

# The Recognition of Transnational Substantive Rules by Courts in Arbitral Matters

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## I. INTRODUCTION: A QUESTION MARK (AND AN OXYMORON)

### A. *A Question Mark: What “Rules” Are We Talking About?*

“Transnational rules” is not a term of art. Its content overlaps and is often assimilated to substantive public policy and sometimes used interchangeably with *lex mercatoria*, or general principles, two equally elusive concepts. Many authors have tackled the difficult task of defining these concepts and many have abandoned it in frustration. Some are fervent proponents of these rules, others deny their very existence, comparing *lex mercatoria* to “a phantom ship floating through the scholarly debate, evaporating without leaving a trace if one wants to get a closer look.”<sup>1</sup>

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<sup>1</sup> Rolf Herber, “*Lex mercatoria*” und “*Principlese*” – gefährliche Irrlichter im internationalen Kaufrecht, INTERNATIONALES HANDELSRECHT [IHR] 1/2003, at 1, 5: “*Wie ein Geisterschiff treibt dieser Begriff durch die internationale handelsrechtliche Diskussion – sich in Nichts auflösend, wenn man ihn genauer betrachten will.*” There is abundant scholarly material on these concepts; for selected references, see *infra* note 17.

I do not intend to add to the confusion but shall propose in "cavalier" fashion that, for the present paper, transnational rules are those that are universally considered as being non-waivable fundamental rules to be complied with by the actors of international commerce.

As is made obvious by the use of the term "transnational," we are not looking into the law of a particular country. Obviously, to the extent that a rule is considered by a state (sometimes wrongly) to be of a universal nature, it will inevitably be contained in some shape or form in the statutes and/or case law of this country, although it will seldom be identified as a "transnational" rule. What we are looking for are situations where a country applies such a fundamental rule in an international context, and is not satisfied with merely referring to the rule as part of its internal law but as part of a wider legal order.

Finally, the relevant context of our paper is the interaction between domestic courts and arbitral tribunals. The transnational rules that we have in mind are those that are applied by arbitrators and confirmed by a state court, or those that are applied by the courts themselves in relation to an arbitral matter.

We shall only consider substantive rules of substance, as opposed to procedural rules. More precisely, to the extent that a rule can have an impact on procedural as well as substantive matters, we shall only examine the consequence of a transnational rule on the merits of the dispute.

**B. *Substantive Rules in Arbitral Matters Before a Court: An Oxymoron?***

One of the most distinctive features and key advantages of international arbitration is the absence of an appeal on the merits against arbitral awards. All modern arbitration laws as well as the New York Convention expressly prohibit a review of the substance of the award by state courts. However, a closer inspection permits to identify a number of exceptions where state courts can review the merits of an award.

**II. THREE HYPOTHESIS WHERE A STATE COURT CAN REVIEW THE SUBSTANCE OF AN ARBITRAL AWARD**

Courts may have to review the substance of an award in relation to transnational rules if the award is based only on such rules, rather than on a given statute or law. A court may have to decide whether the arbitral tribunal was even entitled to apply these rules at all (*infra* section A).

A second case where courts examine an award for compliance with transnational rules occurs in the event of a challenge of an award in the courts of the country where it has been rendered: the violation of substantive public policy, which overlaps to some extent with transnational rules, is a ground to set an award aside (*infra* section B).

Thirdly, the court in the country where a party seeks to enforce a foreign arbitral award may also have to analyze whether the award passes the public policy test (*infra* section C).

*A. Awards Based on Transnational Rules Before the Courts*

**1. Admissibility of Opt Out Clauses that Exclude the Applicability of National Law**

Twenty-five years ago, most arbitration laws and sets of rules provided that arbitral tribunals were obligated to apply a particular body of law. Failing a choice of law by the parties, the arbitral tribunal had to determine the law applicable to the merits by referring to the appropriate conflict of laws rule and apply the law designated by this rule.

Thus, the UNCITRAL Arbitration Rules of 1976 provide in Article 33 that “the arbitral tribunal shall apply the law designated by the parties . . . . Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable.”

Recent years have brought two changes in this approach: On the one hand, the “*voie directe*” has gained much ground. The arbitrators are not bound by conflict of laws rules but may decide directly (“*voie directe*”) the law they consider appropriate. On the other hand, the parties and arbitrators may choose to apply “rules of law,” as opposed to statutory law and case law.<sup>2</sup>

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<sup>2</sup> See, e.g., France, Art. 1496 of the New Code of Civil Procedure; Switzerland, Art. 187 of the Private International Law Statute of Dec. 18, 1987; Art. 28 of the UNCITRAL Model Law (1985), which offers the parties a possibility to opt for rules of law: “The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties.” The arbitrators, however, remain confined to a legal system: “Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable.” See also Art. 17 of the 1998 ICC

It is not surprising that the latest set of institutional arbitration rules, the Swiss Rules of International Arbitration of January 1, 2004—although based on the UNCITRAL Rules—did not follow the more restrictive regime of the latter with regard to the law applicable to the merits. Rather, Article 33 of the Swiss Rules provides that “[t]he arbitral tribunal shall decide the case in accordance with the rules of law agreed upon by the parties or, in the absence of a choice of law, by applying the rules of law with which the dispute has the closest connection.”<sup>3</sup>

## 2. Review by a Court of an Award Based on Transnational Rules

In principle, it is possible under most modern statutes to base an award on transnational rules without reference to a specific national law.

A problem may arise if the arbitral tribunal applies transnational rules *instead* of the law chosen by the parties. What will be the fate of this award? Will it be annulled or confirmed?

- In the *Valenciana* case, the sole Arbitrator held in a partial award that—in the absence of any indication by

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Rules: “Applicable Rules of Law – The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.”

<sup>3</sup> The caption of Article 33, “Applicable law, amiable compositeur,” could lead to the conclusion that the Swiss Rules maintain the principle that the dispute is necessarily governed by a law, as it was indeed the case under the UNCITRAL Rules. As the wording of Article 33 shows, however, the drafters of the Swiss Rules clearly had the intention to derogate from the UNCITRAL model and to accept that disputes be decided also in application of a rule of law.

the parties as to the governing law and of sufficient objective connecting factors to any national laws—the dispute would be resolved according to international trade usages, *i.e.*, *lex mercatoria*.<sup>4</sup> The Paris Court of Appeals rejected Valenciana’s petition to set aside this partial award and decided that the arbitrator had complied with the Terms of Reference.<sup>5</sup> The Court found that *lex mercatoria* was indeed the most appropriate law and “could apply to the solution of such a dispute in the absence of a determined [national] jurisdiction.” The French *Cour de cassation* upheld the Court’s decision and affirmed that the Arbitrator, in applying the rules of international commerce, had not violated the Terms of Reference. It further decided that the Court of Appeals was not required to examine how the Arbitrator had determined and implemented the applicable law.<sup>6</sup>

- Similarly, in an ICC award in *Pabalk Ticaret Limited Sirketi (Turkey) v. Norsolor S.A. (France)*, the Arbitral Tribunal, “faced with the difficulty of choosing a national law the application of which is sufficiently

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<sup>4</sup> Sept. 1, 1988 Partial Award in ICC Case No. 5953, *Compañía Valenciana de Cementos Portland SA (Spain) v. Primary Coal Inc. (US)*, 1990 REV. ARB. 701.

<sup>5</sup> CA Paris, July 13, 1989, *Compañía Valenciana de Cementos Portland v. Primary Coal*, 1990 REV. ARB. 663, and P. Lagarde’s note; for an English translation, see XVI Y.B. COM. ARB. 142 (1991).

<sup>6</sup> Cass. 1e civ., Oct. 22, 1991, *Compañía Valenciana de Cementos Portland v. Primary Coal Inc.*, 1992 REV. CRIT. DIP 113, and B. Oppetit’s note, 119 J.D.I. 177 (1992), and B. Goldman’s note, 1992 REV. ARB. 457, and P. Lagarde’s note; for an English translation, see 6(12) INT’L ARB. REP. B1 (1991); see also FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 1556, at 879–80 (E. Gaillard & J. Savage eds., 1999).

compelling," invoked *lex mercatoria* and resorted to the principles of 'good faith' and 'fair dealing' for the resolution of the dispute.<sup>7</sup> This award made its path through the courts of Austria and France where Pabalk sought enforcement. The Austrian Supreme Court finally held that the award could not be set aside as the arbitrators applied "a principle inherent in the private law systems which in no way is contradictory to strict legal regulations of the countries concerned" and that the arbitral tribunal had not transgressed its jurisdiction or infringed mandatory provisions of Austrian law.<sup>8</sup> The French courts, which dealt with the matter simultaneously, decided similarly. The *Tribunal de Grande Instance* found that the arbitrators, in selecting *lex mercatoria*, had acted within the scope of their mandate under Article 13 of the ICC Rules, and had not exceeded their mandate by acting as 'amiables compositeurs' without proper authority. The French *Cour de Cassation* failed to find a violation of public policy and confirmed the award.<sup>9</sup>

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<sup>7</sup> Oct. 26, 1979 Award in ICC Case No. 3131, Pabalk Ticaret Limited Sirketi v. Norsolor, 1983 REV. ARB. 525.

