Malebolge

'From Paris with Love': Transnational Public Policy and the Romantic Approach to International Arbitration

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Abstract

This article discusses the concept of imperative norms (either public policy or mandatory rules) in the context of international commercial arbitration. It demonstrates that, as of today, arbitrators are perfectly suited to apply domestic imperative norms and that they have to carry out the difficult task of applying – or at least taking into account – all the imperative norms that may affect the enforceability of the award. The arbitrators' task is, in this regard, to carry out a balancing process between the need to respect party autonomy and the duty to issue an award which is worthy of enforcement. In this regard, the author criticizes and demonstrates the lack of conceptual autonomy of the concept of transnational public policy, a non-identified set of rules grounded in the practice of international commerce which is allegedly binding for international arbitrators.

I. Introduction

This article considers a phenomenon which has attracted increasing attention from scholars and has also found some followers among domestic judges: the existence of a transnational form of imperative norms, ie a set of mandatory principles and rules developed in the practice of transnational commerce and detached from any country of origin. These principles and rules allegedly emerge within the context of a spontaneous legal system shaped by trade practice, which – in deference to the wording used to define the rules developed by merchants in transnational commerce in the Middle Age – is today referred to as 'new *lex mercatoria*'.[1] It is not by chance that transnational public policy and

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[1] In general terms, on the concept of lex mercatoria, see G. Cordero Moss, *International Commercial Arbitration. Party Autonomy and Mandatory Rules* (Oslo: Tano Aschehoug, 1999), 261; J.H. Moitry, 'Arbitrage international et droit de la concurrence: vers un ordre public de la lex mercatoria?' *Revue de l'arbitrage*, 3 (1989); J. Paulsson, 'La lex mercatoria dans l'arbitrage C.C.I.' *Revue de l'arbitrage*, 55 (1990); E. Gaillard, 'Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules' 10 *ICSID Review - Foreign Investment Law Journal*, 208 (1995); F. Marrella, *La nuova lex mercatoria* (Padova: CEDAM, 2000), passim; O. Lando, 'Choice of lex mercatoria', in J.P. Ancel et al eds, *Vers de nouveaux équilibres entre ordres juridiques. Melanges en l'honneur de Hélène Gaudamet-Tallon* (Paris: Dalloz, 2008), 747. According to the arbitral decision *Petroleum Development (Trucial Coast) Ltd* v *The Sheikh of Abu Dhabi* (1951) lex mercatoria is the ensemble of 'principles rooted in the good sense and common practice of the

mandatory rules have been, indeed, named as the '*jus cogens de la lex mercatoria*'.[2]

According to some scholars, mainly originating and/or teaching in French speaking countries,[3] this conception of public policy and mandatory rules has a precise scope of application: international commercial relationships and arbitration. Indeed, the fact that the latter form of dispute resolution is grounded in a manifestation of party autonomy would, at least in theory, authorize arbitrators to take into account, in their decisions, transnational imperative norms alone, considering that they supposedly operate within a delocalised legal context and they are not bound by any domestic legal order. Hence, within the context of international commercial arbitration, transnational public policy and mandatory rules should (at least according to some scholars) completely

generality of civilized nations'. Generally speaking, examples of sources of lex mercatoria are found in the UNIDROIT principles on international commercial contracts and in the INCOTERMS developed by the International Chamber of Commerce. These are, however, sources of soft law whose application to a contractual relationship is based on a manifestation of party autonomy. See, in this regard, M.J. Bonell, 'Soft law and party autonomy: the case of the UNIDROIT principles' 51 *Loyola Law Review*, 229 (2005). As far as this author is concerned, there are very few cases of domestic courts applying lex mercatoria. Among these cases, it is worth mentioning the decision of Corte di Cassazione 8 February 1982, *Ditta Fratelli Damiano s.n.c.* v *Ditta August Topfer & Co. GmbH*. The concept of lex mercatoria is related to the tendency which is discussed of contrat sans loi, ie a form of agreement only based on party autonomy and completely detached from domestic legal systems. See, inter alia, S.M. Carbone, 'Il 'contratto senza legge' e la Convenzione di Roma del 1980' *Rivista di diritto internazionale privato e processuale*, 279 (1983); N. Boschiero, Il coordinamento delle norme in materia di vendita internazionale (Padova: CEDAM, 1990), 129; and F. Sbordone, *Contratti internazionali e lex mercatoria* (Napoli: Edizioni Scientifiche Italiane, 2008), 11, 18, where the author talks about party autonomy as a possible source of an a-national system of rules applicable to transnational relationships (a possibility that the same author seems to deny at 41-42). The idea of law beyond the state, however, does not convince and is significantly and explicatively rebutted, ex multis, by H.L.A. Hart, *Contributi all'analisi del diritto* (Milano: Giuffrè, 1964) 126-127.

[2] P. Mayer, 'L'application par l'arbitre des conventions internationales de droit prive', in B. Ancel et al eds, *L'internationalisation du droit. Mélanges en l'honneur de Yvon Loussouarn* (Paris: LGDJ, 1994), 285. See also J.H. Moitry, n 1 above. On the grounding of transnational public policy in lex mercatoria see also S.L. Brekoulakis, 'Transnational Public Policy in International Arbitration', in T. Schultz and F. Ortino eds, *The Oxford Handbook of International Arbitration* (Oxford: Oxford University Press, 2020), 122.

[3] See, eg, B. Goldman, 'The Applicable Law: General Principles of Law', in J.D.M. Lew ed, *Contemporary Problems in International Commercial Arbitration* (Dordrecht: Springer Science+Business Media, 1987), 113; O. Lando, 'The law applicable to the merits of the dispute', in J.D.M. Lew ed, ibid, 101 and 104; N. Boschiero, n 1 above, 124. For some criticisms see C. Seraglini, *Lois de police et justice arbitrale internationale* (Paris: Dalloz, 2001), 296, claiming that lex mercatoria is not a complete system of law; F. Sbordone, n 1 above, 102; and G. Zarra, 'Arbitrato commerciale internazionale, principio di autonomia delle parti e legge applicabile' *Il Foro Napoletano*, 419 (2020), contesting the very existence of lex mercatoria; G. Cordero Moss, n 1 above, 270. Also observes the inadequacy of lex mercatoria as a system of law on which arbitral decisions may be based, in particular in light of its vagueness. In general terms see H. Grigera Naón, *Choice-of-law Problems in International Commercial Arbitration* (Tubingen: J.C.B. Mohr - Paul Siebeck, 1992), 26-39.

replace domestic imperative norms.[4] However, according to others, the two bodies of law must be jointly applied but in case of conflicts between domestic public policy and truly international public policy, the latter shall prevail.[5]

International commercial relationships might, therefore, escape from the national conception of imperative norms and would (mainly) see the application of transnational principles and rules. This is, in the opinion of some scholars, the direct consequence of states' inability to adequately regulate transnational commercial relationships.[6] Furthermore, the reference to a hard core of spontaneous commonly accepted principles and rules might represent the only way of avoiding the cultural clashes which are otherwise commonplace in a world – the one of transnational commerce – where parties with very different cultural and legal backgrounds meet for their businesses.[7]

This approach is, however, misleading (even if fascinating) and, as provocatively asserted in the title of this article, might be considered as a form of 'romantic' view of international arbitration, not by chance originating in France, imagining arbitration as a purely transnational (and autonomous) form of justice detached from any domestic system of law. As demonstrated in the present paper, such an approach might have had greater purchase in a context such as that of the Sixties, when it was argued that arbitrators were incapable of taking into account and/or applying domestic public policies. However, if we recognize – as is today commonly accepted – that arbitrators are well-suited to apply domestic public policy and mandatory rules, it is not necessary to make reference to other imperatives applicable only in the context of international arbitration.

In this article, after having clarified the suitability of arbitrators to apply domestic imperative norms and demonstrated how imperativeness operates in the context of international commercial arbitration, it will be argued that arbitrators are only bound by the relevant domestic imperative provisions. As we will see, on the one hand, they will have to assume a case-based approach and take into account *all* the imperative provisions that they consider relevant for the efficacy and enforceability of their decisions, and, on the other hand, their analysis is not to be limited to substantive norms but shall be extended also to procedural principles and rules. In this regard, the article shows that arbitrators carry out a balancing process between the principle of party autonomy

[4] E. Loquin, 'Les manifestations de l'illicite', in P. Kahn and C. Kessedjian eds, *L'illicite dans le commerce international* (Paris: Litec, 1996), 278, affirming that 'l'ordre public véritablement international est l'assurance d'une execution universelle de la sentence'.

[5] C. Seraglini, n 3 above, 296.

[6] J.B. Racine, *L'arbitrage commercial international et l'ordre public* (Paris: LGDJ, 1999), 3.

[7] J.B. Racine, n 6 above, 359. On the cultural clashes in international arbitration see O. Sandrock, 'How Much Freeedom Should an International Arbitrator Enjoy? The Desire for Freedom from Law v The Promotion of International Arbitration' 3 *The American Review of International Arbitration*, 55 (1992).

– possibly requesting to disregard some domestic imperative norms – and the need to issue an enforceable award (to be considered both in light of the sources of the arbitrators' power and of the *ex post* judicial controls to which the award may be submitted). Against this background, the article argues that transnational public policy (originated in *lex mercatoria*) is actually a category deprived of any autonomous content. This result is apparent when one recognizes that all the provisions composing this alleged set of norms may be grounded in other legal systems (either public international law or domestic law).[8] Similarly, should we place transnational public policy within the usages of transnational commerce, the reference to a set of principles and rules, whose boundaries and content are not defined in any source of positive law, may be misleading and lead to confusion. Finally, the article highlights the particularities of the application of imperative norms by domestic courts at the post-award stage – viz challenge proceedings before courts of the country that is the seat of the arbitration as well as proceedings for the recognition and enforcement of the arbitral award – where domestic judges usually have to balance the application of imperative norms, on the one hand, with the diffused policy favouring the recourse to arbitration, on the other.

II. The Suitability of Arbitrators to Take into Account Public Policy and Mandatory Rules in Their Decisions: The Necessity to Respect Party Autonomy Versus the Duty to Issue an Enforceable Award

At first glance, the relationship between international arbitration and domestic imperative norms might seem a complicated one.[9] Arbitration is based on party autonomy and, at least in theory, arbitration proceedings do not depend on any legal system. Hence, they would seem to escape the application of domestic imperative norms, which are by nature the strongest manifestation of the legal identity of a national community.[10] This observation has certainly a

[8] For a contrary approach see J.B. Racine, n 6 above, 355, arguing that the application of truly international public policy is useful because it allows an escape from the unforeseeable effects of the conflict of laws mechanism and, moreover, due to transnational recognition of the values enshrined by transnational public policy, ensures a wider possibility of recognition and enforcement of the award.

