would have any prospect of successful enforcement in Country X is, of course, an entirely different matter. To what extent the tribunal should be concerned with that subsequent enforcement problem relates, again, to the question of whether—under Article 35 of the Arbitration Rules of the International Chamber of Commerce (ICC), for example—the arbitrator has a duty to render an award that is “enforceable at law” and what the scope of such duty is.

⁹ Compare, for example, in the European Union, Article 7, para. 1 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, enabling courts to factor in foreign mandatory rules. Germany, Luxembourg and the United Kingdom have taken the reservation pursuant to which their national courts may *not* take foreign mandatory rules into account.

¹⁰ Article 9 of the 1991 Resolution of the Institute of International Law concerning the autonomy of the parties in international contracts between private persons or entities, reprinted in Institut de Droit International, *Tableau des résolutions adoptées (1957-91)*, at 408, 413 (1992), 1992 Rev. Crit. DIP 198.

¹¹ *Beverly Overseas S.A. v. Privredna Banka Zagreb*, Swiss Fed. Trib., 28 March 2001, 2001 Asa Bull. 807 f.

An award of a tribunal respecting suspected or manifest violation of public policy cannot make legal what would otherwise be illegal. At the same time, the arbitrator should not disregard the governing substantive law in favour of some other connected national law respecting illegality unless the application of the governing law (in disregard of the other connected law) would result in a violation of international public policy. This is no different from saying that the arbitrator need not apply the agreed or determined governing law if doing so would cause him or her to violate international public policy. In such extreme cases, party autonomy is trumped by the “higher good” of international public policy.

Returning to our scenario, the tribunal may disregard the mandatory public policy at Country X in favour of the agreed “laws of Australia”, even if such Australian law has vastly less connection to the disputed contract than does Country X’s law, unless such disregard would offend international public policy. Where disregard of the mandatory public policy at Country X would itself offend international public policy, moreover, the arbitrator has a right to apply the law of Country X over and above the agreed Australian law so as to avoid offending that transcending public policy:

“[T]he parties are entitled to submit their legal relations to whatever law they choose, and to exclude national laws which would apply in the absence of a choice. Consequently, *the provisions of the law thus excluded can only prevail over the chosen law insofar as they are matters of public policy.*” (emphasis added).¹²

Again, to the extent the arbitrator has a duty to render an award enforceable at law, it is submitted that he or she would then have a duty to apply the law of Country X in such case:

“Accordingly, arbitrators have the right—and *even the obligation*—to themselves raise the issue of whether disputes contracts or legal provisions put before them satisfy the requirements of international public policy.” (emphasis added).¹³

In cases where the provisions of foreign law are not considered to rise to the level of a transnational *loi de police*, then there should be no obligation *by the arbitrator* to apply them in lieu of the agreed substantive law:

“... although commercial corruption is deserving of strong judicial and governmental disapproval, few would consider that it stood in the scale of opprobrium quite at the level of drug-trafficking.”¹⁴

Similarly, where the provisions of the foreign law are considered to be valid in as much as the parties *agreed* to them at arm’s length, they may nevertheless not be applied *by the enforcing court* if the court considers that the mandate of party autonomy must yield to the mandate of forestalling absurd results which offend public policy. In the

¹² *Westacre, supra*, footnote 5, 1995 Bull. ASA 301, 330-32, upheld by Swiss Federal Tribunal, 30 December 1994.

¹³ Fouchard Gaillard Goldman, *On International Commercial Arbitration*, Kluwer, The Hague, 1999, § 1533, at 861, citing, regarding European Community antitrust law, ICC Awards No. 7315 (1992) and No. 7181 (1992).

¹⁴ *Westacre, supra*, footnote 5, 1995 ASA Bull. 301, 331.

enforcement context, that local public policy may in fact be local public policy and not necessarily transnational public policy.¹⁵

IV. ASCERTAINING CONSENSUS SURROUNDING TRANSNATIONAL PUBLIC POLICY

The foregoing does not change the challenge confronting the arbitrator as to whether a *loi de police* or other prohibition should be regarded as local or transnational. Nor does it alter the challenge of ascertaining whether in fact particular kinds of public policy violation which are *not* necessarily uniformly condemned still give rise to a transnational norm justifying or requiring respect by the arbitrator.