<sup>8</sup> Austrian Sup. Ct. (*Oberster Gerichtshof*), Nov. 18, 1982, Norsolor v. Pabalk, 1983 REV. ARB. 516 (1983), 110 J.D.I. 645 (1983), and note by I. Seidl-Hohenveldern; see also Berthold Goldman, *Une bataille judiciaire autour de la lex mercatoria: l'affaire Norsolor*, 1983 REV. ARB. 379; FOUCHARD GAILLARD GOLDMAN, *supra* note 6, at 879 *et seq.*

<sup>9</sup> See CA Paris, Dec. 15, 1981, Norsolor v. Pabalk Ticaret Sirketi, 1983 REV. ARB. 465, 470, and the commentary by B. Goldman; CA Paris, Nov. 19, 1982, Norsolor v. Pabalk Ticaret Sirketi, 1983 REV. ARB. 465, 3d decision, and the commentary by B. Goldman; for an English translation, see XI Y.B. COM. ARB. 484 (1986); Cass. 1e civ., Oct. 9, 1984, Pabalk Ticaret Sirketi v. Norsolor, 1985 REV. ARB. 431, and B. Goldman's note, *Dalloz*, Jur. 101 (1985), and J.

- The ICC arbitrators in the case *DST v. Rakoil*, sitting in Geneva, found that—again in the absence of an express choice of law by the parties—it would be inappropriate to apply a particular national law. They referred “to what has become common practice in international arbitrations particularly in the field of oil drilling concessions and especially to arbitrations located in Switzerland” and held the applicable law to be “internationally accepted principles of law governing contractual relations to be the proper law applicable to the merits of this case,” as permitted by ICC Rule 13(3).<sup>10</sup> The Court of Appeal in London dismissed Rakoil’s appeals based on the law applicable to the award, holding that “by choosing to arbitrate under the Rules of the ICC and, in particular, Article 13(3), the parties have left proper law to be decided by the arbitrators and have not in terms confined the choice to national systems of law.” The Court held that, consequently, the arbitrators had not exceeded their authority.<sup>11</sup> These findings were not overturned in the

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Robert’s note, 112 J.D.I. 679 (1985), and P. Kahn’s note; for an English translation, see 24 I.L.M. 360 (1985), with an introductory note by E. Gaillard.

<sup>10</sup> 1982 Final Award in ICC Case No. 3572, *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH. v. Government of the State of R’as Al Khaimah (UAE) & the R’as Al Khaimah Oil Co. (Rakoil)*, XIV Y.B. COM. ARB. 111 (1989).

<sup>11</sup> Court of Appeal, Mar. 24, 1987, *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH. v. R’as Al Khaimah Oil Co. (Rakoil)*, [1987] 2 Lloyd’s Rep. 246, [1987] 2 All E.R. 769; see also P. Lalive, *Arbitrage en Suisse et Lex Mercatoria (Note sur un important arrêt anglais)*, 1987 ASA BULL. 165.

subsequent House of Lords' decision which reversed the Court of Appeal's decision on other grounds.<sup>12</sup>

- In the *Cubic Defense* case, the Arbitral Tribunal referred to the UNIDROIT Principles published in 1994 and to equitable principles of contract law such as good faith and fair dealing.<sup>13</sup> The United States District Court confirmed the award pursuant to the New York Convention and held that the arbitrators' reference to the UNIDROIT Principles did not exceed the scope of the terms of reference since the issue of the applicability of general principles of international law was expressly presented to the tribunal by the parties. The mere fact that Cubic disagreed with the tribunal's response to the question is not a reason to find that the tribunal addressed issues beyond the scope of the Terms of Reference.<sup>14</sup>
- In Switzerland, if the arbitrators have applied a law other than that chosen by the parties, or if they decide as *amiable compositeur* rather than in accordance with a chosen law in principle this is not a sufficient ground to set aside an international award (at least if the result

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<sup>12</sup> House of Lords, June 23, 1988, [1988] 3 W.L.R. 230, 27 I.L.M. 1032 (1988), 3(7) INT'L ARB. REP. 3 and A1 (1988).

<sup>13</sup> May 5, 1997 Final Award in ICC Case No. 7365.

<sup>14</sup> United States District Court, Southern District of California, Dec. 7, 1998, *Ministry of Defence and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems*, 29 F. Supp. 2d 1168 (S.D. Cal. 1998), XXIV Y.B. COM. ARB. 875 (1999); see also Gesa Baron, *Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria?*, 15 ARB. INT'L 115 (1999).

would not be substantially different<sup>15</sup>). In fact, as far as the merits are concerned, the Federal Tribunal will scrutinize the result, not the way the arbitrators achieved it. If the result of the award is in line with substantive public policy, the award is upheld. If it is not, it will not be upheld, whatever the law applied by the arbitrators.

The application of a law different from that agreed by the parties may constitute a violation of procedural public policy. In a recent decision, the Swiss Federal Tribunal confirmed that arbitrators have full discretion to apply the law (*iura novit curia*) and are not obliged to inform the parties of the facts of the case or the legal argument that the tribunal considers decisive from a legal point of view. The Federal Tribunal held, however, that there is one exception to the freedom of the arbitrators (and of judges) to apply the law: *the arbitral tribunal must not take the parties by surprise*. If the arbitral tribunal intends to rely on a fact or a legal argument that the parties discussed only marginally, or not at all, and none of them can reasonably expect that the arbitrators will consider this argument to be decisive for the outcome of the case, the arbitral tribunal is duty-bound to inform the parties and grant them the right to be heard. The Federal Tribunal held:<sup>16</sup>

5. . . . According to the principle “*jura novit curia*,” the arbitrator is not bound by the legal argument developed by the parties, except in the case where the parties have agreed to limit the arbitral tribunal’s mission to their respective

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<sup>15</sup> PAOLO MICHELE PATOCCHI, ELLIOTT GEISINGER, IPRG – INTERNATIONALES PRIVATRECHT – INTERNATIONALE ÜBEREINKOMMEN, SCHIEDSGERICHTSORDNUNGEN 623 (2000), with references to case law.

<sup>16</sup> Our translation from French original. Swiss Fed. Trib., Sept. 30, 2003 (4P.100/2003/ech), 2004 ASA BULL. 574.

legal arguments (with the possibility for a plaintiff considering that an award does not comply with this limitation to challenge the award for the violation of the rule “*ne eat judex ultra petita partium*” or to argue that the tribunal was not competent, i.e., article 190.2 b and c PIL Act). The judge is thus authorized to apply the law on his/her own motion. The judge needs not draw the parties’ attention to a given legal problem, or to another provision of law that would support the claimant’s claim. Neither has the judge to inform a party of the decisive nature of an element of fact on which the tribunal intends to base its decision to the extent that the fact has been duly alleged and evidenced in accordance with the applicable rules. Case law reserves, however, an exception to the “*jura novit curia*” rule if the tribunal intends to base its decision on a legal provision or argument not raised previously in the proceedings and on which none of the parties has relied and could possibly conceive its relevance in the case at hand. In the view of the Federal Tribunal [...] the question of whether something is foreseeable or not is subject to a case by case appreciation. One has to be rather strict in the field of international arbitration in order to do justice to its particularities (intention of the parties to let arbitrators, not courts of law, decide on their disputes; cooperation of arbitrators of different legal cultures); One needs also to be restrictive in order to avoid that the defense based on the purported unforeseeability of the Arbitral Tribunal’s legal reasoning is used to force on the state court a review of the merits of the dispute . . . .

