International Commercial Arbitration and Money Laundering

Problems that arise and how they should be resolved

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Abstract

This thesis is concerned with examining the intersection between the areas of international commercial arbitration and money laundering. There are various points of connectivity between the two and the aim of this thesis is to discern how an arbitrator should conduct arbitral proceedings involving money laundering. For this purpose, a few selected topics have been examined. The practical challenges arising out of these topics, as well as the tools available to arbitrators to face them have been analysed in turn. After a brief inquiry into the nature of international commercial arbitration, money laundering and the ways that they come together, the topics of jurisdiction, the norms applicable to the substance of the dispute, and matters of evidence are subject to discussion.

In studying these topics, a recurring theme, which goes to the very heart of the intersection between the seemingly odd areas of international commercial arbitration and money laundering, is discernible. In practically all of the challenges that an arbitrator will face when adjudicating a dispute involving money laundering a conflict of interest between the pivotal principle of party autonomy and other interests will arise. These interests originate from the public policy concerns vested in countering money laundering and the criminal law nature of this phenomenon. The tools which the arbitrator deem to be applicable as well as the conduct that he might choose in regards to the topics discussed, very much depend on his perception of the role that international arbitrators ought to assume in this conflict.

Keeping these conceptual building blocks in mind the author, whilst examining the relevant legal instrument, case law and legal commentary, reaches the conclusion that arbitral tribunals ought to claim jurisdiction over disputes arising out of contracts tainted by money laundering in the majority of cases. The author also reaches the conclusion that there are other norms than the *lex contractus* that can be applied to the substance of the dispute and that the willingness to apply them will depend on the attitude of the arbitrator. Similarly, the arbitrator could, and arguably should, investigate the issue of money laundering of his own accord, albeit with a few important reservations. The rules of evidence, especially those of the burden of proof and standard of proof, should be tailored to reflect the nature of the complex offence of money laundering. Finally, the eventual possibility for an international arbitrator to report suspicions of money laundering is touched upon.
Preface

This thesis marks the final stop on the fantastic journey that studying in Uppsala has been. I would like to direct my thanks to my friends for treasured experiences and memories, my family for always being there, Michaela for her support and patience and my supervisor Victoria for all her valuable help and belief in this thesis.

Christoffer Coello Hedberg
Stockholm, July 2016.
# Table of Contents

List of Abbreviations ........................................................................................................ iv

1 Introduction ....................................................................................................................... 1
  1.1 Background ............................................................................................................... 1
  1.2 Research Questions ................................................................................................. 2
  1.3 Disposition .............................................................................................................. 2
  1.4 Delimitations ......................................................................................................... 3
  1.5 Methodology and Materials .................................................................................. 4

2 International Arbitration and Money Laundering ......................................................... 7
  2.1 International Commercial Arbitration ................................................................... 7
  2.2 Money Laundering .................................................................................................. 10
    2.2.1 How Money is Laundered ................................................................................. 10
    2.2.2 International Legal Framework ....................................................................... 13

3 Civil Consequences of Money Laundering .................................................................. 17
  3.1 Contracts Tainted by Money Laundering ................................................................ 17
  3.2 The Law Applicable to the Substance of the Dispute ........................................... 18
    3.2.1 Identifying Transnational Public Policy ......................................................... 20
    3.2.2 Applying Foreign Mandatory Rules ............................................................... 25

4 Claiming Jurisdiction over the Dispute ........................................................................ 32
  4.1 Arbitrability .......................................................................................................... 32
  4.2 Validity of the Arbitration Agreement .................................................................... 35

5 Establishing the Facts of the Dispute ......................................................................... 40
  5.1 How is the Issue of Money Laundering Raised? .................................................... 40
    5.1.1 By the Parties ................................................................................................ 40
    5.1.2 By the Arbitrator Sua Sponte ....................................................................... 42
  5.2 Applicable Rules of Evidence ................................................................................ 51
  5.3 Burden of Proof ..................................................................................................... 54
    5.3.1 General in International Commercial Arbitration .......................................... 54
    5.3.2 Shifting the Burden of Proof ........................................................................ 55
  5.4 Standard of Proof .................................................................................................. 60
    5.4.1 A Higher or Lower Standard of Proof ............................................................ 60
    5.4.2 Circumstantial Evidence and Adverse Inferences .......................................... 64
  5.5 Reporting Suspicions, a Way Out of the Conundrum? ........................................... 67

6 Conclusions .................................................................................................................... 71
## List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>FATF</td>
<td>Financial Action Task Force</td>
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<tr>
<td>IBA Rules on Evidence</td>
<td>International Bar Association on the Taking of Evidence in International Arbitration 2010</td>
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<td>ICC</td>
<td>International Chamber of Commerce</td>
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<td>ICC Rules</td>
<td>ICC Rules on Arbitration 2012</td>
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<td>LCIA</td>
<td>London Court of International Arbitration</td>
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<td>SCC Rules</td>
<td>Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce 2010</td>
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<tr>
<td>SOU</td>
<td>Statlig Offentlig Utredning (Swedish Government Official Report)</td>
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<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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<td>UNCITRAL Arbitration Rules</td>
<td>UNCITRAL Arbitration Rules 1976 as revised in 2010</td>
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<tr>
<td>UNODC</td>
<td>United Nations Office on Drugs and Crime</td>
</tr>
</tbody>
</table>
1 Introduction

1.1 Background

International commercial arbitration is a form of dispute resolution that aims to resolve civil disputes. The mechanism, as well as its governing rules and principles, are tailored for this particular purpose. The success of international commercial arbitration is widely praised, and it is often held to be the most common way of resolving international commercial disputes, be it between state entities or private parties.\(^1\) Meanwhile, money laundering is a transnational crime, which due to its widely acknowledged destructive implications on commerce and society at large,\(^2\) has been subject to an ambitious global regulatory approach. The intention of this essay is not to conduct a separate study of these two well developed areas of law but rather to explore an aspect that has not yet been subject to much inquiry, namely how international arbitrators ought to handle disputes involving money laundering.

Even though international commercial arbitration and money laundering may seem to function on different planets, there are a number of ways in which contracts tainted by money laundering can enter arbitral proceedings. In fact, the topic of international commercial arbitration and money laundering extends from the more general topic of the relationship between criminality and international arbitration, which is one that seems to have been subject to growing attention in recent years. When the seemingly distant areas of criminal law and international commercial arbitration collide, there a number of difficulties created in the wake of the collision. Arguably, these difficulties are amplified in the context of money laundering due to the profound public policy significance and crippling difficulties of proof associated with this multifaceted offence. In resolving these issues, the arbitral tribunal will often find itself in a position where it is forced to choose between furthering the sacrosanct principle of party autonomy and giving precedence to competing duties or interests.

Out of the many specific issues that an arbitral tribunal will face under these circumstances, this thesis is concerned with a few selected topics. The rationale behind the selection is that the chosen topics are general in the sense that they will have to be dealt with by the arbitra-

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1 Blackaby et al. 2015, para. 1.01.
2 An IMF report has concluded that money laundering accounts for 2 % to 5% of global GDP. These estimates have been concurred with in later studies. See UNODC 2011 report, p. 7.
tor in the absolute majority of disputes involving money laundering. Thus, the topics of applicable norms, jurisdiction and evidence will be subject to inquiry. This thesis will analyse the specific difficulties arising within the frame of these topics and make suggestions on how arbitrators should overcome them.

1.2 Research Questions

Keeping the object that was put forth in the introduction in mind, the main research question of this thesis has been formulated as follows:

*How should arbitrators handle disputes involving contracts tainted by money laundering?*

The main research question has been divided into the following sub-questions, mirroring the selected topics:

- What is money laundering and how does it intersect with international commercial arbitration?
- What sources of law should the arbitrator apply to the substantial issues of the dispute and what are the civil law consequences of money laundering?
- How should an arbitral tribunal rule upon its jurisdiction in these disputes?
- How should the facts be established in a dispute involving contracts tainted by money laundering and how must money laundering be proven?

1.3 Disposition

This thesis is divided into four sections, which correspond to the research questions mentioned above. Section one is the introduction. Section two is partly descriptive as it seeks to provide somewhat general information about money laundering and international commercial arbitration. However, it is also analytical since it examines the ways in which money laundering and international commercial arbitration can intersect. Section three is concerned with examining the civil law consequences of money laundering and identifying the norms that should be applied by arbitrators in these disputes. Besides a brief elaboration of the contracts that can be seen as tainted by money laundering, this section includes issues of applicable law, transnational public policy and foreign mandatory rules. Section four is concerned with the preliminary issue of jurisdiction. This includes a discussion on whether disputes involving money laundering is at all arbitrable and whether the illegality of the main contract can entail substantive invalidity of the arbitration agreement. In the fifth section, the question of how the facts of a dispute involving money laundering should be
established is examined. This includes the issue of whether an arbitrator ought to investigate the issue of money laundering *sua sponte*, the applicable rules of evidence, how the burden of proof should be allocated and what an appropriate standard of proof is in disputes involving money laundering. As a way of escaping the conundrum that the difficulties of evidence might create, there is also a brief inquiry into the eventual possibilities for arbitrators to report suspicions of money laundering to the appropriate authorities. The conclusions reached in regards to each of the selected topics are brought together at the last section of the thesis.

1.4 Delimitations

International arbitration is usually divided into two branches, international commercial arbitration and investment treaty arbitration. Investment treaty arbitrations, which are based on bilateral investment protection treaties, are not dealt with in this thesis. However, due to the lack of applicable case law, it would be unwise to categorically disregard the case law regarding investment treaty arbitration. Such awards will therefore be referenced when it is deemed to be appropriate.

The approach of this thesis is issue driven and transnational. This means that rather than looking at the laws of a specific jurisdiction, this thesis seeks discern how arbitrators adjudicating international disputes should handle contracts tainted by money laundering in general. This allows for a rather holistic point of view, which seems to be appropriate in light of the fact that the particular issue of international arbitration and money laundering has hardly been subject to any academic inquiry. In many of the topics that are discussed, national law will be determinative for the conduct of the arbitrator. Thus, generalisations will have to be made. Still, it is argued that the chosen approach is suitable for answering the research question at hand since it is possible to discern certain trends and conceptions of the state of *de lege lata*, both from the relevant commentary and case law. Moreover many of the issues discussed are generally unregulated and arbitrators enjoy considerable discretion in choosing how to confront most of the issues that are subject to analysis.

3 There are multiple reasons for this. One is that the consequences of money laundering differ. See for example the investment treaty arbitration case of *Valerie Belokon v. The Kyrgyz Republic* where the tribunal held that if money laundering could have been proven on behalf of the claimant, the claim brought under the Bilateral Investment Treaty might have been defeated. *Valerie Belokon v. The Kyrgyz Republic*, para. 158. See Lamm et al. 2010, p. 719 for an overview of the different consequences of money laundering in the investment treaty arbitration context.

4 With the exceptions of McDougall 2005 and the various entries in Karsten and Berkley 2003. However, while McDougall’s article deals with the issues of jurisdiction and public policy, it is not concerned with matters of evidence. The entries in Karsten and Berkley 2003 cover a few issues connected to money laundering but when these issues are subject to inquiry, it is often as an appendage to the case of corruption.
As mentioned above, the topics of this thesis have been chosen due to their general nature. Besides these, there are many special issues that might become relevant depending on the circumstances of the dispute. The admissibility of claims based on contracts tainted by money laundering and its role in international commercial arbitration, matters of restitution due to the invalidity of contract, how an innocent party may be compensated due to the main contract being invalidated and the significance and effects of parallel criminal proceeding are all examples of such issues. Naturally, these topics fall outside of the scope of this thesis.

### 1.5 Methodology and Materials

The methodology chosen for this thesis is the *traditional legal method*. In order to answer how arbitrators ought to handle disputes involving money laundering, the current state of law surrounding the topics concerned must be interpreted. Since this is an exploration of *de lege lata*, the approach of this thesis is meant to be practical rather than futurist. Discerning *de lege lata* is done by examining the relevant legal sources as positioned in the traditional hierarchy of norms. These legal sources are, in order after their significance, laws, case law, *travaux préparatoires* and legal doctrine.

As the approach chosen for this thesis is issue driven and transnational in nature, there are no domestic statutes that can be put in the top of the hierarchy of norms. Naturally, the same is true for *travaux préparatoires*. Nonetheless, several legal instruments will be used in the analysis of this thesis. In terms of money laundering, multiple UN conventions, the EU anti-money laundering directives and the Financial Action Task Force (FATF) 40 recommendations are briefly examined. The last of these instruments, which is arguably the most significant in the contemporary setting, constitutes soft-law. In regards to arbitration, the UNCITRAL Model Law (the Model Law) and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) is used throughout the analysis. Reference is also made to arbitral institutional rules when appropriate. Generally, these instruments are held to represent common denominators, which might be reflected in arbitral practice or in the laws of national jurisdictions.

The New York Convention is of vital importance since it is concerned with the enforceability of arbitral awards. The convention is a very successful piece of legislation, having been ratified by some 149 nations in 2013.\(^5\) The enforceability of the award concerned will

\(^5\) Born 2014, p. 103.
be a recurring factor of crucial importance in discussing the research questions. For this reason the New York Convention and specifically the provisions regarding non-recognition of awards will oftentimes serve as a theoretical point of departure. The Model Law will be used as a legal source in the same way as the New York Convention. Most jurisdictions have ratified the New York Convention, but not all domestic arbitration laws are drafted with the Model Law as a model.

One of the particular challenges of the topic chosen for this thesis is a lack of relevant case law and publicly available arbitral awards concerning money laundering. However, the case of corruption is similar to money laundering and the two crimes are related in a number of ways. Arguably, the issues which arise in regards to corruption are relevant for money laundering as well. Therefore, analogies will be drawn from the case law and publicly available awards concerning international commercial arbitration and corruption when it is possible and appropriate to do so. When examining the scarce number of awards and case law, there is a risk of attaching to much value to one award by interpreting it as a direct expression of *de lege lata*. The analysis is conducted carrying this methodological pitfall in mind and the cited arbitral awards are not given a function of immediate precedence, but rather one of inspiration. Thus, they provide guidance but are not determinative for the outcome of the analysis. Even so, the reasoning of many awards embodies the arbitral practice, especially when a particular position has subsequently been concurred with in the legal commentary.

When it comes to the legal discourse, most commentaries on international commercial arbitration tend to deal with issues of corruption rather than money laundering. Therefore, apart from using well established general works on international commercial arbitration, more specific texts concerning corruption have been utilised. Even though money laundering is sometimes mentioned or touched upon briefly by these texts, very few sources deal with the issue of money laundering and international arbitration in a direct and focused manner. There are however a few exceptions to this statement. First, Andrew McDougall’s article “International Arbitration and Money Laundering” and second some

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6 Born 2014, p. 133.
7 To date almost seventy countries have drafted their arbitration laws on the basis of the Model Law, See Blackaby et al. 2015, para. 10.37. However, many key jurisdictions, both common law and civil law, have not done so. See Waincymer 2012, p. 172.
8 See Mugarura 2016, for a thorough inquiry of these points of connectivity.
9 The same is true for the cited case law from national courts with the reservation of the precedence that such rulings might have within their own domestic legal system.
10 Such as the treatises of Born 2014, Blackaby et al. 2015 and Hobér 2011.
11 These include Sayed 2004, the entries in Karsten and Berkeley 2003 and Baizeau and Kreindler 2015 respectively as well as a number of articles from different journals on international arbitration.
of the documents originating from a 2003 ICC Conference on Corruption, bribery, money laundering and fraud. Finally, some sources have a more general approach, in that they address the problems associated with crime and international arbitration.\textsuperscript{12} Conclusions will be drawn from all of these sources.

In the 2015 dossier of the ICC Institute of World Business Law, which was titled “Addressing issues of Corruption in Commercial and Investment Arbitration” the authors did not deal with other acts than corruption, such as fraud or money laundering. According to the group, these crimes did “not necessarily raise the same issues, in particular since corruption has a bilateral aspect, in other words it involves two parties”.\textsuperscript{13} It is held by this author that although some issues differ, many are the same. This is especially true in regards to the general topics discussed in this thesis. If some of the more specialised topics were to be discussed, this point of view might be in need of further nuance. As to the specific reservation of the dossier, it is submitted that money laundering can, depending on the relationship between the parties, be a unilateral or bilateral offence. Most importantly, it is submitted that the differences that do exist between money laundering and corruption are not significant enough to keep analogies from being drawn from the case law and commentary on corruption. Rather, the two crimes are both transnational in nature, have similar negative effects on trade and society and they both test the limits of the private dispute resolution mechanism of international arbitration in a number of ways. The perhaps biggest difference is that money laundering is constructed as an ancillary offence. This particularity will be addressed under the respective points of inquiry and will sometimes warrant different conclusions than those that can be drawn in regards to corruption. Another is that the objective pursued in a money laundering operation is different from the one that is pursued in corrupt practice. Whereas the purpose of money laundering is to conceal the illicit origin of money, the act of corruption is aimed at procuring a benefit by transferring funds to a third party.\textsuperscript{14} Nonetheless, both crimes are committed with the clear intention of concealing the true nature of a transaction but whereas this is a means to an end in corrupt transactions, concealment is the very purpose of money laundering.

