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Sources of Transnational Public Policy in International Commercial Arbitration

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Abstract

The paper deals with transnational public policy in international commercial arbitration. Firstly, the distinction between national and international public policy and the application of these types of public policy in arbitration are presented. Secondly, a characterization of transnational public policy is given so that the paper can discuss the question – what are the sources of transnational public policy. In the last part, the application of transnational public policy is then inferred from the existence of international conventions, from the *lex mercatoria* and from deciding as *amiable compositeur*.

Keywords

Transnational Public Policy; National Public Policy; International Public Policy; International Commercial Arbitration; International Conventions; Lex Mercatoria; Amiable Compositeur.

1 Introduction

Public policy (in the sense of private international law) is relatively widely applied in international arbitration. Some issues, such as consideration of national and international public policy, seem to be clearly answered. This is not true for the so-called transnational public policy that is associated with international arbitration. Its existence is accepted by the majority, but opposing views are also heard. The aim of this contribution is to analyze the concept of transnational public policy and to give an answer to the following question – from what is transnational public policy inferred, or whether it has any legal basis. For this purpose, the following structure is chosen. Firstly, the distinction between national and international public policy and their application in international arbitration is outlined. The paper then deals with the concept of transnational public policy, its nature and

content. In the final part, the article discusses the sources of transnational public policy – from which its content can be deduced. The paper deals mainly with international commercial arbitration; international investment arbitration, because of its particularities, is considered only where it is deemed appropriate with regard to the aim of this contribution.

2 The Notion of National and International Public Policy

Before I proceed to analyze the concept of transnational public policy, first, I regard as necessary to make a brief comment on the concepts of national and international public policy *(ordre public interne, ordre public international).*[1] National public policy comprises mandatory rules of an individual legal order which cannot be modified by agreement of the parties. It applies only in situations that have a relation with the law of the forum. International public policy is used in relations with a cross-border element,[2] that is the reason why it is referred to as international public policy from the point of view of its purpose, but at the same time it remains a national or domestic institute because it protects the most important values of a particular forum,[3] or more precisely its principles which must be unreservedly insisted on.

There are three mutually interconnected rules regarding the relation between national and international public policy: 1) what is not national public policy cannot be international public policy; 2) what is national public policy is not necessarily international public policy; 3) what is international public policy must necessarily be national public policy.[4] Thus, it can be summarized that international public policy is based on national public policy. When the authorities of a particular state use public policy as a ground for refusal of a foreign judgment or of a foreign arbitral award, they apply international public policy. However, these authorities are able to define "their" public policy in this way and to determine its content and the way of its application.[5]

1 The distinction is made according to the French approach to the concept of public policy.

2 See, e.g., CLAVEL, S. *Droit international privé.* Paris: Dalloz, 2018, pp. 156–157.

3 GUILLAUMÉ, J. Ordre public international – Notion d´ordre public international. *JurisClasseur Droit international*, 2018, fasc. 534-10, p. 4.

4 GUILLAUMÉ, J. *Le droit international privé en tableaux*. Paris: Ellipses, 2017, p. 77.

5 In general, see GUILLAUMÉ, J. Ordre public international – Notion d´ordre public international. *JurisClasseur Droit international*, 2018, fasc. 534-10, pp. 24, 29.

The first question is whether the arbitrator has a possibility or an obligation to apply or to take into account national or international public policy. The answer seems to be resolved and it differs when considering the public policy of the state where the arbitration proceedings take place and the public policy of the state where the arbitral award is to be recognized and enforced.

It is well known that arbitrators do not have *lex fori* and are therefore not obliged to take into consideration the public policy of the state where the arbitration proceedings take place. It would be inappropriate to apply the concept of the public policy of the place of arbitration proceedings, as *Bogdan* points out, particularly when the place of arbitration proceedings is fortuitous and unrelated to the dispute. Moreover, it would be very difficult for arbitrators from foreign countries to understand the public policy of the state where the proceedings take place.[6] Arbitrators are not guardians of public policy, nor are they invested by the state to apply its mandatory rules. Arbitrators should nevertheless be encouraged to do so in order to "survive" international arbitration as an institution.[7]

In international arbitration, the application of national public policy is relevant only if the applicable law governing the dispute is determined by the parties.[8] Arbitrators do not administer justice on behalf of any particular state and are therefore not obliged to enforce national mandatory rules other than those chosen by the parties. In other words, the arbitrator must apply those rules (mandatory rules) of the governing law of the contract *(lex contractus)*, while it is not clear whether the arbitrator must or may apply those rules of the place of performance or enforcement of the award.[9]

However, the arbitrator should render an award that is enforceable in the state where recognition or enforcement of the award is sought, so that the general

6 BOGDAN, M. Private International Law as Component of the Law of the Forum. General Course on Private International Law. In: *Recueil des cours 2010*, Leiden: Brill – Nijhoff Publishers, 2011, Vol. 348, p. 192.

7 MAYER, P. Mandatory rules of law in international arbitration. *Arbitration International,* 1986, Vol. 2, no. 4, pp. 285–286.

8 SEELIG, M. L. The Notion of Transnational Public Policy and Its Impact on Jurisdiction, Arbitrability and Admissibility. *Annals FLB – Belgrade Law Review*, 2009, Vol. 57, no. 3, p. 120.