The Federal Tribunal described the arbitrators’ legal reasoning in the following terms:

6.2 It is correct that the possible application of article 20 Code of Obligations is a question of law. So is the interpretation and the scope of the decision of the Croatian

Anti-Trust Agency of 5 November 1999. On its face it appears unproblematic that both issues are subject to the *jura novit curia* rule. In the present case, however, the legal analysis of the Arbitral Tribunal had no relation with any of the elements discussed before it. The reference to clause 20 of the Contract in the termination letter of 16 February 2000 was not taken into consideration or discussed by the parties, except two mentions in Claimant [A]'s Request for Arbitration and its post hearing submission where it merely challenged the reference to said clause. Respondent [B] did not elaborate on this reference in any of the letters after 16 February 2000 nor in the submissions in the arbitration. During the entire arbitration proceedings, the parties focused on demonstrating what were, in their view, the real reasons for the breach of contract and what were its legal consequences. The parties could not possibly expect that the Arbitral Tribunal would take a contract provision that none of them considered relevant as a pretext . . . to construe a legal reasoning very remote from the respective positions taken by the parties.

***B. Challenge of an Arbitral Award for the Violation of Public Policy in the Country Where It Has Been Rendered – Transnational Rules as Part of Substantive Public Policy***

There is no exhaustive list of transnational rules, nor a universally accepted definition. It would exceed the limited scope of this paper if we were to try to draw up a list or to propose a definition. Among the principles that are recurrent in international

arbitration case law, and in the precedents of the Swiss Federal Tribunals are the following:<sup>17</sup>

- The binding force of contracts (*pacta sunt servanda*);
- Privity of contracts;
- Good faith (estoppel, *venire contra factum proprium*);
- Prohibition of spoliation and expropriation without compensation;
- Capacity of a party as a prerequisite to a binding obligation;
- *Bonos mores* (prohibition of corruption, traffic of forbidden goods, terrorism, etc.);
- Binding force of UN Resolutions.

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<sup>17</sup> FOUCHARD GAILLARD GOLDMAN, *supra* note 6, ¶¶ 1443 *et seq.*, at 801 *et seq.*; KLAUS PETER BERGER, *THE PRACTICE OF TRANSNATIONAL LAW* (2001) (see in particular the contributions by Emmanuel Gaillard, *Transnational Law: A Legal System or a Method of Decision-Making*, at 43 and Yves Derains, *Transnational Law in ICC Arbitration*, at 53); INTERNATIONAL ARBITRATION IN SWITZERLAND ¶¶ 71 *et seq.* (H. Honsell, N.P. Vogt & A.K. Schnyder eds., 2000) (translation of the arbitration chapter of INTERNATIONALES PRIVATRECHT (1996) by the same editors); CESARE JERMINI, *DIE ANFECHTUNG DER SCHIEDSSPRÜCHE IM INTERNATIONALEN PRIVATRECHT* 267 *et seq.* (1997); Pierre Lalive, *Ordre public transnational (ou réellement international) et arbitrage international*, 1986 REV. ARB. 329 (translated excerpts of Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in ICCA CONGRESS SERIES NO. 3, *COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION* 257 (P. Sanders ed., 1987)); JEAN-BAPTISTE RACINE, *L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC* (1999); Francesco Trezzini, *The challenge of arbitral awards for breach of public policy according to art. 190 para. 2 lit. e) of the Swiss Private International Law*, in *THREE ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION* (2003); Pierre-Yves Tschanz & Jean-Marie Vuillemin, *Chronique de jurisprudence étrangère – Suisse*, 2001 REV. ARB. 885.

Transnational rules are not an invention of the arbitration community. Indeed, long before arbitration became the preferred dispute resolution tool for private actors, disputes among sovereigns and states provided a particularly rich source of general principles governing the procedure and substance. For private law arbitrators, *public international law* is an indispensable reference point, especially if called upon to decide a dispute involving a State or a State-controlled entity. In particular the case law of the International Court of Justice<sup>18</sup> provides valuable insight.<sup>19</sup>

The European Convention on Human Rights also embodies a number of fundamental principles, most of them procedural in nature (due process). In addition, the Convention protects the right to property and prohibits expropriation without proper

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<sup>18</sup> Article 38 of the Statute of the ICJ provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  - b. international custom, as evidence of a general practice accepted as law;
  - c. the general principles of law recognized by civilized nations; . . . .

<sup>19</sup> QUOC DINH NGUYEN, PATRICK DAILLIER & ALAIN PELLET, *DROIT INTERNATIONAL PUBLIC* 344 *et seq.* (6th ed., 1999); ROBERT KOLB, *LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC* 387 *et seq.* (2000); André Blondel, *Les principes généraux de droit devant la Cour Permanente de Justice Internationale et la Cour Internationale de Justice*, in *RECUEIL D'ÉTUDES DE DROIT INTERNATIONAL EN HOMMAGE À PAUL GUGGENHEIM* 201 *et seq.* (1968); CHARLES ROUSSEAU, *DROIT INTERNATIONAL PUBLIC, TOME I: INTRODUCTION ET SOURCES* 379 *et seq.* (1970); CHARLES ROUSSEAU, *DROIT INTERNATIONAL PUBLIC, TOME V: LES RAPPORTS CONFLICTUELS* 248 *et seq.* (1983); PIERRE-MARIE DUPUY, *DROIT INTERNATIONAL PUBLIC* 302 *et seq.* (1998).

compensation.<sup>20</sup> Although the Convention is not directly applicable to arbitral tribunals, the general principles it contains must be respected by arbitrators too.

The case law of the Court of Justice of the European Union is a further source of inspiration for international arbitrators. The Court regularly deals with general principles of contract law and the rights of individuals with regard to the State and State administration and judiciary.<sup>21</sup>

These fundamental rules have an impact on the merits as well as on the jurisdiction of the arbitral tribunal.

## 1. Transnational Rules Relevant for the Jurisdiction of the Arbitral Tribunal

a) The *capacity* of a party, *i.e.*, its legal existence is a prerequisite to its entering into a legal relationship. This was vividly illustrated by a case brought before the Swiss Federal Tribunal where at the very end of a long arbitration proceeding the respondent discovered that the claimant in the arbitration was not properly registered and therefore lacked capacity under its law (Texas). The arbitral tribunal dismissed the claimant's claim. The Federal Tribunal upheld the award upon appeal. As to the late objection by the respondent, the Federal Tribunal pointed out that capacity is an indispensable prerequisite and its absence must be

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<sup>20</sup> LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME – COMMENTAIRE ARTICLE PAR ARTICLE (L.-E. Pettiti, E. Decaux & P.-H. Imbert eds., 2d ed. 1999), especially the comments on Art. 14 of the ECHR by Marc Bossuyt at 475 and on Art. 1 of the Protocol No. 1 by Luigi Condorelli, at 971.

<sup>21</sup> JOËL RIDEAU, DROIT INSTITUTIONNEL DE L'UNION ET DES COMMUNAUTÉS EUROPÉENNES 194 *et seq.* (3d ed. 1999).

sanctioned by the arbitral tribunal even in the absence of any request by the parties.<sup>22</sup>

b) *Privity of contracts* is a core rule. It also applies to the arbitration agreement. No one can be forced to arbitrate a dispute unless he has agreed to it.

c) Arbitration case law derives some exceptions to the rule of privity in the event this rule conflicts with other fundamental rules: the principle of *good faith, estoppel, and prohibition of contradictory conduct (venire contra factum proprium)*. A party that has not signed an arbitration agreement can nevertheless be subject to arbitration if, by its conduct, it demonstrated to the parties that signed the contract that it wanted to adhere to the arbitration agreement. The 'group of company' doctrine, the different theories allowing the extension of an arbitral clause to a non-signatory (alter ego, lifting of the corporate veil, etc.) need not be introduced here.

In particular, it is commonly accepted that as a State that has entered into an arbitration agreement cannot invoke its own law in order to challenge the arbitrability of the dispute or its capacity to act.<sup>23</sup>

An ICC Arbitral Tribunal summarized this reasoning as follows:<sup>24</sup>

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<sup>22</sup> Fed. Trib., Apr. 3, 2002, 2002 ASA BULL. 358, 370.

<sup>23</sup> Lalive, *supra* note 17, ¶¶ 38 *et seq.*, at 343 *et seq.* See also Art. 177.2 of the Swiss Private International Law Statute.

<sup>24</sup> 1992 Partial Award on Jurisdiction in ICC Case No. 6474, XXV Y.B. COM. ARB. 279, 287 (2000).

[36] Such a denial of jurisdiction in the circumstances would be contrary to that clear principle of transnational public policy which is the principle of good faith; it would defeat the legitimate expectations of the Parties to the agreements and finally compel the claimant to go before the Courts of the territory, as suggested by the defendant – all results which do not seem, to say the least, to be in keeping with the requirements of international public policy and of natural justice.

[37] Nor would such a result be in the interest of the present Government of [the area], since they would find it more difficult henceforth to find foreign contracting partners.