[9] On this topic see P. Mayer, 'Mandatory Rules of Law in International Arbitration' 2 *Arbitration International*, 274 (1986); I. Fadlallah, 'L'ordre public dans le sentences arbitrales' *Collected Courses of the Hague Academy of International Law*, 377 (The Hague: Brill, 1994), passim; J.B. Racine, n 6 above, 19; J. Kleinheisterkamp, 'Overriding Mandatory Laws in International Arbitration' 67 *The International and Comparative Law Quarterly*, 903 (2018). For a general analysis see S.L. Brekoulakis, n 2 above, passim.

[10] G. Bermann, 'The Origin and Operation of Mandatory Rules', in G. Bermann and L.A. Mistelis eds, *Mandatory Rules in International Arbitration* (Huntington (NY): Juris Publishing, 2011), 3; H. Smit, 'Mandatory Law in Arbitration', in G. Bermann and L.A. Mistelis eds, ibid, 207; G.

basis in fact: when two (or more) parties choose to make recourse to arbitration they do so, *inter alia*, in order to avoid the particularities and shortcomings of domestic legal systems.

However, the above assertion can be rebutted on the basis of two considerations. First, arbitration is not detached from any legal system. To the contrary, all commercial arbitrations have a 'seat', which is the legal system supporting the proceedings throughout their duration and whose courts will have jurisdiction over possible challenges to the award in cases where one of the parties is not satisfied with the regularity of the arbitral decision.[11] Secondly, and relatedly, while national legal orders – differently from the past[12] – tend to look with favor on the use of international arbitration as a way to solve disputes arising from international transactions[13] and thus allow the arbitrability of almost all subject matters,[14] they still want to ensure that in *all* arbitration proceedings

Zarra, 'Arbitrato internazionale e ordine pubblico' *Il giusto processo civile*, 539 (2018). A significant precedent towards the overcoming of this approach is the US Supreme Court Decision *Scherk* v *Alberto Culver* 417 US 506 (1974), in which it was affirmed that securities transactions were not exclusive jurisdiction of domestic courts. This decision, which significantly influenced other jurisdictions, overcome the idea of inarbitrability of matters of public relevance affirmed in the US Supreme Court decision *Wilko* v *Swan* 346 US 427 (1953).

[11] On the essential role of the seat of arbitration within all arbitration proceedings see F. Mann, 'The UNCITRAL Model Law. Lex facit Arbitrum' 2 *Arbitration international*, 241 (1986). For a significant number of authorities, refer to G. Zarra, 'La lex arbitri e la lex loci arbitri: tra verità normative e incertezze dottrinali' *Diritto del commercio internazionale*, 533 (2019). For the sake of the present work, it is to be highlighted that the seat does not necessarily correspond to the venue where arbitral proceedings take place.

[12] Arbitration was historically considered with hesitation even in the UK. See Lord Thomas of Cwmgiedd, 'Developing Commercial Law Through the Courts: Rebalancing the Relationship Between the Courts and Arbitration, Text of the Bailii Lecture 2016', available at https://tinyurl.com/tr6u5a77, 2 (2016) (last visited 30 June 2021); for a partially different opinion, see S.L. Brekoulakis, 'The Historical Treatment of Arbitration Under English Law and the Development of the Policy Favouring Arbitration' 39 *Oxford Journal of Legal Studies*, 124 (2019). On the increasing role of arbitration as an effective tool of dispute settlement see W.W. Park, 'Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration' 12 *Brooklin Journal of International Law*, 629 (1986).

[13] J.B. Racine, n 6 above, 4; F. Salerno, 'Il coordinamento tra arbitrato e giustizia civile nel regolamento (UE) 1215/2012 (Bruxelles I-bis)' *Rivista di diritto internazionale*, 1146 (2013); P. Perlingieri, 'Sulle cause della scarsa diffusione dell'arbitrato in Italia' *Il giusto processo civile*, 657 (2014); T. Rossi, *Arbitrabilità e controllo di confomità all'ordine pubblico* (Napoli: Edizioni Scientifiche Italiane, 2018), 27. In this regard, A. Leandro, 'Qualche riflessione sul rinvio nell'arbitrato commerciale internazionale', in G. Contaldi et al eds, *Liber Amicorum Angelo Davì* (Napoli: Editoriale scientifica, 2019), 1881, where it is agreeably affirmed that we can today look as arbitration and domestic jurisdiction as perfectly equivalent means of conflict resolution.

[14] S.L. Brekoulakis, 'On Arbitrability: Persisting Misconceptions and New Areas of Concern', in L.A. Mistelis and S.L. Brekoulakis eds, *Arbitrability: International and Comparative Perspectives* (London – The Hague: Kluwer Law International, 2009) 31, who points out that arbitrability is no longer related to public policy or to the inadequacy of arbitrators as decision makers but, on the contrary, it depends on the inherent characteristics of arbitration as an instrument based on consent: '(i)narbitrability should be examined in light of the inherent limitations of arbitration as a dispute resolution mechanism of contractual origins. Based on consent, arbitration has intrinsic difficulties to affect a circle of persons other than the contractual parties to an arbitration agreement.

related to their own legal system the imperative norms expressing the fundamental values of the forum are nevertheless respected.[15] This finds further confirmation, on the one hand, in the text of the relevant treaties (such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention))[16] or domestic legislation concerning challenge and enforcement of arbitral awards (eg the English Arbitration Act and the Italian Code of Civil Procedure)[17] and, on the other hand, in the circumstance that domestic courts have regularly annulled or refused to enforce awards running against mandatory rules or public policy of the forum.[18] In other words, while (most) States have significantly enlarged the scope of arbitrable matters, including also particularly sensitive areas,[19] they still want to have a so-called 'second look' at the award in order to ensure its compliance with the imperative norms of the forum.[20] Such a second look can both be exercised when domestic courts at the seat evaluate a challenge to the award or

This conceptual limitation of arbitration has repercussions on the scope of arbitrability' (31-32). For example, Brekoulakis argues, even if nothing precludes this possibility in theory, it is very difficult to arbitrate bankruptcy proceedings because this would require a manifestation of consent by the entire plethora of involved parties and this is very unlikely to occur. For a similar approach favoring arbitrability see P. Perlingieri, 'La sfera di operatività della giustizia arbitrale' *Rassegna di diritto civile*, 583 (2015); G. Zarra, n 10 above, 550-555. For scholarly essays still connecting arbitrability and public policy see K.H. Bockstiegel, 'Public Policy and Arbitrability', in P. Sanders ed, *Comparative Arbitration Practice and Public Policy in Arbitration*, (The Hague: ICCA Congress Series, Volume 3, Kluwer Law International, 1986), 177; M. Hunter, G. Conde e Silva, 'Transnational Public Policy and Its Application in Investment Arbitrations' 4 *Journal of World Investment*, 367 (2003).

[15] As a confirmation of this idea, see, explicatively, J.D.M. Lew et al, Comparative International Commercial Arbitration (London – The Hague: Wolters Kluwer Law and Business, 2003), 83. Indeed, generally speaking, in international commercial arbitration the relevant imperative norms are those of international public policy (opposite to national public policy) and overriding mandatory rules. See A. Atteritano, L'enforcement delle sentenze arbitrali del commercio internazionale (Milano: Giuffrè, 2009), 335.

[16] See Art V, para 2, stating that '[r]ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country'.

[17] See, eg, s. 67 of the 1996 English Arbitration Act or Art 829 of the Italian Code of Civil Procedure. A separated analysis is deserved by the French law and case law, for which see the next Section.

[18] See the last Section of this article.

[19] See the significant example of succession law (in Italian law) on which see G. Perlingieri, 'La disposizione testamentaria di arbitrato. Riflessioni in tema di tipicità e atipicità del testamento' *Rassegna di diritto civile*, *L'autonomia negoziale nella giustizia arbitrale* (Napoli: Edizioni Scientifiche Italiane, 2016), 411.

[20] See Mitsubishi Motors Corp. v Soler Chrysler-Pymouth Inc., 473 US 614 (1985); Case C-126/97 Eco Swiss China Time Ltd. v Benetton International NV, Judgment of 1 June 1999. See H. Grigera Naón, n 3 above, 221-270; L.G. Radicati di Brozolo, 'Arbitrage commercial international et lois de police: Considerations sur le conflits de jurisdictions dans le commerce international' *Collected Courses of the Hague Academy of International Law*, 265 (The Hague: Brill, 2005), 471; and, also for other references, G. Zarra, n 10 above, 553.

when a domestic court is called upon to enforce an arbitral award in accordance with the New York Convention, whose Art V(2)(b) allows non-enforcement for contrariness to the public policy of the forum.[21]

In light of the above, it can be argued that arbitrators' task in relation to imperative norms is to undertake a process of balancing. On the one hand, they have to ensure, as far as possible, respect for party autonomy (the cornerstone of international arbitration)[22] and this might require them to depart from the application of certain imperative norms, for example in cases where a contractual provision runs against the public policy of the country of the seat. On the other hand, however, they will have to issue an award that is compliant with the requirements of the relevant legal systems as expressed by its imperative norms. This is mainly due to both the necessity to respect the provisions of the legal system which is the source of arbitral power – the law of the seat – and the legal provisions of all the systems which will have 'a second look' on the final award or where the decision will have to produce its effects – and here again the law of the seat, as well as the law of the likely places of enforcement and all the legal systems which are somehow related to the case.

Having made these clarifications, it is to be noted that, usually, judicial decisions applying the New York Convention, supported by scholars, tend to simply discuss the effects of the contrariness of arbitral awards to public policy, but it is commonly accepted that the reference applies to both public policy and overriding mandatory rules.[23] As a confirmation of this statement, it is possible

[21] A.J. van den Berg, The New York Arbitration Convention of 1958 (Deventer, Antwerp, Boston, London, Frankfurt: Kluwer Law and Taxation Publishers, 1981), 359. In this regard, it is to be noted that the public policy exception set forth by the New York Convention may be extended also to mandatory rules (as discussed later in this Section) and this is the reason why we can consider that – for the purpose of this article – all forms of domestic imperatives may be protected through Art V(2)(b) of the Convention.

[22] See, inter alia, J.D.M. Lew, L.A. Mistelis and S. Kroll, n 15 above, 86 and 413, where it is affirmed that it 'is now recognised that party autonomy operates as a right in itself. The rule has a special transnational or universal character and has binding effect because it has been agreed to and adopted by the parties. Unquestionably, party autonomy is the most prominent and widely accepted international conflict of laws rule. These national conflict of laws systems recognise that contracting parties do express their view as to the law to govern their contractual relations, and the national laws have no reason to ignore and very limited rights to interfere with the expressed will of the parties'.