9 Final Award of ICC of 2016, Case No. 16981, point 197 and 198; RENNER, M. Towards a Hierarchy of Norms in Transnational Law? *Journal of International Arbitration,* 2009, Vol. 26, no. 4, p. 540.

courts have no reason to refuse the recognition of a foreign award. For that reason, the arbitrator should take into account the public policy of that state – international public policy.[10] This is not only the case when the arbitrator decides on the basis of the chosen or designated state law, but also in situations where he arbitrates on the basis of non-state body of law, such as the *lex mercatoria*, or when deciding as *amiable compositeur* or *ex aequo et bono*. Even in these cases, international public policy constitutes limits to arbitrating, as it should be taken into consideration in order for the arbitral award to be recognized and enforced in the state of enforcement.[11]

Contradiction with the public policy of the state where recognition and enforcement of the arbitral award is sought constitutes also a ground for refusal of the arbitral award according to the most important international convention in the field of arbitration – the United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[12] This ground is applied *ex officio* by the state courts. Under the wording of the New York Convention, it is a matter of the public policy of the state of the forum, but most jurisdictions recognize that a mere breach of national law is unlikely to be a ground to refuse recognition or enforcement on the basis of public policy.[13]

The New York Convention refers the public policy of the state where recognition and enforcement of the arbitral award is sought, but it is the international public policy that is intended. This can be supported by reference to both case law and literature. *Bělohlávek* states that in the case of international public policy

10 SEELIG, M. L. The Notion of Transnational Public Policy and Its Impact on Jurisdiction, Arbitrability and Admissibility. *Annals FLB – Belgrade Law Review*, 2009, Vol. 57, no. 3, p. 120; KOSSUTH, L. Transnational (or Truly International) Public Policy and International Arbitration. In: SANDERS, P. (ed.). *Comparative Arbitration Practice and Public Policy in Arbitration. ICCA Congress Series.* Alphen aan den Rijn: Kluwer Law International, 1987, p. 273.

11 See ROZEHNALOVÁ, N. Právo rozhodné v řízení před mezinárodními rozhodci. In: ROZEHNALOVÁ, N., J. VALDHANS and T. KYSELOVSKÁ. *Právo mezinárodního obchodu včetně problematiky mezinárodního rozhodčího řízení.* Praha: Wolters Kluwer ČR, 2021, p. 484.

12 Art. V para. 2 letter b) New York Convention.

13 Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). *UNCITRAL Secretariat* [online]. 2016, p. 243 [cit. 11. 8. 2021]. Available at: https://newyorkconvention1958.org/pdf/guide/2016_Guide_on_the_NY_Convention.pdf#page=251; SEELIG, M. L. The Notion of Transnational Public Policy and Its Impact on Jurisdiction, Arbitrability and Admissibility. *Annals FLB – Belgrade Law Review*, 2009, Vol. 57, no. 3, p. 120.

it is mainly a matter of taking into consideration the nature of international conventions which bind states to a certain procedure, particularly in the field of recognition or enforcement.[14] *Drličková* also justifies the application of international public policy in the New York Convention by the international nature of the Convention.[15] From the point of view of case law, an ICSID arbitral award (Case No. ARB/00/7) can be mentioned. This case states, with reference to the New York Convention and the UNCITRAL Model Law 1985, that foreign arbitral awards should be subject to a narrow concept of public policy, by which is meant international public policy. However, this is not a "supranational" principle, but a national public policy applied to foreign arbitral awards. The definition of the content and the application remains to each State.[16] With regard to the interpretation of the concept of public policy in the New York Convention, the question arises whether this concept should be interpreted autonomously.

Bonomi summarizes the arguments for and against as follows. The explicit reference to the law of the state of enforcement and the absence of a definition of public policy are reasons against an autonomous interpretation of public policy in the New York Convention, although *Bonomi* partially refutes both of these arguments. The need for a uniform interpretation, the goals of the New York Convention and the practice of the contracting states are reasons for an autonomous interpretation of public policy. If an autonomous interpretation is rejected, reference to the law of the court of enforcement will jeopardise any attempt to a uniform interpretation. *Bonomi* therefore assumes that the New York Convention requires an autonomous concept of public policy. On the other hand, it does not imply a reference to transnational or truly international public policy.[17] *Bonomi* summarizes

14 BĚLOHLÁVEK, A. J. *Evropské a mezinárodní insolvenční řízení. Komentář k Nařízení Evropského parlamentu a Rady (EU) č. 2015/848 o insolvenčním řízení.* Praha: C. H. Beck, 2020, p. 694.

15 DRLIČKOVÁ, K. *Vliv legis arbitrii na uznání a výkon cizího rozhodčího nálezu*. Brno: Masaryk University, 2013, p. 157.

16 Award of the ICSID of 4 October 2006, Case No. ARB/00/7 (World Duty Free Company vs. Republic of Kenya), point 138.

17 BONOMI, A. Chapter 13: The Concept of Public Policy under the 1958 New York Convention: An Autonomous Interpretation? In: FERRARI, F. and F. ROSENFELD (eds.). *Autonomous versus domestic concepts under the New York Convention*. Alphen aan den Rijn: Kluwer Law International, 2021, pp. 319–328.

the various approaches of the general courts to the application of public policy under Art. 5 para. 2 letter b) of the New York Convention[18] and concludes that there is insufficient uniformity to support the claim that this article of the New York Convention is to be interpreted in conformity with the doctrine of transnational public policy. On the other hand, courts may incorporate international or supranational elements into their public policy.[19]

As mentioned, the state or its authorities constitute the content of international public policy. However, the same cannot be said of transnational public policy which has emerged precisely in connection with international arbitration and which is the subject of the analysis in the following chapter.

3 Transnational Public Policy: Notion and Content

The concept of transnational public policy was introduced by *Pierre Lalive*.[20] *Lalive* states, in the introduction to his article, that the existence, content and role of public policy considered as a truly transnational public policy is a question that is unclear, difficult to grasp, and controversial. He adds that a truly international public policy is more appropriately called transnational, although such a designation is used, in his view, only out of convenience.[21]

From the point of view of designation, some authors do not distinguish between transnational and truly international public policy (*ordre public véritablement* or *réellement international* in French), while others do. To the first category belongs, for example, *Fadlallah* who writes about this public policy that we can call it truly international, transnational, the general principles

18 See also TRAKMAN, L. E. Aligning State Sovereignty with Transnational Public Policy. *Tulane Law Review,* 2018, Vol. 93, no. 2, pp. 230–231.

19 BONOMI, A. Chapter 13: The Concept of Public Policy under the 1958 New York Convention: An Autonomous Interpretation? In: FERRARI, F. and F. ROSENFELD (eds.). *Autonomous versus domestic concepts under the New York Convention.* Alphen aan den Rijn: Kluwer Law International, 2021, p. 340.