[38] The line of defense adopted (and, as its consequence, a decline of jurisdiction) would appear, moreover, to be closely similar to cases of *unilateral* rescission or withdrawal of the arbitration undertaking, a course of conduct which, whether adopted by States or by private organizations or companies, is generally rejected by the international community as in flat contradiction with the fundamental principle of good faith, as well as with what may be described as the '*jus cogens*' of international arbitration.

While the courts of many countries have a clear pro-arbitration bias and regularly confirm and enforce awards against parties that did not sign the arbitration agreement, this is not considered to be in contradiction to the privity rule, but rather as a particular form of its application: a party is deemed to have adhered to a contract that it did not sign when it cannot argue in good faith that it did *not* want to be bound.

It should be noted, however, that State courts are considerably less enthusiastic about bringing non-signatories into an arbitration than many arbitral tribunals that are more liberal, and

sometimes too liberal, when admitting that an arbitration agreement should be extended to a non-signatory.<sup>25</sup>

In the famous *Westland* decision, the Swiss Federal Tribunal was faced with a challenge to an arbitral award in a dispute between Westland Helicopters and Arab Organisation for

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<sup>25</sup> See, however, two recent cases decided in the U.S.A and in the U.K. respectively, where courts disavowed arbitral tribunals for disregard of the privity rule. In *Peterson Farms, Inc. v. C&M Farming Ltd.* ([2004] EWHC 121 (Comm.)), Judge Langley did not accept the "Group of companies"-doctrine (John Leadley & Liz Williams, *Peterson Farms: There is no group of companies doctrine in English Law*, INT'L ARB. L. REV. 111 (2004)). The United States Court of Appeals for the Fifth Circuit, in *Bridas Sapic et al. v. Government of Turkmenistan et al.* (345 F.3d 347 (5th Cir. 2003)), refused to confirm an ICC Partial Award. Bridas, an Argentine corporation, had entered into a joint venture agreement with Turkmenneft, a State-controlled organisation, for the conduct of hydrocarbon operations in Turkmenistan. Some time thereafter, the Government of Turkmenistan ordered Bridas to suspend its operations. Bridas initiated arbitration against Turkmenistan and Turkmenneft. The ICC Tribunal admitted its jurisdiction in a Partial Award. The Court of Appeals considered that this was not proper:

Had Bridas truly felt that Turkmenneft was signing the agreement not for itself but on behalf of the Government, it had the obligation to make that fact clear on the face of the agreement. This could have been accomplished in a myriad of ways. Bridas could have requested that the Government sign the agreement, or inserted a prominent and direct statement as to Turkmenneft's status. Bridas has not presented any evidence that would permit us to excuse such an oversight. Bridas was doubtlessly well aware of the risks inherent in investing in countries of the former Soviet Union in 1993, and the possibility that its investment would be swept away in political turmoil. We will not bind the Government to the agreement, simply because Bridas lost a gamble that it was willing to take. To do otherwise would vitiate the predictability of the legal backdrop against which the parties voluntarily agreed to do business.

Industrialisation (AOI) and its founding members Qatar, Saudi Arabia and the UAE. The arbitrators decided that while AOI was the party that was primarily liable for damages incurred by Westland, the States were subsidiarily liable. The States argued before the Swiss Federal Tribunal that this finding violated the public policy rule of privity of contracts, since AOI had signed the contract with Westland alone. The Federal Tribunal had to define, as a preliminary point, whether the relevant public policy standard was Swiss or international. It did not decide the issue in a final way but explained that "in order to ensure a uniform application, the concept of public policy mentioned in Article 190.2.e PIL Act should be interpreted extensively. *The applicable public policy is transnational or universal*, including the fundamental principles of law that must be taken into account in light of the links of the dispute with a given State."<sup>26</sup>

In subsequent decisions, the Federal Tribunal went one step further and held that the relevant public policy was of universal nature, independently of the law applicable to the substance.<sup>27</sup>

d) It is commonly admitted that *UN embargos and resolution of the Security Council* form part of transnational public policy (see case law below). It has sometimes been argued that the existence of an embargo affects the jurisdiction of an arbitral tribunal. Usually, however, this is not the case. The arbitration agreement remains valid and the arbitral tribunal can be

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<sup>26</sup> Our translation from French original. Swiss Fed. Trib., Apr. 19, 1994, *Les Emirats Arabes Unis v. Westland Helicopters Ltd.*, 120 II 155, 1994 ASA BULL. 404, 418 *et seq.*

<sup>27</sup> See also Swiss Fed. Trib., Feb. 17, 1999, *Gübag Terminal AG v. Gübre Fabrikalari TAS*, 2000 ASA BULL. 311, 318: "*Der Anfechtungsgrund von Art. 190 Abs. 2 lit. e IPRG ist einheitlich im Sinne eines universellen, vom anwendbaren materiellen Recht unabhängigen Ordre public zu verstehen.*"

constituted. It will, however, have to take into account the embargo when deciding the merits of the case, in particular if the embargo prevents a party from performing a contractual obligation or if the entering into the contract as such was a violation of an embargo.

## 2. **Transnational Rules Relevant for the Decision on the Merits: Emergence of a “Universal Public Policy”**

Rather than attempting to compile case law on the individual rules pertaining to substantive public policy, we shall briefly summarize three cases where courts have gone beyond their country's public policy and applied a universal public policy. It is certainly no coincidence that two of these cases were rendered in relation to arbitration, a domain which is international by nature.

a) Canada, Court of Appeals, Province of Québec, *Air France v. Libyan Arab Airlines*, March 31, 2003.<sup>28</sup>

In order to challenge the jurisdiction of an arbitral tribunal under the IATA Rules, Air France invoked an embargo measure, adopted by the Security Council of the UN in a Resolution 883 of November 1993 prohibiting any States to hear claims of Libyan parties. The Tribunal nevertheless declared the case arbitrable in a partial award. Air France challenged this award before the Court of First Instance and then before the Court of Appeals. The latter did not reject the appeal but declared it premature and reserved its right to scrutinize the final award in proceedings for grounds of annulment. However, the Court recognized that Security Council Resolution 883 was part of a “transnational public policy.”

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<sup>28</sup> Excerpts published in 2003 ASA BULL. 630, with comments by P. Pinsolle.

b) England, House of Lords, *Kuwait Airways Corporation v. Iraqi Airways Company*, May 16, 2002:<sup>29</sup>

In this case, which was linked to the 1990 invasion of Kuwait by Iraq, Kuwait Airways claimed compensation for the confiscation of an aircraft by the Iraqi party. In defense, the Iraqi company invoked Resolution 369 taken by the Revolutionary Council of the Iraqi commandment, during the invasion of Kuwait, which decided the dissolution of the Kuwaiti company and the transfer of its assets to Iraqi Airways. According to Iraqi Airways, the said Resolution was part of Iraqi public policy.

The House of Lords underlined that on 2 August 1990 the United Nations Security Council adopted Resolution 660 which condemned the invasion of Kuwait as a breach of international peace and security (this was followed by a series of supplementary Security Council Resolutions). Therefore, the House of Lords stated that:

it would have been contrary to the international obligations of the United Kingdom were its courts to adopt an approach contrary to its obligations under the United Nations Charter and under the relevant Security Council Resolutions. It follows that it would be contrary to domestic public policy to give effect to Resolution 369 in any way.

The House of Lords added:

115. This conclusion on English public policy does not reflect an insular approach. Our domestic public policy on the status of Resolution 369 does not stand alone. In recent years, particularly as a result of French scholarship, *principles of international public policy (l'ordre public*

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<sup>29</sup> [2002] 2 AC 882 (discussed by P. Pinsolle in his note, *supra* note 28).

*véritablement international*) have been developed in relation to subjects such as traffic in drugs, traffic in weapons, terrorism, and so forth; see a magisterial paper by Professor Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration, ICCA', in *Comparative Arbitration Practice and Public Policy in Arbitration*, ed. Sanders (1986), p. 257, at pp. 284-286; Fouchard, Gaillard and Goldman on *International Commercial Arbitration* (1999), p. 953, et seq.; Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 3<sup>rd</sup> ed. (1999), p. 152, para 3-27; Craig, Park and Paulsson, *International Chamber of Commerce Arbitration*, 3<sup>rd</sup> ed. (2000), pp. 338-346, para 17.04. Similarly, there may be an international public policy requiring States to respect fundamental human rights: *Restatement*, vol. 2, pp. 152 et seq., para 701. The public policy condemning Iraq's flagrant breaches of public international law is yet another illustration of such a truly international public policy in action. This international dimension reinforces the view of the Court of the Appeal.

