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REFLECTIONS ON THE DUTIES OF THE ARBITRATOR- BY ALEXIS MOURRE

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Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator

by ALEXIS MOURRE*

I. INTRODUCTION

Arbitration and criminal law appear to live on two distant planets, and their paths do not seem ever to have to cross each other. Arbitration is based upon private autonomy, and its purpose is to adjudicate private disputes. Criminal law endeavours to restrict private autonomy for the sake of the general interest. Criminal law is at the core of the state's mandatory laws, while arbitration is autonomous from states. Yet, because criminal law rules might have an impact on both the arbitral proceedings and the solution of the dispute, these two disciplines have more points of connection than could be suspected from the outset. The aim of this article is to address this odd relationship from the point of view of the arbitrator's duties.¹

The international business legal environment is nowadays characterised by a double trend. On one side, globalisation and the creation of a true world marketplace have sidelined national states and undermined their traditional role as the ultimate source of legality. In countries like France or Germany, ever since the time of Napoleon III and Bismarck, well before the Welfare State was invented, the state was perceived as having unlimited resources and unrestricted power. This is no longer true in today's economy. Transnational law has become a reality. Arbitration, the autonomy of which from national jurisdictions is more and more widely recognised, has emerged as the normal way to settle international business disputes. With the growing flow of state contracts, state arbitrations and investment arbitrations, states have become subject to international liability, just like private parties.

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¹ We shall not in this article address the issue of procedural fraud, nor the general topic of challenges against awards for contradiction with public policy.

On the other side, however, mandatory rules tend to proliferate, particularly in the field of economic and business law. The causes of such a trend are various. In Europe, the tendency to overregulate is one of them. The growing penalisation of business law is another, of no less relevance. A recent French statute provides a good example of such tendency. On 2 August 2005, the French Parliament adopted new rules purpose of which is to regulate the relationship between product manufacturers and distributors.² Such rules provide that any sales relation between suppliers of consumer goods and distribution chains has to be based upon a written contract compliant to certain precise conditions of validity.³ Non-compliance with such conditions is a criminal offence, which may be punished by a fine.⁴ One might wonder why such sanctions are needed. Surely, civil liability, or maybe antitrust rules, would have been sufficient to prevent abusive behaviour. Yet, French law-makers felt that private mechanisms of regulation were not sufficient, and that criminal sanctions were necessary to ensure the correct application of the rule. Endless examples of that kind could be given, in the fields of company law,⁵ commercial law,⁶ labour law,⁷ financial law,⁸ etc. In fact, most of the time, penalising business behaviour does not result in making law enforcement more effective. But in a world in which legislators often have a sense of impotence, criminal law tends to become the ultimate medicine to impose rules where it is feared that the voice of the law would otherwise not be heard.

So, quite paradoxically, the state crisis comes along with increased state restrictions to party autonomy. Arbitration stands in the midst of that contradiction, because on the one side it is a private and truly international way of solving disputes, but on the other it exercises a function which is still perceived to be part of state monopoly, i.e. justice. Arbitrators are not judges of the state, but they are allowed to perform the same activity as state judges. How should they then react when a criminal law rule is applicable? How should they behave when faced with an illicit behaviour? With a criminal inquiry? What should they

² Act of 2 August 2005 no. 882.

³ Article L.441-7, para. 1 of the French Commercial Code, as amended by Act of 2 August 2005, no. 882.

⁴ Fines up to 75,000 euros (art. L.441-7, II, of the French Commercial Code, as amended by Act of 2 August 2005, no. 882).

⁵ According to art. L.245-3 of the French Commercial Code, the directors of a company can be punished by imprisonment for up to six months and a fine of 6,000 euros if the company does not comply with regulations applicable to preferred shares. Article L.245-9 of the same Code provides for fines up to 9,000 euros in case of violation of regulations applicable to the issuance of bonds, etc. Such fines have a criminal nature and are pronounced by criminal courts.

⁶ *E.g.* Article L.122-2 of the French Commercial Code punishes by up to six months' imprisonment and a 3,750 euro fine a foreigner who enters into a commercial profession without having obtained an administrative permit to that effect. Article L.442-2 of the French Commercial Code provides that reselling a product or service at a loss may be punished by a fine of up to 75,000 euros.

⁷ Article L.631-4 of the French Labour Code punishes the publishing an announcement seeking applications for employment without having complied with certain applicable regulations by up to one year's imprisonment and by a 37,500 euro fine.

⁸ Article L.571-1 *et seq.* of the French Monetary and Financial Code.

do if they suspect that a fraud has been committed by one of the parties? That a contract has been signed because of influence peddling? What should they do if they suspect that a claim hides a money laundering operation? Finally, how should they react if criminal law is used to disrupt the arbitration?

The answer to these questions should not be one of confrontation. In many jurisdictions, where the state's role is still pervasive, international arbitrators are too often perceived as the servants of selfish individual interests and, hence, as a potential instrument for fraud. Such a perception entails a tight control of arbitrators by local courts, in particular when mandatory rules have to be applied. Ultimately, arbitrators tend to be perceived as part of each jurisdiction's national judicial structure, and their duties assimilated to those of national judges. Defiance towards the arbitrators' capability to take general interest into account leads to a discussion of the well-established and widely recognised principle of arbitrability of disputes involving public policy issues, and to jeopardise the main advantage that parties seek in adopting arbitration, i.e. the finality of the award.

We believe, on the contrary, that international arbitrators are perfectly suited to take the general interests of the forum into due consideration. This is also true with regard to criminal law, because, as we shall see, the rules which aim at fighting illicit behaviour in international trade are becoming increasingly international, and international arbitrators have a natural vocation to take them into consideration. The answer to the question of ethics in international arbitration does not therefore lie in the integration of arbitral tribunals into each state's own jurisdictional system, which would in fact kill the specificity of arbitration and destroy its advantages both for the parties and for international trade, but in a balanced and reasonable cooperation between states and international arbitral justice. Arbitrators are naturally sensitive to the need for morality in international business. States should on their side acknowledge the autonomy of arbitration and the difference between arbitrators and judges. In a nutshell, there is no contradiction between the autonomy of arbitration and the need to fight crime in international trade: it is because arbitrators are the natural judges of international trade that they are the natural guardians of ethics and good morals in international commerce. They may even be better placed than national judges to combat international fraud.

Criminal law has long been perceived as raising an issue of jurisdiction of the arbitral tribunal. This is no longer true. Arbitrators, however, may still face difficult questions when dealing with allegations of fraud, and need to find the proper balance between the private nature of their mission and the necessary protection of ethics and good morals in international trade.

II. ISSUES OF JURISDICTION AND ARBITRABILITY

(a) Severability Set Aside?

The first issue with which an arbitrator may be confronted when faced with an allegation of fraud or illegality is whether, in spite of the principle of severability

of the arbitration agreement,⁹ the fraud voids the contract in its entirety, including the arbitration agreement. In his famous award in ICC Case 1101 of 1963,¹⁰ Judge Lagergren seemed to answer that question by the affirmative:

under French law the arbitrators are not merely prevented from entertaining cases reserved for the ordinary courts, but they will also, in a general manner, like the courts, not lend their aid to enforce contracts based on grave offence to bonos mores, whether committed in France or abroad. In view of these considerations and with regard to the nature of the adventure in which the parties to this dispute have engaged, French law cannot admit this case to be settled by arbitration, regardless of whether the adventure was located in France or elsewhere.

Such *dicta* was generally understood as setting a principle of non-arbitrability of fraud allegations.¹¹ However, it is arguable that what Judge Lagergren really decided was not in fact that allegations of fraud would not be arbitrable in the sense that the arbitration agreement would not be valid and the issue reserved to the jurisdictions of the state, but that such allegations are not capable of being submitted to *any* judge, be it an arbitrator or a state judge, because fraud makes the contract non-existent in the eyes of the law. In other words, the claims would be inadmissible on the merits, rather than non-arbitrable.¹² In this regard, it should be noted that the Lagergren award went deep into substantive issues in order to determine that the contract was tainted by fraud. If that interpretation of the Lagergren award is correct, unlike a situation of non-arbitrability, the parties should also have been barred from presenting the same claims before a state court. Besides, the idea that fraud renders any claim based on an illicit contract inadmissible (rather than non-arbitrable) is not an isolated position in arbitral case law.¹³

⁹ On that principle, see *inter alia* P. Mayer, *The Limits of Severability of the Arbitration Clause*, ICCA Congress Series no. 9 (Kluwer Law International, The Hague, 2003), p. 261.