20 MAYER, P. Chapter 2: Effect of International Public Policy in International Arbitration. In: LEW, J. D. M. and L. A. MISTELIS (eds.). *Pervasive Problems in International Arbitration.* Alphen aan den Rijn: Kluwer Law International, 2006, p. 62. It should be added that prior to this year, French publications commonly worked with the concept of a truly international public policy. For example, BATIFFOL, H. *Droit international privé.* Paris: Libraire générale de droit et de jurisprudence, 1970, p. 353.

21 LALIVE, P. Ordre public transnational (ou réellement international) et arbitrage international. *Revue de l'Arbitrage*, 1986, no. 3, p. 330.

of civilized nations, or whatever we want.[22] The second category includes, for example, *Guillaumé* who states that truly international public policy refers rather to international public policy in the sense of the law of nations – as the International Court of Justice referred to *(ius cogens)*. Transnational public policy is used by arbitrators in international trade in a transnational legal order.[23] Both concepts are similarly distinguished by *Mayer*. Truly international public policy means public policy that belongs to public international law. He gives the example of sanctions in the form of embargoes by the Security Council of the United Nations. He distinguishes it from international public policy applied in private international law.[24]

For the purposes of this paper, I will use the term transnational public policy. It is not about the designation, but mainly about the characterization of this institute. The base is that transnational public policy is separate from the particular legal system created by the state or states.[25] It is a set of legal principles that do not belong to the law of a particular state[26] or that transcend one particular legal system.[27] The arbitrator is not an authority of the state and therefore it is neither easy nor satisfactory for him to rely on the public policy of a particular state. He needs to have his own public policy.[28] It is the arbitrator himself who discovers it without limitation.[29] Indeed, the arbitrator must in no way violate the principles of arbitration proceedings on which there is broad consensus in the international community.

22 FADLALLAH, I. L'ordre public dans les sentences arbitrales. In: *Recueil des cours 1994,* Leiden: Brill – Nijhoff Publishers, 1996, Vol. 249, p. 384.

23 GUILLAUMÉ, J. Ordre public international – Notion d´ordre public international. *JurisClasseur Droit international*, 2018, fasc. 534-10, p. 30.

24 MAYER, P. Chapter 2: Effect of International Public Policy in International Arbitration. In: LEW, J. D. M. and L. A. MISTELIS (eds.). *Pervasive Problems in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2006, p. 61.

25 SEELIG, M. L. The Notion of Transnational Public Policy and Its Impact on Jurisdiction, Arbitrability and Admissibility. *Annals FLB – Belgrade Law Review*, 2009, Vol. 57, no. 3, p. 122.

26 MAYER, P. Chapter 2: Effect of International Public Policy in International Arbitration. In: LEW, J. D. M. and L. A. MISTELIS (eds.). *Pervasive Problems in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2006, p. 62.

27 BRABANDERE, E. de. The (Ir)relevance of Transnational Public Policy in Investment Treaty Arbitration – A Reply to Jean-Michel Marcoux. *Journal of World Investment & Trade,* 2020, Vol. 21, no. 6, p. 849.

28 Ibid.

29 FADLALLAH, I. L'ordre public dans les sentences arbitrales. In: *Recueil des cours 1994,* Leiden: Brill – Nijhoff Publishers, 1996, Vol. 249, p. 384.

That international consensus will most often result from a detailed examination of the legal systems of the various states or from the existence of international treaties.[30] It is an international consensus on universal standards and accepted norms of conduct applied in all fora.[31] Arbitrators often base their decisions on universal standards such as good morals, ethics of international trade or explicitly transnational public policy. However, it is necessary to objectively assess the rule constituting transnational public policy when identifying such a rule through international conventions, comparative law, and arbitral awards.[32] It is needed to ask how broad such a consensus should be. The mere existence of transnational conventions or resolutions condemning a certain practice such as corruption does not necessarily signify a broad consensus that an arbitrator could use as a justification for applying public policy. It is not just the existence, but also the extension and transparency of such a consensus.[33]

Which values or rules constitute the content of transnational public policy is difficult to determine, or even unnecessary in advance, as it depends on the circumstances of the dispute and the values of the arbitrator.[34] In general, the content is filled with vague terms and concepts such as the fundamental rules of natural law, the principles of universal justice, *ius cogens* or the general principles of morality accepted by civilized nations.[35] However, the vagueness of transnational public policy should not be a reason to reject this concept, since even the international public policy of a particular state in classic private international law is a vague concept,[36] both in definition and content.

30 MAYER, P. Chapter 2: Effect of International Public Policy in International Arbitration. In: LEW, J. D. M. and L. A. MISTELIS (eds.). *Pervasive Problems in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2006, p. 63.

31 Award of the ICSID of 4 October 2006, Case No. ARB/00/7 (World Duty Free Company vs. Republic of Kenya), point 139.

32 Ibid., point 141.

33 KREINDLER, R. H. Approaches to the Application of Transnational Public Policy by Arbitrators. *Journal of World Investment & Trade,* 2003, Vol. 4, no. 2, p. 246.

34 BREKOULAKIS, S. Transnational Public Policy in International Arbitration. In: SCHULTZ, T. and F. ORTINO (eds.). *The Oxford Handbook of International Arbitration.* Oxford: Oxford University Press, 2020, p. 126.

35 Ibid.

36 LALIVE, P. Ordre public transnational (ou réellement international) et arbitrage international. *Revue de l'Arbitrage*, 1986, no. 3, p. 364.

