ARE THE ARBITRATORS SUITABLE TO APPLY PUBLIC POLICY PROVISIONS IN INTERNATIONAL COMMERCIAL ARBITRATION?

❖❖❖❖❖

Av. Yunus Emre ERSOY
İstanbul Barosu Avukatı,
İstanbul Kadir Has Üniversitesi Özel Hukuk alanında doktora öğrencisi

❖❖❖❖❖

ABSTRACT: States virtually maintain some restrictions upon the subject matter of arbitration such as states' public policy provisions. The extent of public policy in the international commercial arbitration becomes more comprehensive than that of the New York Convention, where it might be a defence against enforcement when the arbitral award is rendered; hence the problem occurs only at the final stage of arbitral process. Besides that, arbitrability also directly relates to public policy provisions that has effect on the base of the arbitration agreement or, more specifically, arbitration clause. It seems that arbitrators will have more discretion in arbitration process as to applying of domestic public policy provisions in the future, but are they really suitable to do that?

Keywords: International Commercial Arbitration, Arbitrator, Public Policy Provisions, New York Convention, Dispute Resolution.

Uluslararası Ticari Tahkimde Görev Alan Hakemler Dış Ülkelerin Kamu Politikalarına Uygun Karar Vermeye Ehiller midir?

Özet: Küreselleşen dünyada ekonomilerin gönencini artırmak, tedarik sürecini kısaltarak uluslararası ticarete hız kazandırmak yalnızca ortaya çıkan ticari sorunları olabildiğince kısa ve etkili yöntemlerle çözerek hakkaniyetli bir biçimde neticelendirmekle mümkün olabilecektir. Ticari tahkim, tarafları uzun mahkeme prosedürlerinden ve yavaş işleyen bürokrasilerden vareste tutarak bu sorunların çözümünde anahtar rol oynamakta; peki ya uluslararası alanda görev alan ticari tahkim hakemleri çok iyi tanımadıkları dış ülkelerin kamu politikalarına uygun, uygulamaya koyulabilir kararları vermeye ehiller midir? Yoksa bu mesele yalnızca halihazırda meslekleri ve eğitimleri gereği ülkelerin kültürlerini, geleneklerini, iç hukuklarını bilen, uygulamalara ve içtihatlara aşina olan hakimlere mi bırakılmalıdır? Okumakta olduğunuz makalede bu konuda doktrinde kabul görmüş iki zıt görüş karşılaştırılmış, gerekçeler ve çekinceler de irdelenerek yeni bir yaklaşım getirilmiştir.

Anahtar Kelimeler: Uluslararası Ticari Tahkim, Hakemler, Kamu Politikaları, New York Konvansiyonu, Uyuşmazlık Çözüm Yolu.

1. INTRODUCTION

Arbitration is a private system of adjudication. Parties who arbitrate have decided to resolve their disputes without using any state's judicial system.[1] Parties in arbitration are totally free to decide whether to arbitrate their disputes or who the decision-makers will be and where the arbitration will take place and which procedural rules will be applied.[2] In our global world, disputes arise out of international transactions need to be resolved as effective as possible to increase the quality of cross-border trade and make more profit.[3] Globalization fundamentally describes an economy where especially public and private companies regularly do cross-border transactions.[4] Most industrialized countries allow private parties to arbitrate their transnational disputes in this "globalized" trade area; generally, arbitration agreements are recognized and enforced.[5] Arbitration provides the most efficient way of dispute resolution to parties. Especially, for international trade and transnational investment areas, arbitration has become "the accepted method for resolving business disputes."[6] Therefore, parties increasingly turn to private arbitration to resolve their disputes.[7] At the same time, virtually all nations maintain some restrictions upon the subject matter of arbitration such as states' public policy provisions.[8] On that sense, arbitration has a crucially important role between business and politics.[9] And both developed and developing states are trying to grow arbitration's scope in terms of arbitrable matters in order to get benefits from its advantages[10], because it is also useful for them to take the burden away from their legal system.[11] It has also some benefits for the parties such as cost efficiency, quick procedure, more flexibility, less formal bureaucracy etc.[12]

---

1 Dr Julian Lew, Arbitration and Mediation in International Business, Kluwer Law Academic 1996, 36.

2 Cindy G Buys, Arbitrators' Duty to Respect the Parties' Choice of Law in Commercial Arbitration, [2005], 79 John's L Rev., 59.