¹⁰ (1994) 10(3) *Arbitration International* 282, and the article by J.G. Wetter, 'The Authentic Text and True Meaning of Judge Gunner Lagergren's 1963 Award in ICC Case No. 1110', (1994) 10(3) *Arbitration International* 227.

¹¹ A. Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer, International Arbitration Law Library, 2004), p. 65 *et seq.*; amongst the vast literature on corruption and fraud in international arbitration, see also K. Karsten and Andrew Berkeley (eds), *Arbitration, Money Laundering, Corruption and Fraud* (ICC Publishing, 2003); 'Bribery of Foreign Public Officials in International Business Transactions' in (1991) 1 *International Business Law Journal*, Special Issue.

¹² In French law, the qualification would be that of an *irrecevabilité de fond* rather than one of *inarbitrabilité*. For a study of the difference between inadmissibility and lack of jurisdiction, see G. Block, *Les fins de non-recevoir en procédure civile* (Bruylant, 2002). Block defines inadmissibility as a defence which prevents a judge who has jurisdiction from deciding the merits. For an award dismissing an allegation of non-arbitrability based on fraud, see ICC Award 6401 at B-1 to B-69, (1992) 7(1) *Mealey's Arb. Rep.* See also, on the difference between jurisdiction and admissibility, J. Paulsson, 'Jurisdiction and Admissibility' in *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner* (ICC Publishing, 2005), p. 601.

¹³ See, e.g., ICC Award 3913: 'the agreement ... is based on an illicit consideration, and ... it is for this reason null and void, and therefore it renders the parties ill-founded to claim its enforcement or compensation for damages resulting from its non-enforcement, and even the taking into account, or, as the case may be, the restitution of the funds paid or any advance payments made as part of its performance' (I Collection of ICC Arbitral Awards 498 Vol. 1, 1974-1985; *JDI* 1984, 920). Only the inadmissibility of the claim can explain that, in case of nullity, a party would be barred from claiming the restitution of amounts paid in compliance with a voided contract.

The impact of fraud on the validity of the arbitration agreement has been dealt with in the *Westacre* dispute.¹⁴ When reviewing the ICC award having ordered the principal to pay the fees due to the consultant, and faced with the argument made by the principal that the contract's purpose was bribery, the English court had to address an argument of *Westacre* according to which, by seeking the enforcement of the award, it was not enforcing an allegedly illegal contract, but the separate arbitration agreement. The court, in order to deal with that issue, made a distinction based on the degree of illegality involved:

it would therefore seem in principle that if the underlying contract were illegal and void at common law the question whether an arbitration agreement ancillary to it was also impeached by the illegality would have to be answered by reference to the policy of the Court in relation to the particular nature of the illegality involved ... No doubt, if it were proved that the underlying contract was, in spite of all outward appearances, one involving drug trafficking, the alleged offensiveness of the transaction would be such as to outweigh any countervailing consideration. Where, however, the degree of offensiveness is far down the scale as in the present case, I see no reason why the balance of policy should be against enforcement.¹⁵

According to that reasoning, the arbitrability of the dispute would depend on a subjective assessment of the degree of illegality involved. But in order to decide whether the fraud is more or less up or down in the scale of illegality, the arbitrator necessarily needs to have jurisdiction to assess the merits, which implies a valid arbitration agreement.¹⁶ It is therefore preferable to apply the principle of severability strictly, and to adopt an approach according to which claims based on fraud, although they may not be admissible, and hence, not decided on the merits, are nevertheless arbitrable.

The same reasoning can in our view be adopted in public international law arbitrations. The case would be that the investment contract giving rise to a BIT or ICSID arbitration has been obtained by corrupting the representative of the state or of a public entity.¹⁷ In such cases, the alleged corruption cannot affect the validity of the treaty upon which the consent to arbitrate is based. The consequence will rather be inadmissibility of the investor's claims.¹⁸ The

¹⁴ [1998] 2 Lloyd's Rep. 111. See also A. Sheppard, 'Case Comment: *Westacre Investments Inc. v. Jugoinport-Spdr Holding Co. Ltd*' in (1998) *International Arbitration Law Review* 54; S. Wadé, 'Westacre v. Soleimany: What Policy? Which Public?' (1999) *International Arbitration Law Review* 97.

¹⁵ [1998] 2 Lloyd's Rep. 111.

¹⁶ See, in a case in which corruption was alleged, ICC Awards 6474, *YCA* 2000, 279, and 8891, *JDI* 2000, 1076.

¹⁷ See B. Cremades, 'Corruption and Investment Arbitration' in *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner* (ICC Publishing, 2005), and the cases cited at pp. 213-224.

¹⁸ See Cremades, *supra* n. 17 at p. 214: 'the corrupt investor will be estopped from claiming the benefit of the substantive rights in the BIT. This view is supported by the doctrine of "clean hands" or *ex injuria jus non oritur* in public international law'. This situation implies, in our view, that the claim is not capable of being judged in its substance. But in order to assess whether the allegation of corruption is grounded, the arbitrators need to proceed to a detailed investigation of the facts, which imply that the allegedly corrupt investor's offer to arbitrate has been validly accepted. The issue is therefore one of admissibility rather than jurisdiction (*contra*, Cremades, *supra* n. 17 at p. 215).

allegation may also be made that the signature of the BIT itself was obtained by corrupting a representative of the state. The state would then submit that there is no consent to arbitrate, based on Article 50 of the Vienna Convention.¹⁹ In such hypothesis, the jurisdiction to assess the purported corruption would not lie upon the investment tribunal, but upon a state to state arbitration pursuant to Articles 65 and 66 of the Vienna Convention. Meanwhile, the investment arbitration would presumably have to be stayed. Such situation, to our knowledge, never occurred and is probably theoretical.

(b) The Power of Arbitral Tribunals to Take Criminal Law Rules into Consideration

From the arbitrator's point of view, a criminal law rule is no more and no less than a mandatory rule. It is, to use a French expression, a '*loi de police*' which institutes a particular non-derogatory prescription or prohibition. The particularity of this rule lies in the fact that the policy it promotes is deemed to be so important to the forum that its infringement is criminally punished, either by way of fines or by imprisonment. The arbitrator has obviously no power to apply such rules in the same way as a criminal judge would, but he can take them into consideration provided they have a reasonable title to be applied to the dispute. Thus, in broad terms, the problem could simply be presented as a question of arbitrability of mandatory provisions of law.

We shall not dwell on this question, as it could drive us way out of the boundaries of this presentation. It suffices to say that the arbitrability of rules of public policy is now widely recognised. Depending on jurisdictions, a dispute is deemed to be arbitrable either when the subject matter of the arbitration concerns rights the parties may dispose of (France,²⁰ Belgium,²¹ Italy,²² Spain,²³ Denmark),²⁴ or rights or assets of a patrimonial nature (Switzerland,²⁵ Germany).²⁶ Beyond these differences, in most jurisdictions, unless there is a special provision to the contrary (such might be the case, for example, when the law applicable to a public tender provides for the exclusive jurisdiction of local courts in case of disputes related to the tender), the existence of a mandatory provision does not make the dispute non-arbitrable. It should be acknowledged, though, that in a small number of countries hostile to arbitration, an allegation of illegality is still perceived to be a cause of non-arbitrability of the dispute.²⁷

¹⁹ Article 50 of the Vienna Convention on the Law of Treaties provides that: 'If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty'.

²⁰ Articles 2059 and 2060 of the French Civil Code.

²¹ Article 1676 of the Belgian Code Judiciaire.

²² Article 806 of the Italian Codice di procedura civile.

²³ Article 2 of the Arbitration Act 60/2003 of 23 December 2003.

²⁴ Act no. 181 of 24 May 1972 on arbitration, art. 7-4.

²⁵ Swiss Federal Statute on Private International Law, art. 177.

²⁶ German Code of Civil Procedure, s. 1025 ZPO.