More recent literature also points out that transnational public policy has nowadays acquired a more precise meaning in the form of legal rules or legal principles, particularly as case law and positive law (both at the national and international level) cover areas where they were previously abstract legal concepts.[37] According to *Bělohlávek*, transnational public policy represents another category of public policy, under which fall principles on which there is an international consensus, such as universal standards and norms that must be unreservedly observed. He adds that its use is manifested in the application of the *lex mercatoria*.[38]

The aforementioned existence of the *lex mercatoria* and the attempt to create a united normative system is closely related to transnational public policy. Even at a time of doubt if transnational public policy existed, this possible doubt was justified by *Lalive* in the 1980s as follows: if an arbitrator defines and applies international trade usages and other non-state rules, why should it be more difficult to uncover the existence of transnational public policy?[39] International trade usages and non-state norms are considered part of the *lex mercatoria*.[40] As *Fadlallah* points out, arbitrators do not have a forum, but they have a law – a law created by the arbitrators themselves, or by those who conduct international commerce. By this he means the *lex mercatoria*, whose legitimacy is derived from the state's recognition of the *lex mercatoria*.[41]

It is necessary to put the question whether the *lex mercatoria* – which is also called transnational law – represents a normative system from which the nature of transnational public policy can be inferred. If the institute of public policy (in whatever form) is to be applied, there must exist a legal system. National and international public policy protects the principles and

37 BREKOULAKIS, S. Transnational Public Policy in International Arbitration. In: SCHULTZ, T. and F. ORTINO (eds.). *The Oxford Handbook of International Arbitration*. Oxford: Oxford University Press, 2020, p. 134.

38 BĚLOHLÁVEK, A. J. *Rozhodčí řízení, ordre public a trestní právo. Komentář*. Praha: C. H. Beck, 2008, p. 54.

39 LALIVE, P. Ordre public transnational (ou réellement international) et arbitrage international. *Revue de l'Arbitrage*. 1986, no. 3, p. 332.

40 ROZEHNALOVÁ, N. Mezinárodní obchodní transakce. In: ROZEHNALOVÁ, N., J. VALDHANS and T. KYSELOVSKÁ. *Právo mezinárodního obchodu včetně problematiky mezinárodního rozhodčího řízení*. Praha: Wolters Kluwer ČR, 2021, pp. 149–151.

41 FADLALLAH, I. L'ordre public dans les sentences arbitrales. In: *Recueil des cours 1994*. Leiden: Brill – Nijhoff Publishers, 1996, Vol. 249, pp. 382–383.

rules of a particular state legal system which have the character of public policy. Similarly, truly international public policy is a part of international law as a legal system – that part which cannot be violated by an agreement between two states. Hence the question whether there is a legal system distinct from states and from international law that imposes on subjects an obligation to respect principles that have the character of transnational public policy. That is why it is important to determine for the nature of transnational public policy whether or not it is a part of a legal system and whether such a legal system is the *lex mercatoria.*[42] The above will be analyzed in a separate chapter.

Although the existence of a transnational public policy is often discussed, there are those who either partially or completely do not recognize this concept. *De Brabandere* belongs to the former category. He recognizes the relevance of transnational public policy in international commercial arbitration or in investor-state arbitrations (the so-called contract-based arbitrations), but he does not recognize it in arbitrations based on investment treaties (the so-called treaty-based arbitrations).[43]

Pryles falls into the latter category. According to *Pryles* arbitrators must apply internationally accepted procedural norms (among them equality of parties, adjudication the dispute in accordance with the proof, independence and impartiality of the arbitrators), but it would not be desired for them to also apply transnational public policy. It could be used to cancel a contract valid under its governing law or to modify the obligations undertaken by the parties to the contract. If the parties expressly choose the applicable law, the arbitrator has no power to deviate from the chosen law and apply transnational public policy.[44] Others regard the foregoing as the essence

42 MAYER, P. Chapter 2: Effect of International Public Policy in International Arbitration. In: LEW, J. D. M. and L. A. MISTELIS (eds.). *Pervasive Problems in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2006, p. 63.

43 BRABANDERE, E. de. The (Ir)relevance of Transnational Public Policy in Investment Treaty Arbitration – A Reply to Jean-Michel Marcoux. *Journal of World Investment & Trade,* 2020, Vol. 21, no. 6, p. 849. For his reasons for the irrelevance of transnational public policy in the field of investment treaty arbitration, see p. 852 et seq. of that article. Given the particularities of international investment treaty arbitration, I do not deal with the reasons in this paper.

44 PRYLES, M. Reflections on Transnational Public Policy. *Journal of International Arbitration,* 2007, Vol. 24, no. 1, pp. 4 and 7.

of the application of public policy – its application means that arbitrators should disregard the *lex contractus* on a particular matter that would contradict transnational public policy.[45]

Pryles further explains that if a dispute arising from a contract is related to bribery, corruption, or slavery, then in effect all legal systems do not allow such contracts to be enforced. And if they did, the general courts would refuse to recognize and enforce such an arbitral award. As for less clear examples, such as labour or environmental rules, it is likely that arbitrators from different parts of the world will not approach these issues the same way. The argumentation still remains – if these issues are incorporated into the applicable law, the arbitrator will apply them, or there is the possibility to refuse recognition and enforcement on the grounds of contradiction with the public policy of the state. The arbitrators' discretion to take into consideration transnational public policy principles undermines the legal certainty that is essential for international trade. Certainty could be undermined by an arbitrator who changes what follows from the applicable law on the basis of a reference to transnational public policy whose content is vague itself.[46] *Mayer* also ponders whether to use transnational public policy or the mandatory rules of a given state. In some cases, it is suitable to apply the *lex contractus,* especially when the mandatory rule of the state is present in the *lex contractus*. The question is if such a mandatory rule is present in the law of another state that has not been chosen by the parties, such as *loi de police*. Then transnational public policy is appropriate, especially if the protected principle is universally recognized and at the same time there is no doubt that this principle has been violated.[47]

Pryles partly admits the relevance of transnational public policy in cases where the arbitrator is empowered to decide as *amiable compositeur* or *ex aequo et bono*, or where the arbitrator is empowered to choose "rules of law" as distinct

45 BRABANDERE, E. de. The (Ir)relevance of Transnational Public Policy in Investment Treaty Arbitration – A Reply to Jean-Michel Marcoux. *Journal of World Investment & Trade,* 2020, Vol. 21, no. 6, p. 850 and the reference to the literature listed there.

46 PRYLES, M. Reflections on Transnational Public Policy. *Journal of International Arbitration,* 2007, Vol. 24, no. 1, p. 6.