3 Catherine Swee Kian Tay, Resolving Disputes by Arbitration: What You Need to Know, (Singapore University Press 1995) 5.

4 Anton G Maurer, *Public Policy Exception Under The New York Convention: History, Interpretation, and Application* (Revised Edition, Juris Publishing, Inc, 2013) 1.

5 Ludwig Von Zumbusch, 'Arbitrability of Antitrust Claims under US, German, and EEC Law: The International Transaction Criterion and Public Policy' [1987] 22 Tex Int'l L. Journal. 291.

6 John H. Barton and Barry E. Carter, International Law and Institutions for a New Age, 81 GEO. L. J. (1993). 536.

7 Cameron L. Sabin, 'The Adjudicatory Boat Without a Keel: Private Arbitration and the Need for Public Oversight of Arbitrators' [2002] 87(3) Iowa Law Review, 1.

8 Julian Lew (no-2) 36.

9 Yves Dezalay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996) 274.

10 Stacie I. Strong, Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns. [2008] *University of Pennsylvania Journal of International Law* 30, 1.

11 F. Brown, and Catherine A. Rogers, 'Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China' [1997], 15 The Berkeley J International Law, 329.

12 Margaret L. Moses, *The Principles and Practise of International Commercial Arbitration* (Cambridge University Press, 2012) 3.

The extent of public policy in the international commercial arbitration becomes more comprehensive than that of the New York Convention[13], where it might be a defence against enforcement when the arbitral award is rendered; hence the problem occurs only at the final stage of arbitral process.[14] However, arbitrability also directly relates to public policy provisions that has effect on the base of the arbitration agreement or, more specifically, arbitration clause. Nevertheless, this pertinence can also be used both at the beginning or at the end of process., as a defence against enforcement.[15] Courts can refuse recognition and enforcement of foreign awards. This means that an arbitrator who makes a national award is bound to obey national public policy.[16] When making a stateless award he is not bound by the public policy of any one country.[17] It can be detected that public policy is contingent on the particular judgement system of any state. For this reason, the fact must be considered that one of the main principles of one state's legal system can differ in another state's, in terms of public policy, with regard to financial, bureaucratic, theological or social, and, therefore legal system.[18]

Three main principles are applied by the courts when determining whether an award is contrary to public policy. The first of the criterions is the international nature of public policy, the second one is application in concrete, and the third one is its evolving character.[19] In many disputes, depending on the type of contract, arbitration is usually preferred over litigation as a dispute resolution tool; some other disputes end in litigation before state courts.[20] Finally, the commercial character of arbitration depends principally on nature of underlying dispute and, perhaps, also on the remedies requested.[21] All systems of law throughout the world recognize the concept of *ordre public,* or public policy, in private international law.[22] The public policy exception thus enables the forum

---

13 Kenneth-Michael Curtin, 'Redefining Public Policy in International Arbitration of Mandatory National Laws' [1997] 64 Def Couns J., 283.

14 Ole Lando, 'The Lex Mercatoria in International Commercial Arbitration' [1985] 04 (34) International and Comparative Law Quarterly, 762.

15 Karl-Heinz Böckstiegel, 'Public Policy as a Limit to Arbitration and its Enforcement' Journal of Dispute Resolution Special Issue (2008) The New York Convention - 50 Years, 11th IBA Arbitration Day and United Nations New York Convention Day (New York 2008), 123.