In situations where bribery or corruption are generally condemned throughout the world, should the arbitrator attach importance to the fact that a particular corrupt practice is indeed widely practiced and widely accepted in a *single* country and it is that country which has the closest connection to the “performance” of the contract in dispute? In cases where the illegal act relates to disrespect of a United Nations-sanctioned embargo against one or only a few States, what importance, if any, should be attached to the fact that respect of the embargo constitutes a *crime* in the target country and that target country has the closest connection to the performance?

The arbitrator’s task need not be complicated in the case of a generally condemned corrupt practice which is nevertheless widely—perhaps even officially or statutorily—condoned in a single country. The agreed substantive law should be applied, except to the extent that it violates generally accepted international norms. Alternatively, the tribunal may be entitled to conclude that even if the agreed substantive law is the law of that single country it will *disregard* that governing law if applying it would contravene international public policy.

Given such situations, the arbitrator cannot possibly be the servant to several different masters; he or she must observe generally accepted international norms, even if it is thereby likely that the award will have little prospect of cross-border enforcement in that single country. In as much as Article v(2)(b) of the New York Convention should be seen as a mandatory guideline for the arbitrator,¹⁶ he or she must attempt to determine whether or not the broad consensus internationally is embodied in the

¹⁵ *Soleimany*, *supra*, footnote 6, [1998] 3 W.L.R. 811, 13 Int’l Arb. Rep. A1 (1998) (C.A. 1998), where the Court of Appeal refused to enforce an award at the London seat under Jewish law in a dispute between two Iranian refugees where the award gave effect to a contract which violated Iranian customs regulations.

¹⁶ It is noteworthy that neither fraud in the *factum* nor illegality is expressly mentioned as a basis for denial of enforcement under the New York Convention, although they may be deemed to be encompassed within Articles II(3), V(1), V(2)(a) or V(2)(b), depending upon the circumstances. Notably, while the UNCITRAL Model Law grounds for setting aside an award found in Article 34 do not include corruption, the Singapore International Arbitration Act (Cap 143A), entered into force on 27 January 1995 enacting the Model Law with minor modifications, adds two additional grounds in Section 24 for setting aside an award, one of which is fraud or corruption, the other of which is breach of natural justice: “Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if: (a) the making of the award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.” Compare also Jan K. Schaefer, *Borrowing and Cross-Fertilising Arbitration Laws: A Comparative Overview of the Development of Hong Kong and Singapore Legislation for International Commercial Arbitration*, 16 J. Int’l Arb. 41, at 67, 1999.

application of the agreed substantive law. The same would apply to alleged illegality relating to embargo measures, where arguments could be made that the measures reflect the will of only a handful of States and not necessarily global policy:

“In no case shall an arbitrator violate principles of international public policy as to which a broad consensus has emerged in the international community.”¹⁷

V. HOW BROAD IS THE CONSENSUS ON “INTERNATIONAL PUBLIC POLICY”?

However, the existence of transnational conventions, resolutions and the like condemning a particular practice does not necessarily translate into a broad consensus which might be used by the arbitrator as justification for ascertaining the existence and violation of a principle of “international public policy”:

“Despite general lip-service one hesitates to believe in that there is an effectively practised worldwide consensus against corruption (*pots-de-vin*) as long as under the fiscal law of many industrial countries bribes paid can be deducted as business expenses and corruption is endemic in many countries and rarely seriously fought.”¹⁸

The many “industrialized” countries alluded to include certain principal places of international arbitration in Western Europe and East Asia.

It is also open to query how extensive and transparent such “broad consensus” in the international community really is on some of the issues of illegality that typically affect an international commercial arbitration proceeding:

“... even in particular areas of law one finds disappointingly few interventionist norms that are common to all or even just to the most legal systems. Even in the area of ordinary criminal law such common rules exist only in the narrow area of international substantive criminal law on the basis of international treaties (genocide, drug trafficking, terrorism, slave trade, slavery, piracy).”¹⁹

In view of the foregoing, is an attempt to directly apply transnational *ordre public* simply too risky for an arbitrator and, therefore, not his or her mandatory duty after all (but rather the duty of the reviewing or enforcing judge)? Should the arbitrator avoid making a decision when international public policy may be such a moving target? Should the arbitrator simply resign his or her office where he or she believes that the illegality of the contract at issue is so distasteful as to prevent him from carrying out his or her role?