\textsuperscript{12} See for example Mourre 2009 and Kreindler 2003.
\textsuperscript{13} Baizeau 2015, p. 9.
\textsuperscript{14} Karsten 2003, p. 15. When corruption is referred to in this thesis, it is meant to have the meaning assigned to it by Sayed’s definition, which reads; “Actions of transfer of money or anything of value to foreign public officials, either directly or indirectly, to obtain favourable public decisions in the course of international trade”. See Sayed 2004, p. 1.
2 International Arbitration and Money Laundering

2.1 International Commercial Arbitration

Part of the explanation for the success of international commercial arbitration is, as for the growth and gravity of the money laundering offence, the internationalisation of business and commerce.\(^{15}\) The roots of arbitration as a method for resolving international disputes stretches far back in time, with many historians tracing it back as far as antiquity and although the opinion of the first recorded instance of arbitration varies,\(^{16}\) there is no doubt that this particular form of dispute resolution is not a recent invention. International arbitration is distinct from national arbitration. There is no general agreement as to what constitutes international arbitration. However, some significant factors that are usually assigned weight are the international nature of the dispute and the nationality of the parties of the dispute.\(^{17}\)

The basic characteristics of international commercial arbitration are tailored, or at least rather well fitted, to the nature of international business transactions. For example, international arbitration is a form of private dispute resolution, meaning that the process is not subject to public insight and that the awards are seldom made publicly available.\(^ {18}\) A related but different advantage is that the arbitral procedure is, to a certain degree, confidential.\(^ {19}\) Furthermore, arbitral adjudication provides for greater flexibility in the proceedings and allows for a procedure which is not encumbered by jural formalities in the same way as court litigation.\(^ {20}\)

Arguably, one of the most fundamental aspects that sets arbitration apart from conventional litigation, be it national or international, is its source of legitimacy. The possibility for the parties to settle disputes through arbitration rather than through the use of courts of law is essentially derived from the freedom of contract.\(^ {21}\) However, the exact source of the powers and obligations of arbitrators remains a debated issue. Some believe that, since the source of legitimacy of the arbitral process is the freedom of contract, the powers of and duties of arbitrators are merely those conferred to them by the parties. Others view nation-

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\(^{15}\) Blackaby et al. 2015, para. 1.01.  
\(^{16}\) Born 2014, p. 7.  
\(^{17}\) Blackaby et al. 2015, para. 1.27-1.30.  
\(^{19}\) Smeureanu 2011, p. 27. See section 5.5 for a closer discussion on confidentiality.  
\(^{20}\) Carbonneau 2012, pp. 24-25.  
\(^{21}\) Ramberg 1999, p. 23.
al statutory provisions as the origin of the arbitrator’s powers and duties. 22 Without delving deeper into this inquiry, it is clear that the arbitrator is encumbered by a number of duties stemming from his contractual relationship with the parties. 23 However, it seems equally clear that arbitration does not function in a legal vacuum and that the arbitrator must have regard to a number of different laws when adjudicating an international dispute arising from a contract tainted by money laundering. 24 These laws include the law governing the procedure (the *lex arbitri*), the law chosen by the parties to govern the substantive issues of the dispute (the *lex contractus*), the law at the place of enforcement or recognition and, as will be seen below, possibly other laws with a close connection to the dispute at hand. Moreover, certain ethical rules, such as rules issued by bar associations, as well as applicable institutional rules are also relevant in shaping the way in which tribunals conduct the procedure. 25

Keeping the contractual nature of international commercial arbitration in mind, it should come as no surprise that one of the core principles of international commercial arbitration is party autonomy. 26 Party autonomy is generally perceived as a cornerstone of arbitration. Seeing as how the topics chosen for this thesis give rise to situations where party autonomy might be in conflict with other interests, it is essential to acknowledge the importance of this principle in the upcoming discussion. The principle of party autonomy grants the parties the right to determine the scope of the dispute, and it is the duty of the arbitrator to adjudicate the dispute as envisaged by the parties on the basis of the claims and evidence presented by them. 27 A crucial aspect of party autonomy is that it gives the parties the freedom to choose the substantive law that are to be applicable to the main contract, 28 as well as the law governing the arbitral procedure, 29 which will normally be the law of the seat of the arbitration. 30 However, the principle of party autonomy is still subject to certain restrictions. Most importantly these restrictions are made up by public policy, mandatory rules and rules on arbitrability. As will be discussed below, interventions into this fundamental notion might be warranted and necessary in disputes tainted by money laundering.

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22 Hobér 2011, p. 160, who advocates viewing the relationship between the parties as a combination of these two theories and as a *sui generis* legal relationship.
24 Blackaby et al. 2015, para. 3.07.
25 Blackaby et al. 2015, para. 3.07.
26 Hobér 2011, p. 39.
27 Hobér 2011, p. 159.
28 Born 2014, p. 2671. However, a small number of countries which do not accept choice of law agreements exist, see Born 2014, p. 2680.
29 Blackaby et al. 2015, para. 3.65–3.68.
30 Blackaby et al. 2015, para. 3.53.
Another fundamental principle of international commercial arbitration, which stands at the centre of the intersection between international arbitration and crime, is the principle of competence-competence. This principle grants arbitrators the competence to determine their own jurisdiction when there is a challenge to the validity of the arbitration agreement. The closely related doctrine of separability, according to which the arbitration agreement is separate from the principal contract, and thus not necessarily affected by potential or factual invalidity or termination of the main agreement, is of equal importance.

Even though international arbitral awards are generally final in the sense they cannot be appealed, the battle for the winning side is not necessarily over once the award has been rendered. First, the award can be challenged by the losing party. The grounds on which such a submission can be granted will depend on the national law of the seat of arbitration. However, Article 34 of the Model Law contains an enumeration of grounds upon which an award can be annulled. The grounds are essentially the same as those spelled out in Article V of the New York Convention, albeit with small differences of expression. There is thus a “pleasing symmetry” between the two instruments and procedures in this regard. Furthermore, even though Article V of the New York Convention does not limit the grounds upon which an award can be annulled, most jurisdictions have adopted grounds corresponding to those enshrined in Article V and Article 34 and 36 of the Model Law. Second, the stage following the arbitral proceedings is that of recognition or enforcement of the award by a national court. At this stage, the enforcing court has the option of denying the recognition or enforcement of an award. However, domestic courts employ a presumption to recognize and enforce international awards. This is indeed a presupposition for the effectiveness of international commercial arbitration as it assures the finality of the award which the parties have designated time and resources into achieving. The presumptive and mandatory obligation of recognition and enforcement of foreign awards is enshrined in Article III of the New York Convention. Article V of the New York Convention provides for an exhaustive enumeration of grounds upon which a decision to refuse the recognition or enforcement of a foreign arbitral award can be made. The most im-

31 Blackaby et al. 2015, para. 5.105, Hobér 2011, p. 106 and Sayed 2004, p. 44.
32 Born 2014, pp. 359–361, Blackaby et al. 2015, para. 2.101–2.113 and Sayed pp. 42–44.
33 Blackaby et al. 2015, para. 10.01–10.10.
34 See Blackaby et al. 2015, para. 10.38. See also Born 2014, p. 3178.
36 Hwang and Lee 2015, p. 183. However, many awards do not reach this stage since they are complied with voluntarily, see Blackaby et al. 2015, para. 11.02 and Born 2014, p. 3409.
38 Born 2014, p. 3413.
39 Born 2014, p. 3425.
important grounds for the research questions at hand are public policy and excess of mandate, which will be discussed at length in this thesis. The extent to which domestic courts will consider annulling or refusing recognition of an award depends on the attitude of that particular jurisdiction. However, due to the prevailing pro-arbitration stance held in most jurisdictions, it is generally held that the window in which domestic courts will do so is very narrow.\footnote{Blackaby et al. 2015, para. 11.60–11.63. This is the intention of both the New York Convention and the Model Law. However, the extent to which this intention is abided to varies between jurisdictions.}

Closely related to the concepts of annulment and refusal of recognition, it is often held that an arbitrator is obliged to render an award “enforceable at law”.\footnote{See for example Article 41 of the ICC Arbitration rules. As expressed in this provision, this duty must be perceived as an obligation for the arbitrator to do so to the best of his ability. See Blackaby et al. 2015, para. 11.11. However, according to some commentators, the existence of this obligation in international commercial arbitration is not entirely evident, see Kurkela 2008, p. 283. Moreover, according to the Kurkela, this duty is to be measured against the criteria in the New York Convention, See Kurkela 2008, p. 283.} This obligation is enshrined in multiple institutional rules and is a well established principle of international arbitration.\footnote{Article 35 ICC Arbitration Rules, Article 32(2) LCIA Rules and Article 47 SCC Rules.} Enforceability ought to be reviewed by the arbitrator in light of the grounds for annulment or refusal of recognition as envisioned in the relevant domestic laws. Since the issue will be discussed strictly from an international point of view, the grounds provided for in the New York Convention and the Model Law will be used as a platform for analysis. Naturally, the obligation to render an award enforceable at law is pivotal when discussing the issue of money laundering due to the strong public interests associated with countering this offence.

2.2 Money Laundering

2.2.1 How Money is Laundered

According to Article 3(1)(b) of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention), money laundering is defined as:

i) The conversion or transfer of property, knowing that such property is derived from any of the drugs offences established by the Convention, or from an act of participation in such offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence to evade the legal consequences of his actions;
ii) The concealment or disguise of the true nature, source, location, disposition movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph a) of this paragraph or from an act of participation in such an offence or offences.

The definitions of later international instruments are modelled after this provision.\(^{43}\) The common denominator for all money-laundering schemes is the objective of the operation, which is to conceal the origins of revenues linked to criminal activity in order to make the criminally derived funds appear legal.\(^{44}\) The practice of concealing the source of illicitly gained funds is not a novel phenomenon. However, the origins of the term money laundering is relatively contemporary, as it is believed to have first seen the light of day in 1986 when it was introduced in the US Money Laundering Control Act of 1986.\(^{45}\) The crime of money laundering contains two components. The first being a relevant predicate offence, which is the offence from which the illegitimate funds are derived, the second being the actual laundering process. Thus, money laundering is dependent on the existence of a predicate offence that serves as the source of the illicit funds and can be said to constitute both a dependent and independent offence.\(^{46}\)

Since the purpose behind organised and financial crime is to accumulate funds, money laundering is often a necessary step for enjoying the fruits of one’s illicit labour.\(^{47}\) Consequently, one of the objectives of anti-money laundering legislation is to ensure that crime is not profitable.\(^{48}\) Besides suppressing profit oriented crimes by dampening the incentive to commit them, the rather obvious objective of anti-money laundering regulation is to address money laundering as such.\(^{49}\) This is important since money laundering carries a wide variety of negative consequences for the financial system and society at large.\(^{50}\) These well-recognised implications affects many different sectors and in a number of different ways, both in the long term and short term.\(^{51}\) Additionally, one of the reasons for recent interna-

\(^{43}\) Mitsilegas 2003, p. 196.
\(^{44}\) Gallant 2005, p. 11 and Unger and Busuioc 2007, p. 15.
\(^{46}\) Boister 2012, p. 108.
\(^{47}\) Karsten 2003, p. 15.
\(^{48}\) Unger and Busuioc 2007, p. 15.
\(^{49}\) Unger and Busuioc 2007, p. 15.
\(^{50}\) Unger and Busuioc 2007, p. 145
\(^{51}\) Unger and Busuioc 2007, pp. 109–183.
tional concern is the connection between money laundering and terrorism financing.\textsuperscript{52} As is reflected in the rather vast international regulatory framework, the international community has clearly acknowledged the gravity of the money laundering offence and the destructive consequences following in its wake.

As a result of the necessity for the organised crime business to launder money and the actions that have been taken to obstruct such behaviour, a myriad of different methods of laundering money has been developed and they have become increasingly sophisticated.\textsuperscript{53} The money laundering process is usually divided into three stages, placement, layering and integration.\textsuperscript{54} In the placement stage, money derived from a predicate crime in the form of cash is deposited to a bank deposit or an otherwise negotiable, redeemable or saleable instrument or moved electronically to a bank account. The goal is to place the funds where a withdrawal of them will not raise any suspicion as to their origin. The money is placed through small transactions in order to avoid the screening procedures of financial institutions. In the layering phase, the funds are distanced further from their illicit source by a series of transactions where the money is usually blended with legally obtained funds. In the integration phase, the funds are integrated with the legal economy, for example through the making of investments or purchasing a certain good.\textsuperscript{55} These transactions commonly involve transfers across different banks and jurisdictions, creating a concealing layer of complexity.\textsuperscript{56} Due to the many methods available, there is no use in trying to provide an exhaustive enumeration of the relevant ways in which money can be laundered throughout these stages. However, one simple form of trade based money laundering consists of an import/export transaction where the buyer pays a higher price for certain goods than that which corresponds to market value with money originating from a relevant predicate crime. When the buyer proceeds to sell the good, he receives legitimate funds in return.\textsuperscript{57} If the contract regulating the export/import transaction was to contain an arbitration clause, this could be one of the ways in which a dispute involving money laundering would find its way into international commercial arbitration.\textsuperscript{58} In fact, trade based money laundering is one of

\textsuperscript{52} Which has also resulted in nine additional recommendations being added to the original FATF 40 recommendations as well as an increased effort on researching terrorism financing, see FATF Annual report 2014–2015, p. 16.

\textsuperscript{53} Karsten 2003, pp. 14–15. This statement was made in 2002 and it can be assumed that the sophistication of the money laundering methods and of the actors involved continues to be a growing concern.


\textsuperscript{55} Karsten 2003, p. 16.

\textsuperscript{56} Young 2007, p. 11.

\textsuperscript{57} Karsten 2003, p. 18.

\textsuperscript{58} McDougall 2005, p. 1024.
the main ways in which money is habitually laundered,\(^{59}\) and the contracts regulating these trades can give rise to a range of different commercial disputes.\(^{60}\) Seeing as how international commercial arbitration is the most common way to resolve such disputes, it is valid to assume that contracts tainted by money laundering might enter arbitral proceedings in a variety of ways.

### 2.2.2 International Legal Framework

When the term money laundering was first introduced it was still perceived as an issue that resided mainly within national borders and this was reflected in the regulatory approach.\(^{61}\) However, this is no longer the case. Rather, the problems posed by money laundering are continuously growing and evolving across jurisdictions as a result of the on-going internationalisation of business and commerce and technical developments that allows for new ways of laundering money.\(^{62}\) An example of the latter is the growth and development of virtual currencies that allow criminals to distance themselves from the fund-generating crime with an additional layer of anonymity.\(^{63}\) Thus, as with most international crimes, money laundering is not easily regulated on the international level.

However, in light of the transnational nature of money laundering, it is clear that an international regulatory framework is needed to effectively address this particular form of criminality.\(^{64}\) This need has been satisfied to some extent. The historical background of the international anti-money laundering legislation begins with the abovementioned Vienna Convention, which was adopted in 1988. The money laundering offence as construed in the Vienna Convention only covered the laundering of funds derived from illegal drug trade.\(^{65}\) The scope of the criminalisation was broadened through the 2000 United Nations Convention against Transnational Organized Crime (the Palermo Convention). Article 6 of the Palermo Convention obliges states to criminalise money laundering and include the

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\(^{59}\) The two other main ways in which money is laundered is through the financial system and through the physical movement of money. See FATF report on Trade Based Money Laundering 2006, p. 1.

\(^{60}\) McDougall 2005, p. 1024.


\(^{62}\) Recommendation 15 of the FATF 40 recommendations urges countries to be aware of and assess money laundering risks that comes with such developments.


\(^{64}\) The fact that money laundering, as well as terrorist financing, is frequently carried out in an international context and therefore in need of international judicial cooperation, is emphasised in recital 4 of the fourth anti-money laundering directive recital and Article 1 of the Palermo Convention.

\(^{65}\) Article 3(1)(b) of the Vienna Convention. See also Unger and Busuioc, 2007, p. 16.
“widest range of predicate offences”\(^{66}\). Furthermore, the Palermo Convention obliges states to criminalise as predicate offences all offences punishable by a maximum deprivation of freedom of at least four years or a more serious penalty,\(^{67}\) certain forms of organised crime,\(^{68}\) corruption\(^{69}\) and obstruction of justice.\(^{70}\) Since then, the regulatory framework, primarily through the FATF 40 recommendations, has branched out even more, adding a number of predicate offences. Besides the FATF 40 recommendations, the Vienna Convention and the Palermo Convention, there are a number of other conventions and private initiatives in force.\(^{71}\)

The perhaps most important, albeit not binding, instrument in the international anti-money laundering framework is the FATF 40 recommendations. FATF is an intergovernmental organisation that is entrusted with drafting international standards in the fight against money laundering, terrorism financing and the proliferation of weapons of mass destruction.\(^{72}\) To date, the organisation comprises of 36 member states, but due to the vast number of associated members and members with observer status, more than 180 jurisdictions have agreed to implement the FATF standards and to submit themselves to mutual evaluation.\(^{73}\) It is thus safe to state that the recommendations issued by this organisation are very influential on the anti-money laundering legislation of states. However, it is important to keep in mind that the recommendations are soft law and thus not legally binding.\(^{74}\) Recommendation 3 of the FATF 40 recommendations urges states to criminalise money laundering on the basis of the Vienna Convention and the Palermo Conventions. Furthermore, the FATF 40 recommendations urges states to “apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences”.\(^{75}\) The interpretative note to the relevant recommendation states that predicate offences should, at a minimum be comprised of all offences that fall within the category of serious offences under the national law of the country in question, or should include offences that are punishable

\(^{66}\) Article 6(2)(a) of the Palermo Convention.
\(^{67}\) Article 6(2)(b) and Article 2 of the Palermo Convention.
\(^{68}\) Article 6(2)(b) and Article 5 of the Palermo Convention.
\(^{69}\) Article 6(2)(b) and Article 6 of the Palermo Convention.
\(^{70}\) Article 23 of the Palermo Convention.
\(^{71}\) Bergström 2011, p. 101. See for example the 2003 United Nations Convention against Corruption and the 1999 International Convention for the Suppression of the Financing of Terrorism. For private initiatives, the Wolfsberg Anti-Money Laundering Principles have been mentioned as an important private initiative. See Young 2013, pp. 50–51 and Cremades and Cairns 2003, p. 74.
\(^{72}\) SOU 2016:8, p. 63.
\(^{74}\) This will primarily be important when discussing the place of money laundering in transnational public policy. See section 3.2.1.
\(^{75}\) Recommendation 3 of the FATF 40 recommendations.
by a maximum penalty of more than one year of imprisonment. Apart from this threshold criminalisation, the FATF 40 recommendations also urges countries to include a relatively broad range of offences within each of the “designated categories of offences”, which include *inter alia*, corruption, fraud, insider trading, tax crimes and various kinds of illicit trafficking. It has however been left to each state to decide upon the crimes which are to be categorised as serious crimes in this regard. Besides urging countries to criminalise money laundering, the recommendations consist of provisions urging states to implement various obligations, primarily state measures or requirements aimed at the financial sector. These provisions regard *inter alia* customer due diligence, transparency and beneficial ownership and reporting obligations for suspicious transactions. Out of these, only the reporting obligation is of further interest to this thesis.