16 Ole Lando, (No 14) 762.

17 Ole Lando, (No 14) 762.

18 Karl-Heinz Böckstiegel, (No-15) 124.

19 Fauchard Gaillard Goldman, International Commercial Arbitration, (Kluwer Law International, 1999), 953.

20 Ali Yesilirmak, Provisional Measures in International Commercial Arbitration, (Kluwer Law Press 2005) 1.

21 Georgios Petrochilos, Procedural Law in International Arbitration, (Oxford Press, 2004) 5.

22 Javier Garcia De Enterria, 'The role of public policy in international commercial arbitration' [1990] 21(3) Law and Policy in International Business: the International Journal of Georgetown University Law Center 390.

to protect the sanctity of certain values and minimum standards of justice and morality.[23] Further, arbitration clauses are voluntary. The contracting parties freely waive the protection of their own courts in order to submit the disputes to an arbitral tribunal.[24]

2. A REMARKABLE INSTANCE FOR APPLICATION OF PUBLIC POLICY BY AN ARBITRATOR

Waiver by pre-litigation conduct can also be described as a matter of public policy. Michael P. Scharpf explains why that special kind of public policy matter in arbitration is best left to the arbitrator while questions of waiver by litigation conduct are best left to the court.[25]

In *JPD Inc. v. Chronimed Holdings, Inc. case,*[26] the Sixth Circuit recently held that pre-litigation conduct is a question for the court to decide and not the arbitrator.[27] Scharpf disagrees with *Chronimed decision* acknowledging that Supreme Court clarification will ultimately be needed to resolve the confusion created by the *Howsam*[28] decision*, for this reason,* waiver by pre-litigation conduct is a question for the arbitrator to decide according to him.[29] To reach this conclusion, he argues that the convincing interpretation used by courts in countenance of deciding waiver by litigation conduct cannot be applied to waiver by pre-litigation conduct due to the significant differences between these two kinds of conduct.[30]

As explained, *Tristar*[31]*, Marie*[32]*, and Ehleiter*[33] developed a cohesive argument based on case history, statutory interpretation, and, most critically, public policy that courts ought to make decision on the matter of waiver by litigation conduct.[34] These opinions are generally used to support courts determining

---

23 Pierre Lalive, 'Transnational (or truly International Public Policy) and International Arbitration [1986] (In P.Sanders, Comparative Arbitration Practice and Public policy in Arbitration, Deventer, 1987) 261.

24 Robert B. von Mehren and Michael E. Patterson, 'Recognition of Foreign Country Judgments in the United States,' [1974] 37(6) Law & Pol Int'l Bus. 63.

25 Michael P. Scharpf, 'Court v. Arbitrator: Who Should Decide Whether Prelitigation Conduct Waves the Right To Compel an Arbitration Agreement?' *St. John's Law Review* (2011), 84(1), 365.

26 JPD Inc. v. Chronimed Holdings,.Sixth Circuit: August 22, 2008. Appeal from the Southern District of Ohio

27 Michael P. Scharpf, (No 25) 365.

28 Howsam V. Dean Witter Reynolds, Inc. (01-800) 537 U.S. 79 (2002).

29 Michael P. Scharpf, (No 25) 365.

30 Michael P. Scharpf, (No 25) 365.

31 *Tristar Financial Ins. Agency, Inc. v.Equicredit Corp. of America*, 97 Fed. Appx.462 (5th Cir. 2004)

32 Marie v. Allied Home Mortgage Corp., 402 F.3d 1, 14 (1st Cir. 2005).

33 Jack Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207 (3rd Cir. 2007)

34 Michael P. Scharpf, (No 25) 365.

waiver by litigation conduct, nevertheless, do not apply evenly to waiver by pre-litigation conduct.[35]

Public policy arguments are particularly matters of effectiveness and party anticipations set forth by the FAA, *Moses,* and *Howsam cases that* supports waiver by pre-litigation conduct being a question best left to the arbitrator.[36] Thus, the Sixth Circuit in *JPD, Inc. v. Chronimed Holdings, Inc.* the arguments of effectiveness and party anticipations that are formulated from these three circuit court cases only approve a court deciding questions of waiver by litigation conduct. When such arguments are applied to the question of waiver by pre-litigation conduct, nevertheless, they cut the other way.[37] *Chronimed's* hypothesis does not improve any public policy argument as for why waiver by pre-litigation conduct ought to be best for the state court to make decision.[38] Conversely, the worries of effectiveness and party anticipations support arbitrators deciding questions of waiver by prelitigation conduct.[39]