[23] A.N. Zhilsov, 'Mandatory and Public Policy Rules in International Commercial Arbitration' 42 *Netherlands International Law Review*, 81 (1995); C. Seraglini, n 3 above, 157; L.G. Radicati di Brozolo, 'Controllo del lodo internazionale e ordine pubblico' *Rivista dell'arbitrato*, 629 (2006); G. Bermann, n 10 above, 6; A. Sheppard, 'Mandatory Rules in International Commercial Arbitration: An English Law Perspective', in G. Bermann and L.A. Mistelis eds, n 10 above, 173; L. Villiers, 'Breaking in the Unruly Horse: The Status of Mandatory Rules of Law as a Public Policy Basis for the Non-Enforcement of Arbitral Awards' 18 *Australian International Law Journal*, 155 (2011). Contra, see E. Gaillard, 'Droit applicable au fond du litige' *Journal Clunet du Droit International*, 27 (1991), arguing that in arbitration there is space for public policy only, because lois de police preclude an analysis of the content of the applicable law. This problem is, however, overcome if one accepts that, from the point of view of their substantive content, there is generally no difference in

to mention Recommendation 1(d) of the Final Report on public policy as a bar to enforcement of arbitral awards issued by the International Arbitration Committee of the International Law Association after the 2002 New Delhi Conference, according to which:

> [t]he international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as 'lois de police' or 'public policy rules'; (…)

This is not surprising if we accept that, as confirmed by Art 9 of the Rome I Regulation, overriding mandatory rules express the fundamental principles of a country and, therefore, from the substantive point of view they are usually not different (or at least not far) from public policy, both representing the imperative norms of a legal system.

On the other hand, Recommendation 3(a) asserts that simple mandatory rules are irrelevant for the purpose of international arbitration, considering that they do not express fundamental values of a state which shall be applied to all cases (viz also to arbitration proceedings which are not entirely related to the forum) and without exceptions. It affirms that:

> (a)n award's violation of a mere 'mandatory rule' (ie a rule that is mandatory but does not form part of the State's international public policy so as to compel its application in the case under consideration) should not bar its recognition or enforcement, even when said rule forms part of the law of the forum, the law governing the contract, the law of the place of performance of the contract or the law of the seat of the arbitration.

However, nothing seems to preclude that, where the Rome I Regulation is considered applicable by arbitrators (being part of the law of the seat) or is at least taken into account as a point of reference for determining the applicable law,[24] if an arbitration is entirely located within a domestic legal order and the parties have chosen to apply a foreign system of law, Art 3, para 3, of the Regulation still allows the application of simple mandatory rules of the law of the country where the dispute is located.[25]

functioning between public policy and mandatory rules. On the same vein see A. Atteritano, n 15 above, 327.

[24] In this regard, it is to be noted that, in the unlikely case that arbitrators decide to autonomously determine the applicable law without referring to any domestic conflict of laws (something that is possible for whoever considers arbitration as detached from any country of origin), it is nevertheless possible that they make reference to domestic conflict of laws systems in order to justify their decision. See J.D.M. Lew et al, n 15 above, 425.

[25] See G. Zarra, n 10 above, 563.

Having explained that the application of imperative norms in arbitration is usually required by domestic legal orders in order to give effect to arbitral awards, it is important to point out that this conclusion is also dictated by considerations pertaining to the intrinsic characteristics of international commercial arbitration as an effective means of dispute settlement.

The first and foremost reason pushing arbitrators to ensure respect for the mandatory rules lies in the (today universally accepted) obligation according to which they should do their best to issue an award that is enforceable.[26] In this regard, Art 42 of the Arbitration Rules of the International Chamber of Commerce (as amended in 2020 and applicable since 1 January 2021) is emblematic. It is named 'General Rule' and affirms that:

> In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.

Similar provisions may be found in Art 32.2 of the 2020 Arbitration Rules of the London Court of International Arbitration[27] and in Art 2.2 of the Stockholm Chamber of Commerce Rules.[28] It is evident, in this regard, that an award not respecting the imperative norms of the country where the arbitration is seated, or of the place where the award will be enforced, risks not being recognized (and then enforced).

Hence – apart from the obligations imposed by the law of the seat – the reason why arbitrators tend to respect domestic mandatory rules may be, at least implicitly, founded on a different legal obligation, pertaining to the arbitrators' mandate.[29] This is another factor of the balancing process to be carried out by arbitrators pointing towards a possible compression of party autonomy in favor of the application of the relevant imperative norms.

The question, therefore, arises regarding which country's imperative norms

[26] On this obligation (and its fundamental role in arbitration) see P. Mayer, n 9 above, 284; H. El Talhouny, 'The Respect by the Arbitrator of Rules of Public Policy in International Commercial Disputes'1 International Journal of Arab Arbitration, 27 (2009).

[27] 'For all matters not expressly provided in the Arbitration Agreement, the LCIA, the LCIA Court, the Registrar, the Arbitral Tribunal, any tribunal secretary and each of the parties shall act at all times in good faith, respecting the spirit of the Arbitration Agreement, and shall make every reasonable effort to ensure that any award is legally recognised and enforceable at the arbitral seat'.

[28] 'In all matters not expressly provided for in these Rules, the SCC, the Arbitral Tribunal and the parties shall act in the spirit of these Rules and shall make every reasonable effort to ensure that any award is legally enforceable'.

[29] A.S. Rau, 'The Arbitrator and 'Mandatory Rules of Law'', in G. Bermann and L.A. Mistelis eds, n 10 above, 90; H. Smit, n 10 above, 212. In this regard, J.B. Racine, n 6 above, 20, also talks about an approach by arbitrators based on utilitarism and this is not a plausible argument considering that they may consider worth applying the relevant imperative norms in order to issue an enforceable award and ensuring their reputation within the 'community' of international arbitration. On the application by arbitrators of private international law see A. Leandro, n 13 above, 1882.

have to be respected by arbitrators.[30] In this regard it is commonly accepted that the reference primarily applies to public policy and mandatory provisions of the state of the seat of arbitration, whose courts will certainly annul the award in the case that it does not comply with imperative norms.[31] The imperative norms of the seat, therefore, shall never be ignored by arbitrators. However, in order to respect the abovementioned obligation to issue an award which is enforceable, other legal systems may come into play and, among them, particular relevance is to be conferred to the country or countries where – in light of the concrete circumstances of the case – it is likely that enforcement proceedings will be started.[32] Some authors also refer to the law of the country of performance of the obligation in question.[33] In this regard, however, it is not possible to give a universal solution: arbitrators will have to make an analysis of the case and, every time imperative norms of the place of performance may risk causing the non-enforceability of the award, they will certainly have to take these rules into account.[34] For this reason, it is also arguable that – in adopting a pragmatic approach – arbitrators have to take into account, on a case-by-case basis, the imperative norms of all the other relevant domestic legal systems.[35] In this

[30] Some authors have tried to make a decalogue of circumstances which may induce arbitrators to apply a certain country's mandatory rules. See M. Blessing, 'Mandatory Rules of Law Versus Party Autonomy in International Arbitration' *Journal of International Arbitration*, 14, 23 (1997); A. Barraclough and J. Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' 6 *Melbourne Journal of International Law*, 205 (2005).

[31] This reasoning is reinforced if one accepts that annulled awards may not be enforced abroad or that, generally speaking, the annulment decision taken at the place of the seat is to be significantly taken into account before foreign enforcing courts. On this issue see, also for the relevant bibliography and case law, G. Zarra, 'L'esecuzione dei lodi arbitrali annullati presso lo stato della sede e la Convenzione di New York: verso un'uniformità di vedute?' *Rivista dell'arbitrato*, 574 (2015).

[32] H. Fazilaftar, Overriding Mandatory Rules in International Commercial Arbitration (Cheltenham – Northampton: Edward Elgar, 2019), 5 and 76.; A.S. Rau, n 29 above, 77; L. Shore, 'Applying Mandatory Rules of Law in International Commercial Arbitration', in G. Bermann and L.A. Mistelis eds, n 10 above, 131.

[33] A. Sheppard, n 23 above, 172.

[34] A.K.A. Greenewalt, 'Does International Arbitration Need a Mandatory Rules Method?', in G. Bermann and L.A. Mistelis eds, n 10 above, 148, notes that the parties might contractually rule out the application of imperative norms. It is my opinion, in this regard, that this reasoning may not apply with regard to mandatory rules of the seat of arbitration – the non-respect of which will reasonably lead to the annulment of the award – but might be taken into consideration when the parties agree to exclude the application of imperative norms of other legal systems, which do not have a direct influence on the efficacy of the decision (provided that one accepts that annulled awards may not circulate or that decisions annulling arbitral awards are at least a significant factor to be considered when enforcing foreign awards).

[35] C. Seraglini, n 3 above, 188. See also N. Voser, 'Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration' 7 *American Review of International Arbitration*, 338 (1997); G. Zarra, n 10 above, 563. With express reference to the application of this pragmatic approach to lois de police see L.G. Radicati di Brozolo, 'L'arbitrato come sistema transnazionale di soluzione delle controversie: caratteristiche e rapporto con il diritto interno' *Rivista dell'arbitrato*, 25 (2020).

regard, however, due to the essential role of the law of the seat in relation to any arbitration proceedings, it can be asserted that in all cases where the imperative norms of the seat are in conflict with other imperative norms that are considered relevant to the case, the latter shall prevail; in the alternative, the final award may risk being annulled.

According to some scholars, moreover, respect for the relevant imperative norms is also dictated by the parties' expectation that such norms will be respected.[36] This consideration is certainly based in fact – we could talk, in this regard, of a form of *social* legitimacy of awards meeting the parties' expectations[37] – and has a significant *psychological* relevance in arbitral decisions[38] even if, in this author's opinion, it does not play a significant role in the balancing process to be carried out by arbitrators as the *legal* obligation to do their best to issue an enforceable award.[39]

Such a duty also has an impact on (and it is to be valorized in light of) the principle of legal certainty, which requires stability of the arbitral *res judicata* and promotes the idea according to which, once a case is decided, the decision should put an end to disputes. In this respect, considering that an award which is possible of being annulled or not enforced risks not ensuring a final dispute resolution, this is another reason supporting the idea that arbitrators may sacrifice, when necessary, the respect of party autonomy in favor of the relevant imperative norms.[40]

In conclusion, it can be argued that arbitrators have a duty to take into account the relevant national imperative norms. In this regard, it has been suggested that respect for this duty is the main reason why states continue to give credit to international arbitration as a valuable (arguably the most valuable) way of solving disputes pertaining to transnational commerce.[41] Should arbitrators carry out their function without respecting the legal provisions of the countries which are related to the proceedings, indeed, this might lead to a diminishing of the role of arbitration within domestic legal systems and, possibly, to a restraint of the attitude of *favor arbitrati*.