Money laundering is one of the euro crimes, which is a particular serious group of crimes that has been granted an individual legal basis in the Lisbon Treaty. The special legislative attention that has been given to money laundering within the EU legal context is another testament to the fact that money laundering is an international crime that enjoys high priority on the global agenda. The EU has taken action against money laundering since the first anti-money laundering directive. Subsequent anti-money laundering directives have been adopted up until the most recent version, the fourth anti-money laundering directive. One intention of the fourth anti-money laundering directive, which was adopted on 20 May 2015, is to align the EU legislation with the revised FATF 40 recommendations, and the directive is more or less in convergence with the recommendations. This is not to say however that the two regulatory regimes are identical. For example, the fourth anti-money laundering directive obligates EU Member States to establish registers of beneficial owners. This obligation is not found in the FATF 40 recommendations, making the EU legal framework more far reaching in this regard. Most importantly the EU legislative acts of course differ from the FATF 40 recommendations in that they are binding upon the Member States of the EU. The fourth anti-money laundering directive obligates Member States

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76 Interpretative note to recommendation 3, p. 34 of the FATF 40 recommendations. This can be compared to the four-year threshold of the Palermo Convention.
77 The FATF 40 recommendations, p. 114–116.
78 Interpretative note to recommendation 3, p. 34 of the FATF 40 recommendations.
79 Recommendation 4, 33–34 and 13–14 of the FATF 40 recommendations respectively.
80 See section 5.5.
81 Article 83(1) Treaty on the Functioning of the European Union (TFEU).
83 Recital 4 of fourth anti-money laundering directive. The directive entered into force in June 2015 and member states have two years to implement it.
84 SOU 2016:8, p. 73.
to criminalise certain terrorist offences, the abovementioned offences referred to in the Vienna Convention, certain activities of criminal organisations, fraud affecting the Unions financial interests, corruption and all offences that are punishable by deprivation of liberty or a detention order for a maximum of more than one year. Since the fourth anti-money laundering directive is a minimum harmonisation directive, the member states are however free to adopt more far-reaching measures against money laundering. The determination as to what constitutes criminal behaviour, as well as other obligations arising out of anti-money laundering rules, is thus ultimately a matter settled by the national law applicable to the dispute at hand.

The fact that the international instruments have given states the freedom to decide which precise crimes constitute predicate offences to money laundering seems to have resulted in an international regulatory situation that has been described by one commentator as “a patchwork of predicate crimes”. Without conducting a thorough comparative investigation, it is difficult to validate this statement. It is however easily imagined that the criminalisation of money laundering differs significantly throughout different jurisdictions, either through the included range of predicate crimes or through the domestic conception as to which crimes constitute serious offences. Soft laws like the FATF framework are likely to result in soft harmonisation and a rather fragmented regulatory landscape. Generally, non-harmonisation is somewhat of a necessary evil following the voluntary nature of international law in general. This assumption is held in regards to some crimes, especially tax crimes, whereas other crimes, such as illicit trafficking of drugs, can be assumed to be criminalised as predicate crimes in most jurisdictions. This is mainly due to the fact that states are obligated to criminalise such conduct as predicate offences under the UN Conventions. However, FATF addresses strategic deficiencies and legislation of countries that are deemed to be inadequate through mutual assessment reports, which are made available to the public. Furthermore, FATF identifies and “blacklists” non-cooperative countries and territories which have not implemented the FATF 40 recommendations and are not cooperating in the international struggle against money laundering. These name-and-shame

85 Article 1 and Article 3(4) (a)–(f) of the fourth anti-money laundering directive.
86 SOU 2016:8, p. 28.
87 Unger and Busuioic 2007, p. 16.
88 Keesoony 2016, p. 3.
89 Keesoony 2016, p. 144.
90 See above section 2.2.
92 FATF Annual Report 2014–2015, pp. 18–20 and McDougall 2005, p. 1031. In 2000, FATF assessed 31 countries and blacklisted 15 of these. Presently, only Iran and the Democratic People’s Republic of Korea remain. There are however nine other jurisdictions which are deemed to be high risk and monitored due to
procedures are likely to bring the legislation of different jurisdictions in line with the FATF 40 recommendations in a way that would not be possible otherwise.

3 Civil Consequences of Money Laundering

3.1 Contracts Tainted by Money Laundering

The contractual consequences that money laundering, once proven to the satisfaction of the tribunal, has on the validity of the commercial agreement of the parties will depend upon the applicable legal norm. These will be discussed below. Before doing so, a terminological inquiry as to when a seemingly valid commercial contract can be perceived as involving or being tainted by money laundering should be carried out. This is necessary since this terminology is often employed in the commentary to describe contracts that can be subject to civil consequences due to illegality. The same terminology is employed in this thesis. Determining whether a certain contractual relationship is tainted by money laundering is essentially a question if there is an adequate connection between the criminal conduct and the contract that the dispute is rising out of. In furtherance of this conceptualisation, Ashford distinguishes between three main species of contracts that can be seen as tainted by criminal acts and therefore illegal. Contracts which had an illegal purpose at the time of inception, contracts that are a result of criminal conduct and contracts which had a legal objective at the inception but which were subsequently tainted by criminal acts. Similarly, the commentary on corruption routinely distinguishes between contracts providing for corruption and contracts procured by corruption. The former is generally held to be void whereas the latter is held to be voidable. One of the most common forms of corrupt contracts, which are dealt with in a number of arbitral awards, is contracts which are made to appear legal but are providing for corruption, commonly the payment of a bribe either directly or through an intermediary. Such contracts usually end up in arbitration when the payer of the bribe refuses to pay the recipient, or intermediary, and the recipient or intermediary refers the case to arbitration in order to get the payee to honor its contractual obligation to pay. Taking the nature of money laundering into account, it would seem like

93 Ashford 2014, p. 163.
94 Ashford 2014, p. 164.
96 Armesto 2015, 167.
most contractual relationships which could involve this particular form of criminality, and thus demonstrate the adequate connection between the criminality and the main contract, would belong to the first bracket of contracts. For example, the simple scenario of the export/import agreement with an inflated price would constitute a clear case of a contract providing for money laundering.\(^97\) Similarly, such a contract could enter arbitral proceedings if money laundering was to be raised as a defence against a claim aimed at getting one of the parties to honour its contractual obligations in regards to such a transaction. Due to the objective of corruption being fundamentally different from that of money laundering it is indeed difficult to think of a contract that could be seen as “procured” by money laundering.\(^98\) Working under the assumption that contracts tainted by money laundering are those that provides for money laundering, these should, as far as analogies can be drawn, be treated on the same terms as contracts providing for corruption, or to use Ashford’s terminology, contracts which were illegal at their inception. At first glance, it may not seem plausible that a contract providing for criminal acts would be submitted to arbitration.\(^99\) However, it seems feasible that the party or parties harboring intent to launder illicit funds through the contract at issue would rather have any dispute rising out of this contract tried by an arbitral tribunal, instead of taking the risk of the true nature of the contract coming to light in court proceedings. Contrary to state court proceedings, arbitral proceedings are not public, which keeps attention from being drawn to the parties’ contractual relation and an arbitrator is less likely than a judge to report questionable conduct to state authorities in order to initiate criminal proceedings.\(^100\) Thus, contracts tainted by money laundering should generally be understood as contracts that provided for money laundering at their inception.\(^101\) As a point of departure, they should suffer the same fate as contracts providing for corruption.

### 3.2 The Law Applicable to the Substance of the Dispute

When determining the civil consequence that alleged money laundering would have on the contract at issue, the first thing that needs to be done by the arbitrator is to determine the

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\(^{97}\) However, if the contract is legal at its inception but the business transaction is later hijacked by one or both parties by starting to pay with the goods with funds with illicit origin, the contract might, using Ashford terminology, belong to the third species of contract. This could perhaps influence the possible contractual consequences.

\(^{98}\) See section 1.5 regarding these different objectives.

\(^{99}\) This particular concern is raised by Ashford. See Ashford 2014, p. 164.

\(^{100}\) Khvalei 2013, p. 16 and Ziadé, 2015, p. 117. Both authors emphasise these arguments in regards to corruption. They are just as viable in the context of money laundering.

\(^{101}\) The possible exception being or contracts which were legal at their inception and later used for money laundering, see n. 97.
law or norm according to which the answer to this question should be sought. Similarly, the applicable law which defines the criminal offence of money laundering must be determined in order to identify the elements that have to be proven. Due to the fact that the definition of money laundering and the range of criminalised predicate offences vary throughout different legal systems, this question is of vital importance for the adjudication of the dispute.

As a consequence of party autonomy, the law chosen by the parties is undoubtedly the point of departure when examining the law applicable to the substantive issues of the dispute, such as the validity of the contract. Thus, the arbitrator should address the issue of money laundering under the lex contractus. In the case that there is no governing law appointed by the parties, the arbitrator is at a wide discretion to tailor appropriate choice of law rules or apply the legal provisions, public policies and mandatory rules that he deems to be appropriate in the dispute at hand. In light of the comprehensive legal framework accounted for above, and the near absence of blacklisted jurisdictions, a majority of jurisdictions can be presumed to have legislation in place that adequately criminalises money laundering. Thus, in most jurisdictions, money laundering and contracts providing for criminality ought to be contrary to the applicable law. However, if the lex contractus is, in the view of the arbitrator, inadequate in the way that the offence of money laundering is construed or in regards to the civil consequences sanctioning tainted contracts, the arbitrator might want to apply another norm in adjudicating the dispute. When pondering this alternative, the arbitrator must determine the limitations that can constrain the parties’ choice of law, and override the lex contractus. There are two possible options that can be considered in this regard. The first alternative that will be discussed is whether the arbitrator might apply a rule of transnational public policy to this effect. Second, it will be discussed whether the arbitrator may review the possibilities of applying anti-money laundering rules of a jurisdiction other than that of the lex contractus. It is generally held that public policy and

102 However, in practice arbitrators have been known to reason from a “preconception” about what corruption is when adjudicating such disputes, rather than examining the criteria in the applicable substantial law. See Sayed 2004, p. 89.
104 Kreindler 2013, p. 169.
105 Sayed 2004, p. 163. See also Article 28(2) of the Model Law and Born 2014, p. 2636. This discretion might be restricted by the relevant arbitral rules of the seat of the arbitration. The absolute majority of countries, with the exception of a few undeveloped jurisdictions, do not apply such restrictions. See Born 2014, p. 2628. However, some modern jurisdictions, such as Japan and Germany, apply special choice of law rules to tribunals seated within their jurisdictions, for example imposing that the law with the closest connection should be chosen to govern the substance if there is no choice of law.
106 Which is hardly unfeasible if the parties had criminal intent at the inception of their contract and chose the applicable law on the basis of such intent.
mandatory rules of interested states may invalidate the choice of law agreement of the parties. Moreover, according to Gaillard and Savage, taking account of norms other than the *lex contractus* is not merely a possibility, but an obligation of international arbitral tribunals when the results following an application of the *lex contractus* would be contrary to transnational public policy.

### 3.2.1 Identifying Transnational Public Policy

The concept of public policy is not easily defined, yet it holds a strong place in arbitral practice and legal discourse. A common description of the nature of public policy is “moral, social or economic principles so sacrosanct...as to require its maintenance at all costs and without exception”. The basis for public policy can be said to be national conceptions of justice and moral. Since the conception of such principles or values is subject to change over time, and since different countries will have different notions as to the content of public policy, it makes for a multi faceted and flexible concept. There are three different types of public policy and they are relevant at different levels. First, national public policy allows the national governments to create rules and principles that apply to the citizens of said country. Second, international public policy, whilst still embodying national values, is the part of a state’s public policy that prevents the enforcement or recognition of foreign arbitral awards, laws and judgements. Naturally, this concept is narrower in its content than national public policy. Both national and international public policy constitute a ground for the refusal of recognition for international arbitral awards according to Article V(2)(b) of the New York Convention and for annulment according to Article 34(2)(b) of the Model Law. However, in many jurisdictions, the refusal of recognition does in fact require a violation of international public policy. Thus, the relevance of the concept of public policy in international commercial arbitration is that arbitrators should render awards that are compatible with it in order to safeguard the finality of the award. The fact that arbitrators must do so is derived from their duty to render awards which are enforcea-
ble at law. The concepts of national and international public policy, as expressed in the abovementioned Article V(2)(b) of the New York Convention, are distinguishable from the concept of transnational public policy.

Transnational public policy is fundamentally different from national and international public policy. It is not connected to the public policy of a single jurisdiction, but rather it consists of universal values that are generally protected and which constitute the public policy of a majority of states. Since the content of transnational public policy is meant to consist of “the most extreme forms of human conduct that offends public morals”, it is construed very narrowly. Even though transnational public policy as such is not covered by the New York Convention, it is submitted that arbitrators need to take it into account. Since the notion of transnational public policy is based on convergence and universally shared values, rendering an award which violates transnational public policy is likely to be challengeable due to it violating the national and international public policy of a relevant jurisdiction.

Another point of view, which validity depends on how the role of arbitrators is perceived, is that arbitrators must consider fundamental notions of justice that are embodied in transnational public policy. Even though the concept of transnational public policy may seem abstract, it does exist and it makes for a rather creative and useful instrument in the toolbox of an international arbitrator.

Corruption is commonly held to be contrary to the international public policy of most jurisdictions. For example, this was expressed by the tribunal in the investment treaty arbitration case *World Duty Free v Kenya* where the tribunal held that;

In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to international public policy of most, if not all, States, or to use another formula, to transnational public policy.

Similarly, contracts providing for corruption are null and void according to the laws of most jurisdictions. If this effect is not outright provided for in law, such contracts will

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115 Lamm et al. 2010, p. 708. See section 2.1 regarding this duty.
116 Transnational public policy is sometimes referred to as truly international public policy.
118 Jagusch 2015, p. 27.
119 Lamm et al. 2013, p. 708.
120 Gaillard and Savage 1999, para. 1534.
121 See Lalive 1987, para. 101.
122 See Born 2014, p. 2716 and Armesto 2015, p. 167. This was also held by the tribunal in ICC Case No. 7664, see *World Duty Free v. Kenya*, para. 154 at n. 19.
not be enforceable due to existence of principles like the *ex turpi causa non oritur* (an action cannot arise from a dishonourable cause), which forms part of the legal system of many countries.\textsuperscript{125} Partly as a result of this convergence, it is generally held that corruption and bribery are contrary to transnational public policy.\textsuperscript{126} In fact, the prohibition of corruption has been said to be one of the “hard core” values of transnational public policy.\textsuperscript{127} For example the tribunal in ICC Case No. 8891 held that consultancy agreements with the object of corruption are contrary to transnational public policy and therefore leaves a tribunal with no other choice than to declare it null and void.\textsuperscript{128} Thus, claims arising out of contracts providing for corruption have been denied by a number of tribunals.\textsuperscript{129} Most commentators seem to presume that such denial should be executed by declaring the main agreement null and void.\textsuperscript{130} This view was for example expressed in the abovementioned ICC Case No. 8891 and in ICC Case No. 3916, where the tribunal held a commission agreement to be void due to the purpose of it being to bribe state officials.\textsuperscript{131} The question that needs to be taken into consideration is whether money laundering forms part of transnational public policy in the same way as corruption.