2.1. Party Anticipations

In Howsam decision, The district court declined the legal action "on the occasion of the arbitrator[40], not the court, ought to interpret and apply the National Association of Securities Dealers (NASD) rule.".[41] The Court of Appeals for the Tenth Circuit, made it opposite, stating that the "application of the NASD rule presented a question of the underlying dispute's 'arbitrability'; and the presumption is that a court, not an arbitrator, will ordinarily make decision on 'arbitrability' question."[42]

The Supreme Court granted certiorari to find a solution for the matter of "whether a state court or an arbitrator primarily ought to interpret and apply this particular NASD rule."[43]. The Court put the judgment of the Tenth Circuit in opposite way, stating that the NASD rule was for an arbitrator to interpret and apply.[44] In court's point of view, the Supreme Court created a framework for courts to use in deciding which gateway questions such as waiver were for the courts to make decision and which were reserved for arbitrators.[45]

---

35 Michael P. Scharpf, (No 25) 366.

36 Michael P. Scharpf, (No 25) 381.

37 Michael P. Scharpf, (No 25) 382.

38 Michael P. Scharpf, (No 25) 384.

39 Michael P. Scharpf, (No 25) 388.

40 The National Association of Securities Dealers (NASD). NASD rules provided that "no dispute 'shall be eligible for submission.., where six years have elapsed from the occurrence or event giving rise to the.., dispute.' NASD Code of Arbitration Procedure § 10304).

41 Michael P. Scharpf, (No 25) 370.

42 First Options of Chi. Inc. v. Kaplan, 514 U.S. 938, 947 (1995).

43 *Howsam,* 537 U.S. at 82-83. (No 332)

44 *Id.* at 86.

45 *Id.* at 83-86.

If we review this case law, we can notice that the Court mentioned the phrase "question of arbitrability" applicable in the typical narrow-scoped circumstances where parties would likely have demanded a court to have made a decision on the gateway matter, where they have not likely thought that they had admitted that an arbitrator would do so, and, finally where reference of the gateway dispute to the court prevents the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.[46]

Accordingly, with examining party anticipations, the Court categorized questions of arbitrability for a court to decide and those gateway questions more suitably left to the arbitrator.[47] The Court gave description of arbitrability as questions related to the presence of a binding arbitration agreement and questions as to if an issue is included to the scope of an agreement.

As opposite, gateway questions which is related to "general circumstance(s)" where parties would likely demand that an arbitrator would decide the gateway matter were not "questions of arbitrability," and therefore were not to be decided by courts."[48] Particularly, procedural questions which grow out of the dispute and bear on its final disposition are presumably *not* for the judge, but likely for an arbitrator, to decide. For this reason, the Court seperated gateway questions to two main classification: "(1) substantive questions, which are the "questions of arbitrability" for judges to decide-such as the existence and scope of an arbitration agreement; and (2) procedural questions, which are for arbitrators to decide."[49]

In order to reach its decision, the Court examined the Revised Uniform Arbitration Act of 2000 (RUAA), which provided that "an arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled.". The Court cited comment 2 of the RUAA, which forced "issues of procedural arbitrability, i.e., whether preconditions such as time limitations, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to make decision.[50]

Furthermore, to clear up which gateway questions were for courts and which were for arbitrators to decide, the Court examined the anticipations of parties when accepting an arbitration agreement.[51] As such, the Court held that an issue regarding NASD's time-limitation rule would be demanded to fall within the kind of procedural question that an arbitrator would decide. Moreover,

---

46 Id. at 84.

47 Michael P. Scharpf, (No 25) 371.

48 Michael P. Scharpf, (No 25) 372.

49 David LeFevre, Whose Finding Is It Anyway?: The Division of Labor BetweenCourts and Arbitrators with Respect to Waiver, 2006 J. DISP. RESOL. (2006). 311.