47 MAYER, P. Chapter 2: Effect of International Public Policy in International Arbitration. In: LEW, J. D. M. and L. A. MISTELIS (eds.). *Pervasive Problems in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2006, pp. 67–69.

from "law", or in a contract subject to the *lex mercatoria*. However, even in these cases, the arbitrator should consider equitable ensuring of rights and obligations rather than transnational public policy.[48]

In the foregoing, there can be seen several initial points from which to consider the derivation of the application of transnational public policy, or from what legal system it can be derived. International consensus on the values to be protected by transnational public policy can be inferred from the existence of international conventions. It may also infer from the existence of the *lex mercatoria*. Finally, transnational public policy may be applied in proceedings in which arbitrators are empowered to decide as *amiable compositeur* or *ex aequo et bono*.

4 Transnational Public Policy: Derivation of Its Application

4.1 Derivation From the Existence of International Conventions

International consensus may result from a detailed examination of the legal systems of different states or from the existence of international treaties.[49] A typical example is corruption. In such cases, the application of transnational public policy can be inferred from the existence of international treaties.

The conclusion of a contract with an illicit object, in particular a contract of corruption or bribery, is contrary to transnational public policy. The prohibition of corruption is explicitly stated in a number of international and regional conventions. Most of these conventions concern illegal payments to public officials, so there is no doubt about the existence of transnational public policy. However, not so many international conventions concern the prohibition of private commercial bribery, i.e., with agents or employees of prospective business partners to secure an advantage over other competitors.[50] Just as national laws take different positions on that issue.

48 PRYLES, M. Reflections on Transnational Public Policy. *Journal of International Arbitration,* 2007, Vol. 24, no. 1, pp. 5 and 7.

49 MAYER, P. Chapter 2: Effect of International Public Policy in International Arbitration. In: LEW, J. D. M. and L. A. MISTELIS (eds.). *Pervasive Problems in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2006, p. 63.

50 BREKOULAKIS, S. Transnational Public Policy in International Arbitration. In: SCHULTZ, T. and F. ORTINO (eds.). *The Oxford Handbook of International Arbitration*. Oxford: Oxford University Press, 2020, pp. 134–138.

In particular, where intermediary and lobbying agreements are involved, it is questionable whether there is a transnational public policy prohibiting such agreements. Arbitrators cannot artificially look into political or ethical consensus in order to apply transnational public policy if such a consensus is absent or is present only in certain national laws and judgments.[51]

The derivation of transnational public policy from international conventions was also made by the ICSID in the famous decision *World Duty Free Company vs. Republic of Kenya*. The arbitral tribunal concluded that it could not recognize claims based on contracts of corruption or contracts obtained by corruption. In doing so, the tribunal referred to domestic laws and international conventions relating to corruption, as well as to decisions made by general courts and arbitral tribunals on corruption. Bribery is contrary to the international public policy of most, if not all, states, in other words, contrary to transnational public policy.[52] The arbitral tribunal has reviewed international arbitral awards, national case law and international legal instruments to conclude that there is a transnational public policy in relation to corruption and bribery. The arbitral tribunal thus avoided non-legal considerations such as morality, good morals, or principles of universal justice.[53] *Brekoulakis* appreciates this, since, in his view, the legal concept of public policy, including transnational public policy, comprises only legal norms in the form of legal rules or legal principles, free from morality or good morals.[54]

However, it is not only corruption that could be the reason for the application of transnational public policy, but there are also other areas that can be included in criminal law, namely drug trafficking, trade in weapons of war between private persons, trade in stolen art objects, trade in human organs, terrorism,

51 Ibid., pp. 138–140.

52 Award of the ICSID of 4 October 2006, *World Duty Free Company vs. Republic of Kenya*, Case No. ARB/00/7, point 157.

53 BREKOULAKIS, S. Transnational Public Policy in International Arbitration. In: SCHULTZ, T. and F. ORTINO (eds.). *The Oxford Handbook of International Arbitration*. Oxford: Oxford University Press, 2020, pp. 131–132.

54 Ibid., p. 128.

genocide, slavery, or piracy.[55] There are international conventions on these areas which are common to at least most legal systems. However, they represent a relatively narrow area of substantive international criminal law.[56] Corruption and contracts concluded for criminal purposes could be included into the transnational concept of public policy, namely substantive public policy.[57]

If we proceed from the notion that transnational public policy consists of principles and values on which there is an international consensus, then its application can be derived from the existence of international conventions that are recognized by all or most states. There will be no doubt where international conventions prohibit certain criminal activities. There can be doubt where international conventions regulate private relations with a cross-border element and where the violation of a rule does not have a criminal nature.

The international conventions regulating international air carriage may serve as an example. The Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929, known as the Warsaw Convention, currently has 152 contracting parties[58], and the Convention for the Unification of Certain Rules for International Carriage by Air done at Montreal on 28 May 1999, known as the Montreal Convention, currently has 137 contracting parties[59]. Both

55 LALIVE, P. Ordre public transnational (ou réellement international) et arbitrage international. *Revue de l'Arbitrage*. 1986, no. 3, p. 341; KREINDLER, R. H. Approaches to the Application of Transnational Public Policy by Arbitrators. *Journal of World Investment & Trade,* 2003, Vol. 4, no. 2, p. 246; MAYER, P. Chapter 2: Effect of International Public Policy in International Arbitration. In: LEW, J. D. M. and L. A. MISTELIS (eds.). *Pervasive Problems in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2006, p. 63.

56 KREINDLER, R. H. Approaches to the Application of Transnational Public Policy by Arbitrators. *Journal of World Investment & Trade,* 2003, Vol. 4, no. 2, p. 246.