Due to the similarity between money laundering and corruption,\textsuperscript{132} it seems like it would be reasonable to assume so. Indeed, a number of commentators have concluded that the prohibition of money laundering is part of transnational public policy.\textsuperscript{133} However, keeping in mind the extraordinarily restrictive scope of the concept of transnational public policy, answering this question in such a categorical manner might be too simplistic and the basis for this point of view should be examined. Whereas it seems feasible to assume that money laundering, and the enforcement of contracts providing for such, is a violation of the na-

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{125} Wallgren-Lindholm 2015, p. 184, Armesto 2015, p. 167, Hobér 2011, pp. 305–306. Or a variant of this principle. In common law systems the unclean hands doctrine ought to have a similar function.
  \item \textsuperscript{126} See for example Lamm et al. 2010, p. 709.
  \item \textsuperscript{127} Sayed 2004, p. 278.
  \item \textsuperscript{128} Translation provided by the tribunal in *World Duty Free v. Kenya*, para. 155 and n. 20. See also Martin 2004, p. 49 for an English summary of the case. See also ICC Case No. 1110, p. 51, where the arbitrator held that corruption is an “international evil” which is “contrary to good morals and to an international public policy common to the community of nations”.
  \item \textsuperscript{129} Lamm et al. 2010, p. 729.
  \item \textsuperscript{130} Lamm et al. 2010, pp. 727–731. The authors also mention lack of jurisdiction or declaring such claims inadmissible as possible options.
  \item \textsuperscript{131} Lamm et al. 2010, p. 730.
  \item \textsuperscript{132} See section 1.5.
  \item \textsuperscript{133} Jagusch 2015, p. 37, according to whom it is “generally accepted” that this is the case and that the transnational public policy should be applied by tribunals. See also Cremades and Cairns 2003, p. 66 and with some reservation, McDougall 2005, p. 1046 are also of this opinion. Finally, Mourre especially mentions the prohibition of contracts made with the purpose of committing money laundering as a rule of transnational public policy, Mourre 2009, p. 228.
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tional and international public policy of many states, the difficult task is to determine what precise conduct constitutes the relevant form of money laundering. As was elaborated upon above, the term money laundering encompasses many types of behaviours and due to the discretion given to states to determine the relevant predicate offences, the range of prohibited behaviours might vary significantly between jurisdictions. These divergent views might make it difficult to define money laundering as part of transnational public policy, a concept that is built on unity and shared values.

As the concept of transnational public policy hinges on whether there is a consensus regarding a particular principle or issue, there are certain theoretical building blocks to be taken into account when identifying the content of transnational public policy. These sources include arbitral awards, national court decisions, international conventions, Inter-Governmental Organisations, Non-Governmental Organisations and general principles of law. Arguably, academic commentary can also be of use in this regard. Applying these criteria to the notion of money laundering, one is bound to acknowledge the lack of available awards and case law. As opposed to corruption, where a variety of arbitral awards and national courts have condemned corruption as being contrary to transnational public policy, no such awards exist in regards to money laundering. However, as was accounted for above, there is a rather comprehensive legal framework in place, forefronted by the FATF 40 recommendations, which aims to combat money laundering. This includes instruments issued by both public and private actors. However, seeing how these instruments are rather non-conclusive as they leave the criminalisation and classification of predicate crimes at the discretion of the states, coupled by the fact that the FATF 40 recommendations constitute soft-law, it is questionable whether these instruments establish the form of consensus that is necessary to construe a notion of transnational public policy. The problem of definition seems to be inherent in the structure of the money laundering offence. Not so much with regards to the money laundering operations as such (the first element of the offence), but rather in terms of the definition of predicate crimes (the second element of the offence). Recall that the international regulatory situation has been described as a “patchwork of

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134 As was seen above, there are a vast number of international instruments condemning money laundering as such, see section 2.2. As was also seen above, there is much speaking in favour of the view that contracts providing for money laundering should be treated in the same way as contracts providing for corruption, section 3.1.
135 Lamm et al. 2010, p. 707.
136 Jagusch 2015, p. 29.
137 Lamm et al. 2010, p. 707.
predicate crimes” in the past.\footnote{138} This issue was raised by McDougall in his 2005 article as well, where he emphasised the fact that tax evasion was not included as a predicate crime in the FATF 40 recommendations or the previous EU anti-money laundering directives.\footnote{139} Since then however, a few significant changes has occurred. First, tax crimes have been included as relevant predicate offences in both of these instruments.\footnote{140} Second, the FATF blacklist, which in 2005 included 13 countries now only include two, Iran and the Democratic People’s Republic of Korea.

Arguably, the lack of arbitral awards and case law could, due to the many similarities between corruption and money laundering, be somehow mitigated by the strong position taken against corruption by arbitral tribunals and commentators alike. These crimes are similar and their harmful effects on society and commerce are of equal significance. Furthermore, the regulatory landscape surrounding money laundering is certainly more unison than the one that was in place in 2005. The inclusion of tax crimes and the diminished number of countries which are present on the FATF blacklist plays into this. It is however hard to supply an answer of how significant a national court would perceive the possibly diverging opinions of states as to what constitutes relevant predicate offences to be. Even so, it is argued that there is a sufficiently clear and convergent definition in regards to certain forms of money laundering to support the claim that it is indeed contrary to transnational public policy. This is the case for money laundering of funds originating from serious predicate crimes which ought to be generally included in state legislation, such as drug trafficking. However, the same cannot be held with certainty in regards to more ambiguous and elusive categories of predicate offences, such as tax crimes, which is still a relatively new addition of predicate offences to the international regulatory context. Thus, it is warranted for arbitrators to be careful in the application of transnational public policy when adjudicating claims of money laundering involving these types of predicate crimes. Such care is necessary due to the general narrowness of application of transnational public policy as well as the fact that one of the main critiques against the concept is the risk of false assumptions of consensus.\footnote{141}

\footnotetext{138}{See section 2.2. However, it should be noted that full convergence between domestic laws is not required. See Gaillard and Savage 1999, para. 1535.}
\footnotetext{139}{McDougall 2005, p. 1045. McDougall nonetheless reaches the conclusion that money laundering should likely be perceived as contrary to transnational public policy.}
\footnotetext{140}{Article 3(4)(f) as well as recital 11 of the fourth anti-money laundering directive and the FATF 40 recommendations, p. 116. This was one of the news in the recently adopted fourth anti-money laundering directive.}
\footnotetext{141}{Lamm et al. 2010, p. 708.}
What then are the effects of holding the parties agreement to be contrary to transnational public policy? On the one hand, one could argue that a transnational public policy against money laundering would entail that contracts tainted by such would not be enforceable and therefore void. As was mentioned above, this seems to be the preferred course of action in terms of contracts tainted by corruption. On the other hand, it could be submitted that the denial of the parties’ choice of law and the nullity of the contract are separate effects and that one does not entail the other. An argument supporting the latter point of view is that there is a convention on the civil consequences of corruption which obligates its members to render contracts providing for corruption null and void.\textsuperscript{142} No such instrument exists in regards to money laundering. However, even if this were to be the case, the contract could probably still be invalidated with the use of other principles, such as the abovementioned \textit{ex turpi causa non oritur}. Also, if the \textit{lex contractus} could not be applied due to the fact that abiding the claimants claim would violate transnational public policy, invalidating the contract seems to be the logical continuation.\textsuperscript{143} It is indeed difficult to imagine that an award which obligates a party to engage in an operation which is contrary to a relevant conception of public policy could be seen as enforceable. Such an award would in practice equal an order to carry out criminal actions. The alternative to invalidity would perhaps be to relinquish jurisdiction, declare the claim as inadmissible or to fill the void left after the inapplicable \textit{lex contractus} with a foreign mandatory rule. However, in succumbing to the latter option, the boundary to the mandatory rules method is blurred, meaning that the problems associated with that method, as well as transnational public policy, must be resolved. Due to the uncertainty and problems of definition associated with money laundering as part of transnational public policy, a better alternative might be to apply a mandatory rule of a law belonging to a jurisdiction other than the \textit{lex contractus} in the cases discussed above. In doing so, the problem of definition is circumvented since the definition has already been considered by the foreign legislator in shaping the scope of the relevant provision.

\subsection*{3.2.2 Applying Foreign Mandatory Rules}

Mandatory rules have been defined as rules which are a matter of such strong public policy concerns of a certain jurisdiction that they must be applied even if the body of that coun-

\textsuperscript{142} Article 3 of the Council of Europe Civil Law Convention on Corruption.

\textsuperscript{143} See ICC Case No. 1110, p. 50 at para. 16. The arbitrator in this case held, already in 1963, that there exist “a general principle of law recognised by civilised nations that contracts which seriously violate bonos mores or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators”.

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try’s law is not applicable.\textsuperscript{144} It is submitted that criminal law rules prohibiting money laundering make up such rules and that mandatory rules of the \textit{lex contractus} can be applied by arbitrators.\textsuperscript{145} Two types of application of foreign mandatory rules seem to be available to the arbitrator.

First, mandatory rules could be taken into consideration as a fact when applying the \textit{lex contractus}.\textsuperscript{146} The clearest example of this is the first \textit{Hilmarton} award, where allegations of corruption were put forth.\textsuperscript{147} The \textit{lex contractus} was Swiss law and the arbitration took place in Switzerland.\textsuperscript{148} Throughout the dispute, the alleging party, who raised bribery as a defence against a payment obligation arising out of a form of agency agreement, was not able to prove that bribery had taken place. However, there was sufficient evidence for establishing influence peddling, which was a crime under Algerian law but not Swiss law.\textsuperscript{149} In deciding upon the law that should be used to determine the validity of the agency agreement, the arbitrator did not apply the Algerian statute directly to invalidate the contract. Instead, the arbitrator found that the agency agreement was null and void under Swiss law.\textsuperscript{150} In reaching this conclusion, the arbitrator made use of a Swiss legal rule which protected foreign mandatory rules insofar as a violation of them would constitute a violation of certain Swiss fundamental interests.\textsuperscript{151} The agent sought to challenge the award before the Swiss court, which annulled the award. However, both the lower court and the Federal Supreme Court concurred with the arbitrator in that a violation of a foreign mandatory rule could indeed be seen as contrary to Swiss morality, but held that the Algerian provision in question did not constitute such a rule as its real purpose was not to counter corruption.\textsuperscript{152} In

\textsuperscript{144} Mayer 1986, pp. 274–275 and Born 2014, p. 2695. See also Article 9(1) of Regulation (EU) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (the Rome I Regulation) according to which mandatory rules are such rules for which the respect is regarded as “crucial by a country for safeguarding its public interests”.

\textsuperscript{145} The arbitrator should however consider the type of rule, it might not always be entirely clear whether a certain rule is mandatory or not. See for example ICC Case No. 7047. In this case the tribunal considered that a circular note from the Kuwaiti Ministry of Defence which prohibited the use of intermediaries in arms deals did not constitute foreign mandatory law, ICC Case No. 7047, p. 89. The Swiss Supreme Court later concurred with this view, see Sayed 2004, p. 270 f. See also the discussion on arbitrability below, section 4.1.

\textsuperscript{146} McDougall 2005, p. 1047.

\textsuperscript{147} ICC Case No. 5622. References to this strain of awards and cases can be confusing. This chain of adjudications comprises of, in chronological order, an initial arbitral award, the Swiss national court cases overruling this award, a subsequent arbitral award concurring with the view of the Swiss courts and an English case of enforcement since recognition was sought in England. See Sayed 2004, pp. 234–244. It is perhaps the English case that has gained the most attention. However, this case is not of immediate interest to the mandatory rules method.

\textsuperscript{148} ICC Case No. 5622, pp. 105–106.

\textsuperscript{149} ICC Case No. 5622, p. 112. See Sayed 2004, p. 199 for a description of this corruption related crime.

\textsuperscript{150} ICC Case No. 5622, p. 114.

\textsuperscript{151} ICC Case No. 5622, p. 113.

\textsuperscript{152} \textit{Hilmarton v. OTV} 1989, p. 218 and \textit{Hilmarton v. OTV} 1990, p. 221 para. 21 and 23.
concurring with the Swiss court, the arbitrator in a subsequent arbitration enforced the contract.153

Thus, in order to consider a foreign mandatory rule in this manner, a provision in the \textit{lex contractus} which provides for such an opportunity is necessary. This limitation marginalises the relevance of this method. Furthermore, if the requirement of the \textit{lex contractus} for considering the foreign money laundering is, like in the \textit{Hilmarton} case, that the purpose and aim of the foreign mandatory rule should correspond with values which are safeguarded under the \textit{lex contractus}, this method might lead to apprehensive results. If the goal of applying foreign mandatory rules is to avoid perceived immoral consequences resulting from the application of the \textit{lex contractus}, it does not seem to be a good alternative to let the moral standard of the jurisdiction to which the \textit{lex contractus} belong be determinative as to whether the provision rendering the contract illegal should be applicable or not. However, if the possibility is present under the \textit{lex contractus}, the arbitrator should evaluate whether considering foreign mandatory rules could lead to appropriate results.

The second application of foreign mandatory rules is direct application. This approach is more accessible and straightforward than the previous method. However, it is also more intrusive in party autonomy as it entails a direct override of the law chosen by the parties.154 Many commentators seem to be positively inclined towards granting arbitrators this option.155 However, this topic has been subject to lengthy academic and practical debate. One argument in favour of using this method is that arbitrators, having been given adjudicatory powers by states, are obligated to have due regard to the public policy and mandatory rules of these states.156 Consequently, it is sometimes argued that it lies in the interest of arbitration as such to be lenient towards the application of such rules in order to keep the support of the nations which grant the mechanism its powers.157 An additional argument is that arbitrators have an obligation to render awards enforceable at law.158 The relevant mandatory laws pertaining from this obligation would be those belonging to the jurisdictions

\begin{itemize}
\item Sayed 2004, pp. 234–242. Similar reasoning can be found in two subsequent Swiss arbitral awards, see Sayed 2004, pp. 244–246.
\item A number of different laws are often cited as examples embodying the method of direct application, see Sayed 2004, pp. 254–255. Perhaps, the provision that is mostly referred to is Article 9 of the Rome I regulation. Sayed 2004 as well as McDougall 2005 refer to Article 7 of the Rome Convention, which was replaced by Article 9 of the Rome I regulation. See Sayed p. 254 and McDougall, p. 1047.
\item See for example Born 2014, p. 2699, Sayed 2004, pp. 259–260 and McDougall 2005, pp. 1047–1048. See Born 2014, p. 2703 for an overview of this discussion. See also Mouro 2011, p. 11. According to Mouro there is a “general consensus” that arbitrators can apply mandatory rules and determine civil law consequences arising out of violations of these rules.
\end{itemize}
where the parties are likely to seek recognition or enforcement. The arguments against the direct application of mandatory rules is mainly based on the point of view that arbitration is autonomous and that it should not be concerned with alleviating the moral deficiencies of the lex contractus at the cost of party autonomy. Furthermore, it is sometimes held that arbitrators should apply transnational public policy directly instead of applying foreign mandatory rules on the basis of shared moral values. However, taking into account the problems of definition associated with identifying money laundering as part of transnational public policy, the latter argument is not very convincing in this context.

Moreover, tribunals do not seem to have been overly eager to apply foreign mandatory rules regarding corruption in practice. When they have done so, the awards rendered on the basis of foreign rules or public policies have frequently encountered a rather strict judicial control at the enforcement stage. The Northrop award is illustrative of the interests competing with the notion of direct application of foreign mandatory rules. In this case the defendant argued that the contract should be invalidated due to the mandatory law-nature of a Saudi Arabian decree prohibiting the use of intermediaries in arms deals. However, the tribunal rejected this argument and considered that Northrop’s argument was not sufficient to deviate from the “strong public policy consideration” of party autonomy. Sayed perceives this as the tribunal valuing party autonomy, in the sense of the parties right to chose the law applicable to the substance of the dispute, higher than the possibility to fight corruption through the application of foreign mandatory rules. Thus, even though it seems reasonable to apply the mandatory rules method in some disputes involving money laundering, the practical possibility to do so and how such application would be perceived by domestic courts is not entirely clear. This should be kept in mind by arbitrators adjudicating such disputes. However, proceeding under the presumption that arbitrators can apply anti-money laundering provisions from laws other than the lex contractus, the next task for the arbitrator is to determine which rules to apply. In the commentary, a number of different opinions on how this choice should be made have been put forth.