[36] L.G. Radicati di Brozolo, n 20 above, 464; R.S. Rau, n 29 above, 78.

[37] The argument is, mutatis mutandis, applicable with regard to the reasons why arbitrators apply precedents. See A. Rigo Sureda, 'Precedent in Investment Treaty Arbitration', in C. Binder at al eds, *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press, 2009), 831-832.

[38] In this regard, note that C. Seraglini, n 3 above, 189, affirmed that arbitrators shall apply imperative norms in order to enhance the credibility of arbitration as the natural forum of transnational commerce.

[39] On the identification of the relevant imperative norms, see B. Audit, 'How do Mandatory Rules of Law Function in International Civil Litigation?', in G. Bermann and L.A. Mistelis eds, n 10 above, 58. There is no space in arbitration, like in domestic litigation, for considerations based on subjective morals of arbitrators. See C. Seraglini, n 3 above, 271.

[40] On the value of legal certainty and finality see G. Zarra, *Parallel Proceedings in Investment Arbitration* (Torino: Giappichelli; The Hague: Eleven International Publishing, 2017), 37.

[41] C. Seraglini, n 3 above, 190, talks about a tacit agreement between states and arbitrators.

1. Procedural and Substantive Imperatives in Arbitration: Some Brief Examples

Having demonstrated that arbitrators have a duty to apply the imperative norms of the states connected with the proceedings, for the sake of completeness it is here worth briefly describing how arbitrators have applied domestic imperative norms. In this regard, it is worth highlighting that, while

> [a]n arbitration tribunal may have to consider the effects of international public policy at different stages of the proceedings. This includes when deciding whether to give full or limited effect to the law chosen by the parties or which is otherwise applicable, if jurisdiction, ie arbitrability, is contested, or where the factual or substantive issues are alleged to be contrary to fundamental international standards[42]

another very relevant ambit of application of public policy rules concerns arbitrators' respect for fundamental canons of procedure. In this regard, it is necessary to make a distinction between substantive and procedural imperative norms.

With regard to substantive imperative norms, as already outlined in the previous Section, there is case law confirming that, for example, arbitrators have taken into account – apart from the peremptory legislation of the law of the seat,[43] of the law applicable to the substance of the claim,[44] or of the law of the place where the enforcement was likely to take place[45] – imperative norms of other countries which, *in concreto*, were relevant for the case, such as the country where a patent was registered[46] or of the place of performance of the obligation in question.[47] The reasoning used by arbitrators, again, consists of a balancing process in light of the circumstances of the individual case: the

[42] J.D.M. Lew et al, n 15 above, 423.

[43] Which is applicable as a matter of law. See, eg, Section 4 of the 1996 English Arbitration Act.

[44] See the in-depth analysis carried out by J.B. Racine, n 6 above, 237. As an example of this kind it is possible to refer to all the cases where arbitrators have applied EU competition law (on which see J.B. Racine, n 6 above, 255-264).

[45] See eg ICC Award no 953 mentioned by J.D.M. Lew, Applicable Law in International Commercial Arbitration (New York: Oceana, 1978), 543.

[46] See ICC Award no 1230 mentioned by J.D.M. Lew, ibid, 541-542.

[47] See ICC Award no 761 mentioned by J.D.M. Lew, ibid, 542-543. In England, this is a consequence of the well-known English High Court decision of 17 December 1919, Ralli Bros v Compania Naviera Sota y Aznar (1920) 1 K.B. 614, where the English Court stated that it will not enforce a contract which is unlawful at the place of performance. A different approach was assumed by the arbitrators in the well-known Hilmarton case where the arbitrators refused to take into account Algerian law on corruption in an arbitration governed by Swiss law (where the performance of the contract had to take place in Algeria). However, the Court de Justice du Canton de Geneve, Decision of 7 November 1989, Omnium de Traitement et de Valorisation (OTV) v Hilmarton, annulled the award by saying that the arbitrators should have applied Algerian law. This decision was confirmed by the Swiss Federal Tribunal on 17 April 1990.

application of mandatory rules is based on the existence of an effective link and connection between the case and the imperative norms and, for some scholars, on the interest that a state somehow involved in the case has in seeing its imperative norms applied.[48]

In this regard, it is particularly relevant to note that, according to the principle *iura novit curia* (that is today considered applicable in international arbitration too, and is named *iura novit arbiter*),[49] arbitrators are entitled to take into account the relevant imperative norms even if the parties did not raise this issue, as long as the parties are then provided with the possibility of expressing their views on the principles and rules that the arbitrators are going to apply. By contrast, arbitrators have refused to take into account mandatory rules of countries which were not related in any way to the case at hand, notwithstanding the fact that one of the parties claimed the application of such mandatory rules. In ICC Case 6320 of 1991,[50] for example, the dispute concerned a choice of law clause for Brazilian law and the proceedings were seated in France. The claimant was Brazilian and the respondent was from the USA. One of the parties asked for treble damages under the US Racketeer Influenced and Corrupt Organizations (RICO) Act arguing that it was an imperative set of norms of the law of the respondent. The Tribunal, however, noted that the goal of the RICO Act was to prevent corruption within the territory of the USA and therefore application to a case located in Brazil was outside of the scope of the norm. According to the Tribunal, there was not even an abstract interest of the USA in seeing the RICO Act applied to this case.[51]

Turning to procedural imperative norms, it should be recalled that the New

[48] On this topic see D. Hochstrasser, 'Choice of Law and 'Foreign' Mandatory Rules in International Arbitration' 11 *Journal of International Arbitration*, 57 (1994); A.S. Rau, n 29 above, 82.

[49] G. Kaufmann-Kohler, 'The Arbitrator and the Law: Does He/She Know It? Apply It? How? And a Few More Questions' 21 *Arbitration International*, 631 (2005); A. Carlevaris, 'L'accertamento del diritto nell'arbitrato internazionale tra principio jura novit curia e onere della prova' *Rivista dell'arbitrato*, 505 (2007); A. Sheppard, n 23 above, 204. See also International Law Association, Final Report Ascertaining the Contents of the Applicable Law in International Commercial Arbitration, Rio de Janeiro Conference, 2008. See Swiss Federal Tribunal, decision of 15 April 2015, case 4/A_554/2014 where it was affirmed that 'in Switzerland, the right to be heard concerns particularly factual findings. The parties' right to be invited to express their position on legal issues is recognized only to a limited extent. Generally, according to the principle jura novit curia, state or arbitral tribunals are free to assess the legal relevance of factual findings and they may adjudicate based on different legal grounds from those submitted by the parties'. See also, inter alia, UK Commercial Court, Queen's Bench Division, Pacol ltd. v Joint Sotck Co Rossakhar [2000] 1 Lloyd's Rep 109; Paris Court of Appeal, decision of 15 March 2016, De Sutter P. – K., DS2 S.A. et al v Republic of Madagascar. In the arbitral practice, see Caratube International Oil Company LLP v Republic of Kazakhstan, Decision on the annulment application of Caratube International Oil Company LLP of 21 February 2014, ICSID Case no ARB/08/12, para 90.

[50] The case is mentioned and described by A.S. Rau, n 29 above, 83.

[51] S. Lazareff, 'Mandatory Extraterritorial Application of National Law' 11 *Arbitration International*, 146 (1995).

York Convention sets forth, as a grounds for the non-enforcement of an award, that:

> [t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case. (Art V(1)(b)).

Hence, the Convention seems to set forth a universal standard for the respect of the *audi alteram partem* principle, according to which the parties must be able to express their views on all the matters which have to be decided by arbitrators. More generally, as noted in scholarship, it is necessary that tribunals, notwithstanding the discretion they enjoy in conducting proceedings, ensure respect for 'fundamental norms of procedural fairness'.[52] This is particularly true since Art V(1)(b) is to be read in conjunction with Art V(2)(b), which provides that awards which are contrary to the public policy of the forum may not be enforced.[53] In this regard, it is to be noted that the concept of public policy shall be determined by the relevant national laws and, as we have seen, this concept usually involves procedural standards. Hence, we can assume that respect for the principle of due process is also dictated by Art V(2)(b) of the New York Convention (and, as we will see, judges shall be able to raise this defence *ex officio*).

From the above, it is understandable that the conventional concept of procedural public policy is to be read in conjunction with the relevant national law provisions (mainly the law of the seat and the law of the likely place of enforcement). In order to understand the general trends concerning the content of this concept in domestic laws on international arbitration, one may first of all refer to the principle of due process of law as recognized in fundamental treaties on human rights (primarily Art 6 of the European Convention on Human Rights and Art 47 of the EU Charter on Fundamental Rights).[54] Such a principle has

[52] S. Schwebel and G. Lahne, 'Public Policy and Arbitral Procedure', in P. Sanders ed, n 14 above, 205.

[53] On the strict relationship between public policy and due process in arbitration see, ex multis, A. Atteritano, n 15 above, 219.

[54] See A. Atteritano, n 15 above, 214; G. Carella, 'Arbitrato commerciale internazionale e Convenzione europea dei diritti dell'uomo', in G. Carella ed, *La Convenzione europea dei diritti dell'uomo e il diritto internazionale privato* (Torino: Giappichelli, 2009), 53; M. Benedettelli, 'Human Rights as a Litigation Tool in International Arbitration: Reflecting on the ECHR Experience' 31 *Arbitration International*, 631 (2005); G. Zarra, 'Rinuncia preventiva all'impugnazione dei lodi arbitrali internazionali e compatibilità con l'art. 6 della Convenzione europea dei diritti dell'uomo' *Rivista dell'arbitrato*, 302 (2016); J. van Compernolle, 'La Convenzione Europea dei Diritti dell'Uomo e l'arbitrato' *Rivista dell'arbitrato*, 663 (2017); A. Leandro, 'Arbitration, Multi-tier Waiver of the Access to Courts and the European Convention on Human Rights: Some Remarks on the Tabbane Decision', in E. Triggiani et al eds, *Dialoghi con Ugo Villani* (Bari: Cacucci editore, 2018), 321; A. Sardu, 'Arbitrato volontario e giusto processo nella giurisprudenza CEDU' *Rivista di diritto internazionale privato e processuale*, 691 (2018); M. Nino, 'Il rapporto tra arbitrato e diritto al giusto processo nella Convenzione europea dei diritti dell'uomo: quali risultati e quali prospettive?' *Ordine internazionale e diritti umani*, 756 (2019).

been also recalled by domestic laws on international arbitration. In this regard, it is worth mentioning – by way of example – S. 33 of the 1996 English Arbitration Act, according to which

> The tribunal shall -
>
> (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent (…).