50 *Howsam,* 537 U.S. at 84-85 (No 332)

51 Michael P. Scharpf, (No 25) 372.

the Court had its conclusion that NASD arbitrator would be better at interpreting and applying the agency's own rule than a court. The Court said that "for the law to assume an expectation that aligns decision maker with comparative expertise will help better to secure a fair and expeditious resolution of the underlying controversy-a goal of arbitration systems and judicial systems alike."[52]

While the *Howsam* Court demonstrated the two different aspects of the arbitrability issue and precisely determined that the NASD time-limit rule was suitable for arbitrators to decide, but however, there is still ambiguity about where waiver fits in as a gateway question.[53] The *Howsam* Court, quoting *Moses,* declared that, "so, the assumption is that the arbitrator ought to decide 'allegation(s) of waiver, delay, or a like defence to arbitrability."[54] For this reason, until the Supreme Court clears up what it meant by "waiver," particularly, whether the term involved waiver by litigation and pre-litigation conduct and on which side of the issue of arbitrability waiver falls, waiver will continue to provide an uncertain content and to be in a grey area between court and arbitrator.[55]

The Third Circuit also added another different aspect to the argument that favouring courts deciding waiver by litigation conduct. The Third Circuit argued that, when accurately considered within the framework of the whole aforementioned idea that 'the presumption is that the arbitrator ought to decide allegations of waiver, delay, or a like defence to arbitrability...' indeed refers to "waiver, delay, or like defences arising from non-compliance with contractual conditions precedent to arbitration, such as the NASD time limit rule at issue in that case, and not to claims of waiver based on active litigation in court."[56]

2.2. Should Arbitrators be Allowed to Decide Issues of Public Policy?

Under contemporary understanding and application of public policy in commercial arbitration, aberrations of private agreements cannot be tolerated.[57] Compulsory positive law and supposedly peremptory social values which rule in default of definite legal rules are encountered with the norms of public policy.[58] And for the main purpose of this chapter, we seek an answer of question that whether there is any specific rationale why arbitrators should not decide if and how mandatory laws apply. According to Jan Paulsson, if arbitrators were unauthorised to make such judgments, any respondent could easily parry any attempt to arbitrate by raising a factitious defence said to involve public policy.

---

52 Howsam 537 U.S. at 84-85 (No 332)

53 Michael P. Scharpf, (No 25) 373.

54 Howsam 537 U.S. at 84-85 (No 332)

55 Michael P. Scharpf, (No 25) 374.

56 Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 209-10 (3d Cir. 2007).

57 Jan Paulsson, The Idea of Arbitration (Clarendon Law Series 2014), 128..

58 Jan Paulsson (No 57) 128.

Arbitrators should also be fail-proof to draw the basic consequences from conduct incompatible with the essential values of society. But whereas the category explicitly compulsory rules is broad and expanding, the need to invoke unwritten and theoretical notions of public policy seems gradually getting smaller and the overruling where positive laws is unmentioned, of arbitral determinations therefore highly exceptional. Arbitral determinations in terms of compulsory rules, inasmuch as they make a determination in dispute among the two arbitrants, should not be subject to rectification.

Private dispute resolution would be affected badly from rejecting arbitration altogether, or to disqualify arbitrators from being able to decide any questions of law. Claiming that arbitrators are not capable of getting involved to decision stage of public policy matters in commercial arbitration, may also seem a sensible limitation; it suggests a natural limit to tolerance of private arrangements. Yet anyone starting to contemplate this subject must first consider that the notion of public policy could be hazardous and risky; since there is no limitation to what may be proclaimed to be a matter of public policy from which no deviance is to be tolerated. To put it another way, excessive faddishness to admit objections as per "procuration" public policy may result in the same extreme position as the outright rejection of arbitration.[59]