²⁷ See, e.g., Pakistan: Pakistani Supreme Court, *Hubco v. Wapda*, (2000) 15 Mealey's Arb. Rep. 2000, no. 7, cited by Sayed, *supra* n. 11 at p. 71.

The 1993 *Labinal* judgment of the Paris Court of Appeal²⁸ is a good example of the liberal approach adopted in most jurisdictions with respect to the arbitrability of rules of public policy. The dispute related to a joint venture agreement and, despite the arbitration clause included in the joint venture, one of the parties had sued the others before French municipal courts by arguing that the conclusion of a confidentiality agreement between two of them amounted to an abuse of a dominant position contrary to Article 82 of the EC Treaty. The Court of Appeal upheld the challenge to the Paris court's jurisdiction by stating that 'the arbitrability of a dispute is not excluded by the sole fact that rules of public policy are applicable to the dispute', and concluded that arbitrators 'have the power to draw the civil consequences of an illicit behaviour under the profile of rules of public policy which can be directly applicable to the legal relationship at hand'.

On the basis of the same reasoning, an arbitrator has the power to draw the civil consequences of a rule of criminal law in a business dispute. Such consequence will most of the time be the nullity of the contract.²⁹ The basis for declaring the contract null and void may be public policy.³⁰ It can also be that the fraud committed by a party, such as the bribery of an official of the state, is treated as a misrepresentation having vitiated the consent of the other party.³¹

When the basis for nullity is submitted to be that of contradiction with *bonos mores*, the arbitrator will be faced with the issue of whether the party responsible for the fraud should be entitled to invoke the nullity of the contract. The principle *nemo auditur propriam turpitudinem allegans*³² should lead to a negative answer. Applying that principle leads to consideration as to whether the claim is inadmissible (see above). Arguably, though, applying that principle could lead to the unpleasant result of allowing the fraud to remain undiscovered. Nevertheless, overriding considerations of good faith and procedural loyalty should prevail.

Avoidance of the contract for fraud will normally give the aggrieved party the right to claim for damages or restitution,³³ while any outstanding amount due under the voided contract will not be collectable. Here again, however, allowing the party having committed fraud to recover amounts paid pursuant to a voided contract could be considered as unacceptable. Hence, such party is frequently denied that right, on the basis of the old principle *In pari causa turpitudinis cessat repetitio*.³⁴ Arbitral awards have frequently applied such a principle of non-recovery.³⁵ In cases of corruption, the nullity of a consultancy or of an agency agreement may then lead to the unpleasant result of the company which instigated corruption to benefit from the fraud not having to pay the agreed

²⁸ Paris, 19 May 1993, *Labinal v. Mors*, *Rev. Arb.* 1993, 645, with the note of Ch. Jarrosson.

²⁹ ICC 3916/82, *JDI* 1984, 930; and the first award in the *Hilmarton* case ICC 5622/88, *Rev. Arb.* 1993, 327, *YCA* 1994, 105.

³⁰ See, e.g., art. 6 of the French Civil Code or art. 20 of the Swiss Code des obligations.

³¹ UNIDROIT Principles, art. 3.8.

³² On the principle, see H. Roland and L. Boyer, *Adages du droit français* (Litec, 1999), p. 483.

³³ UNIDROIT Principles, arts 3.17, 3.18.

³⁴ On the principle, see Roland and Boyer, *supra* n. 32 at p. 335.

³⁵ See ICC Award 3913, I Collection of Arbitral Awards 497 Vol. 1, 1974–1985;; ICC Award 5622, *YCA* 1994, 122; ICC Award 5943, *JDI* 1996/4, 1014; ICC Award 6248, *YCA* 1994, 124.

price.³⁶ But it is not necessarily the case. In fact, the purpose of the corruption agreement generally consists in the award of a contract, where the counterparty – generally a state or a public entity – may well sue for damages on the basis that the price was artificially inflated, or ask for its annulment on the basis that the corruption constitutes fraudulent misrepresentation.

III. ARBITRATING ISSUES OF CRIMINAL LAW

(a) *Issues of Evidence*

From a procedural point of view, arbitrators will frequently be confronted with the issue of the level of evidence required to establish a fraud.

First of all, there may be an issue as to whether it should be established that both parties had a fraudulent intent. There are indeed awards requiring that both parties had knowledge of the illegality and had the common intention of committing the fraud.³⁷ This is a stringent requirement, which may render such proof impossible. In agency or consultancy agreements, it is arguably sufficient to prove that the intermediary had the intention to commit corruption.³⁸

Another issue is that of the quality of the evidence. Should a mere suspicion suffice? For example, it might appear, during the proceedings, that the respondent's defence to the claim is surprisingly weak. Should that be taken as an indication that the arbitration is simulated? The arbitral tribunal might be surprised to discover that, in an apparently large case, only very little evidence of work performed is produced. Should that be considered as an indication that the contract was entered into with the purpose of paying bribes? The arbitrators might realise that a state official is also a shareholder or an officer of a private investor, etc. In such situations, there would be no conclusive evidence of fraud or of corruption. Should the arbitrators then void the contract on the basis of a mere suspicion?

On this issue, reference can be made to an award rendered in a case where a party had submitted that the contract was null and void because the Indonesian officials who signed it were corrupt. The allegation was rejected because 'there is a presumption in favour of the validity of contracts' and 'a finding of illegality or other invalidity must not be made lightly, but must be supported by clear and convincing proof'.³⁹ Several ICC awards⁴⁰ have adopted the same solution, and

³⁶ See, e.g., ICC Award 8891, *JDI* 2000, 1076, in which the arbitral tribunal qualified this result as 'unpleasant', but ruled that it would be even more unsatisfactory to validate an illicit corruption agreement.

³⁷ ICC Award 4145, II Collection of ICC Arbitral Awards 53; ICC Award 7047, *ASA Bull.* 1995, 301.

³⁸ See the award in *Lunik v. Soliman*, *ASA Bull.* 1998, 210, quoted by Sayed, *supra* n. 11 at p. 114.

³⁹ *YCA* 2000, 13.

⁴⁰ ICC Award 4145, *JDI* 1985, 985, *YCA* 1987; ICC Award 5622, III Collection of ICC Arbitral Awards 220 Vol. 3, 1991–1995, *YCA* 1994, 105; ICC Award 6286, *YCA* 1994, 141; ICC Award 6401 at B-20, (1992) 7(1) *Mealey's Arb.* In the latter case, the arbitral tribunal held that 'the party having the burden of persuasion must establish the facts on which it relies by a "preponderance of evidence". In other words, it must have the "superior weight of evidence" and establish that its version of the facts "is more likely true than not true"' (quoted by Sayed, *supra* n. 11 at p. 104). See also ICC Award 8891, *JDI* 2000, 1076, where the arbitral tribunal required serious indices to establish bribery.

rejected allegations of criminal offences such as bribery because of insufficient evidence brought thereof. The principle so affirmed is healthy. As stated above, an arbitrator is not an investigator or a criminal judge. If evidence of a criminal offence has not been clearly provided, he cannot void the parties' agreement on the sole basis of suspicion.⁴¹

The suggestion has been made, however, that in cases in which corruption is suspected, the burden of proof could be shifted to the party suspected of corruption,⁴² who would then have to bring evidence of the absence of corruption. Such a reversal of the burden of proof does not seem to be acceptable or compatible with the right to a fair trial.⁴³ In some cases, however, arbitral tribunals seem to have accepted to shift the burden of proof. For example, in ICC Award 6497,⁴⁴ where an allegation of bribery was at stake, the tribunal held that:

the alleging party may bring some relevant evidence for its allegations, without these elements being really conclusive. In such cases, the arbitral tribunal may exceptionally request the other party to bring some counter-evidence, if such task is possible and not too burdensome. If the other party does not bring such counter-evidence, the arbitral tribunal may conclude that the facts alleged are proven (Article 8 of the Swiss Civil Code). However, such change in the burden of proof is only to be made in special circumstances and for very good reasons.