57 FERIS, J. and S. TORKOMYAN. Impact of Parallel Criminal Proceedings on Procedure and Evidence in International Arbitration: Selected ICC Cases. *ICC Dispute Resolution Bulletin* [online]. 2019, no. 3 [cit. 12. 8. 2021]. Available at: https://library.iccwbo.org/

58 Contracting Parties to the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 and the Protocol Modifying the Said Convention Signed at the Hague on 28 September 1955. *International Civil Aviation Organization* [online]. [cit. 30. 8. 2021]. Available at: https://www.icao.int/secretariat/legal/List%20of%20Parties/WC-HP_EN.pdf

59 Contracting Parties to the Convention for the Unification of Certain Rules for International Carriage by Air Done at Montreal on 28 May 1999. *International Civil Aviation Organization* [online]. [cit. 30. 8. 2021]. Available at: https://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf

Conventions allow for disputes to be settled by arbitration under certain conditions.[60] Both Conventions contain an article which renders null and void and legally ineffective those provisions in the contract between the parties which tend to relieve the carrier of liability or to fix a lower limit than that which is laid down in the Convention.[61] In my view, this article in the Convention, which prescribes the invalidity and ineffectiveness of the provision as a sanction, represents a rule that must be unreservedly insisted on. For that reason, then, this rule can be considered to have the character of public policy. Given that these international conventions are binding on 137 or 152 States, there is an apparent international consensus on the rules laid down in the Conventions. In other words, a majority international consensus is present. In such a case, the arbitrators could refer to transnational public policy if the private contract contains the prohibited provision mentioned above. Provided that the parties submit the contract to the legal regime of the Convention in question, or the arbitrators conclude to apply the Convention in question to the dispute between the parties in the absence of a choice of law by the parties. It should also be noted that it depends on which approach to arbitration prevails in a particular country (jurisdictional vs. contractual doctrine, alternatively mixed type).

Another example is the United Nations Convention on Contracts for the International Sale of Goods ("CISG") which currently has 94 contracting parties.[62] Deriving the application of transnational public policy from the CISG entails several problematic points. Firstly, most of the provisions of the CISG, apart from the final provisions and Art. 12, are non-mandatory in nature[63] and thus cannot have the character of public policy. The principles on which the CISG is based and which are expressly or implicitly mentioned or implied in the CISG, such as the principle of the autonomy of the will of the parties, the principle of good faith, the prohibition of abusive exercise of rights or the prohibition of inconsistent conduct,

60 Art. 32 Warsaw Convention, Art. 34 Montreal Convention.

61 Art. 23 Warsaw Convention, Art. 26 Montreal Convention.

62 Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG). *United Nations* [online]. [cit. 30. 8. 2021]. Available at: https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status

63 TICHÝ, L. *CISG (Úmluva OSN o smlouvách o mezinárodní koupi zboží).* Praha: C. H. Beck, 2017, p. 5.

may then go against public policy.[64] Secondly, the CISG can be considered as part of the *lex mercatoria* (transnational law). This is discussed in more detail in the following subchapter.

Human rights are also considered part of transnational public policy.[65] Arbitrators can condemn conduct that violates international human rights standards. Leaving aside the discussion whether human rights are natural law or whether they are recognized by civilized nations, the fact remains that they are contained in international conventions and declarations.[66] For example, the International Covenant on Civil and Political Rights is binding on about 170 countries. It can be said that there is a clear consensus of states resulting from this convention to respect human rights.

Arbitrators can thus rely on positive law (even if they are not bound by it) when resolving a dispute, particularly on the existence of international conventions from which an international consensus can be inferred, which is the basis of transnational public policy. Another possibility is to derive transnational public policy from the *lex mercatoria*.

4.2 Derivation From the Existence of the *Lex Mercatoria*

It has been indicated above that transnational public policy is often invoked in the context of the *lex mercatoria*. Answering the question of what the nature of transnational public policy is thus depends on answering the question of what is the nature of the *lex mercatoria*, a question at least as difficult. If the *lex mercatoria* represents a normative legal system, then it will constitute a source for the application of transnational public policy. A discussion on the determination of the *lex mercatoria* in this sense would go far beyond the length of this paper, so only some views are briefly presented.

64 Ibid., pp. 64–65.

65 TRAKMAN, L. E. Aligning State Sovereignty with Transnational Public Policy. *Tulane Law Review,* 2018, Vol. 93, no. 2, p. 261; LALIVE, P. Ordre public transnational (ou réellement international) et arbitrage international. *Revue de l'Arbitrage*, 1986, no. 3, p. 359; RENNER, M. Towards a Hierarchy of Norms in Transnational Law? *Journal of International Arbitration,* 2009, Vol. 26, no. 4, p. 542 and the literature listed there.

66 TRAKMAN, L. E. Aligning State Sovereignty with Transnational Public Policy. *Tulane Law Review,* 2018, Vol. 93, no. 2, p. 218; LALIVE, P. Ordre public transnational (ou réellement international) et arbitrage international. *Revue de l'Arbitrage*, 1986, no. 3, p. 359.

Lex mercatoria is a set of non-state rules. It is questionable whether these rules can constitute a legal system. *Mayer* believes that the *lex mercatoria* does not constitute such a legal system, but only a set of non-binding legal rules. A legal system is constituted not only by legal rules, but also by judges and executive authorities, which the *lex mercatoria* lacks.[67] These opinions of the rejection of the *lex mercatoria* as a comprehensive legal system appear in the literature.[68] For *Lalive*, on the other hand, it is irrelevant whether the *lex mercatoria* constitutes a legal system. In practice, neither the parties nor the arbitrators are interested in whether the principles applied in arbitration proceedings constitute a system or not. Nor is it relevant whether it is a complete system, since even national legal systems are not complete.[69] It is sometimes stated that part of transnational public policy is the non-dispositive core of the *lex mercatoria.*[70]

Another approach is to attribute a supranational character to the *lex mercatoria*, where this character is closer to the uniform substantive rules of unifying international conventions.[71] In other words, not to treat the *lex mercatoria* on the dichotomy of state vs. non-state law, but as a supranational law. In this view, the *lex mercatoria* regulates a certain type of contractual obligations without ensuring completeness of regulation. Any gaps in the regulation are filled by internal principles or by otherwise determined internal rules. Then the CISG can be seen as part of the *lex mercatoria.* It is an internationally recognized standard where the arbitrator is entitled to use these norms even if they have not been chosen by the parties. The arbitrator thus determines the most appropriate substantive rule – a rule that is widely known in international trade, both to the parties to the contract of sale and to the arbitrators themselves.[72] In the same way, it could be concluded that

67 MAYER, P. Chapter 2: Effect of International Public Policy in International Arbitration. In: LEW, J. D. M. and L. A. MISTELIS (eds.). *Pervasive Problems in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2006, pp. 63–64.