¹⁷ Article 2 of the Resolution on Arbitration between States, State Enterprises or State Entities, and Foreign Enterprises, adopted by the Institute of International Law on 12 September 1989, XVI Y.B. Com. Arb. 236, 238 (1991).

¹⁸ Pierre Karrer, *Commentary to Article 187 of Swiss Private International Law Act*, International Arbitration in Switzerland, 2000, N. 160, at 520, also citing *a contrario* Swiss Fed. Trib., 30 December 1994, cons. 2d, 119 II 380 cons. 4b.

¹⁹ *Ibid.*, N. 159, at 520.

VI. THE ARBITRATOR'S RIGHTS AND DUTIES IN THE CASE OF PUBLIC POLICY VIOLATIONS

The answer to the questions posed above, in each and every case, must be no. The arbitrator is not solely a manifestation and instrumentalization of party autonomy, and his or her role cannot be reduced to that of a private adjudicator of the parties' dispute, solely with power to decide the rights and duties without any broader reference to international goals or sanctioning illegality.

The question does not relate solely to the arbitrator's duty to make best efforts to render an award that is enforceable at law. He or she clearly has such a duty. Nor does the question relate solely to the arbitrator's duty to heed mandatory international public policy, even to the point of disregarding the otherwise agreed substantive or procedural law. He or she clearly has this duty as well. The question is whether the arbitrator, having established the illegality of the contract and of the parties' performance and a resulting violation of *ordre public*, for example, should confine his or her reaction to the arbitrator's role as adjudicator of the rights and duties *within the contract*, without any further consequences resulting from the parties' offense of generally accepted public morals.

Clearly, the arbitrator is an instrument of the parties and an adjudicator of their internal relations. He or she is also charged with applying the legal standard agreed by the parties or, in the absence of agreement, as determined according to the applicable procedural and substantive rules. Indeed, the arbitrator is even "bound" by a valid waiver in advance of the parties' rights to challenge an award by set-aside proceedings, to the extent such a waiver can validly be made and has been validly made under the applicable law, including notably that of the seat.²⁰

Particularly in those countries, such as Switzerland, where such a waiver of possible grounds for nullification is possible, based on the underlying illegality of the contract, for example, why should the arbitrator be concerned about offenses to public policy? The answer must be that knowledge that the award will not be subject to review by the courts at the seat, even on public policy grounds, should not embolden the arbitrator to be lax in consideration of illegality or other *ordre public* violations.

Rather, the finality of the award and the impossibility of nullification of the findings on illegality should doubly motivate the tribunal to determine the illegality and to rule on it. Of course, even an award as to which *vacatur* has been validly ruled out may still be subject to denial of enforcement either at the seat²¹ or elsewhere. Therefore, all of the duties which may flow from Article V of the New York Convention, and

²⁰ See, for example, Article 192(1) of the Swiss Private International Law Act: "Provided that neither of the parties has its domicile, habitual residence or place of business in Switzerland, they can agree, in express terms either in the arbitration agreement or in a subsequent agreement, to waive the right to file an appeal; they can also exclude some of the grounds set out in Article 190 para. 2."

²¹ Article 192(2) of the Swiss Private International Law Act provides: "Have the parties agreed on a total waiver of their rights to file an appeal and shall the award be enforced in Switzerland, the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Awards applies accordingly."

equivalent or parallel national legislation on cross-border enforcement, will enable the award debtor, or the enforcing court *ex officio*, to review the tribunal's award to a certain degree respecting illegality or other violations of public policy.

Where the award is normally subject to review by the courts at the seat (and elsewhere), the tribunal should still not turn a blind eye to suspected, admitted or manifest violations of public policy arising out of the contract and the conduct of the parties. That the courts at the seat and/or at a place of attempted enforcement abroad might have an opportunity to review and assess the illegality themselves does not make it any less imperative for the award already to have done so.