But it could be submitted that what the tribunal really did in this case is to draw adverse inferences from the refusal of a party to cooperate fully with the procedure rather than to really shift the burden of proof.⁴⁵

That the alleging party has the burden of evidence does not mean, however, that the arbitral tribunal should not be free in its assessment of the value of the evidence of an alleged fraud. As stated above, refusal by a party to cooperate fully with the proceedings can be used by the arbitral tribunal as a presumption. Likewise, the absence of any proof of the performance of the services for which the intermediary pretends to be paid,⁴⁶ the unusually short period of time between the appointment of an intermediary and the procurement of a contract,⁴⁷ or the unusual amount of an intermediary's remuneration,⁴⁸ may – if

⁴¹ The Swiss Federal Tribunal has refused to set aside an award which had found that allegations of corruption had not been proven: SFT, 2 September 1993, *National Power v. Westinghouse*, ASA Bull. 1994, 244.

⁴² Such suggestion has, e.g., been made by K. Mills, *Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration relating Thereto*, ICCA Congress Series no. 11 (Kluwer Law International, The Hague, 2003), p. 295.

⁴³ On the principle that a party has the burden of proving its allegations as a principle of transnational law, see J. Ortscheidt, *La réparation du dommage dans l'arbitrage commercial international*, Dalloz 2001 pp. 26–28.

⁴⁴ YCA 1999, p. 71.

⁴⁵ For another case in which the tribunal held that the refusal of a consultant to provide information about the nature of his intervention was an indication that the contract had the purpose of bribing public officials, see ICC Award 3916, I Collection of ICC Arbitral Awards 507 Vol. 1, 1974–1985.

⁴⁶ ICC Award 8113, cited by Sayed, *supra* n. 11 at p. 149.

⁴⁷ As in ICC Case 3916, I Collection of ICC Arbitral Awards 507.

⁴⁸ ICC Award 6497, YCA 1999, 73; ICC Award 8891, JDI 2000, 1076.

established with sufficient certainty – be used as presumptive evidence.⁴⁹ In all cases, the alleging party should be required to meet a reasonable standard of proof and, even if the respondent does not cooperate, an allegation of bribery or corruption should be rejected if such standard was not met.⁵⁰

(b) *Direct Application by Arbitral Tribunals of Sanctions of a Mixed Nature*

In certain cases, arbitral tribunals will not limit themselves to taking a rule of criminal law into consideration in order to draw the civil consequences thereof, but will make a direct application of it. This might be the case for sanctions of a mixed nature, such as punitive or treble damages. In American law, treble damages play the role of a civil sanction in case of violation of certain statutes to which the forum attaches a general interest, such as the Sherman Act or the civil section of the RICO (Racketeer Influenced Corrupt Organisations) statute. Punitive damages are meant to sanction fraud, oppressive or wilful misconduct. Unlike treble damages, punitive damages are not limited in their amount, and can be applied in the absence of a particular statutory provision. As such sanctions do not only play a compensatory role, but also have a punitive function, the question arises of whether an arbitrator should be allowed to award them.

With respect to treble damages, the US Supreme Court ruled, in *Mitsubishi*,⁵¹ that, notwithstanding their policy function, they are of a civil nature. This solution applies to antitrust treble damages,⁵² as well as to the treble damages provided by the RICO statute.⁵³ American jurisdictions have therefore repeatedly held that claims concerning treble damages are arbitrable. Reference can be made in this respect to the US Supreme Court's 1987 ruling in *Willis v. Shearson/American Express Inc.*,⁵⁴ and to the 1990 *Kerr McGee v. Triumph Tankers* Second Circuit decision.⁵⁵ The US Supreme Court also held, in *Pacificare Health Systems v. Book*,⁵⁶ that arbitrators have jurisdiction to determine whether they have jurisdiction to grant treble damages. The case involved a controversy between doctors and managed healthcare organisations, where the claimant doctors claimed treble damages based on the RICO statute, while the respondents objected that the arbitration agreement explicitly denied the right to punitive damages, which in their view also applied to treble damages. The Court held that

⁴⁹ On the issue of presumptive evidence of corruption, see Sayed, *supra* n. 11 at pp. 125–157; A. El-Koshery and Ph. Leboulanger, 'L'arbitre face à la corruption et aux trafics d'influence', *Rev. Arb.* 1984, 3; M. Sherer, 'Circumstantial Evidence in Corruption Cases before International Arbitral Tribunals' in (2002) 2 *International Arbitration Law Review* 29; J. Rosell and H. Prager, 'Illicit Commissions and International Arbitration: the Question of Proof' in (1999) 15 *Arbitration International* 329.

⁵⁰ For cases in which the arbitral tribunal rejected an allegation of corruption or bribery, see ICC Award 6497, *YCA* 1999, 71; ICC Award 9333, *ASA Bull.* 2001/4, 757.

⁵¹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985).

⁵² Antitrust treble damages are designed in part to punish past violations and also serve to deter future violations and compensate victims.

⁵³ The RICO statute treble damages provision, 18 U.S.C. 1864(c).

⁵⁴ 569 F. Supp. 821 (M.D.N.C. 1983).

⁵⁵ *YCA* 1993, 150.

⁵⁶ 538 U.S. 401 (2003).

such an issue of construction of the arbitration agreement was for the arbitrators to decide.

The problem is, however, to determine the conditions under which an arbitrator might apply such a sanction. The easiest answer to that question would be to refer to the applicable law. If the parties submitted their contract to American law, or if the arbitrator finds that, in the absence of a choice of law, American law is applicable, then treble damages may be applied. The particular nature of such damages, however, makes the answer slightly more complex. For example, in an ICC case in which Brazilian law applied,⁵⁷ the arbitrators seemed not to exclude the application of the treble damages provided by American law, because 'the main purpose of the RICO law is to protect the economy and the society of United States against the adverse effects of organised rackets'. The tribunal, however, refused to apply the RICO statute because 'the alleged fraud mainly took place outside the United States'. The tribunal also noted that the alleged fraud produced its effects outside the USA. It would thus appear from that decision that the application of treble damages does not depend on the law applicable to the contract (as determined by the parties' choice of law or by the arbitral tribunal), but from the effects of the parties' conduct within the territory which the criminal rule aims at protecting. The method on the basis of which treble damages can be applied would therefore be similar to the one which commands the taking into consideration of antitrust rules. Another example of that approach is ICC Arbitral Award 8385 of 1995,⁵⁸ in which, although the law chosen by the parties was that of the State of New York (which includes the RICO statute), it was held by the arbitral tribunal that such choice could not be meant to include the RICO statute, because of its exceptional character, peculiar to the American tradition. The RICO statute was therefore treated as if it were a mandatory law extraneous to the law chosen by the parties, and its application rejected on the basis that, in the case at hand, the contract did not present sufficient links with the territory of the USA.

That method is, however, dangerous. In fact, a claim for exemplary damages cannot be treated in the same manner as the taking into consideration of a mandatory rule having the purpose of protecting the public interest. The first has a private nature, even if it has the function of a penalty and of a deterrent, while the second directly touches upon public interest. Here again, a parallel with competition law can be made. In European competition law, Article 81 of the EC Treaty provides for the nullity of a contract affecting trade between European Member States. This rule applies independently of any choice of law. Yet, the civil consequences of such nullity are left to the *lex contractus*.⁵⁹ Likewise, the so-called 'effects theory' has no reason to govern the allocation of damages to a party, as

⁵⁷ ICC Award 6320, *JDI* 1995, 986.

⁵⁸ ICC Award 8385, *JDI* 1997, 1061.

⁵⁹ Case 10/86 *VAG France v. Magne*, ECJ, 18 Dec. 1986, Eur. Court Reports 1986, p. 04071 with limitations, however. For example, Community law does not allow a state to exclude damages as a remedy on the basis of the principle *nemo auditor*; Case C-453/99 *Courage v. Crehan*, 20 September 2001, ECJ Off. Journal C 317, 10 November 2001, p. 0004.

law which ignores punitive damages, they should be deemed not to have granted such power to the arbitrators. In this regard, the ICSID award rendered in 1984 in *Letco v. Liberia*⁶⁹ is interesting. The arbitral tribunal examined the applicable law of Liberia, and held that such law did not permit a civil judge to increase damages beyond the amount needed to compensate the loss of the injured party, except in cases where 'the actions of the liable party are of a criminal character'.⁷⁰ Likewise, a 1988 AAA award held that, according to the applicable law of the State of Columbia, 'punitive damages may be awarded when an insurer acts in bad faith in rejecting a claim', but it finally rejected that claim because such bad faith did not appear in the case.⁷¹ In these two cases, it seems that the arbitrators looked at the law applicable to the contract to determine whether the power to grant punitive damages was vested in them.