According to Born, as well as Hwang and Limm, an arbitrator which presumably has the power to apply public policy and mandatory law is faced with a conflict of laws issue when

161 Born 2014, p. 2715.
162 The award is not publicly available but the reasoning is accessible through the publicly available proceedings from the United States Court where the award was challenged. Sayed 2004, p. 247. See Northrop v. Triad 1984.
163 Sayed 2004, p. 266.
determining what public policy or mandatory rule to apply.\textsuperscript{165} Born concludes that the conflict of law rules of the seat of arbitration should be applied in these scenarios.\textsuperscript{166} This argument is based on the opinion that such application allows for “a single, predictable and neutral” set of conflict laws, which is presumed to be in the interest of the parties.\textsuperscript{167} According to Born, the method consisting of determining which foreign mandatory rule have the closest connection to the dispute at hand is not well developed enough to shape the arbitrator’s choice of law.\textsuperscript{168} A strong argument in favour of letting the conflict of law rules of the arbitral seat decide the outcome of the choice, is thus that the uncertainty and potential arbitrary decision-making which might take place when deciding upon relatively loose points of connectivity such as “close connection” is avoided.\textsuperscript{169}

Conversely, other authors seem to consider that the choice of foreign mandatory rules should be made more freely.\textsuperscript{170} According to this point of view, the closeness between the dispute and the foreign mandatory rule should be determinative of the choice of law. There are certain factors, which are drawn from the requirements of national conflict of law rules, which should be considered when employing the second perspective and determining the closeness of connection between the dispute and foreign laws.\textsuperscript{171} First, the foreign mandatory rule in question must have an interest in the dispute at hand. Such interest is dependent on the provision claiming applicability to the situation and is construed on the basis of the aim and purpose of the rule, as well as its scope of application.\textsuperscript{172} Seeing as how anti-money laundering laws, in acknowledging the border-crossing nature of the crime, often-times strive to have a transnational reach, a wide range of mandatory rules pertaining from different jurisdictions can have an interest in the dispute. It is in the face of such conflict that the mandatory rule which has a close connection or which have preponderant or materially greater interest to the situation subject to dispute, should be applied.\textsuperscript{173} Moreover, Sayed draws attention to the fact that it is sometimes held in the scholarly debate on the issue that the choice of a mandatory rules pertaining from a law other than the \textit{lex contractus}

\begin{itemize}
\item \textsuperscript{165} Born 2014, p. 2706.
\item \textsuperscript{166} Born 2014, p. 2706 and Hwang and Lim 2013, p. 632.
\item \textsuperscript{167} Born 2014, p. 2658.
\item \textsuperscript{168} Born 2014, p. 2658.
\item \textsuperscript{169} Born 2014, p. 2659.
\item \textsuperscript{171} Sayed 2004, p. 260.
\item \textsuperscript{172} Sayed 2004, p. 260.
\item \textsuperscript{173} Sayed 2004, p. 262. In national conflict of law rules, a sufficiently close relationship between the place of performance and the dispute is often a condition for applying the law at the place of performance. See Hwang and Lim 2013, p. 634.
\end{itemize}
must be guided by the “legitimacy” of said rule.\textsuperscript{174} Such legitimacy can only be measured against universally accepted values.\textsuperscript{175} Another possible criterion that could be used is that the choice of the mandatory rule should be guided by the objective consequences following application or non-application of the provision.\textsuperscript{176} This does indeed seem to be a more suitable criterion than that of legitimacy. If the arbitrator would consider that the legitimacy criterion would have to be fulfilled, the problem of definition associated with identifying transnational public policy will not be entirely circumvented. However, the choice of law is naturally limited by the notion of transnational public policy.\textsuperscript{177} In considering which mandatory rule has the strongest connection to the dispute at hand, the law of the seat of the arbitration and the law of the place of performance of the contract are the alternatives which are frequently discussed.\textsuperscript{178} Likewise, if the conflict of law rules of the seat were to be applied, the common “candidates” of mandatory rules which are capable of overriding the \textit{lex contractus} according to most conflict of law rules are the law of the seat of the arbitration and the law of the place of performance of the contract.\textsuperscript{179}

In practice, the law of the seat of the arbitration may, unlike the \textit{lex fori} for a national court judge, not always have a strong connection to the contractual relationship of the parties. In fact, the parties to the dispute often chose a neutral seat for the sake of neutrality. However, considering the arbitrators duty to render an award enforceable at law, the arbitrator should be able to take the mandatory rules of the seat into account. Not doing so would put the award at risk of being challenged or refused recognition at the seat of arbitration.\textsuperscript{180} According to Pavic, arbitrators tend to be aware of the “pressure” from mandatory rules and public policy stemming from the law of the seat of the arbitration since subsequent enforcement might later be sought in this jurisdiction.\textsuperscript{181} Moreover, if an arbitrator were to give force to a contract without granting application to the criminal laws of the seat, he might expose himself to becoming an accomplice to the crime, depending on how the relevant criminal law provision is construed and perhaps his degree of intent and knowledge of the true nature of the transaction.\textsuperscript{182}

\textsuperscript{174} Sayed 2004, p. 262.  
\textsuperscript{175} Sayed 2004, p. 265.  
\textsuperscript{177} Born 2014, p. 2718.  
\textsuperscript{178} McDougall also argues that the law of the nationality of the parties might have a sufficiently strong connection. See McDougall 2005, p. 1050.  
\textsuperscript{179} Hwang and Lim 2013, p. 632.  
\textsuperscript{180} McDougall 2005, p. 1051.  
\textsuperscript{181} Pavic 2012, p. 676.  
\textsuperscript{182} McDougall 2005, p. 1051.
There is also merit to the opinion that the law of the place of performance can be applied. The connection to this law is rather self-evident and perhaps provides for the most real point of connectivity since it, contrary to the law chosen by the parties and the law of the seat of the arbitration, has a physical connection to the contractual transaction. According to McDougall, the arbitrator should indeed have the choice to apply the anti-money laundering rules of this law since the arbitrator would otherwise give force to a contract which he knows is illegal in the country where it will be carried out.\textsuperscript{183} According to another view however, this connection is in itself of no immediate relevance in the arbitrator’s choice of applicable norms. According to this view, a requirement for applying mandatory rules of the law of the place of performance would be that they violate the international public policies of either the \textit{lex contractus} or the curial law.\textsuperscript{184}

To conclude, if the \textit{lex contractus} provides for it, then the arbitrator has the possibility to consider whether a foreign mandatory rule has been violated. However, if there is no such possibility stipulated in the law chosen by the parties, the arbitrator should examine the possibility of direct application of mandatory rules. It is submitted that an arbitrator could, and often should, take foreign mandatory rules into consideration and possibly apply them directly if he deems the \textit{lex contractus} to be too tolerant of money laundering conduct. Moreover, the arbitrator should consider the applicable foreign mandatory rules \textit{ex officio},\textsuperscript{185} and taking applicable foreign mandatory rules into account could, as was mentioned above, be perceived as a duty rather than an option of the arbitrator.\textsuperscript{186} The choice of applying the conflict of law rules of the seat of the arbitration or to make the determination of the relevant mandatory rule more freely will depend on how much the arbitrator values the argument of predictability of the parties. It might indeed be a better option to apply the conflict of law rules of the seat seeing how the free choice approach could easily take the shape of arbitrary decision making in the hands of an inquisitorial arbitrator. Another argument is that there seems to be a difference of opinion as to when mandatory rules of the law of the place of performance or the curial law could be applied. Furthermore, money laundering schemes are often very complex and carried out through a number of different intermediary connections through which the illicit funds are transferred across jurisdictions for the

\textsuperscript{183} McDougall 2005, p. 1049. Inspiration can also be drawn from Article 9(3) of the Rome I Regulation, according to which effect may be given to mandatory rules of the laws of the country where the contractual obligations are to be performed if the mandatory provisions render the performance of the contract unlawful.\textsuperscript{184} Kreindler 2003, pp. 249–250.

\textsuperscript{185} See Born 2014, p. 2719, according to whom there is also “substantial commentary” which grants the arbitrator the option, and sometimes obligation, to do so. See also Gaillard and Savage 1999, para. 1533 to this point.

\textsuperscript{186} Born 2014, p. 2718.
sake of concealment. Perhaps, this methodology makes it difficult to determine which of
the involved jurisdictions will have the strongest connection to the dispute at hand.

Arguably, the outcome will be the same in the majority of cases due to the widespread
condemnation of money laundering. Regardless of the approach chosen, there are primari-
ly two foreign laws that can be of interest, the law of the seat of the arbitration and the law
of the place of performance. While the problem of definition is avoided in applying foreign
mandatory rules, the intervention in party autonomy is greater than if the transnational
public policy option would be applied. However, it is submitted that, due to the public
policy significance associated with condemning contracts tainted by money laundering, this
intervention is necessary and justified. Perhaps, the best course of action would be to rec-
ognise the transnational public policy concerns of money laundering whilst being prepared
to resort foreign mandatory rules in cases where the problems of definition would prove to
be too difficult to overcome.

4 Claiming Jurisdiction over the Dispute

4.1 Arbitrability

This section is concerned with issues that are preliminary in the sense that they might ter-
minate the arbitration proceedings before the merits phase, and thus, regardless if the
claimant is able to prove its claims on the merits of the case or not. Since arbitration is a
method aimed at private dispute settlement and since its fundamental source of legitimacy
is the general freedom of contract, it is only rational that states would impose certain de-
limitations of the subject matter that can be referred to arbitration. As an outflow of public
policy, such delimitations are imposed through the concept of arbitrability. Thus, arbitra-
bility constitutes the boundary between judicial and arbitral adjudication of disputes.

Each jurisdiction has its own conception of which legal matters must be handled by a court
of law and which matters that may be settled through arbitration. Consequently, the arbi-
trability of a given dispute in international commercial arbitration will be dependent upon
the relevant national law.

187 Banifatemi 2015, p. 16. There are indeed other possible preliminary issues than the ones discussed under
this section, see Blackaby et al. 2015, para. 6.53. However, the arbitrator will normally not have to deal with
those issues in the disputes that are subject to inquiry in this thesis.
188 Sayed 2004, p. 27.
189 Carbonneau 2012, p. 135.
190 The relevant provisions on arbitrability will most likely be regulated by the law of the place of the arbitra-
tion and the law of the place of the court asked to enforce the award. See Blackaby et al. 2015, para. 3.46.
There are however common ground to be found since there is a number of issues that are normally deemed to be non-arbitrable in the majority of jurisdictions. These issues include, *inter alia*, the grant or validity of intellectual property rights as well as certain issues of competition and insolvency law.\(^{191}\) Questions of criminal culpability and criminal responsibility are archetype issues that are commonly deemed to be non-arbitrable due to the public policy concerns vested in them.\(^{192}\) The appropriateness of arbitrators not being able to impose criminal sanctions is self-evident and is in no way questioned in this thesis. Neither is the fact that arbitrators cannot assign criminal guilt and rule on sanctions of a criminal nature. To the contrary, it is held that it is of great importance that such prosecutorial functions are transparent and subject to democratic scrutiny.\(^{193}\) Thus, this section is not concerned with discussing whether arbitrators can assign criminal culpability through direct application of mandatory rules of criminal law.\(^{194}\) However it is widely recognised, with the possible exception of jurisdictions maintaining adverse stances towards arbitration that the civil, rather than criminal, consequences of mandatory rules on the parties’ contractual relation can be subject to arbitration.\(^{195}\) Therefore, the following discussion on arbitrability is exclusively concerned with the civil consequences *inter partes*, resulting from a contract tainted by money laundering.\(^{196}\)

Depending on the view employed, the consequence of non-arbitrability is the illegality or invalidity of the arbitration agreement, both resulting in a lack of jurisdiction for the tribunal.\(^{197}\) Non-arbitrability should be distinguished from other causes of the substantive invalidity of the arbitration agreement.\(^{198}\) The concept of arbitrability is concerned with whether the dispute at hand belongs to a category of subject matters which, in the words of the

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\(^{191}\) Blackaby et al. 2015, pp. 2.131–2.146.

\(^{192}\) Blackaby et al. 2015, para. 2.131–2.146.

\(^{193}\) Born 2014, p. 1041.

\(^{194}\) There might however be some room for arbitrators to apply mandatory rules with mixed sanctions, such as treble damage or punitive damages, see Mourre 2009, p. 219. There are however no such rules that are relevant for money laundering.

\(^{195}\) Mourre 2009, pp. 215–216. In most jurisdictions the existence of applicable mandatory rules does not make the dispute non-arbitrable. Mourre exemplifies this with a French case, in which the court held that the “arbitrability of the dispute was not excluded by the sole fact that rules of public policy are applicable to the dispute” and that “arbitrators have the power to draw the civil consequences of an illicit behaviour under the profile of rules of public policy which can be directly applicable to the legal relationship at hand”. Based on the view that criminal rules are simply mandatory rules which are deemed to be important enough to be punishable by criminal sanctions, Mourre concludes that the reasoning in this case, which concerned competition law, is generally valid in disputes where criminal law rules are applicable.

\(^{196}\) Drawing contractual consequences from mandatory rules of criminal law can also be perceived as an “indirect application” of such rules, see Kurkela 2008, p. 282.

\(^{197}\) Sayed 2004, p. 28.

\(^{198}\) Born 2014, pp. 835 and 947.
New York Convention and the Model Law, are “capable of settlement by arbitration”.\textsuperscript{199} Other cases of substantive invalidity of the arbitration clause results in the there being no jurisdiction at all over disputes arising out of the main contract, notwithstanding whether they are arbitrable or not. Thus, in order to determine whether the tribunal has jurisdiction over a particular dispute involving elements of money laundering, the arbitrator will have to confront both the issue of arbitrability under the applicable law and that of the validity of the arbitration agreement in light of the illegality of the main contract. If either of these questions were to be answered in the negative, the result would be that an award rendered in spite of this could be challenged or set aside at the enforcement stage, in accordance with Article V(1)(a) or V(2)(a) of the New York Convention.\textsuperscript{200} The tribunal is able to determine whether it has jurisdiction over the dispute due to the principle of competence-competence.\textsuperscript{201}

The often-cited starting point on the topic of arbitrability of disputes concerning criminal contracts is ICC Case No. 1110, adjudicated by the sole arbitrator Lagergren. The case involved bribes addressed to Argentinean officials through a commission agreement between a British company, the respondent, and an Argentinean agent, the claimant. Somewhat simplified, the dispute regarded the payment of the claimant’s commission. Even though the commission agreement appeared to be legal, it was found that it contemplated bribing Argentinean officials in order to procure government contracts. For this reason, the arbitrator concluded, after weighing all the evidence of the case, that jurisdiction had to be declined.\textsuperscript{202} This conclusion was based on the view that a case such as the one before the arbitrator could have no countenance in any arbitral tribunal or the courts of any civilised country.\textsuperscript{203} The arbitrator did not relinquish jurisdiction on the basis of national rules on arbitrability, but on “general principles denying arbitrators to entertain disputes of this nature”.\textsuperscript{204} Thus, disputes arising out of contracts contrary to bonus mores, such as contracts providing for corruption, were excluded from the jurisdiction of arbitral tribunals in order to not assist the enforcement of such contracts. The reasoning of Lagergren is generally held to be one of non-arbitrability.\textsuperscript{205} However, some authors argue that this is a misinter-

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\textsuperscript{199} Article II(1) and V(1)a of the New York Convention and Article 34(2)(b)(i) and 36(1)(b)(i) of the Model Law.

\textsuperscript{200} Which are concerned with non-arbitrability and invalidity of the arbitration agreement respectively. The corresponding grounds are found in Article 34, annulment, and 36, refusal of recognition, of the Model Law.

\textsuperscript{201} See above section 2.1.

\textsuperscript{202} ICC Case No. 1110, p. 51 at para. 23.

\textsuperscript{203} ICC Case No. 1110, p. 51, at para. 23.

\textsuperscript{204} ICC Case No. 1110, p. 51, at para. 23.

\textsuperscript{205} Blackaby et al. 2015, para. 2.150, Born 2014, p. 989 and Sayed 2004, p 64.
pretation of the award, and that the reasoning in the case is actually more in line with the modern conception of arbitrability than it is commonly held to be.\textsuperscript{206}

The Lagergren position, interpreted as a stance on the non-arbitrability of claims of corruption, has been almost completely abandoned in subsequent awards.\textsuperscript{207} Today, the arbitrability of disputes involving corruption has been described as somewhat of a non-issue,\textsuperscript{208} and cases of corruption and similar forms of illegality are generally perceived as arbitrable in the absolute majority of legal systems.\textsuperscript{209} There is no reason to treat disputes involving money laundering any differently in this regard.\textsuperscript{210}

### 4.2 Validity of the Arbitration Agreement

The second issue that the tribunal has to examine when determining its jurisdiction over the dispute is whether the arbitration agreement is still valid in light of the fact that the main agreement is tainted by money laundering, and therefore, presumably, null and void. Due to the doctrine of separability, the arbitration agreement should be perceived as separate from the main contract and thus unaffected by allegations or findings of money laundering which would render the main contract null and void. This doctrine is a generally accepted principle in international commercial arbitration.\textsuperscript{211} An example of how it has been applied by tribunals in corruption cases is ICC Case No. 8891 in which the tribunal held that it was competent to make a finding of nullity although the arbitration clause was inserted into the main contract.\textsuperscript{212} This should generally be upheld in cases where the validity of a contract tainted by money laundering is called into question as well. However it is not entirely clear if the principle of separability is always unaffected in disputes involving money laundering.\textsuperscript{213}

First, the arbitration agreement might be compromised if the cause of invalidity of the main agreement targets the arbitration agreement directly.\textsuperscript{214} In \textit{Fiona Trust v. Privalov}, the

\textsuperscript{207} As illustrated by the relatively big number of awards dealing with corruption claims at the merits stage. See, Born 2014, p. 883 and Kreindler 2013, p. 46.
\textsuperscript{208} Banifatemi 2015, p. 16.
\textsuperscript{209} Born 2014, pp. 988–989, according to whom this is true for “virtually all jurisdiction”. See also Kreindler 2013, p. 251. One case from the Supreme Court of Pakistan is sometimes mentioned as a divergent view. See the \textit{Hubco v. WAPDA} and Kreindler 2013, p. 249.
\textsuperscript{210} This is also the opinion of McDougall, see McDougall 2005, p. 1042.
\textsuperscript{211} It is for example enshrined in Article 16(1) of the Model Law.
\textsuperscript{212} Sayed 2004, p. 58. Sayed provides for an unofficial translation of a passage from ICC Case No. 8891, p. 1079.
\textsuperscript{213} See Sayed 2004, pp. 45–46. Sayed writes about this issue in regards to corruption.
\textsuperscript{214} Hobér 2011, pp. 111–112.
English court of appeal concluded that an arbitral tribunal will only be prevented from deciding disputes involving corruption if the arbitration agreement is directly tainted by the illegality.\textsuperscript{215} This case built on the earlier English case Harbour v. Kansa,\textsuperscript{216} in which the court similarly held that the dispute could be settled by arbitration as long as the invalidity did not impeach the arbitration agreement.\textsuperscript{217} Similarly, the tribunal in the Westinghouse award held that separability could not be seen as absolute where a defect goes to the root of the arbitration agreement.\textsuperscript{218} One situation where the money laundering crime would be directly connected to the arbitration agreement, and thus not confined to the main agreement, would be in the presumably very rare scenario where the arbitral proceedings as such are used as a way of laundering money.\textsuperscript{219} This would be the case if one of the parties, acting in conspiracy with the other, were to submit a fake claim which he is certain to loose, in order to pay damages to the counterparty. The payment of these damages would in turn consist of funds in need of laundering. In this scenario, where the arbitration agreement in itself is apparently nothing more than a method for laundering money, the arbitrator should not proceed with trying the merits of the case, but instead proclaim the arbitration clause to be invalid on substantial grounds.\textsuperscript{220} Establishing direct impeachment as the outer limit of the survival of the doctrine of separability is not controversial as it is accepted in the majority of countries with developed rules on arbitration.\textsuperscript{221}

Second, there has been some discussion as to whether the sheer gravity of certain violations of public policy could break the insulation between the arbitration agreement and the main contract, leading to a lack of jurisdiction for the tribunal.\textsuperscript{222} The basis for this discussion is the case Westacre v. Jugoimport, which was adjudicated by the English courts before the abovementioned Fiona Trust v. Privalov. In this case, enforcement of an arbitral award, which obligated the principal to pay outstanding consultancy fees to the agent in accordance with an intermediary contract, was sought at an English court. In challenging the enforcement of the award, the principal brought fourth evidence to the point that the intermediary agreement did in fact contemplate corruption since its object was bribery of state

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215 Fiona Trust v. Privalov and Hobér 2011, pp. 111–112. See also ICC Case No. 6474, p. 308. In this case the tribunal held that the jurisdiction of the tribunal would only be affected if the arbitration agreement was entered into as a result of corruption or fraud. See Sayed 2004, pp. 74–76 for an account of this award.