This provision is expressly recognized as mandatory, considering that S. 4 of the same Arbitration Act states that the provisions listed in Schedule 1 to the Act – which includes S. 33 – are mandatory and have effect notwithstanding any possible agreement of the parties to the contrary.[55] It is not by chance that S. 68 of the Arbitration Act provides for a ground for challenge of arbitral awards issued in England when procedural guarantees set forth in S. 33 are not respected.

Likewise, Art 34(2)(a)(ii) of the UNCITRAL Model Law[56] states that arbitral awards may be challenged whenever

> [t]he party making the application was not given proper motive of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case.

Similar provisions making non-respect of procedural guarantees a ground for challenge of arbitral awards may also be found in Italian[57] or French law.[58]

Violations of due process have been found in cases where the respondent was not duly informed of the pending arbitration proceedings,[59] where one of the parties did not have the possibility to put forward their position on a factual[60] or legal[61] element on which the tribunal based its decision, or where the tribunal based its decision on elements which were known by none of the

[55] See A. Sheppard, n 23 above, 191.

[56] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. The Model Law is designed to assist states in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration.

[57] See Art 816-bis of the Code of Civil Procedure.

[58] See Art 1504 of the Code of Civil Procedure, on which see J.B. Racine, n 6 above, 18.

[59] US District Court for the Southern District of Florida, *Corporaciòn Salvadorena de Calzado S.A.* v *Injection Footwear Corp.*, decision of 18 February 1982, 533 F. Supp. 290.

[60] House of Lords, Aiden Shipping Co Ltd v Interbulk Ltd (The Vimeira) (No2), decision of 22 May 1986, [1986] A.C. 965.

[61] English Court of Appeal, Kanoria v Guinness, decision of 21 February 2006, [2006] EWCA Civ 222.

parties.[62] Interestingly, many legal systems (and some authors)[63] do not consider that the duty to explain the motivation for arbitral awards is an imperative norm to be applied to all arbitration proceedings.[64] In this regard, the present author respectfully dissents from. Motivation is an essential part of arbitral awards, which offers the parties the possibility to understand that all their procedural rights have been respected and to comprehend the reasons for their victory or defeat in the case, as well as the reasonableness of the decision.[65]

III. The Alleged Lack of a Legal Order to Which Arbitral Tribunals Pertain. Theories Asserting that Arbitrators Are Exclusively Bound by Transnational Imperative Norms

The analysis of imperative norms in international arbitration should have ended with the previous Section. However, the approach proposed above – according to which arbitrators are bound to apply the relevant *domestic* imperative norms – does not find unanimous approval in scholarship. There are, indeed, a few – although distinguished – mainly francophone authors who argue that arbitration is a transnational form of justice, grounded only on manifestations of party autonomy and therefore not bound in any way to apply domestic imperative norms.[66] There would be, therefore, no place for any

[62] UK Technology and Construction Court, Kye Gbangbola and Lisa Lewis v Smith Sherriff Limited, decision of 20 March 1998, [1999] 1 TCLR 136.

[63] L.G. Radicati di Brozolo, 'Controllo del lodo' n 23 above, 634.

[64] This is the case of, inter alia, UK and Italy. See, eg, Corte di Appello di Firenze, decision of 22 October 1976, Tradax Export v Carapelli S.p.A. and the other cases mentioned in G. Zarra, 'Arbitrato internazionale e ordine pubblico' n 10 above, 558-559. The issue of motivation is analysed in depth by T. Carbonneau, 'Rendering Arbitral Awards with Reasons: The Elaboration of Common Law of International Transactions' 23 Columbia Journal of Transnational Law, 579 (1985); P. Lalive, 'On the Reasoning of International Arbitral Awards' *Journal of International Dispute Settlement*, 1, 55 (2010); G. Cordero Moss, 'Reasoning in Arbitration: What Do Users Want or Need?', in ICC Institute of World Business ed, *Dossier XVIII: Explaining why you lost: Reasoning in Arbitration* (Paris: ICC Publishing, 2020), 93.

[65] In a recent decision issued in Singapore, it was argued that the summary of the relevant facts, the crystallization of the parties' cases and the analysis of the relevant documents and of the merits of certain arguments were sufficient reasons for an arbitral award. See TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd (2013) 4 SLR 972. This leads us to imply that lack of motivation is considered as part of public policy in Singapore. It is certainly so in Australia, where the Supreme Court of Victoria held that an arbitrator must five reasons commensurate to those provided by judges in their determination. See BHP Petroleum Pty Ltd v Oil Basins Ltd [2006] VSC 402. The same Court, however, then clarified that the duty of motivation may change on the basis of the complexity of the case at hand. See Westport Insurance Corporation v Gordian Runoff Ltd [2011] HCA 37. In general, it has been affirmed that the award shall be able to inform the parties on the bases (legal and factual) that brought the tribunal to reach its decision. This is also the approach by Courts of New Zealand. See Ngāti Hurungaterangi & Ors v Ngāti Wahiao [2016] NZHC 1486.

[66] See, inter alia, P. Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration', in P. Sanders ed, n 14 above, 258; E. Gaillard, 'International Arbitration

balancing in arbitration proceedings, considering that party autonomy would be the only value to preserve. According to this approach, strictly anchored in the idea that arbitration is completely autonomous and detached from state justice (so-called 'a-national' or 'floating' arbitration'),[67] in all matters brought before arbitration tribunals, domestic imperatives should be replaced by so-called 'transnational public policy', ie an alleged set of imperative norms which are grounded in the *lex mercatoria*.[68] These norms are claimed to be universally respected in transnational commerce[69] and to represent not the interests of a state but the shared interests of the transnational community of commercial actors.[70] Similarly, other scholars, even if not asserting that the concepts of transnational public policy and mandatory rules have completely replaced domestic imperatives, still believe that a form of transnational public policy exists and that arbitrators are, on the one hand, free to cherry pick from it when making their decisions and, on the other hand, bound to apply it whenever it clashes with domestic imperative norms.[71]

This is a fascinating approach to international arbitration, which might be defined as 'romantic' because it locates international arbitration in an ideal world where justice is detached from state activity. But what is, then, the real content of the concept of transnational imperative norms? Authors and decisions are far from being uniform in this regard.[72] Many scholars, when discussing this form of public policy, make reference to *jus cogens* norms, ie the fundamental principles and rules of public international law.[73] This seems to be the case of

as a Transnational System of Justice', in A.J. van den Berg ed, *Arbitration – The Next Fifty Years, ICCA Congress Series 16* (London – The Hague: Kluwer Law International, 2012), 66. In this regard, J.B. Racine, n 6 above, 6, affirms that the only limitation to arbitration should be the public policy of the place of enforcement: 'aussi libérale que soit l'attitude des Etats envers l'arbitrage, une reserve s'impose: celle de l'ordre public. Dans tous les cas en effet 'le juge garde le glaive de l'ordre public sous sa robe. (…) L'ordre public est, en quelque sorte, le seul îlot de resistance à l'autonomie de l'arbitrage international'. This opinion recalls the one by R. David, 'Le droit du commerce international: une nouvelle tâche pour les legislateurs nationaux ou une nouvelle lex mercatoria?', in VVAA eds, News Directions in International Trade Law (Dobbs Ferry (NY): Oceana, 1977), 19.

[67] J. Paulsson, 'Arbitration Unbound: Award Detached from the Law of Its Country of Origin' 30 *The International and Comparative Law Quarterly*, 358 (1981); J.B. Racine, n 6 above, 4; J.D.M. Lew, 'Achieving the Dream: Autonomous Arbitration' 22 *Arbitration International*, 179 (2006); E. Gaillard, n 66 above, passim. Contra, see, emblematically, F. Mann, n 11 above, according to whom any arbitration 'is a national arbitration' because it receives authority from a state. The territorial approach is also followed by A.J. van den Berg, n 21 above, 349.

[68] C. Seraglini, n 3 above, 280.

[69] P. Lalive, n 66 above, passim.

[70] C. Kessedjian, 'Transnational Public Policy', in A.J. van den Berg ed, International Arbitration 2006: Back to Basics? (London – The Hague: Kluwer Law International, ICCA Congress Series, Volume 13, 2007), 857.

[71] E. Gaillard, n 1 above, passim; C. Seraglini, n 3 above, 154.

[72] This is not surprising, considering the murky nature of the concept of lex mercatoria. See S.M. Carbone, Autonomia privata e commercio internazionale (Milano: Giuffrè, 2014), 59.

[73] This is also the opinion recently supported by E. De Brabandere, 'The (Ir)relevance of Transnational Public Policy in Investment Treaty Arbitration – A Reply to Jean-Michel Marcoux' 21

the 1989 Resolution of the International Law Institute on 'Arbitration Between States, State Enterprises, or State Entities, and Foreign Enterprises' issued in Santiago de Compostela (Rapporteurs: Eduardo Jiménez de Aréchaga and Arthur von Mehren), whose Art 2 affirms that

> '(i)n no case shall an arbitrator violate principles of international public policy as to which a broad consensus has emerged in the international community'.

In this regard, it is worth noting that, while this Resolution addresses arbitration involving states (so-called investment arbitration), it expressly states in the Preamble that it also contains general principles regarding arbitration more broadly.[74] Hence, while respect for international public policy as defined in Article 2 is certainly imposed in international investment cases, there is no reason – from the perspective of the drafters of the Resolution – not to extend it also to other forms of arbitration. This is also (at least indirectly) confirmed by the consideration that, very often, investment arbitration cases are regulated by a certain domestic law and are seated in a domestic legal system; in these cases, investment arbitration cases are very similar, at least from the perspective of the application of imperative norms, to commercial cases.[75]

In the same vein, Gaillard and Savage argue that arbitrators 'should base their judgment on values widely recognized in the international community'.[76] In this regard, indeed, as subsequently recognized in scholarship, it is arguable

Journal of World Investment & Trade, 853 (2020). Contra, see J.M. Marcoux, 'Transnational Public Policy as a Vehicle to Impose Human Rights Obligations in International Investment Arbitration' 21 *Journal of World Investment & Trade*, 22 (2020), affirming that the fundamental rights protected by jus cogens norms may fall within the conception of transnational public policy.

74 The fourth Recital of the Preamble expressly states that: 'while there are many principles that apply to international arbitrations in general, this Resolution also draws attention to other principles which are of special importance to arbitrations between States, state enterprises, or state entities, on the one hand, and foreign enterprises, on the other'. (emphasis added)

75 National laws have a role even in cases celebrated within the framework of ICSID (see Art 42 of the ICSID Convention). As a confirmation of the above see G. Cordero Moss, 'Court Control on Arbitral Awards: Public Policy, Uniform Application of EU Law and Arbitrability', in A. Calissendorff and P. Schöldström eds, *Stockholm Arbitration Yearbook* (London – The Hague: Wolters Kluwer, 2020), 209, affirming that '[t]he specific nature of investment disputes may require considerations that are not generally made in commercial disputes, in particular, due to the public interests involved in investment arbitration. However, it should be remembered that a considerable part of investment disputes is carried out under the rules applicable to commercial arbitration. From a procedural point of view and from the point of view of court control, investment disputes resolved under the rules for commercial arbitration do not differ from regular commercial disputes'.