Still, the law of the seat of the arbitration can play as an excluding factor. As a matter of fact, an award of punitive damages might be considered as contrary to public policy in the country where the seat of the arbitration is located. As a consequence, even if the *lex contractus* allows punitive damages, an arbitral tribunal might refuse to grant them if such decision would put the validity of the award at risk at the place of the arbitration. For example, an arbitral tribunal sitting in Switzerland refused to award punitive damages in spite of the submission of the contract to a law allowing that sanction.⁷² We are not aware of any court case in respect of a challenge of an award on such a ground, even though it seems that the Court of Basel accepted to enforce in Switzerland a judgment from a court of California having awarded punitive damages in application of English law.⁷³ But there is case law in Germany,⁷⁴ England⁷⁵ and Italy,⁷⁶ according to which the recognition of an American judgment awarding punitive damages is contrary to public order and should be denied.

Still, the solution would not necessarily be the same for a foreign judgment and for an award. In most jurisdictions, the powers of the court to vacate an award are limited to the violation of the most fundamental principles⁷⁷ and courts are not allowed to review the merits of the arbitrators' determination.⁷⁸ On the basis

⁶⁹ *Liberian Eastern Timber Corp. (LETCO) v. Liberia*, ICSID ARB/83/2.

⁷⁰ In that particular case, the tribunal rejected the claim for punitive damages because such criminal character was not established.

⁷¹ *YCA* 1989, 73.

⁷² ICC Award 5946, *YCA* 1991, 97, III Collection of ICC Arbitral Awards 46 Vol. 3, 1991–1995.

⁷³ Civil Court of Basel, 1 February 1989, quoted by A. Court de Fontmichel, *L'arbitre, le juge et les pratiques illicites du commerce international* (Panthéon Assas, 2004), p. 392, citing R. A. Brand, *Punitive Damages and the Recognition of Judgements* (NILR, 1996), p. 169.

⁷⁴ Bundesgerichtshof, 4 June 1992; Bundesverfassungsgericht, 7 December 1994.

⁷⁵ *Lewis v. Eliades* [2003] EWHC 368 (QB), [2003] 1 All E.R. (Comm) 85.

⁷⁶ Venice Court, 15 October 2001.

⁷⁷ For a general overview, see A. Mourre, *Le libre arbitre, ou l'aveuglement de Zaleucus (variations sur l'arbitrage, l'ordre public et le droit de la concurrence)* (Mélanges Knoepfler, Neuchâtel, Helbing and Lichtenhahn, 2005), p. 283.

⁷⁸ See the House of Lords 30 June 2005 decision, overturning a Court of Appeal decision which had set aside an award on the basis of excess of power because the arbitrators had awarded amounts in a different currency than that provided by the contract: *Lesotho Highlands Development Authority v. Impregilo SpA*, *Cahiers de l'arbitrage* 2005/2, *Gaz. Pal.* 294/295, *panorama de jurisprudence anglaise*, 49; see also, in respect of that decision, A. Crivellaro, 'All's Well that Ends Well: London Remains a Suitable Venue for International Arbitration – But Only Thanks to the House of Lords' in 22(4) *ICL Rev.* (2005), 480.

of the principle of finality of awards, it is arguable that the decision of an arbitral tribunal to grant punitive damages should not be opened to review, insofar as the law chosen by the parties, or the parties' agreement itself, does not prohibit that kind of private sanction.

IV. ARBITRATORS AS PRIVATE JUDGES ...

(a) *The Duty of International Arbitrators to Take Rules of Criminal Law into Consideration*

As stated above, arbitrators may take a rule of criminal law into consideration. But when should they do so? Here again, criminal law rules should not be treated differently from ordinary rules of public policy. In principle, if such rules are part of the *lex contractus*, the consequences therefrom – insofar as applicable to the circumstances of the case – should be drawn on the civil dispute. By submitting their contract to the laws of a particular country, the parties elected such laws in their entirety, including mandatory provisions of a criminal character. Still, arbitrators will frequently be confronted by the problem of whether they should raise such rules on their own motion. Under most arbitration rules⁷⁹ and arbitration laws,⁸⁰ arbitral tribunals certainly have the power to do so. But do they have that obligation? A judge has the duty to raise *ex officio* any applicable criminal rule which is part of his own national law.⁸¹ The position of the international arbitrator is different, because he looks at the case from an international perspective. Being a private international judge, an arbitrator will not put on an equal footing local prohibitions and internationally recognised rules. This is not to say that he will necessarily disregard the first, but considerations of parties' equality and procedural fairness will make him less inclined to disrupt the arbitration proceedings by raising a local prohibition *ex officio* than if it were to ensure the application of a widely recognised principle.⁸² The question is not specific to criminal law, and reference can simply be made to the abundant literature on the crucial problem of *ex officio* duties of the arbitral tribunal.⁸³ In a nutshell, the decision of an arbitral tribunal to raise a local prohibition *ex officio* will mainly depend on an assessment of the degree of illegality involved, and on the consequences that disregarding the rule at stake would likely have on the validity of the award.

What should the arbitrator do if the criminal rule at stake is not part of the *lex contractus*? The starting point of the reasoning is again that the arbitrator, unlike the judge, has no forum. Unlike the judge, all legal rules are extraneous to him.

⁷⁹ Most Arbitration Rules grant arbitrators the greatest discretion in the management of the proceedings: arts 15(2) and 20(1) of the ICC Rules; art. 14.1 of the LCIA Rules; art. 16.1 of the AAA Rules; arts 34(2), 35(1) and 36(b) of the ICSID Rules of Arbitration.

⁸⁰ See D. Bensaude, 'Les moyens relevés d'office par l'arbitre en arbitrage international', *Cahiers de l'arbitrage* 2004/1, *Gaz. Pal.* 19–20 May 2004, 141.

⁸¹ Or to report the facts to the Attorney General.

⁸² For an award in which the tribunal raised an issue of bribery on its own motion, see ICC Award 8891, *JDI* 2000, 1076.

⁸³ See Bensaude, *supra* n. 80.

As a consequence, the only source of his obligation to apply the laws of a particular country is the will of the parties, as expressed in their contract. As a matter of principle, an arbitrator should therefore not apply to the dispute a law different from the one chosen by the parties. This is also true for criminal rules, under certain reservations that we will analyse hereinafter. For example, an arbitral tribunal has disregarded the US Foreign Corrupt Practices Act in a case where Swiss law was applicable on the basis of the following reasoning:

Even if one supposes that (i) the FCPA is a mandatory law and (ii) the arbitrator admits that such a law can be applied notwithstanding the choice of another substantive law, the powerful and legitimate interests of the United States in the application of this law must also be shown. Serious doubts can in this matter result from the fact that the FCPA does not primarily aim to protect the fundamental public policy of the United States, but rather has the purpose to restore the confidence of the public in the integrity of American corporations whose reputation has been tarnished by a series of high profile corporate scandals.⁸⁴

Likewise, in an arbitration submitted to the Geneva Chamber of Commerce Rules, the tribunal disregarded Algerian regulations on the prohibition of intermediation, because Swiss law applied and said regulations are 'only part of the economic policy of the country'.⁸⁵

Two exceptions, however, should be made to the principle according to which arbitral tribunals may not apply mandatory rules extraneous to the law chosen by the parties.

The first is when the criminal rule at stake is, notwithstanding the parties' choice of law, particularly relevant and has a very strong title to be applied. For example, in the field of antitrust law, which is close in many respects to criminal law (in particular where hardcore cartels are involved), it is clear that the parties' choice of law cannot have the effect of avoiding the application of a rule which has a manifest interest in being applied. Hence, EU antitrust law will apply to a contract having the purpose of fixing prices within the European territory, even though the parties have submitted it to the law of a non-EU country. The same reasoning would apply to a criminal law rule.

The second is where such rule is part of transnational or truly international public policy. This is the case, for example, of the prohibition of contracts made with the purpose of corrupting foreign officers or committing money laundering. We will address that question in more detail later on.