The award is meant, to the greatest extent possible, to be final and binding. It is meant to be based on the arbitrators' conscientious establishment of the facts and, where necessary, the law of the case on the basis of often copious and extensive taking of evidence. The reviewing or enforcing court, even if it were entitled to review certain elements of the illegality essentially *de novo*, cannot possibly have the same access to the evidence as did the tribunal. In most cases, the reviewing court is not allowed to conduct such an inquiry, in any event. Therefore, the tribunal must not forsake the opportunities provided by the unique access which it has to the facts during the arbitration.

The possibility of review by a court at the seat or elsewhere should not be seen as a sword of Damocles. The award is meant to be final and binding and to be carried out voluntarily by the parties, without attack at the courts of the seat and without compulsory enforcement there or abroad. The strength of a well-reasoned and judiciously penned award lies in large part in the hope that it will be complied with by the parties without further ado.

Thus, the duty of the tribunal to address the illegality issue may be seen as all the more compelling. The parties may determine from the award that the tribunal has carefully considered the existence and ramifications of the illegality and that the award stands up to scrutiny in this and all other respects that might affect its enforceability. Also, it is conceivable that the award will never be attacked in the first place, whether on the basis of a public policy violation or otherwise.

Because of the unique position of the tribunal to assess the public policy violation, it should carry out its taking of the evidence respecting the violation with a depth and transparency that any effective reviewing court can readily appreciate. The greater the doubts of the reviewing court as to the precision of the tribunal's analysis of the illegality, the greater the likelihood that the reviewing court may take it upon itself to revisit the evidence respecting the violation. In those jurisdictions, such as England and the United States, where the tribunal may have a statutory basis for reviewing manifest errors respecting the public policy finding, the likelihood of second-guessing by the court could rise.

It is not the primary duty of the tribunal to be concerned with the precedential value of its award, whether as a result of an official reporting of its findings via subsequent court proceedings or by its entering into the bloodstream of arbitral practice and jurisprudence through unseen channels. On the other hand, in view of the importance of combating illegality and other forms of public policy offenses and the difficulties of defining any “consensus” as to which kinds of illegality offend public policy transnationally, it is all the more important to ensure transparency and uniformity on this issue, where possible.

The fact that there is no single transnational public policy even as to certain kinds of corruption and illegality does not make the goal of striving toward such uniformity any less important. Certain issues of illegality remain regional, cultural, religion-based, etc., and depend on arguably parochial needs which may make the ends justify the means in one region but not another. These parochial standards are a product of socio-political conditions and cannot always be prejudged by an outsider.

This should not, however, prevent an arbitrator from endeavouring to establish and civilly sanction the offense. He or she may do so based on the standards agreed by the parties, or as otherwise determined by the arbitrators, and subject to public policy as the tribunal perceives it. The arbitrator has no mandate to engage in social engineering, but it would be a mistake to assume that his or her office did not give the arbitrator a legitimate platform from which to investigate and combat public policy offenses, within the constraints of his or her mission.

VII. CONCLUSION: THE ARBITRATOR’S DUTIES AND PUBLIC POLICY VIOLATIONS

Failure or refusal to address an illegality or public policy issue head-on in arbitral proceedings could be seen as a toleration, or indeed perpetuation, of nefarious practices. While those practices might be tolerated and widespread in a particular country, the arbitrator should not condone or support hindrances to the elimination of those practices.

Seen less in the context of a private adjudication than in the context of transnational goals, ignoring or tolerating illegality in such situations can be seen as contributing to distortion and suppression of competitive forces as well as discouragement of future investment.

The arbitrator’s findings respecting illegality and other public policy offenses may be attacked either at the seat or elsewhere and, indeed, perhaps precisely on the grounds that the findings themselves violate a putatively applicable public policy standard. The State judiciary will of course be implicated in the decision on the public policy transgression.

To the extent the arbitrators have made a conscientious and unobjectionable ruling as to the existence and consequences of the public policy violation under the applicable

standards, the reviewing or enforcing court may be obliged to decide whether to condone or reward the violation. Ultimately, this is a useful and important kind of pressure and moral suasion to place on the courts, particularly in the context of their transnational obligations under Article v(2)(b) of the New York Convention and other bases for potentially “policing” transnational public policy.