76 E. Gaillard and J. Savage, Fouchard Gaillard Goldman on International Commercial Arbitration (London – The Hague: Kluwer Law International, 1999), 863. In the same vein see Fourteau, 'L'ordre public 'transnational' ou 'réellement international'' 138 *Journal du droit international*, 3 (2011); C. Seraglini, n 3 above, 1, also argues that the 'system of reference' for international arbitrators is the law generated by the international community of states.

that the hard core of principles to which these definitions make reference is *jus cogens*.[77] This is also the approach of Lalive, who expressly equates (at least part of) his conception of transnational public policy and domestic imperative norms grounded on public international law.[78] The same Lalive, acting as sole arbitrator in ICC Award no 1664,[79] refused to apply the relevant domestic imperative norms – in that case the law of Pakistan, which governed a bank guarantee which was issued by a Pakistani Bank in favor of a Pakistani corporation and the enforcement of which was demanded of arbitrators – and expressly asserted that the only relevant peremptory laws for arbitrators were the rules of truly international public policy.[80]

A critique of this conception of transnational public policy comes directly from the observation that it is a mere repetition of the principles of international law (originating both in customary law and in international treaties, mainly those concerning human rights such as the ECHR) that cannot be derogated by private parties and are considered to be a form of truly international public policy. It seems, therefore, that there is no reason to refer to a further form of public policy which is allegedly proper of international arbitration but is in fact solidly anchored in public international law as applied in domestic legal systems.

Other scholars tend to derive the principles of transnational public policy from a comparative analysis of a large number of domestic legal systems.[81] This is, for example, the case of a well-known arbitration decided under English law, which ruled that the prohibition of bribery and corruption and the related principle according to which a party cannot ask for the enforcement of a contract obtained through corruption (*ex iniuria jus non oritur*) are norms of truly international public policy because they are recognized by the law of most, if not all, countries[82] (as well as by several international conventions). Should we

[77] E. De Brabandere, n 73 above, 853.

[78] P. Lalive, n 66 above, 283. Similarly see J.B. Racine, n 6 above, 368.

[79] The content of which is meticulously reported by J.D.M. Lew, Applicable Law n 45 above, 545.

[80] In that case, the arbitrator was asked to impose the execution of a bank guarantee issued by the respondent (Pakistan Bank) in respect of the contractual obligations of a Pakistani corporation towards an Indian creditor. The performance of the guarantee was then allegedly rendered illegal by imperative Pakistani norms issued after the raise of the hostilities between Pakistan and India. The arbitrator, however, refused to take these norms into account saying that as a neutral or international arbitrator he was not obliged to take cognizance of local and politically inspired public policies. Lalive applied, in this regard, international law as described in Lord Mc Nair's 'Legal Effects of War' and deduced that in general international law there is no prohibition of trading with the enemy in presence of armed conflicts.

[81] On this basis, A. Stone Sweet, 'The New Lex Mercatoria and Transnational Governance' 13 *Journal of European Public Policy*, 641 (2006), argues that 'arbitrators are becoming – if with some hand-wringing and reluctance – default law makers for international traders'.

[82] World Duty Free Company Limited v Republic of Kenya, ICSID Case no ARB/00/7, Award, 4 October 2006, para 142 (where several other arbitral and domestic cases are mentioned). Similarly, in the European Gas Turbines v Westman case, the French Court of Appeal of Paris ruled,

accept that the emergence of a principle from its repetition in different domestic legal systems generates an autonomous source of the law applicable in international commercial arbitration only? This solution does not seem possible. Indeed, the only real example of this kind which is put forth by the supporters of this conception of transnational public policy is the abovementioned principle of *ex iniuria jus non oritur*.[83] This principle, however, is so widely recognized by domestic legal systems that Professors Hersch Lauterpacht and Giorgio Sacerdoti noted that this is one of the unquestionable 'general principles of law common to domestic legal systems' to which Art 38, para 1, letter c), of the Statute of the International Court of Justice make reference.[84] Such principles are a source of general international law. Hence, they may be considered, again, part of a truly international public policy (grounded in public international law) and they are applied by arbitrators as part of the relevant domestic imperative norms (ie, it is worth repeating, mainly the ones of the law of the seat and, then, the other legal systems involved in the arbitration). Accordingly, they do not deserve an autonomous place in the legal analysis of the different forms of imperatives.

For the sake of completeness, it is necessary also to point out that in the practice of international investment arbitration some tribunals have held that a rule of transnational public policy (again, the prohibition of bribery and corruption) may be obtained by referring to principles and rules which find application in a significant number of international treaties.[85] Again, what is here

on 30 September 1993, that 'a contract having influence-peddling or bribery as its motives or object is, therefore, contrary to French international public policy as well as to the ethics of international business as conceived by the largest part of the members of the international community'. Another relevant case in which an arbitrator declared not to have jurisdiction on a contract based on corruption due to transnational public policy is the well-known ICC Case 1110 of 1963 decided by Judge Lagergren acting as sole arbitrator.

[83] A. Crivellaro, 'Arbitrato internazionale e corruzione' 26 *Rivista dell'arbitrato*, 701 (2019), speaking – on the basis of a comparative analysis – of a truly international public policy principle concerning the prohibition of corruption. M. Hwang and K. Lim, 'Corruption in Arbitration – Law and Reality' 8 *Asian International Arbitration Journal*, 59-60 (2012). See, in this regard, J.M. Marcoux, n 73 above, 4, affirming that '(a)lthough the inclusion of corruption and other forms of illegality appears as fairly uncontroversial, the contours of transnational public policy are inherently precise'.

[84] H. Lauterpacht, Recognition in International Law (Cambridge: Cambridge University Press, 1947), 420-421; G. Sacerdoti, 'Corruption in Investment Transactions: Policy Initiatives, Legal Principles and Arbitral Practice' 24 *ICSID Review – Foreign Investment Law Journal*, 565 (2009); J.B. Racine, n 6 above, 369, makes express reference to principles *ex* Art 38(1)(c) as a source of transnational public policy. The equivalence between transnational public policy and general principles common to domestic legal systems can also by inferred by J.M. Marcoux, n 73 above, 7.

[85] See eg Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Company Limited ('Bapex') and Bangladesh Oil Gas and Mineral Corporation ('Petrobangla'), ICSID Case no ARB/10/18, Decision on the Corruption Claim of 25 February 2019, para 434; Vladislav Kim and Others v Republic of Uzbekistan, ICSID Case no ARB/13/6, Decision on Jurisdiction of 8 March 2017, paras 593-597. This is, according to Michael Reisman, the only

relevant is that the principle or rule at stake is grounded in a source of international law which is applicable in the case. The repetition of a principle in several international treaties may be only used as evidence of the existence (or emergence) of a norm of customary international law.

Some authors, finally, make reference to non-positive standards as sources of transnational public policy. The reference applies both to moral conceptions of imperativeness and to imperative norms grounded in soft- law instruments.

As to the former, according to Julian Lew

> '(t)hese truly international or 'pluri-national' criteria are drawn from the fundamental rules of natural law, the principles of 'universal justice', jus cogens in public international law and the general principles of morality and public policy accepted by civilized countries'.[86]

This statement is problematic because – apart from referring to forms of public policy generated in public international law – it makes reference to concepts such as 'natural law', 'universal justice' and 'general principles of morality',[87] without providing readers with any guidance as to how to understand these concepts.[88] Moreover, apart from the reference to *jus cogens* principles, due to the very murky borders of the concepts referenced, the idea of transnational public policy would be deprived of any precise meaning.[89] Indeed, Pierre Mayer correctly observed that the reference to transnational principles of justice

> merely serve(s) as justification and do[es] not constitute the source of legal rules which the arbitrator would simply apply.[90]

possible meaning of transnational public policy. See W.M. Reisman, 'Law, International Public Policy (So-called) and Arbitral Choice in International Commercial Arbitration', in A.J. van den Berg ed, n 70 above, 856. Similarly see R. Kreindler, 'Standards of Procedural International Public Policy', in D. Bray and H.L. Bray eds, *International Arbitration and Public Policy* (Huntington (NY): Juris, 2015), 245-249. See, with regard to the applicability of international economic sanctions by arbitrators (considered as a rule of truly international public policy by this author) C. de Stefano, 'L'arbitrabilità dell'embargo internazionale alla prova delle Sezioni Unite' 53 *Rivista di diritto internazionale privato e processuale*, 1998 (2017).

[86] J.D.M. Lew, Applicable Law n 45 above, 534.

[87] In this regard see also J.C. Pommier, Principes d'autonomie et loi du contrat en droit international privé conventionnel (Paris: Economica, 1992), 247, talking about a 'moralité internationale contractuelle'.

[88] Similarly, E. Loquin, n 4 above, 277, affirms that '(l)'arbitre puise à toutes les sources du droit les règles de comportement aptes à satisfaire un sentiment de justice, qui, dans les relations internationals doit tendre à l'universalité'.

[89] S.L. Brekoulakis, 'Transnational Public Policy' n 2 above, 127.

[90] P. Mayer, 'La règle morale dans l'arbitrage international', in P. Bellet et al eds, *Etudes offertes à Pierre Belief* (Paris: Litec, 1991), 384. A.S. Rau, n 29 above, 81, ironically noted that '[r]eliance on 'transnational principles' of 'morality' (like 'transnational principles' of what constitutes effective 'consent' to contract) is attractive precisely because – given that they constitute

In addition, readers should be warned of the risk of subjectivism intrinsic to the application of concepts such as 'general principles of morality' and 'universal justice' in domestic litigation and the same considerations apply in international arbitration.[91] Indeed, arbitrators are perfectly conscious of the risk that an award based on their conception of morality and justice (and not on a system of positive law) may be annulled or not enforced and have therefore regularly avoided this practice.[92] In this regard, it is worth adding that, whenever the parties intend to ask arbitrators to depart from the application of the law and to decide on the basis of their perception of morality and justice, they can provide that the decision shall be taken *ex aequo et bono*.[93] It is not by chance, indeed, that in ICC Case 3540 of 3 October 1980 arbitrators – which were entrusted to decide *ex aequo et bono* – decided to apply *lex mercatoria*, justifying their choice by asserting that, by applying

> the most recent and authoritative doctrine as well as the jurisprudence (...) in determining the substantive law, arbitrators may avoid the rules of conflict of the form, the more so if they have the power of *amiables compositeurs*.