So much so that, it seems that Oliver Wendell Holmes would probably have to reconsider his description, if writing today, to the effect that comprehensions of public policy are those 'which judges most rarely mention and always with an apology'.[60] It can clearly be detected that state courts are, as it seems, both lazy and unhelpful when they make a theoretical potpourri of public policy, on the one hand, and explicit rules of illegality, unenforceability, or mandatory obligations, on the other.[61] Besides that, only confusion was made when national courts state that it is contrary in terms of public policy to enforce a contract that violates competition rules, sets out an unconscionable bargain, or contains a waiver of liability for hidden defects, if each is already proscribed by positive law.[62]

Once it is understood that the limited dimension of public policy defences as autonomous grounds of decision, it can clearly be seen that the most crucial question is the rights and duties of independent arbitrators to apply compulsory rules of law. Furthermore, the main question of whether arbitrators, because their authority is derived from a contract, precluded from considering the impact of compulsory laws that are at variance with contractual terms? The simple answer would be negative[63] unless the arbitration agreement is unusually con-

---

59 Jan Paulsson (No 57 130.

60 Jan Paulsson (No 57) 130.

61 Jan Paulsson (No 57) 131.

62 Jan Paulsson (No 57) 132.

63 Article 2639 of the Civil Code of the Quebec.

stricting.[64] Supposing that, there is a contradiction between public policy and party autonomy would approve the scholars who doubt that the arbitration should not be trusted. Viewing compulsory laws as humiliating to party autonomy is not only theoretical misunderstanding but a strategic fault on the part of scholars who seek an improvement for commercial arbitration.[65] There is remarkable statement -fortunately outdated- by the US Supreme Court to explain aforementioned issue:

"As the protector of the bargain, the arbitrator's task is to effectuate the intent of the parties... The arbitrator has no general authority to invoke public laws that conflict with the bargain between the parties"[66] As the outcome of this perception -it can be said that arbitrators -bound with the contract-have no competence to apply corrective or proscriptive laws, and for this reason their awards are subject to judicial control.[67] After all these arguments how should we understand the role of arbitrators in terms of enactments said to reflect public policy? An important proposition is so rarely conceived that it may startle: to accept that contractual disputes may be arbitrated is instantly for endorsement of the idea that arbitrators may make a decision on the issues of public policy.

It is definitely a matter of public policy that contractual entitlements ought to be implemented by the law; it is a vital element of life in cutting edge social orders, which would be unrecognizable without our frequently negligent, yet stable conduct as parties to the multitudinous contracts of daily life. To say that arbitrators may make a decision if an agreement has been violated or not is accordingly to acknowledge arbitral authority to determine a matter of public policy.[68] This does not imply that the point must necessarily be decided by judges; the law is satisfied that an appropriately authorized arbitrator is interposed between the parties and determines their contractual rights.[69] This being so, we can make a stride further to the point of compulsory laws, and now conceive that it does not make sense to refuse that arbitrators are able to apply them.[70] On the off chance that for instance an arbitrator decides that a building contract is governed by a law that imposes a five-year guarantee for shrouded defects, the award will apply that provision regardless of the possibility that the agreement required a shorter guarantee period, or stipulated that there are no guarantees by any means. The arbitrator may make a decision on that the legal guarantee cannot be applied on the grounds that the defects could clearly be noticed, or in light of the fact that the contract does not qualify as a build-