68 See GRODL, L. *Transnacionalismus v lex mercatoria a jeho projevy v soudobé rozhodčí praxi.* Rigorous thesis. Brno: Masaryk University, 2021, p. 17 and the literature listed there.

69 LALIVE, P. Ordre public transnational (ou réellement international) et arbitrage international. *Revue de l'Arbitrage*. 1986, no. 3, p. 365.

70 RENNER, M. Towards a Hierarchy of Norms in Transnational Law? *Journal of International Arbitration,* 2009, Vol. 26, no. 4, p. 541.

71 GRODL, L. *Transnacionalismus v lex mercatoria a jeho projevy v soudobé rozhodčí praxi.* Rigorous thesis. Brno: Masaryk University, 2021, p. 96.

72 Ibid., pp. 44–46, 96, 100.

part of the supranational character of the *lex mercatoria* are, for example, the aforementioned international conventions regulating air carriage. If the arbitrator is dealing with a dispute concerning the international carriage of goods and the parties have not chosen the applicable law (or their contract is not subject to the regime of the Montreal/Warsaw Convention), the arbitrators may conclude that the Warsaw or Montreal Convention would be the most appropriate way to resolve the dispute concerning the application of the uniform substantive rules.

If this supranational character is attributed to the *lex mecatoria*, the result of the application of unifying international conventions is the same as if we inferred an international consensus from these international conventions. In this sense, the derivation of the application of transnational public policy is intertwined. In addition to the aforementioned uniform laws (such as the CISG) or public international law (here, for example, several of the provisions of the 1969 Vienna Convention on Treaties reflect the common core of legal systems), the *lex mercatoria* includes the general principles of law, the rules of international organisations, customs and usages, standard form contracts, and reporting of arbitral awards.[73] In this regard, it is worth noting the general principles of law on which there is a consensus in most jurisdictions, leaving aside the minor differences between each principle.[74] Such fundamental principles include the interpretation of a contract in good faith[75] or the autonomy of the will of the parties.[76] Regardless whether or not the *lex mercatoria* constitutes a normative legal system, general principles of law permeate the entire law and need to be taken into account, including in arbitration proceedings.

73 LANDO, O. The Lex Mercatoria in International Commercial Arbitration. *The International and Comparative Law Quarterly*, 1985, Vol. 34, no. 4, pp. 749–751; ROZEHNALOVÁ, N. Mezinárodní obchodní transakce. In: ROZEHNALOVÁ, N., J. VALDHANS and T. KYSELOVSKÁ. *Právo mezinárodního obchodu včetně problematiky mezinárodního rozhodčího řízení*. Praha: Wolters Kluwer ČR, 2021, pp. 149–151.

74 TERAMURA, N. *Ex Aequo et Bono as a Response to the 'Over-Judicialisation' of International Commercial Arbitration*. 2018, doctoral thesis, UNSW Australia, Faculty of Law, p. 107.

75 Ibid.

76 ROZEHNALOVÁ, N. Mezinárodní obchodní transakce. In: ROZEHNALOVÁ, N., J. VALDHANS and T. KYSELOVSKÁ. *Právo mezinárodního obchodu včetně problematiky mezinárodního rozhodčího řízení*. Praha: Wolters Kluwer ČR, 2021, p. 150; LALIVE, P. Ordre public transnational (ou réellement international) et arbitrage international. *Revue de l'Arbitrage*. 1986, no. 3, pp. 350–351.

4.3 "Derivation" From Deciding as *Amiable Compositeur* or *Ex Aequo Et Bono*

Deciding as *amiable compositeur*, *ex aequo et bono*, or according to equity principles are ways in which arbitrators may resolve a dispute. These ways are sometimes seen as synonymous, at other times they are distinguished. They have in common seeking of equity or fairness. For the purposes of this paper, I perceive these approaches to arbitrating as synonymous.

It is possible to start from the definition of *Loquin* who characterized *amiable compositeur* as a clause by which the parties waive their right to the protection or the benefit of legal rules and authorize the arbitrator to decide the dispute without necessarily applying legal rules.[77] Although arbitrators may decide on the basis of equity, public policy constitutes limits to their decision-making. Arbitrators must apply rules of public policy, both substantive and procedural. In particular, it is the procedural rules that are generally admitted by all national laws, such as equality of treatment or the right to be heard. The aim of respecting these rules is to prevent arbitrators from making arbitrary decisions.[78] I will add the position of *Teramura* for *ex aequo et bono* decision-making that these public policy rules overlap with mandatory rules of law – norms that cannot be contractually excluded by the parties, even if the arbitrator is empowered to decide *ex aequo et bono*. These are mandatory rules of the *lex arbitri* and the law of the obvious place of enforcement of arbitral awards. The purpose is to render an enforceable arbitral award.[79]

Then, there is a situation where the arbitrator does not decide according to the law and the legal rules, but according to his (or her) feelings about what should be a fair and just solution. Since the arbitrator does not have to decide according to the chosen or determined applicable law, he also lacks a source from which to infer the application of transnational public policy. However, he has transnational public policy at his disposal, and nothing prevents him to invoke it if the arbitrator, in his discretion, feels that he should

77 KIFFER, L. Nature and Content of Amiable Composition. *International Business Law Journal,* 2008, no. 5, p. 626.

78 Ibid., p. 633.

79 TERAMURA, N. *Ex Aequo et Bono as a Response to the 'Over-Judicialisation' of International Commercial Arbitration*. Doctoral thesis. UNSW Australia, Faculty of Law, 2018, pp. 163–165.

take it into consideration. In general, it should be noted that in order for an arbitrator to decide a dispute as *amiable compositeur*, he must be authorized to do so by the parties.[80] The parties to the dispute – professionals of international trade – must be aware that in such a case they have given the arbitrator also the authority to apply transnational public policy.