This award perfectly confirms that the concepts of *lex mercatoria* and transnational public policy do not have a foundation in positive law[94] and, on the contrary, they have an equitable, rather than legal, nature.[95] They seem to be a creation of scholarly thinking which can hardly be provided with any autonomous content.[96]

the core of any developed legal system – they appear to avoid any need for recourse to choice of law. Such are the benefits of a fruitful methodological sloppiness'.

[91] S.L. Brekoulakis, n 2 above, 130, affirms that '[i]t is worrying that some arbitration tribunals feel empowered under a misplaced concept of transnational public policy to render decisions on the basis of what they consider to be basic standards of morality, no matter how lofty such standards may be'.

[92] C. Seraglini, n 3 above, 273.

[93] G. Zarra, 'Arbitrato commerciale internazionale' n 3 above, 423.

[94] L. Crema, 'Il caso WDF: corruzione e ordine pubblico transnazionale innanzi alla giurisdizione ICSID' 44 *Rivista di diritto internazionale privato e processuale*, 120 (2008).

[95] S.L. Brekoulakis, n 2 above, 125 and 129. As a confirmation of this idea, the author mentions ICC Award no 15300 of 2011, where the sole arbitrators realized that a set of five contracts was a scheme for reverse payments ('kick-backs') to be equated to a form of bribery. He therefore argued that this practice was against 'standards of basic morality' and stated that 'it would not be compatible with fundamental values of international commerce, necessary to allow business being conducted in a loyal surrounding, to lend a helping hand to such agreements'.

[96] As noted by H. Arfazadeh, Ordre public et arbitrage international à l'épreuve de la mondialisation (Bruxelles – Paris – Zurich : Bruylant – LGDJ – Schulthess, 2006), 236, 'une juridiction étatique ne peut, sans mandate et en toute modestie, ni élaborer, ni proclamer des principes transnationaux ou (quasi) universels, de surcroit d'ordre public. Une juridiction étatique, au contraire, ne peux rendre justice qu'au nom de son propre droit, ou en application des principes du droit international privé et du droit international public qui font déjà partie de son droit national'. Similarly, see also J. Fry, 'Désordre Public International under the New York Convention:

This opinion applies, *mutatis mutandis*, also to alleged public policy principles derived from private sources of contractual regulation, such as UNIDROIT principles, INCOTERMS or codes of conduct, which are mere soft law sources that are applicable to private agreements insofar as the parties recall them in their contract.[97] The reference also applies to fundamental principles regulating trade usages,[98] which some domestic decisions[99] considered as binding within the context of the 1980 Vienna Convention on the International Sale of Goods (CISG), whose Art 9, para 2, affirms that

> '(t)he parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned'.

However, as (correctly noted in scholarship) trade usages are mentioned in Art 9 CISG not as a source of law, but as a mere means of interpretation of contractual provisions to be used in cases of doubt.[100] This means that these usages can neither replace nor integrate the contractual regulation.

Concluding on this point, it is worth borrowing Stavros Brekoulakis' words, arguing that

> (u)nder a conception of transnational public policy that includes non-legal standards, judicial function is dangerously conflated with legislative function and international arbitrators assume the role of the 'regulators of society', which runs counter to the way our world is politically organized

Wither Truly International Public Policy' 8 *Chinese Journal of International Law*, 89 (2009); H. Fazilaftar, n 32 above, 19. See also, as to the impossibility of outlining a precise content of the lex mercatoria, F. Sbordone, n 1 above, 102 .

[97] Similarly see J.B. Racine, n 6 above, 373. In this regard see J.M. Marcoux, n 73 above, 16-17; J.M. Jacquet, 'L'ordre public transnational', in E. Loquin and S. Manciaux eds, *L'ordre public et l'arbitrage* (Paris: Lexis Nexis, 2014) 101. In this regard see S.M. Carbone, Autonomia privata n 72 above, 11, correctly highlighting that the same UNIDROIT Principle recognizes in any case the prevalence of domestic imperative norms over contractual regulations agreed by the parties.

[98] These principles are considered as a source of transnational public policy by J.B. Racine, n 6 above, 374, even if the author does not identify their specific content. In the same vein see P. Kahn, Les reactions des milieux économiques, in P. Kahn and C. Kessedjian eds, n 4 above, 491. Contra see T. Mustill, 'The New Lex Mercatoria: The First Twenty-five Years' 4 *Arbitration International*, 111-112 (1988).

[99] See Oberster Gerichstshof Austria, 21 March 2000, in cisgw3.law.pace.edu. Similarly see Oberster Gerichtshof Austra, 15 ottobre 1998 in cisgw3.law.pace.edu.

[100] R. Schmidt-Kessel, 'Article 9', in I. Schwenzer ed, *Commentary to the UN Convention on the International Sale of Goods* (Oxford: Oxford University Press, 2010), 182; R. Goode, 'Usage and its reception in transnational commercial law' *The International and Comparative Law Quarterly*, 46, 35 (1997). Contra, see M.J. Bonell, 'Art. 9', in C.M. Bianca ed, *Convenzione di Vienna sui contratti di vendita internazionale di beni mobili* (Padova: CEDAM, 1992), 39, arguing that these usages may also integrate the contractual regulation in cases of lacunae.

today.[101]

Given the above, we might conclude that the idea of arbitration as a system of justice detached from any country of origin and of arbitrators as the judges of 'the international community of businessmen'[102] applying a law – the *lex mercatoria* – originating in the practice of transnational commerce and expressing certain principles of transnational public policy iscertainly very attractive.[103] However, such an idea only complicates an already complicated subject. Arbitration exists because states allow arbitration to exist. The parties' freedom to derogate from state justice exists because the same states recognize the validity of the willingness to refer to arbitration and confer binding force to the award. States want to ensure that the hard core of imperative norms representing the identity of their legal systems are respected in all arbitration cases related to their legal orders;[104] and the parties cannot escape from that.[105] Borrowing the words of Homayoon Arfazadeh, it is possible to assert that

> *[c]ette image idyllique d'un espace transnational homogène et autorégulé est une représentation simpliste et une réalité autrement plus contrastée des relations transnationales. En effet, les dispositions d'ordre public et les lois de police étatiques font partie intégrante de l'environnement juridique des transactions internationales.*[106]

Furthermore, Arfazadeh acutely observes that the relevance of domestic imperatives is even raised by the increase in arbitrable subjects. Indeed, the willingness of states to see their imperative norms applied in arbitration is the counterweight of their agreement to the wide expansion of the number of subjects that can be submitted to arbitration.

In conclusion, provided that the main duty of arbitrators is to provide the

[101] S.L. Brekoulakis, n 2 above, 121.

[102] P. Lalive, n 66 above, 270-271.

[103] According to this view, arbitrators 'are the guardians of the international commercial order: they must protect the rights of participants in international trade; give effect to the parties' respective obligations under the contract; imply the presence of commercial bona fides in every transaction; respect the customs followed in international trade practice and the rules developed in relevant international treaties; uphold the commonly accepted views of the international community and the policies expressed and adopted by appropriate international organizations; and enforce the fundamental moral and ethical values which underlie every level of commercial activity'. See J.D.M. Lew, Applicable Law n 45 above, 540; J. Kleinheisterkamp, n 9 above, 912, defines (correctly, in our view) this approach as 'utopian'.

[104] M.R. Beniassadi, 'Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration?' 10 *International Tax & Business Lawyer*, 11-12 (1992).

[105] Various concerns against transnational public policy have been expressed also by M.W. Reisman, n 85 above, 854; A. Redfern, 'Comments on Commercial Arbitration and Transnational Public Policy', in A.J. van den Berg ed, n 70 above, 871; and M. Pryles, 'Reflections on Transnational Public Policy' 24 *Journal of International Arbitration*, 1 (2007).

[106] H. Arfazadeh, n 96 above, 224.

parties with an award which is enforceable, arbitrators are bound by the application of the relevant domestic imperative norms.[107] There is no different form of public policy and/or mandatory rules applicable in international arbitration. Whenever arbitrators expressly base their decision on transnational public policy, therefore, they have to accept the risk that the award may be successfully challenged or not enforced. This consideration applies in particular where arbitral tribunals do not adequately ground their application and the content of transnational public policy in a source of positive law. This is even recognized by one of the main supporters of the concept of transnational public policy, Prof Pierre Lalive, when he affirms that

> (i)t is understandable that, in general, the international arbitrator would show great caution when using his 'creative powers' and would refrain from resorting unduly to concepts or standards as relative and difficult to define with certainty as that of (transnational) public policy. It is of course much easier for the international arbitrator to refer in a given case to the international public policy *of a State*, since judicial precedents make it comparatively easy to establish its existence and its limits.[108] (emphasis in original)

IV. Public Policy at the Post-Award Stage

Before concluding the present analysis, it is important to note that some authors[109] (followed by very few judicial decisions) argue that domestic legal orders should recognize the transnational nature of arbitration[110] and refuse to regulate the compliance of arbitral awards with domestic imperative norms, having limiting their analysis to the transnational imperative norms emerging from commercial practice. An example of this approach is provided by the well-known Swiss decision in the *Westland* case[111] where, the Federal Tribunal held

[107] J.D.M. Lew, Applicable Law n 45 above, 537, observes that: 'The award is the 'raison d'être' of every arbitration; if the award is unenforceable, the whole arbitration proceeding will have been a waste of time and energy. If an arbitrator's award is not enforceable because it violates the public policy of the place of performance, the arbitrator will have failed the responsibility vested in him'.

[108] P. Lalive, n 66 above, 286.

[109] P. Lerebours Pigeonniere, 'A propos du contrat international' 78 *Journal du droit international*, 14 (1951), affirmed that in transnational cases the French Cour de Cassation has adopted an approach 'which does not underlie the particularism of French domestic life and, quite to the contrary, is based on the desire that private transfrontier relations be governed by an international legal order (...) the exception of public policy leads here to the creation within French domestic law of a kind of ius gentium parallel to the domestic common law'.

[110] See, eg, French Cour de Cassation, PT Putrabali Adyamulia c. Rena Holding, 29 June 2007, affirming that 'la sentence internationale, qui n'est rattachée à aucun ordre juridique étatique, est une décision de justice internationale' which is not even required to respect the law of the seat (being it relevant that it complies with the law of enforcement only).