(b) *Consequences of the Private Nature of the Arbitrator's Mission when Confronted by a Criminal Offence*

As a general rule, arbitrators should act with great caution when introducing in the arbitral debate elements which were not included in the parties' submissions

⁸⁴ ICC Award 9333, ASA Bull. 2001/4, 757.

⁸⁵ ASA Bull. 1988, 136. See also, in a case involving Algerian law, the second *Hilmarton* award, cited in Saye *supra* n. 11 at p. 242.

Although there is no doubt that arbitrators should be sensitive to states' legitimate interests, they should not turn themselves into investigators, policemen or prosecutors. As opposed to state judges, the primary role of an arbitrator is to enforce the contract, and not to defend public policy. As a consequence, the arbitrator has no duty to investigate possible breaches of criminal law of which there is no evidence and which were not raised by the parties in their submissions. As Redfern and Hunter rightly say: 'it is not the duty of an arbitral tribunal to assume an inquisitorial role and to search officiously for evidence of corruption where none is alleged'.⁸⁶ This does not mean, however, that the arbitral tribunal would be bound by a fraudulent agreement to exclude an aspect of illegality from the arbitration. If there are indications that the contract might be illegal, the arbitrators should raise the issue and ask the parties to provide explanations. This derives from the arbitrator's duty not to be an accomplice of a fraud, and also from his duty to make his best efforts to render an award enforceable at law. Yet, they should not self-initiate an investigation on the basis of a mere belief or – even worse – of hearsay or whistle-blowing.

The same approach leads to oppose strong resistance to any suggestion that the arbitrator should report possible violations of criminal law to the state authorities. For example, there is a French law rule according to which any judge who, in the course of judicial proceedings, learns about a violation of criminal law, must report such situation to the Attorney General.⁸⁷ Such rule, however, is explicitly directed to state judges, and therefore does not apply to arbitrators. Nevertheless, there are views according to which the duty to report suspicions of criminal offences should also be applied to arbitral tribunals.⁸⁸ Even though such views are certainly isolated, they illustrate the dangers of a tendency to an excessive assimilation between judges and arbitrators.⁸⁹ Vesting in arbitrators an obligation to report to a national authority or jurisdiction a suspicion of illegal behaviour would be totally incompatible with the private nature of their mission and the trust the parties have in them. No arbitration could ever take place in a context of trust and mutual cooperation if the parties had doubts that anything they say might be reported by the arbitrator to a public prosecutor, or indeed the tax authorities ...

Likewise, the suggestion has been made that the arbitrator should report to the criminal authorities any doubt or suspicion he might have on the criminal origin of the funds at stake in the arbitration proceedings. This suggestion has been made, in particular, in respect to money laundering. The dangers of money

⁸⁶ A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration* (Sweet and Maxwell, London, 1999), p. 153.

⁸⁷ Article 40 of the Code of Criminal Proceedings provides: 'Every constituted authority, every public officer or civil servant who, in the performance of his duties, has gained knowledge of the existence of a felony or of a misdemeanour is obliged to notify forthwith the district prosecutor of the offence and to transmit to said prosecutor any relevant information, official reports or documents'.

⁸⁸ Court de Fontmichel, *supra* n. 73 at p. 351.

⁸⁹ For another illustration of the dangers of assimilating judges and arbitrators, see the debate on the UNCITRAL project on *ex parte* interim measures. See also Y. Derains, 'L'arbitre et l'octroi de mesures provisoires *ex parte*', *Cahiers de l'arbitrage* 2004/II, *Gaz. Pal.* 2004, 74.

laundering should certainly not be underestimated. According to an IMF survey, it would represent from 2 to 5 per cent of the world gross product.⁹⁰ Yet, the fight against this dangerous form of criminality should be respectful of fundamental liberties, amongst which is the right of access to justice, including the right to arbitral justice if the parties made that choice.⁹¹ It has been suggested, however, that arbitrators could be bound to make a declaration of suspicion pursuant to EU Directive 97/2001. While the previous EU Directive 91/308 referred only to banks, insurance companies and other financial institutions as being obliged to report suspicions, Directive 97/2001 has included in that list auditors, tax advisers, notaries and members of independent legal professions. In the latter case, the obligation to report is provided with respect to real estate transactions, asset management, activities related to trusts or companies, or activities performed on behalf of a client in the context of a financial or real estate transaction. In addition, the list of illegal behaviour for which there is an obligation to report a suspicion has been extended to include almost any violation of a criminal rule.

With respect to members of the Bar, there are limits to the obligation to report. As mentioned earlier, such obligation applies only when the activities of the lawyer relate to a financial or real estate transaction. Conversely, no such obligation exist when a lawyer is involved in activities related to litigation. Article L.562-2-1 of the French Monetary and Financial Code includes an express provision to that effect.⁹² In the United Kingdom, the Court of Appeal ruled on 8 March 2005⁹³ that submitting lawyers to the Directive would be contrary to the European Convention on Human Rights. The case related to a real estate dispute, in which the claimant's solicitors, further to discovery, decided to report to the National Criminal Intelligence Service certain documents showing that the defendant had included the costs of works carried out in his personal property

⁹⁰ Cited by F. Baillet, 'Blanchiment, l'état de la législation' in *Gaz. Pal.* 12-13 October 2005, 2.

⁹¹ For a decision acknowledging the right to arbitral justice as a fundamental right, see the decision of the French Supreme Court, *Cass. Civ. 1ère* 1 February 2005, *NIOC v. Israël*, *Cahiers de l'arbitrage* 2005/1, *sommaires de jurisprudence des cours et tribunaux*, 34, *Gaz. Pal.* 2005, 117-118.

⁹² Article 562-2-1 of the French Monetary and Financial Code provides: 'The persons referred to in § 12 of Article L.562-1 are required to make the declaration stipulated in Article L.562-2 when, in the context of their professional activity, they execute for and on behalf of their customers any financial or real-property transaction or when they participate by assisting their customers with the preparation or execution of transactions relating to: 1. Buying and selling real property or business concerns; 2. The management of funds, securities or other assets belonging to the customers; 3. The opening of current accounts, savings accounts or securities accounts; 4. Organisation of the contributions required to create companies; 5. The constitution, administration or management of companies; 6. The formation, administration or management of foreign-law trusts or any similar structure. The persons referred to in § 12 of Article L.562-1, when they are engaged in activities relating to the transactions referred to above, and accountants when they give legal advice ... are not required to make the declaration provided in Article L.562-2 when the information was received from one of their clients, or obtained on one of them, within the scope of a legal consultation, unless it took place for money laundering purposes, or if those persons proceeded therewith knowing that their client wished to obtain legal advice for money laundering purposes, or when they provide their professional services in the interest of that client in connection with judicial proceedings, whether that information was received or obtained before, during or after those proceedings, including advice given in relation to the initiation of such proceedings'.

⁹³ *Bowman v. Fels* [2005] EWCA Civ 226, Court of Appeal (Civil Division).

with his business accounts and VAT returns, even though they were unconnected with his business. Such disclosure clearly amounted to a breach of the privileged character of documents obtained through litigation disclosure. The court rightly held, with respect to section 328 of the Proceeds of Crime Act 2002, that:

legal proceedings are a State-provided mechanism for the resolution of issues according to the law. Everyone has the right to a fair and public trial in the determination of its civil rights and duties which is secured by Article 6 of the European Convention on Human Rights. Parliament cannot have intended that proceedings or steps taken by lawyers in order to determine or secure legal rights and remedies for their clients should involve them in 'becoming concerned in an arrangement', even if they suspected that the outcome of such proceedings might have such effect.

A working party formed under the aegis of the French National Committee of the International Chamber of Commerce⁹⁴ has studied what the response should be in respect of an arbitrator, and reached the conclusion that, since the arbitrator's role is to adjudicate private disputes, it should be excluded that the Directive apply to him in the exercise of his jurisdictional duties. In fact, by no means could the arbitrator's mission be compared to that of assistance of a client. In addition, the obligations provided by Directive 97/2001 are incompatible with both his independence and his duty of confidentiality.