216 Which did not concern corruption but claims of invalidity due to allegedly illegal insurance contracts.


221 Hobér 2011, p. 111.

222 Sayed, pp. 46–47.

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officials. The agent claimed that the possible criminal nature of the main contract should be seen as insulated from the arbitration agreement and an arbitral award giving force to said agreement when the domestic court determined whether to give force to the award or not. Thus the agent held that it was not seeking to enforce the main agreement, but rather the separate arbitration agreement according to which the parties were bound to honour arbitral awards arising out of it. On this basis, the agent reasoned that if a rendered award grants a party a right arising out of a contract in which the parties agree to commit a crime, the court tasked with the enforcement of the award should perceive the criminal main contract as insulated from the arbitration agreement and thus enforce the award.

The English court perceived the situation as a conflict between the public policy of the finality of international arbitral awards and the public policy of not giving force to contracts which are illegal due to their criminal object. According to the court, this conflict was to be resolved by determining if the illegality and invalidity of the main agreement would impeach the arbitration agreement. This determination was to be done on a case to case basis with “reference to the policy of the Court in relation to the particular nature of the illegality involved”. Thus, according to the court, the arbitration agreement and the arbitral award could both be impeached, and consequently severability could be set aside, depending on the degree of the illegality of the main contract. In considering the weight of the illegality of the allegedly corrupt main contract, the court found that even though corruption was contrary to public policy, it was not perceived to stand “in the scale of opprobrium quite at the level of drug-trafficking”. Making use of its self made test of gravity, the court held that a balance had to be struck between the “nature of the illegality alleged” and the public policy of upholding international arbitral awards and that if the alleged crime would have been drug trafficking, the alleged offensiveness would “outweigh any countervailing considerations”. However, the court considered that corruption was not a crime which could tip the public policy scale in disfavour of the arbitration agreement and separability. Therefore, even in considering the international condemnation of corruption and the fact

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225 According to the English judge this reasoning constituted a “very fundamental point”. Sayed 2004, p. 49.
226 Westacre v. Jugoimport, p. 117.
227 Westacre v. Jugoimport, p. 117.
228 Sayed 2004, pp. 50–51.
231 Sayed 2004, p. 53.
that contracts providing for such is invalid under English law, the court held that it would be inappropriate to retry the issue of illegality when the issue had already been dealt with by a competent tribunal.232

In considering the court’s reasoning in this case, the immediate question becomes if the case to case consideration would have been the same if the criminality allegedly tainting the contract would have been money laundering. Could this offence constitute a degree of offensiveness which might lead to the setting aside of the doctrine of separability?233 One point of view is that the crime of money laundering in itself, as corruption, will not constitute a public policy violation that could result in the setting aside of the doctrine of separability. Indeed, similar to corruption money laundering does not seem to stand on the “scale of opprobrium” at the level of drug-trafficking. On the other hand, the money laundering offence is construed differently than that of corruption. If the predicate crime from which the laundered funds originate would constitute a grave violation of public policy could, following the courts’ reasoning in Westacre v. Jugoinport, this mean that the balance between the rivalling public policies would be struck in another way than in the case of corruption? Using the grave example given by the court in Westacre v. Jugoinport, could the laundering of funds which are derived from drug trafficking result in the separability of the arbitration agreement being set aside? It does not seem impossible that a court or tribunal adopting the reasoning from Westacre v. Jugoinport would reach such a conclusion. However, it can in no way be answered with certainty whether this line of argument would hold up in practice. However, an arbitrator who finds himself adjudicating a dispute where the money laundering involved builds on a particularly serious predicate offence could take this possible line of reasoning in to account. Consequently, in considering his jurisdiction as well as the risk of a subsequent award being set aside, the arbitrator might want to examine the place that the particular species of money laundering holds in the public policy of the relevant jurisdictions.234 The examination of the degree of offensiveness of a particular form of money laundering is a subjective determination to be made by the adjudicator, be it an arbitrator considering his jurisdiction in light of the invalidity of the main contract or a judge of a domestic court determining whether an arbitral award is enforceable or not. It is not entire-

232 Sayed 2004, pp. 53–54. According to the court, this did not equate tolerating or turning a blind eye to the problematic issue of corruption, but rather recognising the importance of the finality of arbitral awards and the confidence for international arbitral tribunals to handle such matters of illegality.
234 As was seen above, one indicator of a specific country’s public policy could be the extent of criminalisation of that particular type of criminal conduct.
It is not clear whether the stance in *Fiona Trust v. Privalov* has effectively overruled the views expressed in *Westacre v. Jugoinport*, which was adjudicated earlier.\(^{235}\)

To conclude, denying jurisdiction, although it might be perceived as a morally sound choice,\(^ {236}\) does not seem to be a very practical solution. Tribunals have sometimes used jurisdictional manoeuvres, in order to avoid dealing with issues of corruption.\(^ {237}\) Such an approach should not be employed in regards to corruption or money laundering. Disputes involving claims of money laundering should, like disputes involving claims of corruption, be perceived as arbitrable on the same terms. If disputes involving allegations of money laundering were to be perceived as non-arbitrable, using such allegations as a tactic to disrupt proceedings would be far too easy.\(^ {238}\) However, the tribunal could lack jurisdiction over the dispute in two scenarios where the arbitration agreement could be affected by the element of money laundering involved in the dispute. The first, rather uncontroversial, scenario occurs when the illegality of the main agreement directly impeaches the arbitration agreement. The second potential scenario is when the gravity of the predicate offence could lead to a setting aside of the principle of separability. In the absolute majority of circumstances however, an application of strict separability, as expressed in *Fiona Trust v. Privalov*, by international arbitral tribunals is preferable.\(^ {239}\) Adjudicating the dispute on the merits of the case is in line with the general interest of fighting money laundering. The passing of judgement condemning this type of criminality sends forth the message that the judiciary, be it arbitral tribunals or national courts, will not tolerate or grant rights based on contracts tainted by money laundering.\(^ {240}\) Moreover, in accepting that there are ways in which the arbitration agreement can be impeached by the invalidity of the main agreement, a paradox is apparent. Due to the concealed nature of the money laundering offence, a tribunal will have to examine the merits of the case in order to rule on the validity of the main agreement. If the conclusion was to be reached at this stage that separability should

\(^{235}\) Ashford 2014, p. 161.

\(^{236}\) Like Lagergren in ICC Case No. 1110. Lagergren seems to have adjudicated the dispute with the guidance of his own conscience, resulting in an award rendered through somewhat emotive and value based reasoning.

\(^{237}\) Rose 2014, p. 186. According to Rose, other avoidance techniques have also been employed by certain tribunals. Obviously, these are not endorsed either. See also Watchdogs or Bloodhounds – Is it an Arbitrator’s Role to Sniff out Corruption?, p. 12.

\(^{238}\) Especially since claims of illegality can be submitted in “the heat of battle”, see Banifatemi 2015, p. 19.

\(^{239}\) As illustrated by *Westacre v. Jugoinport*, the operations of an arbitral tribunal determining jurisdiction and that of a domestic court determining the scope of its judicial review in light of public policy are two sides of the same conceptual coin of separability. Thus, if a national court were to follow this recommendation, the possibilities of refusing recognition due to public policy are very limited. Such a position could in turn affect the weight of the arguments based on the arbitrators’ duty to render an award enforceable at law.

\(^{240}\) Banifatemi 2015, p. 20. This is not to say however that separability should be as strictly viewed by domestic courts in enforcement or annulment procedures. In fact, in considering the public policy weight of money laundering, such an attitude might be too strict.
be set aside, the arbitration agreement would be rendered invalid, depriving the tribunal of
the very jurisdictional mandate which allowed it to reach the conclusion of invalidity of
both agreements. There does not seem to be a clear answer as to how this puzzling issue
should be resolve, but keeping the interest of rendering an award which invalidates a main
agreement tainted by money laundering, it seems unsatisfactory to return to the preliminary
stage of the proceedings after reaching a stage where this is possible.

5 Establishing the Facts of the Dispute

5.1 How is the Issue of Money Laundering Raised?

Money laundering, by its very nature, is very difficult to prove; for if the money launderers
have done their job, the money appears to be clean.\(^{241}\)

How, and to what extent, illegality must be proven in international arbitration is often held
to be one of the most challenging issues for arbitrators adjudicating such disputes.\(^{242}\) In
awards where a party has submitted a claim of invalidity of the main contract due to it be-
ing tainted by corruption, such claims have often been rejected due to the claiming party
not being able to present adequate proof.\(^{243}\) Nonetheless, it follows from the previous sec-
tion that arbitrators can and, in most cases, should proceed to adjudicate disputes involving
contracts tainted by money laundering on its merits. Naturally, in order for the issue of
money laundering to become part of the arbitral proceedings, it needs to come to the atten-
tion of the arbitrator in some way. There are two ways in which the issue of money laun-
dering can become part of the arbitral proceedings, through the presentation of the parties
or through the arbitrator acting of his own accord, \textit{sua sponte}. Both of these will be exam-
ined before proceeding to discussing the rules of evidence.

5.1.1 By the Parties

First, one of the parties may raise the issue through submitting a claim that the contract in
question should be invalidated due to it being tainted by money laundering.\(^{244}\) Allegations
of illegality seem to occur somewhat frequently in arbitral proceedings and money launder-

\(^{241}\) Dissenting opinion of Justice Kennedy, p. 9 in \textit{United States v. Bajakajian},
\(^{243}\) Kreindler 2013, pp. 46–47.
\(^{244}\) In a rather unlikely scenario, criminal conduct can be voluntarily admitted. Even though the occurrence of
such behaviour is presumably very rare, it did in fact occur in \textit{World Duty Free v. Kenya}. See Rose 2014, p. 203
for a closer examination of the peculiar facts of this unusual case.
ing has been pointed out as one of the more common forms of alleged criminality.\footnote{Ashford 2014, p. 159. See also Schwarz and Konrad 2009, p. 143. According to these authors, money laundering poses a particularly difficult and “in practice highly relevant” issue for arbitrators.} As mentioned above, it ought to be part of the public policy of most jurisdictions, and quite possibly of transnational public policy, to render contracts tainted by money laundering null and void. Due to the consequence of a successful claim of money laundering being the invalidity of the main contract, a defendant facing a claim based on a breach of contract might submit such allegations as a defence in order to escape its contractual obligations. The possibility of unsubstantiated claims being submitted for this reason needs to be kept in mind by the arbitrator when deciding upon procedural standards and adjudicating the dispute.

When an allegation of money laundering is presented by one of the parties, the role of the arbitrator is quite straightforward. In these scenarios, the arbitrator should simply acknowledge the claim and investigate it to the extent necessary to rule upon the dispute as envisaged by the parties.\footnote{Hwan and Lim 2013, p. 584 and Sprange 2015, pp. 133–134. However, the challenges associated with the burden and standard of proof still arise.} In fact, it is submitted that the arbitrator is obliged to consider claims of illegality put forth by the parties in this way in order to fulfil his mandate.\footnote{Born 2014, p. 2704. Blackaby et al. para. 2.133. See also Hwang and Lim 2013, p. 584, according to whom a tribunal is “clearly obligated to investigate and rule upon the existence and consequences of corruption in such case to resolve the parties’ dispute”.} In a recent award where an allegation of corruption was presented, the ICC tribunal reiterated this obligation as follows;

Accordingly, if during an arbitration proceeding allegations are made that the underlying legal transaction is affected by corrupt practices, the arbitrator cannot ignore these facts but must instead investigate, collect arguments and evidence to corroborate or reject the accusations, and assess their implications on the parties’ claims.\footnote{ICC Case No. 14920. See Ziadé 2015, p. 119.}

As can be discerned from this quote, basing an award on arguments and evidence not immediately presented by the parties in support of their claim should not raise the same *ultra petita* concerns as those discussed below. Thus, even if an allegation of money laundering is made in passing and not elaborated upon by the parties, the arbitrator should investigate and resolve the claim. According to Gaillard and Savage, in order for an award to be refused recognition on the ground of *ultra petita*, the party benefitting from the allegation of money laundering being substantiated must have gained more than the claim amounted to.\footnote{Gaillard and Savage 1999, p. 940. See also Hwang and Lim 2013, p. 590.} As with the scenario that will be discussed below, investigating such claims should, at
least initially, be carried out by asking the parties for their views on the issue. Active case management, where the arbitrators indicate that certain facts are in need of further elaboration, is preferable. However, when engaging in such activities, the arbitrator must have regards to the principle of due process, and especially be wary as to not relinquish his impartiality in investigating or inquiring into facts that may benefit one party. How this balance is struck must be determined on a case-to-case basis.

5.1.2 By the Arbitrator Sua Sponte

A second scenario may arise when there are no allegations from either of the parties but where the arbitrator harbours a suspicion that money laundering might be involved. There are a couple explanations as to why a party would not present an allegation of money laundering even though there are certain indicia pointing towards the existence of it. First, said party might know or suspects that the other party is laundering money through their contractual relationship, but does not want to bring forth an allegation due to their own hands not being entirely clean. Second, the party concerned might lack knowledge of the illegal conduct in its entirety. The question that needs to be answered by the arbitrator in both of these scenarios is whether he is allowed to raise the issue of money laundering sua sponte due to his suspicions that the contract may be tainted by money laundering. Finding a satisfactory answer to this has proven to be rather complex, and there is a divergence of views on the matter between commentators. The complexity of the issue arises out of the fact that this situation provides for a difficult situation for the arbitrator where he is given a, rather non-enviable, choice between three possible ways of conduct.

First, the arbitrator could chose to strictly rule on the claims submitted by the parties and adjudicate the dispute on the basis of the evidence presented by the parties, without any effort to act upon his suspicion. Second, the arbitrator could choose to raise and investigate the issue of money laundering of his own accord, sua sponte. Third, the arbitrator could choose to terminate the arbitral proceedings. The path chosen by the arbitrator in this regard must be subject to a careful balancing of the fundamental underlying principles of party autonomy, due process and the finality of the award.

The argument in favour of the first alternative, to not go outside of the claims presented by the parties, is that there is no deviation from the will of the parties. As mentioned above, the principle of party autonomy is essential to international commercial arbitration. As

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250 Born 2014, p. 3289.
251 See section 2.1.
such, the frame of the dispute is established by the parties and the arbitrator has an obligation to adjudicate the dispute within the scope provided for by the parties.\textsuperscript{252} When discussing the \textit{ex officio} capabilities of arbitrators, it must be kept in mind that the arbitral proceedings are not inquisitorial in nature.\textsuperscript{253} The role of an international arbitrator should not be assimilated to that of a court judge or a prosecutor. Consequently, the mission of the arbitrator is not one of truth finding,\textsuperscript{254} but rather to adjudicate the dispute in a manner that is sound in regards to the agreement and rights of the parties. This particular view was given precedence in one award, where the illegality at issue was corruption in the form of bribes.\textsuperscript{255} In this case, the tribunal held that allegations of corruption had to be put forth by the parties and that “tribunals do not have the power to make an official inquiry and has not the duty to search independently for the truth”.\textsuperscript{256} Likewise, in the abovementioned Westacre award, the tribunal declared that it is the defendant who must bring forth the facts and evidence of bribery and that there is no obligation for the tribunal to investigate a fact not presented by the parties.\textsuperscript{257} A similar position was taken by the tribunal in the Westinghouse award where the tribunal decided to not conduct an investigation since the defendant had not succeeded in proving the alleged corrupt behaviour.\textsuperscript{258} Thus, \textit{sua sponte} investigations are controversial as they might stand in conflict with party autonomy, which as mentioned, holds the position of a cornerstone principle of international commercial arbitration.