[111] Swiss Federal Supreme Court, F. et U. v W. Inc., 30 December 1994, case 4 P.115/1994.

that it is worth adhering to a

> *notion universelle de l'ordre public, en vertu de laquelle est incompatible avec l'ordre public la sentence qui est contraire aux principes juridiques ou moraux fondamentaux reconnus dans tous les Etats civilisés.*

However, this idea does not find other confirmation in case law and it has been rejected even by authors, such as Gaillard, who generally support the concept of transnational public policy. Indeed, in Gaillard's opinion, recourse to transnational public policy is perfectly legitimate when applied by arbitrators, who do not belong to any particular legal system, but it does not find application in the practice of domestic courts,[112] which are bound to ensure respect for the fundamental principles of the forum.[113] With regard to his affirmation of the irrelevance of transnational public policy before domestic judges, Gaillard's opinion seems perfectly justified. In the EU context, indeed, it is confirmed by Article 3 of the Rome I Regulation, which allows judges of the Member States to apply only national laws (including international law as implemented in domestic legal systems) and precludes recourse to non-State law (ie forms of private codification which are not grounded in any positive law).[114]

However, and for the sake of completeness, it is important to highlight a significant and unique conceptual feature concerning the application of imperative norms in cases regarding challenge or enforcement of arbitral awards.[115] In particular, in these cases the application of imperative norms is to be balanced with the so-called *favor arbitrati* (ie the above-mentioned strong policy favoring arbitration which exists in several domestic legal systems). This has led to a self-restraint of domestic judges who have applied imperative norms as a limitation to the efficacy of arbitral awards quite sparingly.[116]

[112] See E. Gaillard and J. Savage, n 76 above, 955. Similarly see C. Seraglini, n 3 above, 154 and 287.

[113] F. Sbordone, n 1 above, 55-56. In this regard, it has been noted that domestic case law shows that judges difficultly take into account foreign imperative norms when evaluating the compliance of an arbitral award with their legal system. See C. Seraglini, n 3 above, 169.

[114] F. Sbordone, n 1 above, 47; V. Behr, 'Rome I Regulation. A – Mostly – Unified Private International Law of Contractual Relationships within – Most – of the European Union' *Journal of Law and Commerce*, 29, 241 (2011); Z.S. Tang, 'Non-state law in party autonomy – a European perspective' *International Journal of Private Law*, 5, 22 (2012). In this regard, in the law of international arbitration a distinction is usually drawn between 'law' (ie domestic law) and 'rules of law' (ie any substantive rule which is applicable upon express reference by the parties in a contract). See P. Bernardini, L'arbitrato commerciale internazionale (Milano: Giuffrè, 2000), 198.

[115] On this topic see J. Beatson, 'International arbitration, public policy considerations, and conflicts of law: the perspectives of reviewing and enforcing courts' 33 Arbitration International, 175 (2017).

[116] Such a self-restraint takes place, however, also in domestic litigation. In this context, however, the application of imperative norms is limited by the necessity to safeguard the international harmony of decisions and/or by international comity (this latter concept mainly in common law systems).

Indeed, a wide recourse to the concept of public policy would undermine the credibility of a certain legal system as an arbitration friendly seat and might have the consequence of leading parties to choose other arbitral seats. Hence, it is understandable that the limited recourse to public policy at the post-award stage is also due to significant economic considerations. A restrictive approach to public policy at the enforcement stage can indeed be found, inter alia,[117] in France,[118] Korea,[119] Italy,[120] Canada,[121] Hong Kong[122] and Singapore.[123]

Arbitral awards have been successfully challenged or not enforced only in very rare circumstances, which can be summed up in two categories: (i) when they did not respect procedural due process; and (ii) when they have been based on substantive laws which were in striking contrast with the *lex fori*.

As to violations of public policy falling under the former category, we can here recall the analysis under Section 2 above. It is here only necessary to clarify that – at least in the countries where the European Convention of Human Rights is applicable – domestic courts are entitled to ensure respect by arbitrators for the guarantees enshrined in article 6 of the ECHR (as interpreted by the Strasbourg Court).[124] Should arbitrators not have respected the due process principle, national courts are entitled to annul or not enforce the award.

As to domestic court decisions not enforcing arbitral awards for substantive violations of public policy, after restating that these cases are extremely rare due to the self-restraint that domestic judges usually practice in the application of the public policy exception,[125] it is necessary to analyze *the* two significant cases,

[117] See the in-depth comparative analysis carried out by A.G. Maurer, The Public Policy Exception Under the New York Convention (Huntington (NY): Juris Publishing, 2012). For an analysis of Chinese practice see P. Rossi, 'Public Policy and Enforcement of Foreign Awards: An Appraisal of China's Judicial Practice' 31 Diritto del commercio internazionale, 299 (2017).

[118] See, eg, Cour de Cassation 2 December 2015 no 1367.

[119] Korean Supreme Court, Adviso N.V. v Korean Overseas Construction Corporation, 14 February 1995.

[120] Corte d'Appello di Firenze, Nuovo Pignone v Schlumberger, 21 February 2006; Corte d'Appello di Milano, Tensacciai v Terra Armata, 15 July 2006.

[121] Court of Queen's Bench of Alberta, 26 September 2007.

[122] Hong Kong Court of Final Appeal, 9 February 1999, Hebei Import & Export Corporation v Polytek Engineering Company Limited; and 9 October 2007, Karaha Bodas Company LLC v Perushahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina), CACV 121/2003.

[123] Singapore Court of Appeal, 1 December 2006, Asuransi Jasa Indonesia (Persero) v Dexia Bank S.A. [2007] 1 S.L.R. 597.

[124] This is not the place for extensive analysis of such cases. See, for some recent decisions, Eur. Court H.R., Tabbane v Switzerland, March 2016, and Mutu & Pechstein v Switzerland, 2 October 2018. In this regard, also for an extensive analysis of scholarship and case law, it is possible to refer to M. Benedettelli, n 54 above, passim; G. Zarra, 'Rinuncia preventiva' n 54 above, passim; J. van Compernolle, n 54 above; A. Leandro, n 54 above, passim; A. Sardu, n 54 above, passim; M. Nino, n 54 above, passim.

[125] See US Court of Appeal for the Second Circuit, Parsons & Whittemore Overseas Co. v Societe Generale de l'Industrie du Papier (RAKTA), 23 December 1974, 508 F.2d 969, where it was affirmed that public policy may be applied only in case of violation of the 'most basic notions of morality and justice'. Similarly see US District Court for the Southern District of New York, MGM

ie the *only* cases where arbitral awards have been (i) successfully challenged in Switzerland due to the award's contrariness to public policy; and (ii) not enforced in England due to the award's contrariness to public policy.

The successful challenge in Switzerland for public policy reasons,[126] occurred in *Matuzalem* v *FIFA*.[127] An award of the Court of Arbitration for Sport (CAS) condemned the Brazilian football player Matuzalem to pay approximately 7 million euros to the Football Club Shakhtar Donetsk due to his arbitrary desertion of the Club's activities. The award also stated that Matuzalem was precluded from playing professional football until he paid the entire amount to Shakhtar Donetsk. The Swiss Federal Tribunal, however, considered that the award constituted an implicit and *sine die* prohibition of work for the football player, something that was in striking contrast with his fundamental rights under the Swiss Constitution.

The *Soleimany v Soleimany* case[128] is the only case where the enforcement of an international award was refused in England on public policy grounds. Sion Soleimany and his son Abner organized the smuggling of carpets from Iran to England and corrupted some diplomats who illicitly transferred the carpets in their luggage. When the business ended, the father refused to pay to the son his part of the earnings. Due to their Jewish faith, the two agreed that the dispute between them had to be resolved by the Beth Din (a Jewish authority), who decided that Abner was entitled to receive an amount of money from Sion arguing that the illegal nature of the contract was irrelevant for Jewish law. When Abner sought enforcement of the award in London, however, the Court of Appeal stated that, notwithstanding the strong *favor* for arbitration existing in England

> [this] is the very type of judgment which the English courts would not recognize on the ground of public policy. We stress that we are dealing with a judgment which finds as a fact that it was the common intention to

Production Group Inc. v Aeroflot Russian Airlines, 14 May 2003, 573 F. Supp. 2d 772 (S.D.N.Y. 2003), in which, interestingly, the Court noted that the payment of commissions allegedly running against US sanctions against Iran was not sufficient to activate the public policy defense. Contra, see the recent English Court of Appeal decision of 12 February 2020, MODSAF v IMS [2020] EWCA Civ 145, where – without discussing of public policy – English judges precluded the enforcement of interests in favor of the Iranian Ministry of Defense because this would have violated EU sanctions against Iran. See A. Atteritano, n 15 above, 336, explaining that US scholarship talks about a 'pro-enforcement bias'.

[126] Generally speaking, Swiss courts tend to exclude recourse to public policy arguing that it is possible only where the award is in 'violation of the fundamental principles of the Swiss legal system, which hurt the innate feeling of justice'. See Geneva Court of Justice, Import and Export Co. v G. S.A., decision of 11 December 1997.

[127] Swiss Federal Tribunal, Francelino da Silva Matuzalem v Federation Internationale de Football Association, 27 March 2012, case 4/A_558/2011.

[128] English Court of Appeal, 4 March 1998, Abner Soleimany v Sion Soleimany [1998] EWCA Civ 285.

commit an illegal act, but enforces the contract.[129]

It is important to note that the Court insisted on the circumstance that the existence of an illicit act was recognized by the Beth Din and not by the English judges, who considered that they were precluded from re-examining the merits of the dispute. This element distinguishes this case from another corruption case, *Westacre* v *Jugoimport*,[130] where the Court refused to apply the public policy exception because – notwithstanding the strong evidence filed in the English proceedings in favor of corruption – the arbitral tribunal considered that corruption was not proved. In this regard, it is interesting to note that – in the first instance decision confirmed by the Court of Appeal's judgment – Colman J noted that:

> [o]n the one hand there is the public policy of sustaining the finality of awards in international arbitration and on the other hand the public policy of discouraging corrupt trading (...) In my judgment, it is relevant to this balancing exercise to take into account the fact that there is mounting international concern about the prevalence of corrupt trading practices (...) However, although commercial corruption is deserving of strong judicial and governmental disapproval, few would consider that it stood in the scale of opprobrium quite at the level of drug-trafficking. *On balance, I have come to the conclusion that the public policy of sustaining international arbitration awards on the facts of this case outweighs the public policy in discouraging international commercial corruption.*[131] (emphasis added)

In conclusion, it seems worth pointing out that recourse to public policy at the post-award stage is a very rare phenomenon. It takes place only in cases where the contrast between the arbitral award and the fundamental principles of the forum is so striking as to necessarily mandate the annulment or non-enforcement of the award, regardless of the *favor arbitrati*. In this kind of reasoning, as in the rest of the arbitral proceedings, there is no space for transnational imperatives.

[129] Paras 32-33.

[130] English Court of Appeal, Westacre Investments Inc v Jugoimport-SDRP Holding Co. Ltd, 12 May 1999, [1999] EWCA Civ 401.

[131] [1998] 3 WLR 770, 798-800.