(c) Simulated Arbitrations and Manipulation of Arbitrators

This is not to say that arbitrators should let themselves be manipulated and turned into a tool for fraud. For example, if the arbitrators realise that the arbitration has been simulated from the outset, which is to say that, in reality, there is actually no dispute, they should resign and might even – depending on the laws of the place where the 'arbitration' was simulated – report the situation to the competent local criminal authorities. But it goes without saying that they should, in order to do so, have obtained very convincing evidence of the fictitious character of the arbitration, which is in practice quite unlikely to happen. A resignation of the tribunal should not, in such extreme cases, be viewed as incompatible with the provisions of law obliging the arbitrators to carry out their mission until it is completed.⁹⁵ The 'arbitration' having been simulated from the outset, there is no real dispute and the arbitrators cannot be bound to carry out a mission which is in fact inexistent.

Fictitious arbitrations organised with fraudulent purposes may lead the parties to request the arbitrators to sign an award by consent. Such an award by consent would then consist in laundering a fraudulent contract into an apparently licit jurisdictional title. This is why arbitrators should exercise the greatest caution

⁹⁴ The Working Party was chaired by J.P. Beraudo. An international Working Party of the ICC, co-chaired by V.V. Veeder and J.P. Beraudo, is still working on the issue of arbitration and criminal law.

⁹⁵ As Article 1462 of the French Code of Civil Procedure, which provides that 'each arbitrator shall carry out his mission until it is completed'.

when accepting such a request.⁹⁶ Under the 1988 ICC Rules of Arbitration, arbitrators were bound to accept the parties' request to that effect.⁹⁷ The 1998 Rules provide that the signature of an award by consent is subject to the arbitrators accepting to do so.⁹⁸ This evolution is indeed welcome. As a matter of fact, if the arbitrator has the duty to render an award, he has no obligation whatsoever to render an award by consent. He should thus be free to refuse a request to that effect, and he should be under no duty to give reasons for his decision to do so. If the arbitrators requested to sign an award by consent refuse to do so, and the parties wish to persist in their desire to obtain such a decision, they might just replace the reluctant arbitrators⁹⁹ and try to find a more accommodating tribunal.

(d) Criminal Law Used to Disrupt Arbitration

Arbitrators should therefore not let themselves be used as a tool for fraud. Likewise, they should not allow criminal law to be used to disrupt a lawful arbitration. Such an attempt to disrupt the arbitration can take several forms. The most direct way to disrupt an arbitration is by direct intimidation of the arbitrators, for example through threats of incrimination and even arrest. In such situations, a possible answer could be to move the seat of the arbitration to a more suitable place.¹⁰⁰ In this respect, it is advisable that arbitration rules evolve towards greater flexibility by permitting the institution to move the seat when local courts or authorities try to disrupt the arbitration by using extreme means.

Another, more frequent situation, is when a party files a criminal complaint and makes a motion to obtain the stay of the arbitration proceedings until the judgment of the criminal court. Such complaint might, for example, relate to the forgery of documents, or simply to the existence of a fraud. In most jurisdictions, the arbitral tribunal has no obligation to stay the proceedings in case a criminal investigation is pending on facts which might be relevant for the arbitration.¹⁰¹

⁹⁶ With respect to awards by consent, see S. Lazareff, 'La sentence d'accord parties aux frontières de l'arbitrage et de l'ADR', *Cahiers de l'arbitrage* 2002/I, *Gaz. Pal.*, 8.

⁹⁷ Article 17 of the 1988 ICC Rules of Arbitration: 'If the parties reach a settlement after the file has been transmitted to the arbitrator in accordance with Article 10, the same shall be recorded in the form of an arbitral award made by consent of the parties'.

⁹⁸ Article 26 of the 1998 ICC Rules of Arbitration: 'If the parties reach a settlement after the file has been transmitted to the Arbitral Tribunal in accordance with Article 13, the settlement shall be recorded in the form of an Award made by consent of the parties if so requested by the parties and if the Arbitral Tribunal agrees to do so'.

⁹⁹ Article 12-1 ICC Rules.

¹⁰⁰ See, in this regard, P. Lalive, 'On the Transfer of the Seat in International Arbitration' in *Law and Justice in a Multistate World, Essays in Honour of Arthur T. von Mehren* (Transnational Publishers, New York, 2002), p. 515; J.-F. Poudret and S. Besson, *Droit comparé de l'arbitrage international* (Bruylant-LGDJ-Schulthess, 2002), p. 115.

¹⁰¹ In France, the rule according to which the civil judge has to stay his decision until the criminal judge's decision if the same facts are at stake is set out by art. 4 of the Code of Criminal Proceedings. Case law, however, acknowledges that an arbitrator is not bound by that principle: Paris, 23 May 2002, 20 June 2002, *Cahiers de l'arbitrage* 2004/II, *Gaz. Pal.*, 356–357. In Switzerland, the Swiss Federal Tribunal (119 (1993) II 386), held that an arbitral tribunal has no obligation to stay the proceedings pending a criminal action. The principle of a stay in case of criminal proceedings is unknown in many jurisdictions (England, Germany, Netherlands, Portugal, Greece).

This principle has been embedded by a resolution of the International Law Association adopted in 1996.¹⁰²

If a criminal complaint is filed, the arbitrators might be called to testify before the criminal judge. In most jurisdictions, they would have to abide by such a request.¹⁰³ The only restriction to the arbitrator's duty to testify would then be the applicable rules on confidentiality. In France, for example, there is such a rule to protect the secrecy of the tribunal's deliberations, but whether this applies in case of criminal proceedings is doubtful.¹⁰⁴

Finally, a party may refuse to disclose documents during the arbitration on the basis of local regulations relating to transactions of national interest, such as arms sales.¹⁰⁵ Arbitrators should not, in particular when the party refusing to disclose is a state entity, be too impressed by such arguments, and may draw adverse inferences from its refusal to participate fully with the disclosure of documents.

V. ... AND GUARDIANS OF GOOD MORALS IN INTERNATIONAL TRADE

(a) Arbitrators as Guardians of International Legality

The relationship between arbitration and criminal law is not and should not be one of confrontation. Indeed, international criminal law powerfully contributes to the constitution of a true transnational public order, which is in turn an element contributing to the creation of an arbitral order autonomous from national laws. International criminal law is therefore part of the arbitral legal order to the same extent as trade usages and fundamental principles of international law. From this standpoint, arbitrators can be viewed as the true guardians of legality and good morals in international trade. There is in fact no doubt that the duties of the arbitrators are not only to the parties who have appointed them, but also to the international business community at large. In a worldwide marketplace, good governance, ethics and transparency are indispensable for ensuring competitors fair access to markets and a global market playing field. If arbitration was to become a safe harbour for illegality or a tool for fraud, it would not only be rejected by states, but also cease to be useful to the business community and, hence, to be the normal way of resolving international business disputes.

In order to understand the arbitrators' duty to guard against fraud in international trade, two concepts should be avoided. The first is to assimilate them to national judges, and the second is to make them servants of the parties. In the first concept, arbitrators would have the duty to apply any local mandatory rule, and their awards would be closely scrutinised by national courts, leading in

¹⁰² ILA, *Report of the 67th Conference* (1996), Resolution 22, p. 32, and the debates, pp. 618–622.

¹⁰³ In France, art. 109 of the French Code of Criminal Procedure: 'Any person summoned to be heard in the capacity of a witness is obliged to appear, to swear an oath, and to make a statement'; in Belgium, art. 72 of the Code of Criminal Procedure; in Germany, s. 48 of the Code of Criminal Procedure.

¹⁰⁴ French Code of Civil Procedure, art. 1469: 'The deliberation of arbitrators shall be in camera'.

¹⁰⁵ In France, art. 413-9 *et seq.* of the Criminal Code.

practice to their review in the merits and depriving the parties of the main benefit of arbitration, which is finality. The second concept would lead to permitting the parties to defraud the state's legitimate interest in having its mandatory rules applied, thus turning arbitration into a vehicle of illegality. It is therefore necessary to balance the autonomy and finality of arbitration with the need to fight illicit behaviour. The only way to achieve such balance is to distinguish parochial local mandatory rules, even when they are of a criminal nature, from universally recognised principles meant to serve the higher interests of the world community. The latter are part of transnational public policy, and arbitrators therefore have a duty to apply them regardless of the law chosen by the parties or of any rule of conflicts of laws.¹⁰⁶ Such universal values are in fact, as the Swiss Federal Court ruled in its 1994 *Westland* judgment,¹⁰⁷ the true public order of international arbitral tribunals.

