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

by ALEXIS MOURRE*

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

(a) Arbitrators as Guardians of International Legality

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

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

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

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

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


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

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

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

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


Referring Principles:

IV.7.2 - Invalidity of contract due to bribery