116. There is no scope for treating Resolution 369 as only in part contrary to public policy. The nature and width of the public policy engaged here, based on flagrant breaches of international law, strikes at the root of the Iraqi annexation policy and the entirety of Resolution 369. There is no basis for severance of any part of it. It follows that IAC's argument on Resolution 369 for the purpose of invoking the act of state doctrine, in respect of what was done on Iraqi soil, must be rejected' (p. 1103).

c) Swiss Supreme Court, I. Civil Chamber, *Beverly Overseas SA v. Privredna Banka Zagreb*, March 28, 2001 (4C.172/2000).<sup>30</sup>

This case concerned an arms delivery to Croatia while this country was under a UN-Embargo concerning the supplies of arms to the former Yugoslavia (Resolution 713 of September 25, 1991). At the time the contract was entered into and at the time the judgment was issued, Switzerland was not yet a member of the United Nations. Therefore a Security Council Resolution was not binding under Swiss law.

However, the Swiss Supreme Court decided that a contract governed by Swiss law that violates foreign mandatory laws may be incompatible with *bonos mores* (Article 20 of the Swiss *Code des obligations*; UN-Embargo). In order to determine whether *bonos mores* are violated, Swiss law is not alone decisive: if the factual matrix of the case shows only few links with Switzerland, *universal public policy considerations* must be taken into account in addition to Swiss public policy. The Federal Tribunal considered that the UN Security Council Resolutions are part of this universal public policy.

The *Beverly Overseas* decision was not rendered in relation to an arbitration. Yet, its basic reasoning will undoubtedly also apply in the framework of an application to set an arbitral award aside for the violation of public policy according to Article 190.2.e PIL Act. After having left undecided for years the question of how to define the public policy referred to in the PIL Act, the Federal Tribunal held in the 1994 *Westland* decision that the relevant public policy was neither Swiss nor that of the country the law of which governed the merits, but a *universal public policy*,

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<sup>30</sup> 2001 ASA BULL. 807.

irrespective of the applicable law. This was confirmed in a number of other decisions:

*La décision au fond qui statue sur une prétention contestée ne viole l'ordre public que si elle est en elle-même contradictoire (Vischer, IPRG-Kommentar, n. 32 ad art. 17 LDIP) ou si elle transgresse des principes juridiques fondamentaux au point de ne plus être conciliable avec l'ordre juridique et le système de valeurs déterminant. Au nombre de ces principes figurent notamment la fidélité contractuelle, l'interdiction de l'abus de droit et des mesures discriminatoires, ainsi que la protection des personnes civilement incapables. L'ordre public, au sens de l'art. 190 al. 2 lit. e LDIP n'est qu'une simple clause d'incompatibilité, de sorte qu'il ne saurait déployer un effet positif ou normatif sur les rapports juridiques litigieux. Le motif de recours prévu par cette disposition est donc uniforme, en ce sens qu'il n'a pas de corrélation avec le droit matériel applicable. En d'autres termes, il convient de dissocier l'ordre public en cause et celui qui est en jeu dans l'application du droit par le tribunal arbitral. Partant, lorsque le tribunal arbitral doit appliquer un autre droit matériel que le droit suisse et qu'il n'est donc pas tenu de respecter l'ordre public suisse, rien ne justifie de corriger sa sentence, dans la procédure du recours de droit public, par une référence à l'ordre public de la Suisse. L'application uniforme de l'art. 190 al. 2 lit. e LDIP commande ainsi de s'appuyer sur une 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 (ATF 120 II 155 consid. 6a et les références).<sup>31</sup>

### 3. Public Policy and Foreign Mandatory Rules: Not Necessarily Overlapping

Any discussion of transnational rules will eventually lead to the issue of their relationship with the concept of foreign mandatory rules ("*lois de police*"), i.e., rules that are considered mandatory in the country where they have been issued and often form part of its public policy. Does an arbitrator have to apply such rules as part of international public policy? Or as transnational rules? Or not at all?

In the framework of a challenge of the arbitral award, the court will usually not, or not merely, examine whether the arbitrator has applied a foreign mandatory law or should have done so. Rather the court will assess, irrespective of the law applied, whether the result to (which the application of the law leads the arbitrator in his award) is compatible with public policy.<sup>32</sup>

From this point of view, the arbitrator would be ill-advised to decide an issue based on a law other than that chosen by the parties merely because there is a mandatory provision of a foreign law. The mandatory nature of the rule must be a qualified one.<sup>33</sup> The mandatory law must not, or not only, pertain to the public

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<sup>31</sup> Swiss Fed. Trib., Dec. 30, 1994, 1995 ASA BULL. 217, 224 (author's emphasis).

<sup>32</sup> Tschanz & Vuillemin, *supra* note 17, at 891; Fed. Trib., Feb. 17, 1999, Gubag Terminal, *supra* note 27.

<sup>33</sup> STEPHEN V. BERTI & ANTON K. SCHNYDER, BASLER KOMMENTAR ZUM INTERNATIONALEN PRIVATRECHT ¶ 80, at 1694 (1996).

policy of the country that issued the law or at least it cannot only pertain to such public policy. It must also pertain to a universal public policy.

The famous *Hilmarton* case is a good illustration of the difference between public policy and mandatory laws.<sup>34</sup>

OTV hired Hilmarton as an intermediary in relation to a contract in Algeria. The contract between OTV and Hilmarton was governed by Swiss law and provided for arbitration in Geneva. Hilmarton initiated an arbitration, claiming its fee. In spite of the choice of law clause, a sole Arbitrator applied an internal Algerian law prohibiting any form of intermediaries. The Arbitrator considered that he had to apply this law as it was mandatory and part of public policy in Algeria. Consequently, he rejected Hilmarton's claim. The Geneva Court of Justice set aside the arbitral award and this decision was upheld by the Federal Tribunal. The courts considered that whether or not the Algerian law was mandatory or not was irrelevant. The sweeping prohibition of intermediaries was incompatible with the public policy principle of freedom to contract:

*Or, dans la mesure où la norme algérienne en question interdit toute intervention d'intermédiaires à l'occasion de la conclusion d'un contrat, même en l'absence de pots-de-*

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<sup>34</sup> See FOUCHARD GAILLARD GOLDMAN, *supra* note 6, ¶ 1523, at 854. See also Recommendation 3(a) of the Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards prepared by the Committee on International Commercial Arbitration of the International Law Association (2002): "An award's violation of a mere "mandatory rule" (i.e. 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."

*vin, trafic d'influence ou activités douteuses, elle constitue une mesure prohibitive trop large, de nature protectionniste, destinée à assurer un monopole de l'Etat sur le commerce extérieur. Au regard du droit suisse, une telle norme représente une lourde atteinte à la liberté de contracter des individus et ne peut, à défaut d'activités qui seraient aussi qualifiées de douteuses en Suisse, passer, sur le plan éthique, avant les principes généraux et fondamentaux du droit liés à la liberté contractuelle. Elle peut d'autant moins l'emporter sur ces principes que, comme l'a justement relevé la cour cantonale, il est permis, dans notre ordre juridique, d'utiliser des intermédiaires pour suivre un dossier au sein d'une administration. La négociation, par des intermédiaires, de contrats avec l'administration, sans qu'interviennent des manœuvres douteuses, fait partie des activités entrant normalement, et par définition, dans celles des courtiers, au même titre que la négociation de contrats entre privés.<sup>35</sup>*

In general, the arbitrator will apply the following test:<sup>36</sup>

- Does that law have a sufficient link with the dispute?
- Is the law, according to its own provisions, intended to be applicable in the given situation?
- Is the goal pursued by the law to ensure that international public policy be respected?
- Are the application of the law, as well as the application of its sanctions, proportionate?

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<sup>35</sup> Swiss Fed. Trib., Apr. 17, 1990, OTV c. Hilmarton, 1993 REV. ARB. 324, and the commentary by V. Heuzé; for an English translation, see XIX Y.B. COM. ARB. 214 (1994).