However, the arguments against \textit{sua sponte} investigations are not merely based on the argument of such investigations being contrary to the principle of party autonomy. Rather, the concrete danger of investigating the issue money laundering when claims or facts have not been presented by the parties is the fact that an arbitrator might exceed his mandate in doing so. The possible consequence of this would be that an award rendered on the basis of such investigations could be deemed to be \textit{ultra petita}, which in most jurisdictions would open up for the award being challenged or refused recognition.\textsuperscript{259} As with the majority of matters touched upon in this thesis, the relevant national law will determine the precise

\begin{itemize}
\item \textsuperscript{252} Hobér 2011, p. 159.
\item \textsuperscript{253} Hobér 2011, p. 159
\item \textsuperscript{254} Hobér 2011, p. 159.
\item \textsuperscript{255} ICC Case No. 6497.
\item \textsuperscript{256} ICC Case No. 6497, p. 72.
\item \textsuperscript{257} ICC Case No. 7047, pp. 92–93.
\item \textsuperscript{258} ICC Case No. 6401.
\item \textsuperscript{259} Thus, a party who would like to oppose an award on the basis that a \textit{sua sponte} investigation constituted an excess of mandate can do so both through challenging the award and through opposing recognition or enforcement of the award. See Blackaby et al. 2015, para. 10.05 and para. 11.17–11.18. The closer distinction between these two concepts is not immediately relevant for this analysis. The important aspect is that the validity and finality of the award can be undermined due to an arbitrator exceeding his mandate.
\end{itemize}
extent upon which an award can be challenged or refused recognition. The tribunal must therefore to have regard to the relevant domestic statutes when adjudicating the dispute. However, since most states have adopted grounds that are in line with the grounds in the New York Convention and the Model Law, a solid analysis can be based on these sources. According to Article V(1)(C) of the New York Convention, an award can be refused recognition if:

The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.261

There are two forms of excess of mandate that can be identified as relevant in regards to sua sponte investigations of money laundering. First, this might be the case if the arbitrator rules on claims which are not presented by the parties.262 Second, the same consequences may arise if an arbitrator would render an award based on matters that fall outside of the scope of the arbitration agreement.263 Thus, in evaluating the risk of an award being set aside due to an autonomous investigation having been carried out by the arbitrator, the arbitrator must take account to the arbitration agreement, as well as the claims, facts and evidence presented by the parties. The fact that the tribunal has to take the risk of the award being set aside due to excess of mandate into consideration stems from the obligation to render an enforceable award. Generally, national courts interpret this ground for refusal very restrictively.265

At first glance, it would seem like a sua sponte investigation into the issue of money laundering notwithstanding the lack or presentation of such claims would pose a prime example of an award rendered ultra petita. There are however a number of valid arguments in favour of a contrary opinion. Most importantly, arbitrators are generally not limited to strictly consider the parties’ submissions. In practice, tribunals are also entitled to consider legal issues arising from the parties’ submission and even incidental legal issues.266 In continuation of this reasoning, it can be held that arbitrators are allowed to consider, and investigate, issues

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260Blackaby et al. 2015, para. 10.05. The submission that an award which exceeds the scope of authority granted by the parties can be denied recognition is uncontroversial, see Born 2014, p. 3540.
261 The ground for refusing recognition or enforcement due to excess of mandate is “virtually identical” in Article 36 of the Model Law. See Article 34(2)(a)(iii) and Article 36(1)(a)(iii) of the Model Law. See also Born 2014, p. 3445 and Blackaby et al. 2015, para. 10.38.
262 Born 2014, p. 3544.
263Lew and Mistelis et al. 2003, p 713.
264 It should be noted that domestic courts generally tend to interpret arbitration agreements broadly and grant arbitrators significant leeway in determining the scope of the dispute. See Born 2014, p. 3547.
266 Born 2014, p. 3544.
that are relevant for resolving the dispute at hand without acting ultra vires.\textsuperscript{267} Thus, the arbitrator would only be acting ultra vires if the criminal behaviour would not have any consequences on the claims as laid forth by the parties. This position has indeed been taken by a number of commentators.\textsuperscript{268} As the result of the main contract being tainted by money laundering is oftentimes the invalidity of said contract, this issue is highly relevant to any contractual claim arising from the main agreement. Therefore, investigating money laundering ought to not constitute an excess of mandate in the absolute majority of disputes concerning rights or obligations arising out of a main contract which is subject to the arbitrators suspicions of money laundering.

According to another strand of thought, an award where the tribunal has investigated criminal element would not result in the award being deemed \textit{ultra petita} since such an investigation is necessary to determine the jurisdictional issues discussed above. Already in ICC Case No. 1110, the arbitrator opined that he, due to the contract in question being “condemned by public decency and morality”, could not in the interest of due administration of justice avoid examining the question of jurisdiction on his own motion.\textsuperscript{269} Similarly, according to Born, the tribunal has a duty to raise issues of non-arbitrability and illegality \textit{sua sponte}.\textsuperscript{270} This point of view can also be found in the reasoning of tribunals, an example being ICC Case No 8423.\textsuperscript{271} In the award, which concerned the application of EU competition law, the tribunal held that the first issue that the tribunal had to determine was whether matters of community law was arbitrable, and that this had to be done \textit{ex officio} due to EU law being part of international public policy. The same reasoning should be employed in regards to suspicions of money laundering, which like issues of competition law or corruption ought to be part of most notions of public policy. Finally, the fact that domestic courts rarely rule that an award, or part of an award, as being \textit{ultra petita} due to arbitrators having considering issues not presented by the parties, diminishes the practical risk of the award being set aside.

Taken together, the arguments discussed above seem to weigh in favour of the second alternative, consisting of the arbitrator raising and investigating the issue of money laundering \textit{sua sponte}. Even so, the principle of party autonomy is pivotal in arbitral proceedings

\textsuperscript{267} See Hwang & Lim 2013, pp. 587–588. According to these authors, an award will not be set aside by national courts so long as the issues that are dealt with or the evidence that is held in support of such facts are not irrelevant to the resolution of the dispute.


\textsuperscript{269} ICC Case No. 1110, p. 47. See also Sayed 2004, p. 61.

\textsuperscript{270} Born 2014, pp. 1042–1043. See also Kreindler 2013, p. 350.

and possible deviations from this principle should not be taken lightly. However, there are convincing arguments to be found in favour of *sua sponte* investigations, besides those presented above. It is possible to discern two sets of argumentation in favour of such investigations. First, some commentators tend to base their arguments on the arbitrators responsibilities as administrators of judiciary functions. According to this point of view, the fact that arbitrators have the power to adjudicate disputes and issue final awards entails a responsibility to not condone or “turn a blind eye” towards the illegal nature of the contract upon which the claimant bases it claims.\(^{272}\) The result of applying this view is that the arbitrator is assigned a responsibility towards general public interest. Keeping in mind that the primary role of the tribunal is to adjudicate the dispute in line with the will of the parties and the limits imposed on them by the applicable law, this rather ideological line of reasoning is not entirely convincing on its own.

The second set of argument is based on the arbitrator’s obligations and duties towards the parties and to some extent, towards the dispute resolution mechanism of international commercial arbitration as such. This line of reasoning emphasises the fact that an award not dealing with the illegality of a contract may be annulled or set aside by the enforcing court due to it being contrary to public policy. The exact scope of the public policy exception as a ground for the setting aside of an international arbitral award will depend on the law of the country where the award is challenged or recognition is sought.\(^{273}\) As was mentioned above however, public policy is a ground for refusal according to Article V(2)(b) of the New York Convention.\(^{274}\) Thus, rendering an award which might be challenged or set aside on the ground of the public policy of the place of enforcement is contrary to the arbitrators’ obligation to render an award enforceable at law. However, the possibility of setting aside and refusing recognition of awards has been construed narrowly by domestic courts.\(^{275}\) Arguably, this should not be taken to mean that an arbitrator should not conduct *sua sponte* investigations. Rather, in the interest of not letting arbitral proceedings become a safe port for the enforcement of rights based on illegal contracts, the fact that the decision of the tribunal is likely to be final should encourage the arbitrator to bring the true nature

\(^{272}\) See for example Kreindler 2013, p. 359 and Cremades and Cairns 2003, p. 79.

\(^{273}\) This might prove to be a tedious operation seeing as how the enforcing party can chose the country in which to seek enforcement. The national public policy varies depending on the chosen jurisdiction. However, the criminal laws of the relevant jurisdiction, and specifically the severity of sanctions and degree of condemnation, ought to be used as a general indicator of public policy, See Kurkela 2008, pp. 283–284. As was discussed above, the tribunal should also take the transnational public policy aspect of money laundering into account.

\(^{274}\) Similary, according to Article 34(2)(b)(ii) of the Model Law an award can be annulled, or set aside according to Article 36(1)(b)(ii) of the Model Law.

\(^{275}\) The courts’ reasoning in the *Westacre v. Jugoinport* is a remarkable example of this attitude. See section 4.2.
of contracts tainted by criminal conduct to light. Moreover, an additional argument that could be raised in favour of this view is that an arbitrator, who adjudicates the dispute and gives force to the contract despite his suspicions that it might be tainted by money laundering, runs the risk of becoming an accomplice to the criminal transaction under the applicable criminal law.\textsuperscript{276}

The second alternative seems to be getting increasing support and a general trend that is liberal towards assigning arbitrators the authority, and sometimes even the duty, to instigate \textit{sua sponte} investigations can be discerned.\textsuperscript{277} First, there are a number of awards available where tribunals have conducted \textit{sua sponte} investigations. Besides the ICC Case No. 8423 mentioned above, the view that arbitrators have an obligation to conduct \textit{sua sponte} investigations was expressed in a recent unpublished award.\textsuperscript{278} In this award the tribunal held that “If a suspicion of corruption has materialised, it would be under at duty to carry, even \textit{sua sponte}, enquiries and investigations regarding the irregularities”. Crivellaro has also identified three awards where ICC tribunals declared the parties main contract to be invalid due to corruption \textit{ex officio}.\textsuperscript{279} In the investment treaty arbitration case of \textit{Metal-Tech Ltd. v. Republic of Uzbekistan}, certain circumstances surrounding the agreement of the parties created a suspicion of corruption. As a result, the tribunal decided to demand the production of documents relevant to its suspicions \textit{ex officio}, which led the tribunal to conclude that the agreement between the parties was criminal under Uzbek law.\textsuperscript{280} Second, this view has gained support from a number of commentators.\textsuperscript{281}

Even if the situation were to be perceived as a conflict between party autonomy and rendering an enforceable award in light of public policy, notwithstanding the arguments in favour of the contrary, public policy might still come out on top. Some commentators argue that public policy ought to supersede other legal principles, such as the obligation to stay within the mandate given by the parties.\textsuperscript{282} However, this argument is not very well grounded, and following the reasoning above, a direct conflict between these norms should not arise.

\textsuperscript{276} Naturally, whether this is the case or not will depend on the scope and conditions of such laws.
\textsuperscript{277} Ziadé 2015, p. 120.
\textsuperscript{278} Kvhalei 2013, p. 18 See also Ziadé 2015, p120.
\textsuperscript{279} ICC Cases No. 3913, 3916 and 4219, see Crivellaro 2003, p. 114. See also Kvhalei 2013, p. 19.
\textsuperscript{280} Ziadé 2015, p. 120. As this case was an investment arbitration case adjudicated by and ISCID tribunal, the analogies which can be drawn to international commercial arbitration is limited. Care is warranted since the mandate of taking the general interest into account when adjudicating investment disputes ought to be bigger due to its close connection to international public law.
\textsuperscript{282} Kreindler 2013, p. 345 and Ziadé 2015, p. 119.
The third alternative, terminating the proceedings, has for example been chosen as a possible and endorsed path by the Swedish legislator within the context of competition law. In the case that an arbitrator should be forced to choose between raising an issue of competition law of his own accord and rendering an award that may be set aside due to it being contrary to peremptory competition law rules, the *travaux préparatoires* to the Swedish Arbitration Act state that the arbitrator cannot raise matters of civil consequences of competition law *ex officio*. Therefore, according to the view of the Swedish legislator, an arbitrator is entitled to terminate the proceedings under these circumstances. Choosing to resign or to terminate the proceedings is indeed a way to circumvent the biggest conflicts of interest posed above, but at what price? The consequence following such a decision is likely to be that the parties find another tribunal, which might apply a more traditional view in not investigating the issue of money laundering regardless of any persistent indicia. Coupled with the fact that a domestic court tasked with recognising or enforcing the award will not review the facts of the case, the decision to resign or terminate the proceedings will be an improper course of action in most cases. However, there is one situation where resigning might be a viable option. If the arbitrator is unsure of whether he is encumbered by an obligation to report money laundering under the law of the seat of the arbitration, the safest course of action might be to resign. In doing so, the arbitrator would be at freedom to communicate his suspicions to the relevant authorities, as well as abstain from doing so without exposing himself of unintended complicity to the crime. Whether and when an arbitrator can be obliged to report his suspicions of money laundering will be discussed further below.

In general however, it is, despite some possible difficulties and risks, submitted that an arbitrator should, whilst keeping the principles of due process and impartiality in mind, investigate the true nature of the main agreement. The necessary prerequisite is that the investigation must be relevant for the resolution of the dispute. This alternative is the most satisfactory as it sees to the obligation of the arbitrator to render an award enforceable at law, the integrity of the arbitral procedure and to the general interest of not giving force to contracts tainted by money laundering. However, there are a few limiting factors which must be kept in mind whilst choosing to act upon this alternative.

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284 Swedish Government Bill 1998/99:35, p. 58 and Hobér 2011, p. 120.
285 See section 5.4.2.
First, the arbitrator should not initiate an investigation where there is no substantial basis for doing so. Instead, his suspicion should be warranted either due to the *prima facie* evidence or due to the existence of one or more warning signals of money laundering.\textsuperscript{286} Even though an active approach is endorsed, the arbitrator cannot take the role of an overambitious inquisitor and not every suspicion should be acted upon.\textsuperscript{287} Second, when the arbitrator harbours a suspicion of money laundering which he plans to raise of his own accord, he should let his suspicions be known to the parties and allow them to comment upon it. Alternatively, the arbitrator does not need to communicate his suspicions explicitly, but could in a more indirect way ask the parties to elaborate upon the certain fact, be it a red flag or *prima facie* evidence, that causes his suspicion.\textsuperscript{288} Depending on the result of this implicit approach, the tribunal could then proceed to determine if the suspicion was unwarranted or if the suspicion should be voiced explicitly and if a deeper inquiry should commence.\textsuperscript{289} Directing the proceedings in this manner ought to mitigate the risk, at least to some extent, of the award being deemed *ultra petita* by a national court.\textsuperscript{290} Not letting the parties express their opinion could also be contrary to the principle of due process, specifically the right to be heard, as construed in most jurisdictions.\textsuperscript{291} In an enlightening English case, which Born holds to be illustrative of the general position of state courts on the matter,\textsuperscript{292} the court held that:

\begin{quote}
It is not fair to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it, either by calling further evidence or by addressing argument in the facts or the law to the tribunal.\textsuperscript{293}
\end{quote}

However, care must be taken when actively managing the case in this manner. The equality between the parties might be set aside if the party, who would benefit from the invalidity of

\begin{itemize}
\item Hwang and Lim 2013, pp. 595–596 and Cremades and Cairns 2003, p. 81. See section 5.4.2 regarding relevant warning signals.
\item However, attempting to formulate a threshold level of evidence required for initiating a *sua sponte* investigation is probably not a good alternative. See Hwang and Lim 2013, p. 596. Thus, the balancing of interests will have to be done by the arbitrator on a case by case basis and will, in practice, depend on his attitude and perception of his role as an adjudicator.
\item Cremades and Cairns 2003, p. 61.
\item Cremades and Cairns 2003, p. 61.
\item Marcenaro 2015, p. 144.
\item Cremades and Cairns 2003, p. 82. A lack of which could normally render the award challengeable. See Article 34(2)(a)(ii) and 36(1)(a)(ii) of the Model Law and Article V(1)(b) of the New York Convention. See also Born 2014, p. 3248.
\item Born 2014, p. 3248.
\item Cameroon Airlines v. Transnet Limited. See also Minmetals Germany GmbH v. Ferco Steel, where the court reasoned that in situations where tribunals are procedurally entitled to conduct their own investigations, an award based on findings of facts which the parties has not been able to present its case in relation to, will be avoid enforcement. See Born 2014, p. 3248.
\end{itemize}
the main contract, would not have raised the claim of money laundering without the arbitrator “tipping off” the party in question by communicating his concerns to the parties. Nonetheless, rendering a surprise decision without letting the parties express their views on the matter would be at greater risk of being set aside, either due to excess of mandate or because of due process, and would seem to be alien to the mission of arbitrators. Third, the possibility in regards to the gathering of facts is limited as the tribunal cannot force the parties to tell the truth. However, as will be seen below, it is argued that the tribunals should make use of the possibility to draw adverse inference from the behaviour of uncooperative parties, which could compensate for the lack of coercive powers to some extent.

Finally, in deciding upon the extent of the investigation, the grim reality of the nature of money laundering must be kept in mind. From a practical point of view, it is questionable if an investigation conducted by the arbitrator against the will of the parties might yield any results at all due to the profound difficulties associated with proving money laundering. Establishing a solid paper trail, or even an adequate range of circumstantial evidence, which is coherent enough to prove money laundering is a challenging task even for national prosecutors armed with the coercive powers of the state judiciary. Thus, forging a chain of evidence that links together proof of all instances, from the predicate offence to the fact that the contract in question was used to launder the funds originating from this, might turn out to be an overwhelmingly daunting task for the tribunal. Even in presuming that the defendant is cooperative in the arbitrator’s *sua sponte* endeavour, the defendant might not have access to the information that is necessary to prove that the contract is indeed tainted by money laundering. This could especially be the case in regards to the predicate crime, which might not have been committed within the frame of the contractual relationship of the parties of the dispute.