64 Jan Paulsson (No 57) 133..

65 Jan Paulsson (No 57) 134.

66 Alexander v Gardner-Denver 415 US 36. 56 (1974)

67 Jan Paulsson (No 57) 134.

68 Jan Paulsson (No 57) 134.

69 Gilmer v Interstate Johnson Lane Corp. 500 US 20 at 26 (1991).

70 Jan Paulsson (No 57) 135.

ing contact, or to the contrary that it can be applied, with the consequence that the builder owes the proprietor the amount of X. In addition, it is clear that the state courts have no basis to legitimate the award in either case -i.e. to say that the legal guarantee must apply, or that the flaws must be three times X.[71] The public policy in general approach that underlies the legal guarantee, to be a minimum standard of obligations regarding workmanship in new buildings, is fulfilled by the way of the arbitrators' mediation. Their mediation makes it impossible for the parties to apply by contract what the law does not approve. hat is the very purpose of a compulsory (or non-waivable) principle. (We assume for present purposes that the arbitrator does not disregard compulsory law)[72] The similar situation is also valid in terms of any number of issues which include public policy. The law is not going to be applied for the contracts procured by bribery or fraud, or contracts violating competition law principles or usury statutes. Be that as it may, that does not imply that the law demands only state judges to make decision on such issues, or that judges may overrule arbitrators only because they prefer a dissimilar outcome. Once more, if the law system permits arbitrators to decide if a party does not enjoy contractual entitlements, there is no basis why they ought not have the power to make a decision on the outcomes of an obligatory rule or an issue of unlawfulness. Yet all are matters of essential public interest.[73]

There are two occasions to for the arbitrators to make decision on issues of obligatory law. The first one ought to be self-evident, however should be expressed: arbitrators must have jursdiction. In the event that the arbitration agreement is invalid as per law, they would have no authority. It is obvious that the severability of contractual arbitration provisions implies that charges of unlawfulness do not influence the arbitration clause.[74] Be that as it may, if the unlawfulness relates particularly to the arbitration clause or if the dispute is of a sort which the law characterizes as non-arbitrable, there will be no legal compliance to the putative arbitration agreement.[75] We are still left with the intimidating duty of determining, in challenging cases, what might be unacceptable with regard to the main principles of public policy.[76]

3. Conclusion

It might, perhaps, be contended that an arbitrator can apply a transnational public policy by virtue of his status as an international arbitrator. In other words, the status of the arbitrator is a *sui generis* source of rights and obliga-

---

71 Jan Paulsson (No 57) 135.

72 Jan Paulsson (No 57) 135.

73 Jan Paulsson (No 57) 135.

74 Adam Samuel, 'Separability and the US Supreme Court Decision in Buckeye v. Cardegna. 22 Arb. Int. 227. (2006).

75 Jan Paulsson (No 57) 136.

76 Jan Paulsson (No 57) 136.

tions.[77] However, this brings into the debate the juridical nature of arbitration and the acceptance of the "autonomous theory" of arbitration.[78] Some commentators, mainly of the continental school, have suggested that arbitrators should have regard to principles of transnational public policy.[79]

The extent of international arbitration's public realm and the ability of international arbitrators to take cognizance of public issues not presented by the parties should not be overstated.[80] Particularly in developing countries and in trade-related contexts, arbitral awards can have significant social implications that reach far beyond the stark confines of private commercial relationships.[81] Even under a conceptualization of international arbitrators as justice-providers, it is unlikely they could, under the current conceptions and institutional structures, strive to effectuate deep structural social change.[82] Their justice function and their contributions to a public realm, however, do significantly raise the ante on how their work will be evaluated both by the parties to particular cases and more generally. Moreover, there are existing precedents that testify to the feasibility of these proposals. References by former parties are generally part of mediation practice, and party feedback and public critique is widely available for judges.[83] These resources are arguably much more important for arbitrators than either for mediators, who cannot impose binding decisions, or for judges, who cannot be avoided if they have an undesirable track record. Providing this source of feedback would necessarily require some degree of editing to ensure the confidentiality of parties and to protect arbitrators against malicious or unfounded accusations, but such efforts would likely find ready compensation from parties who are otherwise unable to access the information.

---

77 Michael Pryles, Reflections on Transnational Public Policy, Journal of International Arbitration 24(1): (2007). 7.

78 Michael Pryles, (No 57) 7.

79 Michael Pryles, (No 57) 7.

80 Amr A. Shalakany, *Arbitration And The Third World: A Plea For Reassessing Bias Under The Specter Of Neoliberalism,* 41 Harv. Int'l L.J. (2000) 443

81 Bemardo M. Cremades, *Disputes Arising Out Of Foreign Direct Investment İn Latin America: A New Look At The Clavo Doctrine And Otherjurisdictional Issues,* Disp. RESOL. J., May-July 2004, At 78.