<sup>36</sup> See, for instance, 1998 Award in ICC Case No. 9333, examining the US Foreign Corrupt Practice Act, 2001 ASA BULL. 757, 771 *et seq.*

Foreign export or import restrictions, stock exchange regulations, competition and other market regulation laws are rarely part of fundamental transnational rules.<sup>37</sup>

With respect to EU competition law, the Swiss Federal Tribunal, for instance, held in a decision rendered in 1998 that it is at best questionable whether competition rules in general are of a public policy nature.<sup>38</sup>

A party had challenged an arbitral award on the ground that it violated public policy, which is a ground to set aside the award under Article 190.1.e PIL Act, to the extent that it was incompatible with the competition law of the European Union. The challenge was dismissed because Swiss law applied to the dispute according to a contractual choice of law and none of the parties had raised the issue of the alleged incompatibility with EU law in the arbitration. The Federal Tribunal was of the view that the arbitral tribunal was not obliged to examine on its own motion whether the contract was in compliance with EU law: "*il paraît en effet douteux que les dispositions du droit – national ou européen – de la concurrence fassent partie des principes juridiques ou moraux fondamentaux reconnus dans tous les Etats civilises, au point que leur violation devrait être considérée comme contraire à l'ordre public.*"<sup>39</sup>

Within the EU, however, EU competition law is part of public policy and an award that does not apply the rules is subject to annulment.

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<sup>37</sup> BERTI & SCHNYDER, *supra* note 33, ¶ 79, at 1694.

<sup>38</sup> Fed. Trib., Nov. 13, 1998, 1999 ASA BULL. 529.

<sup>39</sup> *Id.*

Whether or not the award can be enforced abroad, in particular in the State that issued the regulatory rules, is another matter. In Switzerland at least, the real or alleged lack of enforceability will not affect the subject-matter arbitrability of the dispute, nor will it constitute an event of public policy.<sup>40</sup>

***C. The Enforcement of a Foreign Arbitral Award under the New York Convention (Article V.2.b)***

Article V.2.b NYC provides that a State may refuse to enforce a foreign award if “recognition and enforcement of the award would be contrary to the public policy of that country.” Not surprisingly, this provision has given rise to much debate, but little (known) case law.

- a) Case law (*see* Table 1 included in this volume as Annex 1).
- b) An attempt in harmonization: the Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards prepared by the Committee on International Commercial Arbitration of the International Law Association (2002).

Parties that have lost an arbitration frequently try to use the public policy reservation as a loophole to prevent an award from being enforced. In 2002, the International Law Association issued

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<sup>40</sup> Fed. Trib., June 23, 1992, *Fincantieri-Cantieri Navali Italiani S.p.A. v. M.*, 1993 ASA BULL 58; for an English translation, see XX Y.B. COM. ARB. 766 (1995).

a number of recommendations regarding the proper content of public policy.<sup>41</sup> The most relevant for our purposes are as follows:

Recommendation 1(c):

The expression “international public policy” is used in these Recommendations to designate the body of principles and rules recognised by a State, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of said award would entail their violation on account either of the procedure pursuant to which it was rendered (procedural international public policy) or of its contents (substantive international public policy).

Recommendation 1(d):

The 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”; and (iii) the duty of the State to respect its obligations towards other States or international organisations.

Recommendation 1(e):

An example of a substantive fundamental principle is prohibition of abuse of rights. An example of a procedural

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<sup>41</sup> See International Law Association, New Delhi Conference (2002), Committee on International Arbitration, Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, available at <http://www.ila-hq.org/pdf/Trade%20Law/International%20Trade%20Law%202002.pdf>.

fundamental principle is the requirement that tribunals be impartial. An example of a public policy rule is anti-trust law. An example of an international obligation is a United Nations resolution imposing sanctions. Some rules, such as those prohibiting corruption, fall into more than one category.

Comment para. 28:

An example of a substantive fundamental principle is the principle of good faith and prohibition of abuse of rights (especially in civil law countries). Other examples that are cited by courts and commentators include: *pacta sunt servanda*; prohibition against uncompensated expropriation.

ANNEX 1

**T TYPOLOGY OF SWISS CASE LAW  
ON SELECTED ISSUES**

**Table 1**

**Decisions on principles of substantive public policy applied  
in the context of Article V.2.b of the New York Convention\***

a. Recognized principles

Principle	Recognized by	Published in
<b>European Community competition law (Art. 81 EC)</b>	Court of Justice of the European Communities, June 1, 1999, Case C- 126/97, Eco Swiss China Time Ltd. (Hong Kong) v. Benetton International NV (The Netherlands)	XXIV Y.B. COM. ARB. 629 (1999), 1999 REV. ARB. 631, 637 (¶ 39)
<i>Clausula rebus sic stantibus</i>	Bayerisches Oberstes Landgericht, Sept. 17, 1998 <sup>1</sup>	XXIV Y.B. COM. ARB. 645 (1999)

\* According to the section on Consolidated Case Law by Professor van den Berg, published in the Yearbook of Commercial Arbitration. For a recent attempt at harmonizing the notion of public policy with respect to enforcement of international arbitral awards, see International Law Association, Committee on International Commercial Arbitration, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, New Delhi Conference (2002).

<sup>1</sup> A principle which is apparently recognized, although it was not upheld in this case.

Principle	Recognized by	Published in
<b>Good faith</b>	Court of Final Appeal of the Hong Kong Special Administrative Region, Feb. 9, 1999, Hebei Import & Export Corp. (China) v. Polytek Engineering Company Ltd. (Hong Kong) <sup>2</sup>	XXIV Y.B. COM. ARB. 652 (1999)
<b>Prohibition of bribery and corruption<sup>3</sup></b>	<p>English Court of Appeal, May 12, 1999, Westacre Investments Inc. (Panama) v. Jugoimport – SDPR Holding (Yugoslavia)<sup>4</sup></p> <p>High Court of Justice, Queen’s Bench Division, May 24, 1999, Omnium de Traitement et de Valorisation SA (France) v. Hilmarton (GB)<sup>5</sup></p> <p>United States Court of Appeals, Second Circuit, Mar. 23, 1998, AAOT Technostroyexport v. International Development and Trade Services Inc.</p> <p>United States District Court, Western District of Tennessee, Western Division, Feb. 14, 1996, Indocomex Fibres Pte, Ltd. v. Cotton Company International Inc. (USA)<sup>6</sup></p>	<p>XXIV Y.B. COM. ARB. 753 (1999)</p> <p>XXIV Y.B. COM. ARB. 777 (1999)</p> <p>XXIV Y.B. COM. ARB. 813 (1999)</p> <p>XXIV Y.B. COM. ARB. 792 (1999)</p>

<sup>2</sup> *Id.*

<sup>3</sup> In this type of situation, if the victim, without legitimate reason, did not make use of the legal remedies available to it, it is considered that the victim has waived its rights to make use of such remedies, and the award may be recognized, without there being any difficulties in relation to the public policy provision (Court of Appeal, May 12, 1999, Westacre Investments Inc. (Panama) v. Jugoimport – SDPR Holding (Yugoslavia), XXIV Y.B. COM. ARB. 753 (1999); *see also* the AAOT case).

<sup>4</sup> Recognized in a limited manner, and not in this case; in any event, as far as this case is concerned, the relevant issues were discussed in a dissenting opinion.

<sup>5</sup> Recognized in a limited manner and not in this case.

Principle	Recognized by	Published in
<b>Prohibition of <i>dol</i></b>	Kersa Holding Company Luxembourg v. Infancourtage, Famajuk Investment (Liechtenstein) & Isny (Luxembourg)	XXI Y.B. COM. ARB. 617 (1996)
<b>Prohibition of duress, coercion</b>	Verolme Botlek B.V. (The Netherlands) v. Lee C. Moore Corporation (USA)	XXI Y.B. COM. ARB. 824 (1996)

b. Principles raised before the tribunals, but not recognized by them

Principle	Raised before	Published in
<b>Prohibition to violate competition laws</b>	United States Court of Appeals, Seventh Circuit, Jan. 16, 2003, Baxter International, Inc. v. Abbott Laboratories	XXVIII Y.B. COM. ARB. 1154 (2003)
<b>Prohibition to award punitive damages</b>	United States District Court, Northern District of California, Jan. 6, 2001, Dandong Shuguang Axel Corporation, Ltd. (China) v. (1) Brilliance Machinery Company (US), (2) Yong Wang (US), (3) Wei Jun Wang (US), (4) Weh Lin Luo (US)	XXVII Y.B. COM. ARB. 617 (2002)
<b>Prohibition to award compound interest</b>	Oberlandgericht, Hamburg, July 30, 1998, Shipowner v. Time charterer  Supreme Court of India, Oct. 7, 1993, Renusagar Power Co. Ltd. (India) v. General Electric Co. (USA)	XXV Y.B. COM. ARB. 714 (2000)  XX Y.B. COM. ARB. 681 (1995)