Criminal law and international criminal cooperation have powerfully contributed to the creation and development of transnational public policy. In the field of international corruption, the OECD Convention,¹⁰⁸ the Council of Europe Conventions,¹⁰⁹ the work of the United Nations¹¹⁰ and of regional bodies,¹¹¹ as well as the setting up by the World Bank of an Oversight Committee on Fraud and Corruption,¹¹² illustrate the international acknowledgement of the need to fight what arbitrator Lagergren called, as early as 1963, 'an international evil, contrary to good morals and to an international public policy common to the community of nations'.¹¹³

¹⁰⁶ *E.g.*, an arbitral tribunal held that 'a contract instigating or favouring the corruption of public officials is contrary to transnational public policy, and if this appears to be the object of the consultancy contract, there would be no other option than to find it null and void' (ICC Award 8891, *JDI* 2000, 1076).

¹⁰⁷ *Les Emirats Arabes Unis v. Westland Helicopters*, 19 April 1994, ASA Bull. 1994, 404.

¹⁰⁸ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 21 December 1997. *See also* the 1996 OECD Recommendation on Tax Deductibility of Bribes to Foreign Public Officials.

¹⁰⁹ Criminal Law Convention on Corruption signed in Strasbourg, 27 January 1999; Civil Law Convention on Corruption signed in Strasbourg, 4 November 1999. As noted by Sayed, *supra* n. 11 at p. 226, the Council of Europe is also considering adopting a Draft Additional Protocol to the Criminal Convention, whereby states would be compelled to adopt measures to establish as a criminal offence the fact of corrupting an arbitrator. The Organisation of American States Inter-American Convention against Corruption should also be mentioned.

¹¹⁰ The UN Economic and Social Council adopted in 1979 a Draft Convention to prevent and eliminate illicit payments in international business transactions, as well as a Draft Code of Conduct on Transnational Corporations. A UN Convention against Corruption was adopted in December 2003, which is not yet in force.

¹¹¹ The 1996 Inter-American Convention against Corruption, the 1997 Convention against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, the 2003 African Union Convention on Preventing and Combating Corruption.

¹¹² World Bank President, Circular on New Measures to Combat Corruption, 15 October 1998. The World Bank has also put in place guidelines for the procurement of goods and services, *see* Sayed, *supra* n. 11 at pp. 292-295. The WTO has on its side established a Working Party on transparency in government procurement procedures. National laws on public procurement frequently provide that competitors are bound to provide declarations that their price does not include commissions paid to third party intermediaries. In many national laws, intermediation in public tenders is prohibited as such.

¹¹³ ICC Case 1110/1963, *supra* n. 10. On international corruption, *see* Sayed, *supra* n. 11 and, from the same author, 'La question de la corruption dans l'arbitrage commercial international: inventaire des solutions' ASA Bull. 2001/4, 653.

In the field of money laundering, the work of the Financial Action Task Force and the European Directives reveal a similar international consciousness. Many other examples can be given. Smuggling and piracy are certainly contrary to a widely generalised conception of fair trading and good morals. If certain embargo measures, such as those taken by the USA against Cuba or Libya with the Helms-Burton or Amato-Kennedy statutes, are not universally recognised, others, like those applied by the United Nations against the former regime of Saddam Hussein, had the nature of a transnational rule. The prohibition of drugs or human organs trafficking, as well as of many other internationally recognised crimes, are also part of transnational public policy.

(b) Self-regulation and Arbitration: the Path to the Future

Ethics in international trade are nowadays a global concern. After the scandals that have rocked the international business community in recent years, international companies have issued ethical codes for their employees and officers in order to prevent breaches of the law, at home and abroad. A recent survey carried out by Deloitte¹¹⁴ found that more than 80 per cent of American public companies have such codes, the remaining having compliance programmes as an essential component of corporate governance. This is clearly a sign that there is a growing awareness that international crime should not be tolerated. The International Chamber of Commerce has for many years laid down Rules of Conduct,¹¹⁵ and promoted a Commercial Crime Services Bureau; the ICC has also recently launched Fraudnet, a network aiming at combating fraud and money laundering. The OECD has adopted non-binding guidelines for ethical conduct of multinational companies.¹¹⁶ Another significant example of that trend can be found in the 'Transparency International' initiative,¹¹⁷ a non-governmental organisation created by business leaders aimed at fighting international corruption. Many other private initiatives could be mentioned. Crimes like corruption and bribery are indeed a menace for the community of merchants. Bribes affect companies' profit margins. Corruption feeds itself by creating, in certain countries, a class of public officials hungry for more corruption. Public procurement procedures are distorted to the disadvantage of loyal competitors. Barriers preventing companies from entering markets are artificially created, etc.

However, as shown by the recent inquiry into the Iraqi Oil for Food programme,¹¹⁸ business can too easily be the victim of blackmail by corrupt public officials. Crime in international trade needs to be fought on a global scale, and such a battle cannot be successful if it does not come from the business community itself. International cooperation on crime and self-regulation in the

¹¹⁴ *International Bar News*, August 2005, 5.

¹¹⁵ ICC Rules of Conduct: Extortion and Bribery in International Business Transactions.

¹¹⁶ OECD Guidelines for Multinational Enterprises (Revised version 2000).

¹¹⁷ See www.transparency.org

¹¹⁸ '180 entreprises françaises accusées d'avoir enrichi Saddam Hussein', *Le Monde*, 6-7 November 2005.

business community should therefore equally contribute to the development of international criminal law, and international arbitral tribunals should be recognised as the natural judges of these transnational rules. No judge is better placed than an international arbitrator to void contracts which seriously violate *bonos mores* or international public policy. As the English court acknowledged in *Westacre*:

that conclusion [that the award should not be vacated] is not to be read as in any sense indicating that the Commercial Court is prepared to turn a blind eye to corruption in international trade, but rather as an expression of its confidence that if the issue of illegality by reason of corruption is referred to high calibre ICC arbitrators and duly determined by them, it is entirely inappropriate in the context of the New York Convention that the enforcement court should be invited to retry that very issue in the context of a public policy submission.¹¹⁹

The tribute paid by the English judges to arbitration is the best possible demonstration that there is no contradiction between arbitration autonomy and the need to ensure good morals in international trade.

¹¹⁹ *Supra* n. 14.

Swire Properties Revisited: Appeal on a Question of Law Arising out of an Arbitration Award in Hong Kong

by GU WEIXIA*

I. INTRODUCTION

THE PURPOSE of this article is twofold: (a) to consider and review whether the guidelines in *The Nema*¹ and *The Antaios*² ('*Nema-Antaios* guidelines') on how the courts should approach the exercise of the discretion by which leave to appeal from a domestic arbitral award on a question of law is granted or refused, applied by the Hong Kong Court of Appeal in the *Technic Construction* case³ and the *PT Dover* case,⁴ have been changed by the recent *Swire Properties* decision⁵ of the Hong Kong Court of Final Appeal (CFA); and (b) to consider and review the implications of the *Swire Properties* decision and the way forward to clarify the law relating to leave to appeal from a domestic arbitral award on a question of law after the *Swire Properties* decision.

II. BACKGROUND

(a) Domestic Arbitration

The Hong Kong court's jurisdiction to deal with appeal from a domestic arbitral award on a question of law is set out in s. 23 of the Arbitration Ordinance.⁶ Subject to any exclusion agreement,⁷ the Court of First Instance of the High

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¹ *Pioneer Shipping Ltd v. BTP Tioxide Ltd (The Nema)* [1982] AC 724.

² *Antaios Compania Naviera SA v. Salen Rederieria AB (The Antaios)* [1985] AC 191.

³ *Attorney General v. Technic Construction Co. Ltd* [1986] HKLR 541.

⁴ *Re PT Dover Chemical Industry Co. and Lee Chang Yung Chemical Industry Corp.* [1990] 2 HKLR 257.

⁵ *Swire Properties Ltd and others v. Secretary for Justice* [2003] 2 HKLRD 986.

⁶ Hong Kong Arbitration Ordinance (cap.341).

⁷ See Arbitration Ordinance, s. 23B(1)(a).