At this stage, it is useful to recognize the concept of transnational public policy, not only its existence as such and its existence based on legal rules, but also its existence based on non-legal principles such as good morals or morality.

4.4 Hierarchy of Norms

Before concluding, it is necessary to make a brief comment on the hierarchy of norms. If the arbitrator decides as *amiable compositeur*, then it is not necessary to deal with the hierarchy of norms. The arbitrator may apply those rules that, in his discretion, lead to an equitable and fair solution, including transnational public policy. It is sometimes stated that in making decisions as *amiable compositeur* arbitrators can rely on transnational public policy as a positive source of mandatory rules.[81]

In the case of derivation from the *lex mercatoria* or the existence of international conventions (which may have a transnational character), such a hierarchy of norms needs to be determined. This was the subject of *Renner's* article. He examined the hierarchy of norms in the practice of international arbitration at the ICC, ICSID, and the Uniform Dispute Resolution Policy of the Internet Corporation for Assigned Names and Numbers with reference to the arbitral awards. Regarding the ICC, he concludes that *"transnational public policy stands at the top of a hierarchical order of norms, as it is supposed to trump the parties' choice of law and (internationally) mandatory norms of any domestic legal order alike"*.[82] The hierarchy of norms in international commercial arbitration at the ICC is therefore as follows: transnational public policy, then internationally mandatory domestic rules

80 For example, Art. 21 para. 3 ICC Arbitration Rules or Art. 22 para. 4 LCIA Arbitration Rules.

81 RENNER, M. Towards a Hierarchy of Norms in Transnational Law? *Journal of International Arbitration,* 2009, Vol. 26, no. 4, p. 542.

82 Ibid., p. 552.

and finally other national or non-national rules that are at the parties' free disposal.[83]

The primacy of transnational public policy is also justified in the literature as follows. Rules or norms that can be considered part of transnational public policy are accepted by the international community. Arbitrators have a duty to the international community so they should refuse to apply any mandatory rules that are contradictory to transnational public policy.[84] Of course, the basis remains the arbitration clause and the parties' choice of law. Even in these situations, the arbitrator may apply transnational public policy if it has been violated. If there is a lack of chosen law, then the arbitrator also considers transnational public policy when determining the law. Transnational public policy may be seen as a higher good, regardless of the law chosen or otherwise determined.[85]

5 Conclusion

Transnational public policy is an institute that is closely connected to arbitration. It is an institute that arbitrators can invoke in the course of arbitration proceedings. However, it is not an institute that would be applied after arbitration proceedings by the general courts, i.e., in the stage of recognition and enforcement of a foreign arbitral award. The public policy invoked by the general courts as a ground for refusing recognition and enforcement of an arbitral award is international public policy and protects the values and principles of the state of enforcement. Arbitrators do not have a forum. Unlike general courts, they do not protect the interests of a particular state but protect the interests, principles, and values of the international community. By not having a forum, arbitrators can invoke public policy that transcends the borders of one or more states. Therefore, arbitrators should be given the possibility to apply "their" public policy, which is called transnational.

83 Ibid., p. 543.

84 TERAMURA, N. *Ex Aequo et Bono as a Response to the 'Over-Judicialisation' of International Commercial Arbitration.* Doctoral thesis. UNSW Australia, Faculty of Law, 2018, p. 156.

85 FAZILATFAR, H. Transnational Public Policy: Does It Function from Arbitrability to Enforcement. *City University of Hong Kong Law Review,* 2012, Vol. 3, no. 2, pp. 303 and 306.

Although there are opposing views, the existence of transnational public policy seems to be admitted by the majority. Arbitrators are entitled to decide a dispute on the basis of an authorization of the parties, but this authorization has its limits given by the transnational public policy. The basic characteristic is the same as the characteristic of public policy in classical private international law – protection of the principles and values that must be unreservedly insisted on. In international arbitration, arbitrators protect principles on which there is an international consensus, regardless of the jurisdictional or contractual approach to arbitration in a given country. However, the question remains, on which this paper has sought to answer – what is the source of transnational public policy.

Firstly, international consensus can be inferred from positive law – from the existence of international conventions. If international conventions are accepted or ratified by a large number of states, it can then be concluded that there is an international consensus on the legal norms contained therein. And some of these legal norms may have the character of provisions that must be unreservedly insisted on (prohibition of corruption, human rights, but also some provisions of conventions that regulate exclusively private relations with a cross-border element).

Secondly, transnational public policy may result from the existence of the *lex mercatoria* – transnational law whose existence is generally accepted. It is also through the *lex mercatoria* that we can reach the application of international conventions if we attribute to the *lex mercatoria* a supranational character. Further, the general principles of law, on which there is an international consensus, are part of the *lex mercatoria* (for example, autonomy of the will of the parties, good faith, etc.). If we are seeking international consensus in the components of the *lex mercatoria*, there is no need to follow up whether or not the *lex mercatoria* constitutes a normative legal system. However, if the *lex mercatoria* is considered to be a normative legal system, then we can infer the existence of transnational public policy from that system without seeking or examining the existence of an international consensus.

Thirdly, a separate category is deciding as *amiable compositeur* or *ex aequo et bono*. These types of arbitrating do not need to be supported by rules of law.

Thus, there is no source from which to infer transnational public policy. However, it is clear from the nature of the deciding as *amiable compositeur* that the arbitrator may consider it fair to apply transnational public policy to the dispute in question. If the parties have given the arbitrator the authority to rule as *amiable compositeur*, they must be aware that the arbitrator may apply transnational public policy.

In the third mentioned case, it is not necessary to deal with the hierarchy of norms. In the first two cases, we can accept the position that if some norms have been accepted by the international community, then the provision must not be against those transnational norms. If they are, transnational public policy applies and takes precedence over other norms.

In conclusion, the question of the sources of transnational public policy is not finally answered nor comprehensively grasped.

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