<sup>6</sup> *Id.*

Principle	Raised before	Published in
<b>Prohibition to award interest without a claim</b>	Oberlandgericht, Hamburg, July 30, 1998, Shipowner v. Time charterer	XXV Y.B. COM. ARB. 714 (2000)
<b>Prohibition of unjust enrichment resulting from the enforcement of an award</b>	Supreme Court of India, Oct. 7, 1993, Renuşagar Power Co. Ltd. (India) v. General Electric Co. (USA)	XX Y.B. COM. ARB. 681 (1995)
<b>Compliance with foreign exchange regulation acts</b>	Supreme Court of India, Oct. 7, 1993, Renuşagar Power Co. Ltd. (India) c. General Electric Co. (USA)	XX Y.B. COM. ARB. 681 (1995)
<b>Prohibition to award interest on damages</b>	Supreme Court of India, Oct. 7, 1993, Renuşagar Power Co. Ltd. (India) v. General Electric Co. (USA)	XX Y.B. COM. ARB. 681 (1995)
<b>Compliance with currency regulations</b>	Finagrain Compagnie Commerciale Agricole et Financière SA v. Patano snc (Italia)	XXI Y.B. COM. ARB. 571 (1996)
<b>Prohibition of blackmail</b>	Adviso N.V. v. Korea Overseas Construction Corp. (Korea)	XXI Y.B. COM. ARB. 612 (1996)
<b>Prohibition to create patent right by an agreement between private parties</b>	Adviso N.V. v. Korea Overseas Construction Corp. (Korea)	XXI Y.B. COM. ARB. 612 (1996)

Table 2

Inventory of substantive public policy principles<sup>\*</sup>

## Swiss Federal Tribunal (FT)

a. Principles recognized by the FT in connection with the challenge of international arbitral awards (Art. 190 para. 2(e) of the PIL Act)

Principle	Recognized in (case)	Published in
<i>Pacta sunt servanda</i>	Nov. 14, 1990, E. AG v. K. Ltd. and IHK-Schiedsgericht Zürich	Official Court Reporter (ATF) 116 II 634, 638 (1991 ASA BULL. 268)
	June 10, 1996, Saudi Modern Foods Factory (Saudi Arabia) v. Pavan Mapimpianti SpA (Italia)	2000 ASA BULL. 764, 776
	Sept. 6, 1996, X. v. ICC Award	1997 ASA BULL. 291, 305
	May 26, 1999, Reteitalia SpA (Italia) v. Lagardère SCA (France)	2000 ASA BULL. 331, 335
	June 14, 2000, Dumez-GTM SA v. Campenon Bernard SGE Snc, Hochtief AG and Spie Batignolles TP SA	2000 ASA BULL. 582, 599
	Nov. 10, 2000, Sadri Sener Instaat Sanayi Ve Ticaret AS, Türkei v. You One Engineering & Construction Company Ltd, ROK-Seoul	2001 ASA BULL. 102, 108

\* The present compilation is far from being exhaustive; it provides the reader with a summary of principles invoked in case law. The author is grateful to Mathias Félix for his precious help in carrying out the necessary research.

Principle	Recognized in (case)	Published in
	<p>Sept. 18, 2001, Özmak Makina Ve Elektrik Sanayi A.S. (Turkey) v. Voest Alpine Industrieanlagenbau GmbH (Austria)</p> <p>Sept. 30, 1994, F. v. U.</p>	<p>2002 ASA BULL. 311, 316 <i>et seq.</i></p> <p>1995 ASA BULL. 225</p>
<p><b>Privity of contractual rights</b></p> <p>– general principle</p> <p>– only the person who holds a right can invoke it in court</p>	<p>Apr. 19, 1994, Emirats Arabes Unis v. Westland Helicopters Limited</p> <p>Sept. 6, 1996, X. v. ICC Award</p> <p>Feb. 9, 1998, I. SA v. V.</p>	<p>ATF 120 II 155, 169 (1994 ASA BULL. 404; 1995 ASA BULL. 132)</p> <p>1997 ASA BULL. 291, 305</p> <p>1998 ASA BULL. 634, 651</p>
<p><b>Good faith</b></p> <p>– general principle</p>	<p>May 5, 1976, Société des grands travaux de Marseille v. People's Republic of Bangladesh, Bangladesh Industrial Development Corp. (<i>obiter dicta</i>)</p> <p>May 11, 1992, D. v. A. (<i>obiter dicta</i>)</p> <p>Sept. 6, 1996, X. v. ICC Award (<i>obiter dicta</i>)</p> <p>Apr. 3, 2002, X. Inc. v. Arbitral Award (<i>obiter dicta</i>)</p>	<p>ATF 102 Ia 574, 581, consid. 7.d.</p> <p>1992 ASA BULL. 381, 400</p> <p>1997 ASA BULL. 291, 304</p> <p>ATF 128 III 191, 198 (2002 ASA BULL. 358, 370 <i>et seq.</i>)</p>

Principle	Recognized in (case)	Published in
<ul style="list-style-type: none"> <li>- prohibition of <i>venire contra factum proprium</i></li> <li>- <i>clausula rebus sic stantibus</i> (i.e., frustration, force majeure, hardship and unforeseeability)</li> <li>- Durchgriff (piercing of the corporate veil)</li> <li>- mutual trust, <i>culpa in contrahendo</i></li> </ul>	<p>JERMINI,<sup>7</sup> at 282</p> <p>Feb. 17, 2000, Rhône-Poulenc Rorer Pharmaceutical Inc. v. Roche Diagnostic Corp.</p> <p>JERMINI, at 283</p> <p>Apr. 19, 1994, Emirats Arabes Unis et consorts v. Westland Helicopters Limited</p> <p>Feb. 17, 2000, Rhône-Poulenc Rorer Pharmaceutical Inc. v. Roche Diagnostic Corp.</p> <p>Jan. 30, 2002, X. SA v. Y. SA</p>	<p>2001 ASA BULL. 787</p> <p>ATF 120 II 155, 170 <i>et seq.</i>; JERMINI, at 284, ¶ 2007</p> <p>2001 ASA BULL. 787, 792</p> <p>2002 ASA BULL. 328, 334 <i>et seq.</i></p>
<p><b>Prohibition of abuse of rights</b></p>	<p>May 11, 1992, D. c. A. (<i>obiter dicta</i>)</p> <p>Sept. 6, 1996, X. v. ICC Award (<i>obiter dicta</i>)</p> <p>Apr. 3, 2002, X. Inc. v. Arbitral Award (<i>obiter dicta</i>)</p> <p>Sept. 30, 1994, F. v. U. (<i>obiter dicta</i>)</p>	<p>1992 ASA BULL. 381, 400</p> <p>1997 ASA BULL. 291, 304</p> <p>ATF 128 III 191, 198 (2002 ASA BULL. 358, 370 <i>et seq.</i>)</p> <p>1995 ASA BULL. 225</p>

<sup>7</sup> CESARE JERMINI, DIE ANFECHTUNG DER SCHIEDSSPRÜCHE IM INTERNATIONALEN PRIVATRECHT 267 *et seq.* (1997).

Principle	Recognized in (case)	Published in
<b>Prohibition of discriminatory measures and spoliation measures / expropriation without compensation</b>	<p>May 11, 1992, D. c. A. (<i>obiter dicta</i>)</p> <p>Apr. 19, 1994, Emirats Arabes Unis v. Westland Helicopters Limited (<i>obiter dicta</i>)</p> <p>Sept. 6, 1996, X. v. ICC Award (<i>obiter dicta</i>)</p> <p>June 14, 2000, Dumez-GTM SA v. Campenon Bernard SGE Snc, Hochtief AG and Spie Batignolles TP SA</p> <p>Apr. 3, 2002, X. Inc. v. Arbitral Award (<i>obiter dicta</i>)</p> <p>Sept. 30, 1994, F. v. U. (<i>obiter dicta</i>)</p>	<p>1992 ASA BULL. 381, 400</p> <p>ATF 120 II 155, 166 (1994 ASA BULL. 404; 1995 ASA BULL. 132)</p> <p>1997 ASA BULL. 291, 304</p> <p>2000 ASA BULL. 582, 601</p> <p>ATF 128 III 191, 198 (2002 ASA BULL. 358, 370 <i>et seq.</i>)</p> <p>1995 ASA BULL. 225</p>
<b>Protection of persons lacking legal capacity</b>	<p>Apr. 6, 1955, D. v. S. (<i>obiter dicta</i>)</p> <p>May 11, 1992, D. v. A. (<i>obiter dicta</i>)</p> <p>Apr. 19, 1994, Emirats Arabes Unis v. Westland Helicopters Limited (<i>obiter dicta</i>)</p> <p>Sept. 6, 1996, X. v. ICC Award (<i>obiter dicta</i>)</p> <p>Apr. 3, 2002, X. Inc. v. Arbitral Award (<i>obiter dicta</i>)</p> <p>Sept. 30, 1994, F. v. U. (<i>obiter dicta</i>)</p>	<p>ATF 81 I 139, 145 <i>et seq.</i></p> <p>1992 ASA BULL. 381, 400</p> <p>ATF 120 II 155, 166 (1994 ASA BULL. 404; 1995 ASA BULL. 132)</p> <p>1997 ASA BULL. 291, 304</p> <p>ATF 128 III 191, 198 (2002 ASA BULL. 358, 370 <i>et seq.</i>)</p> <p>1995 ASA BULL. 225</p>

