THE ICSID CONVENTION
A Commentary
SECOND EDITION

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be investigated thoroughly before relying on a contractual clause purporting to exclude them.\textsuperscript{81}

c) Public Policy

Public policy (ordre public) is a classic reason for excluding the application of foreign law by domestic courts. It represents the superiority of basic value choices of the local community over the strict application of conflict of laws rules. In the case of ICSID arbitration, there is no domestic legal system which would provide the standards for public policy. A host State's reliance on its own ordre public in the face of an agreed choice of law pointing to another system of law is simply a breach of the undertaking to make the chosen law controlling.\textsuperscript{82} For instance, a State, after having consented to the subjection of a loan agreement to French law, could not argue that the obligation to pay interest is contrary to the public policy of its religiously inspired domestic law. Reliance on the ordre public of another State in which an ICSID award might have to be enforced\textsuperscript{83} would be equally unwarranted. Arts. 53 and 54 do not provide for such an exception to the obligation to recognize and enforce awards.\textsuperscript{84}

The matter is different with regard to certain basic international tenets that may be described as international public policy.\textsuperscript{85} These principles would include but not be restricted to peremptory rules of international law. Examples are the prohibition of slavery, piracy, drug trade, terrorism and genocide, the protection of basic principles of human rights, the prohibition to prepare and wage an aggressive war or the use of force contrary to Art. 2(4) of the United Nations Charter. Provisions that would otherwise be applicable, whether contained in an investment agreement or adopted by reference, which violate these basic principles, would have to be disregarded by an ICSID tribunal.\textsuperscript{86} If any theoretical justification is needed for this conclusion, it can be found in the fact that the Convention is rooted in international law which, in a wider sense, is the lex fori of ICSID arbitration.

refusal of an ICSID tribunal to apply and enforce arrangements which serve the violation of one of these principles would be the only appropriate response. The application of international public policy would have to extend to arrangements which violate binding Security Council resolutions under Chapter VII of the UN Charter, even where the resolutions have not been made controlling by a domestic system of law chosen by the parties.

An example for the decisive influence of international public policy is World Duty Free v. Kenya. The case arose from a contract for the construction, maintenance and operation of an airport duty free complex which, the Tribunal found, had been procured by corruption. The Tribunal based its decision not only on the express choice of law clauses opting for both English and Kenyan law (see para. 31 supra). It also relied on international public policy as evidenced by the widespread condemnation of corrupt business practices in a number of regional and universal instruments outlawing bribery and corruption.\(^{87}\) The Tribunal held that the Claimant was not legally entitled to maintain any of its pleaded claims “as a matter of ordre public international and public policy under the contract’s applicable laws”.\(^{88}\) It reasoned:

> In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.\(^{89}\)

These instances of international public policy should be distinguished from the applicability of international law pure and simple, which will be discussed below in paras. 80–115.

6. Renvoi

A law determined to be applicable to a transaction may in turn contain rules on the conflict of laws which refer to another legal system. This process is termed renvoi. The second sentence of Art. 42(1), in referring to the host State’s law, specifically includes its rules on the conflict of laws (see paras. 161–166 infra). No such mention is made in the first sentence of Art. 42(1) in connection with the law agreed by the parties. This may be taken as an indication that renvoi is not contemplated under the first sentence. Moreover, the first sentence refers to “rules


\(^{88}\) World Duty Free v. Kenya, Award, 4 October 2006, para. 188.

\(^{89}\) At para. 157.