82 Owen Fiss, *The Supreme Court, 1978 Term-Foreword: The Forms Of Justice,* harv. l. rev. 1, 2 (1979). 93.

83 Richard Silverberg Et Al., *Best Practices İn Large, Complex Cases: A Practitioner's Guide,* Disp. RESOL. J., May-June 2004, At 63.

BIBLIOGHRAPHY

Books

AGM, *Public Policy Exception Under The New York Convention: History, Interpretation, and Application* (Revised Edition, Juris Publishing, Inc, 2013)

CSKT, Resolving Disputes by Arbitration: What You Need to Know, (Singapore University Press 1995)

GB, International Commercial Arbitration in the United States, Commentary and Materials (Kluwer Law International, 2001).

GP, Procedural Law in International Arbitration, (Oxford Press, 2004)

JL, 'Comparative international commercial arbitration' [2003] Kluwer Law International.

JP, The Idea of Arbitration (Clarendon Law Series 2014).

YD, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996)

Cases

Howsam V. Dean Witter Reynolds, Inc. (01-800) 537 U.S. 79 (2002).

Tristar Financial Ins. Agency, Inc. v. Equicredit Corp. of America, 97 Fed. Appx.462 (5th Cir. 2004)

Jack Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207 (3rd Cir. 2007)

First Options of Chi. Inc. v. Kaplan, 514 U.S. 938, 947 (1995).

Alexander v Gardner-Denver 415 US 36. 56 (1974)

Gilmer v Interstate Johnson Lane Corp. 500 US 20 at 26 (1991).

Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 209-10 (3d Cir. 2007).

JPD Inc. v. Chronimed Holdings, Sixth Circuit: August 22, 2008. Appeal from the Southern District of Ohio

Marie v. Allied Home Mortgage Corp., 402 F.3d 1, 14 (1st Cir. 2005).

Journals

AMS, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism,* 41 HARV. INT'L L.J. (2000)

AS, 'Separability and the US Supreme Court Decision in Buckeye v. Cardegna. 22 Arb. Int. 227.

CAR, 'Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China' [1997], 15 The Berkeley J International.

CGB, Arbitrators' Duty to Respect the Parties' Choice of Law in Commercial Arbitration, [2005], 79 John's L Rev.

CSL, 'The Adjudicatory Boat Without a Keel: Private Arbitration and the Need for Public Oversight of Arbitrators' [2002] 87(3) Iowa Law Review.

DLF, Whose Finding Is It Anyway?: The Division of Labor BetweenCourts and Arbitrators with Respect to Waiver, 2006 J. DISP. RESOL. (2006).

JGE, 'The role of public policy in international commercial arbitration' [1990] 21(3) Law and Policy in International Business: the International Journal of Georgetown University Law Center.

JHB, International Law and Institutions for a New Age, 81 GEO. L. J. (1993).

KHB, Public Policy as a Limit to Arbitration and its Enforcement, Journal of Dispute Resolution Special Issue (2008).

KMC, 'Redefining Public Policy in International Arbitration of Mandatory National Laws' [1997] 64 Def Couns J.,

LvZ, 'Arbitrability of Antitrust Claims under US, German, and EEC Law: The International Transaction Criterion and Public Policy' [1987] 22 Tex Int'l L. Journal.

OL, 'The Lex Mercatoria in International Commercial Arbitration' [1985] 04 (34) International and Comparative Law Quarterly.

OW *The Supreme Court, 1978 Term-Foreword: The Forms of Justice,* HARV. L. REV. 1, 2 (1979).

PL, 'Transnational (or truly International Public Policy) and International Arbitration [1986] (In P.Sanders, Comparative Arbitration Practice and Public policy in Arbitration, Deventer, 1987).

RBM 'Recognition of Foreign Country Judgments in the United States,' [1974] 37(6) Law & Pol Int'l Bus.

RS., *Best Practices in Large, Complex Cases: A Practitioner's Guide,* DisP. RESOL. J., May-June 2004.

SIS, Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns. [2008] *University of Pennsylvania Journal of International Law* 30.