Principle	Recognized in (case)	Published in
<b>Capacity / legal personality of a party</b>	Apr. 3, 2002, X. Inc. v. Arbitral Award	2002 ASA BULL. 358, 370 <i>et seq.</i>
<b>Bonos mores</b>  – prohibition of corruption          – drug traffic   – terrorism – subversion – violation of human rights – traffic of cultural heritage goods	Sept. 2, 1993, National Power Corporation v. Westinghouse International Projects Compagny, Westinghouse Electric S.A., Westinghouse Electric Corporation, Burns & Roe, Enterprises Inc.  Dec. 30, 1994, Federal Directorate of Supply and Procurement (Beograd) and Udruzena Beogradska Banka (Beograd) v. Westacre Investments Inc.  No decision from TF; JERMINI, at 290; Lalive <sup>8</sup>  <i>Id.</i> <i>Id.</i> <i>Id.</i> <i>Id.</i>	ATF 119 II 380, 384 <i>et seq.</i> (1994 ASA BULL. 144)          1995 ASA BULL. 217, 226
<b>Prohibition to waive one's civil rights or freedoms (Art. 27 CCS)</b>	June 14, 2000, Dumez-GTM SA v. Campenon Bernard SGE Snc, Hochtief AG and Spie Batignolles TP SA	2000 ASA BULL. 582, 602

<sup>8</sup> Pierre Lalive, *Ordre public transnational (ou réellement international) et arbitrage international*, 1986 REV. ARB. 329.

Principle	Recognized in (case)	Published in
<i>Res judicata</i>	Sept. 20, 2000, Republik Polen v. Saar Papier Vertriebs GmbH	2001 ASA BULL. 487, 493
<p><b>General principles of contract law</b></p> <ul style="list-style-type: none"> <li data-bbox="268 719 555 936">– prohibition of unjust enrichment (damages limited to prejudice that has been sustained)</li> <li data-bbox="268 981 555 1160">– appropriate causal nexus as limitation of claims for damages</li> <li data-bbox="268 1205 555 1279">– <i>qui tacet consentire videtur</i></li> <li data-bbox="268 1323 555 1503">– taking defects of consent into consideration (mistake, <i>dol</i> or duress)</li> <li data-bbox="268 1547 555 1653">– <i>exceptio non adimpleti contractus</i></li> </ul>	<p>JERMINI, at 292</p> <p>July 17, 1998, Asnidal v. Technip</p>	<p>2002 ASA BULL. 660</p>

Principle	Recognized in (case)	Published in
<ul style="list-style-type: none"> <li>- right to termination in the event of material breach of contract by the other party</li> <li>- right of termination of a long term contract</li> </ul>	<p>Feb. 17, 2000, Rhône-Poulenc Rorer Pharmaceutical Inc. v. Roche Diagnostic Corp.</p> <p>Apr. 3, 2002 (4C.175/2001)</p>	2001 ASA BULL. 787

b. Principles raised by the Parties, but not accepted by the FT

Principle	Raised in (ATF)	Published in
<b>Prohibition of arbitrary measures</b>	<p>Apr. 19, 1994, Emirats Arabes Unis v. Westland Helicopters Limited</p> <p>Feb. 9, 1998, I. SA v. V.</p>	<p>ATF 120 II 155, 166 (1994 ASA BULL. 404; 1995 ASA BULL. 132)</p> <p>1998 ASA BULL. 634, 652</p>
<b>Competition law</b>	<p>Nov. 13, 1998, X. SA &amp; Y. SA v. Z. SA</p> <p>Feb. 1, 2002, X. Ltd v. Y. BV</p>	<p>1999 ASA BULL. 529, 534</p> <p>ATF 128 III 234 (2002 ASA BULL. 337, 348)</p>
<ul style="list-style-type: none"> <li>- general provisions of an economic nature (<i>i.e.</i>, boycott measures, currency regulation and import-export regulations)</li> </ul>	<p>Apr. 28, 1992, Société G (Belgium) v. Société V (Italia)</p>	<p>ATF 118 II 193 <i>et seq.</i></p>

Principle	Raised in (ATF)	Published in
<b>Sanctioning of intrinsic incoherence of the operative part of an award</b>	Apr. 3, 2002, X. Inc. v. Arbiral Award	ATF 128 III 191, 198 (2002 ASA BULL. 358, 369)
<b>Duty to mitigate damages</b>	Dec. 10, 2002	2003 ASA BULL. 585
<b>Prohibition of punitive damages clauses (principle of indemnification)</b>	July 17, 1998, ASMIDAL v. TECHNIP & CLE S.A.  (principle that was recognized under Swiss public policy; it was not decided whether it constituted also international public policy)	2002 ASA BULL. 660, 673 <i>et seq.</i>
<b>Prohibition of an award which is in clear breach of a Swiss or foreign statute</b>	Nov. 14, 1990, E. AG v. K. Ltd & IHK-Schiedsgericht Zürich  Nov. 5, 1991, V. SA v. E. B.V. und vertragliches Schiedsgericht  Jan. 28, 1997, Thomson C.S.F. v. Frontier AG Bern & Brunner Sociedad Civil de Administracao Limitada (Portugal)	ATF 116 II 634, 637 (1991 ASA BULL. 268)  ATF 117 II 604, 606 (1993 ASA BULL. 54)  1998 ASA BULL. 118, 130
<b>Statute of limitation for contractual claims</b>	Mar. 13, 1992, Soc. X v. Soc. Y (see however decision of Jan. 21, 2002 (2002 ASA BULL. 524) in which the FT confirmed that the principle of good faith is of public policy and that a defense of limitation which under the principle of good faith is abusive will never be recognized, whatever the law applicable to the merits)	1992 ASA BULL. 365, 366

Principle	Raised in (ATF)	Published in
<b>Prohibition of an award making manifestly inaccurate factual statements</b>	Nov. 14, 1990, E. AG v. K. Ltd & IHK-Schiedsgericht Zürich  Nov. 5, 1991, V. SA v. E. B.V. und vertragliches Schiedsgericht  Mar. 24, 1997, T A.G. v. H Company	ATF 116 II 634, 637 (1991 ASA Bull. 268)  ATF 117 II 604, 606 (1993 ASA BULL. 54)  1997 ASA BULL. 316
<b>Prohibition of an award making inaccurate findings as to claimant's right to claim</b>	Aug. 17, 1994, TEK (Turkey) v. Metex (Finland)	1995 ASA BULL. 198, 202 <i>et seq.</i>
<b>Stating grounds for an award</b>	Aug. 21, 1990, I. v. C. SA und IHK-Schiedsgericht	ATF 116 II 373, 375 (1991 ASA BULL. 30)
<b>Arbitrator's omission to decide upon an issue that falls within its mission, although he has already decided upon it in relation to another issue</b>	Mar. 24, 1997, T A.G. v. H Company	1997 ASA BULL. 316
<b>Prohibition of disproportionate allocation of costs between the parties in violation of their prior agreement</b>	June 9, 1998, C. S.r.l. (Italia) v. L.S. S.A. (Switzerland)	1998 ASA BULL. 653, 660

<b>Principle</b>	<b>Raised in (ATF)</b>	<b>Published in</b>
<b>Interpretation</b>	<p>Geneva Court of Justice, Feb. 7, 1991</p> <p>Nov. 5, 1991, V. SA v. E. B.V. und vertragliches Schiedsgericht</p>	<p>1991 ASA BULL. 269</p> <p>ATF 117 II 604, 607 (1993 ASA BULL. 54)</p>
<b>Payment of default interest and damages</b>	<p>May 13, 1952, Loudon v. Schweiz. Bankverein</p>	<p>ATF 78 II 243, 250 (pt. c)</p>
<b>Prohibition of reduction of contractual penalty by an arbitrator</b>	<p>Feb. 19, 1990, Sefri v. Komgrap</p>	<p>1990 ASA BULL. 171, 179</p>

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