As was mentioned above, if the money laundering offence is not raised by the defendant it can be assumed that the reason for this is either that defendant do not intend to evoke the defence or have no knowledge of the contract being tainted by money laundering. In the first case, the arbitrator will have to try and investigate the issue together with two uncoop-

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294 Kreindler 2013, p. 217.
295 Born 2014, p. 3248.
296 Crivellaro 2013, p. 18.
297 See section 5.4.2.
298 See for example Bell 2006, p. 23.
299 The recognised difficulties associated with proving money laundering was mentioned by one panellist in a recent discussion on corruption hosted by the Global Arbitration Report. See Watchdogs or Bloodhounds – Is it an Arbitrators Role to Sniff out Corruption?, p. 12.
ervative parties, and getting the necessary information about the transaction from the defendant will likely prove to be as easy as yielding blood from a stone. In the second case, the investigation might not result in much due to the need of having access to information that is possessed by the accomplices of the immoral behaviour. It is difficult to provide a general answer to how the deep the arbitrators’ *ex officio* investigations should venture. In practice this will be dependent of how strong the arbitrators’ suspicion is and the grounds upon which it is based. If the arbitrator identifies several warning signals, or develops a strong and justified suspicion based on *prima facie* evidence, this may justify a more time consuming and interventionist inquiry. Arguably, this difficulty might be mitigated, at least to some extent, by an instrumental use of the rules of evidence as discussed below.

### 5.2 Applicable Rules of Evidence

As adjudicators of the dispute, arbitrators have a mandate and a duty to evaluate the presented evidence. One outstanding characteristic of international commercial arbitration, stemming from the cornerstone principle of party autonomy, is that the parties are at considerable freedom to decide upon the procedural rules applicable to the dispute. This is expressed in Article 19(1) of the Model Law according to which “Subject to the provisions of this law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings”. This freedom of disposition includes agreeing upon rules of evidence, such as the allocation of the burden of proof as well as the standard of proof. The freedom of disposition permeates Article V(1)(d) of the New York Convention according to which an award may be refused recognition or enforcement if the procedure was not conducted in accordance with the agreement of the parties. In practice however, it is not common for the parties to agree upon these issues before entering into the dispute. Usually, there is simply a reference to a set of institutional rules. As will be seen when discussing the matters of burden and standard of proof, these rules are broad and do not regulate evidentiary matters comprehensively. If the parties cannot fill these gaps through a subsequent agreement, the task of deciding upon the procedural rules of the

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300 See section 5.4.2 regarding the use of warning signals when establishing the facts of the dispute.
301 Born 2014, p. 2306 and Waincymer 2012, p. 92. This is for example reiterated in Article 19(2) of the Model Law, Article 27(4) of the UNCITRAL Arbitration Rules and Article 34(1) of the 2006 ISCID Arbitration Rules.
302 Born 2014, p. 2129 and Blackaby et al. 2015, para. 6.09. According to Born, there are very few jurisdictions where this freedom is not given to the parties; see Born 2014, p. 2131. One aspect of this is the parties right to agree on the application of institutional rules to the dispute, see Born 2014, p. 2135.
303 Born 2014, p. 2306.
dispute is left to the discretion of the tribunal.\textsuperscript{305} The autonomy of the parties, as well as the discretion of the tribunal to tailor the rules of the procedure, is limited by mandatory rules of the applicable national law, primarily the law of the seat of arbitration,\textsuperscript{306} and rules that form part of public policy.\textsuperscript{307} These rules are mainly concerned with protecting fundamental values of procedural fairness.\textsuperscript{308} It is only rarely and in exceptional cases that awards are refused recognition or annulled on the basis of mandatory procedural rules.\textsuperscript{309} It is a common trait of the majority of jurisdictions that arbitrators are not obliged to apply the civil procedural statutes of the seat of arbitration or any other national law, and there is no single international “code” of procedural rules which arbitrators should apply.\textsuperscript{310} Rather a customised set of procedural and rules which are tailored to the dispute can be created by the tribunal.\textsuperscript{311}

Due to this inherent flexibility and the profound difficulties of proof associated with crimes like money laundering and corruption, the instrumental use of the burden and standard of proof have been subject to extensive academic discussion in this context. The possibility to tailor the rules of the procedure to the dispute at hand is a central principle and advantage of international commercial arbitration.\textsuperscript{312} Even so, the view that the burden and standard of proof are governed by an applicable national law also exists.\textsuperscript{313} Following this perspective, the arbitrator will have to reach a decision on the choice of laws in this regard.\textsuperscript{314} This choice consists of whether rules governing the burden of proof should be considered to be part of procedural law, and thus governed by the \textit{lex arbitri}, or by substantive law, and thus governed by the \textit{lex contractus} or \textit{lex causae}. Commentators arguing in favour of the latter tend to emphasise the fact that the burden of proof and standard of proof affect the claim of the parties directly,\textsuperscript{315} and that separating the burden of proof from the substantive rules could result in the distortion of the substantive legal rules.\textsuperscript{316} Determining the applicable law in this regard is significant since both the burden and

\textsuperscript{305} Born 2014, p. 2143. See also Article 19(2) of the Model Law which, in the absence of an agreement between the parties, entitles the tribunal to “conduct the arbitration in such manner as it considers appropriate”

\textsuperscript{306} Born 2014, p. 2162.

\textsuperscript{307} Certain aspects of core principles, such as some violations of equal treatment, is arguably part of transnational procedural public policy, see Kreindler 2015, p. 19. According to Sayed, this includes certain notions of due process, see Sayed 2004, p. 90.

\textsuperscript{308} Born 2014, p. 2153 and p. 2162.

\textsuperscript{309} Born 2014, p. 2183.

\textsuperscript{310} Born 2014, p. 2196 and 2198. See also Sayed 2004, p. 90.

\textsuperscript{311} Sayed 2004, pp. 90–91.

\textsuperscript{312} Born 2014, p. 2203.

\textsuperscript{313} Born 2014, p. 2314 and Menaker and Greenwald 2015, p. 77.

\textsuperscript{314} Born 2014, p. 2314.

\textsuperscript{315} Waincymer 2012, p. 763.

\textsuperscript{316} Born 2014, p. 2314, Menaker and Greenwald 2015, p. 77 and Hobêr 2011, p. 238.
According to Born, the better view would be to not base the allocation of the burden of proof upon this choice, but rather to allow for a tailored set of procedural rules as described above.\textsuperscript{317} This point of view is pleasingly dynamic and ought to lead to satisfactory results in the majority of cases. The burden and standard of proof should thus be perceived as concepts which can be allocated and shaped by to the tribunals’ autonomous determination. This approach seems to have a foothold in arbitral practice as well. According to Wilske and Fox, even though tribunals often tend to implicitly apply the law governing the substance of the dispute to issues of the burden and standard of proof; it is even more common for arbitral tribunals to employ an autonomous approach as spelled out above to these matters.\textsuperscript{318}

Having regards to the way that the money laundering offence is construed in the international instruments discussed above, there are four general facts that need to be established in order to prove money laundering. First, the existence of a relevant predicate offence must be proved. Second, it must be shown that the party, the claimant if money laundering is raised as a defence, received funds that were generated by a relevant predicate crime. Third, that the party had knowledge of the facts that the funds had their origins in a predicate offence. Fourth, that these funds were transferred or otherwise used through the contractual relationship governed by the main contract of the dispute. In the fourth step, it must also be proven that the illicit funds were transferred in order to conceal their criminal origins. The precise elements that need to be proven in each of these steps will depend on the applicable criminal law.\textsuperscript{319} Naturally, finding evidence supporting all of these elements is a feat not easily accomplished. This is especially the case if both of the parties oppose any suspicion of money laundering that the arbitrator might have.\textsuperscript{320}

\textsuperscript{317} Born 2014, p. 2314. According to Born, it is preferable to apply specialised rules, rather than the rules of a certain jurisdiction, to all evidentiary matters. See Born 2014, p. 2667.

\textsuperscript{318} Wilske and Fox 2013, p. 495.

\textsuperscript{319} Although, in practice arbitrators have been known to reason from a “preconception” about what corruption is when adjudicating such disputes, rather than examining the criteria in the applicable substantial law. See Sayed 2004, p. 89.

\textsuperscript{320} If the tribunal is able to access evidence from domestic criminal proceedings, this might facilitate the situation. In the cases of \textit{Holding Co. v. Democratic Republic of Congo} and \textit{Niko Resources} the tribunal did indeed accept and gather evidence from domestic proceedings. Even though both of these cases concerned investment arbitration, this should be possible in international commercial arbitration as well. See Kendra and Bonini 2014, p. 451 for more on the effects of parallel court proceedings.
5.3 Burden of Proof

5.3.1 General in International Commercial Arbitration

In conventional litigation, the court judge is obliged to grant or deny the claims presented by the claimant and to not render a decisive judgement could amount to a denial of justice.\textsuperscript{321} However, in reality, it is not possible to establish the true facts of a dispute in every case. Under such circumstances, the burden of proof exists as a facilitating concept that allows a court to render a judgement even though factual or legal uncertainties about a claim or matter of the dispute persist. Thus, the concept of the burden of proof is essentially one of risk allocation, where the party encumbered by it bears the risk of certain legal or factual issues being left uncertain.\textsuperscript{322} Like conventional judges, arbitrators have a duty to adjudicate the dispute submitted by the parties.\textsuperscript{323} In the context of money laundering, where evidentiary issues stand in the forefront, the allocation of the burden of proof is of vital importance for the outcome of the dispute. It is common practice amongst arbitral tribunals to apply the principle of \textit{actori incumbit probatio} (the burden of proof is on the claimant), meaning that the parties bear the burden of establishing the facts on which they base their claim or defence.\textsuperscript{324} In fact, the tribunal in the investment treaty arbitration case \textit{Metal Tech v. Uzbekistan} considered it to be a general principle of international law.\textsuperscript{325} According to Blackaby et al., this principle is generally accepted in international arbitration,\textsuperscript{326} with Sayed even considering it to be part of procedural transnational public policy.\textsuperscript{327} Despite this general acceptance, any explicit principle of the principle of \textit{actori incumbit probatio} is absent in the majority of institutional rules, an exception being Article 27(1) of the UN\-CITRAL Arbitration Rules according to which, “each party shall have the burden of proving the facts relied on to support his claim or defence”.

\textsuperscript{321} Carreteiro 2016, p. 83.
\textsuperscript{322} Carreteiro 2016, pp. 90–91.
\textsuperscript{323} Born 2014, p. 2704.
\textsuperscript{324} See for example ICC cases No. 7047, p. 93, 12990, p. 53 and 13384, p. 63 and Menaker and Greenwald 2015, p. 79.
\textsuperscript{325} Metal Tech v. Uzbekistan, para. 237. As mentioned, this was an investment treaty arbitration case. The tribunal reached its conclusion in light of the claim being to establish responsibility for Uzbekistan for having breach its international obligations. It was therefore deemed to be appropriate to apply international law to the burden of proof. Nonetheless, this statement is useful for illustrating the place of the principle in international commercial arbitration, even though the public international law dimension will clearly be lacking.
\textsuperscript{326} Blackaby et al. 2015, para. 6.84.
\textsuperscript{327} Sayed 2004, p. 92.
5.3.2 Shifting the Burden of Proof

As has been described above, proving money laundering is associated with a number of significant difficulties. First, the very purpose of the offence is to conceal the dubious origins of funds through seemingly legal transactions. Second, money laundering as envisaged in the relevant international instruments requires convincing evidence in regards to the four different elements described above.\(^{328}\) Moreover, the party who has committed money laundering will have gone through lengths to cover his tracks in regard to all of these elements. Hence, the burden proof will in many cases be an extraordinary heavy weight on the shoulders of the party alleging money laundering. Arguably, the inherent complexity and transnational nature of modern money laundering methodologies makes it a harder crime to prove than bribery and other forms of corruption.\(^{329}\) Whereas it will be sufficient to show that a transaction has been made under false pretences to prove the latter, establishing money laundering requires that proof be brought forth not only of objective elements such as the existence of the predicate crime, but also in regards to the knowledge of the origin of funds and intent to launder these through the transaction regulated by the parties agreement. Notwithstanding the difficulties of proving the past occurrence and circumstances of the predicate crime, subjective factors such as knowledge and intent are notoriously hard to prove.

The possibility of shifting the burden of proof has been touched upon by tribunals and commentators alike as a way to mitigate these practical difficulties. According to this view, the burden of proof would not be relocated to the accused party by default, but it would shift over to said party if the alleging party manages to present some degree of evidence of the criminal acts.\(^{330}\) In doing so, the accused party would have to disprove the alleged money laundering in order to fulfil its burden and not suffer under the risk of uncertainty.\(^{331}\) There are indeed arguments to be found both for and against shifting the burden of proof in disputes arising out of contracts tainted by money laundering. Starting with the arguments in favour of shifting, the reasoning in ICC Case No. 6497 provides for an appropri-

\(^{328}\) See section 5.2.

\(^{329}\) This is not to say however that corruption is not hard to prove. To the contrary, it too is a form of criminality that occurs in the shadows and in the guise of a normal business transaction. However, it is usually lacking the various layers of concealment and complex transactions associated with money laundering.

\(^{330}\) See for example Mills 2003, pp. 294–295. See also Partasides 2013, p. 52. However, Partasides, as opposed to Mills find the proposition to be “difficult for any lawyer to accept”. See also Menaker and Greenwald 2015, p. 79.

\(^{331}\) Rose 2014, p. 216.
ate point of departure. In this award, which concerned corruption, the tribunal held that that:

The alleging party may bring some evidence for its allegations, without these elements being really conclusive. In such cases the arbitral may exceptionally request the other party to bring some counter-evidence, if such task is possible and not too burdensome. If the other party does not bring such counter-evidence, the arbitral tribunal may conclude that the facts alleged are proven. However, such change in the burden of proof is only to be made in special circumstances and for very good reasons.332

Thus, whilst opening up for the possibility to shift the burden of proof, the tribunal in the cited award held that this should only be done in exceptional circumstances and for very good reasons. The quantum of evidence required to shift the burden of proof was loosely referred to as “some relevant evidence”. Some, rather vague, support for shifting the burden of proof can also be discerned in ICC Case No. 12990, where the tribunal held that the burden of proof “cannot apply when it involves demonstrating proof of the claimants’ activity”.333 Mills agrees with the point of view expressed by these tribunals and holds that it would be appropriate for an arbitral tribunal to shift the burden of proof where a reasonable indication of corruption exists.334 This position has been interpreted by a number of commentators as that the level of evidence required in order for the burden to shift is prima facie evidence.335 Prima facie evidence is generally held to mean evidence which would be deemed to be adequate proof if it is not refuted or explained in any way. However, it seems like prima facie evidence as the necessary standard to trigger a shift of the burden, was only explicitly employed in one arbitral award, which was rendered in an investment treaty arbitration case.336 If the trigger of shifting the burden of proof would be perceived as the presentation of prima facie evidence by the alleging party, it should be kept in mind that there is not much required to establish prima facie evidence, as it is the perhaps lowest conceivable standard of proof.337 Thus, instigating a shift would be a task quite easily accomplished by the alleging party. Kvhalei also believes that shifting the burden of proof would be an appropriate instrument to come to terms with the difficulties associated with corruption. However, this commentator believes that the shift should occur when a “sufficient

332 See ICC Case No. 6497 p. 72. Mourre however contemplates whether the reasoning of the tribunal should be understood as drawing adverse inference rather than shifting the burden of proof. See Mourre 2009, p. 218.
333 ICC Case No. 12990, p. 55. See Menaker and Greenwald 2015, p. 79.
336 Oostergoet and Laurentinus v. The Slovak Republic, para. 148. The tribunal opposed the idea of shifting the burden of proof and held that it is not sufficient to “make a prima facie case relying on the opponent to rebut that case”.
number of red flags" have been presented by the alleging party.\textsuperscript{338} Depending on how the level of sufficiency is perceived, this proposition might not be so different from shifting upon the presentation of \textit{prima facie} evidence. In a more general sense, Hobér has opined that it is the view of most international tribunals that the burden of proof may indeed shift depending on the circumstances of the dispute.\textsuperscript{339}

The main argument for shifting the burden of proof in this way is the inherent difficulties of proving corruption. As was discussed above, this argument ought to be at least as viable in regards to contracts tainted by money laundering as for corruption. An additional argument which has oftentimes been presented in favour of shifting the burden of proof in cases concerning corruption is that it ought to be easy for an innocent party to produce evidence which is adequate to explain questionable elements and counter unsubstantiated allegations of corruption.\textsuperscript{340} Within the context of corruption this could for example be a record showing that large commission fees paid to an agent who allegedly administrated the bribe did in fact have legal justification and commercial purpose.\textsuperscript{341} Within the money laundering context, the clearest example is perhaps documentation showing the legal origin of the funds that were subsequently transferred through the transaction governed by the main contract. Similarly, information regarding the funds transferred between the parties and the circumstances surrounding this transaction could also be an example of such evidence. Furthermore, records alleviating concerns of banking transactions or suspicious corporate structures might also be of interest in this regard. Admittedly, it would indeed be easier for the party accused of money laundering to supply such information and thereby refuting the allegation in most cases. However, similar results could probably be accomplished by the tribunal requiring said party to produce such documentation and draw adverse inference from the eventual fact that the directions were not adhered to.

Shifting the burden of proof remains controversial due to the manifest position of the principle of \textit{actori incumbit probatio}.\textsuperscript{342} Moreover, a position against shifting the burden of proof has been taken by a number of arbitral tribunals. Unfortunately, the only publicly available awards were rendered in investment treaty arbitration cases. However, the reasoning in these cases is viable in the context of international commercial arbitration as well. Besides the aforementioned \textit{Oostergetel and Laurentius v. The Slovak Republic}, the tribunals in

\textsuperscript{338} Kvhalei 2013, p. 24.

\textsuperscript{339} See Hobér 2011, p. 238. However, this statement was not made in regards to the context of money laundering or corruption.

\textsuperscript{340} Rose 2014, p. 217 and Menaker and Greenwald 2015, p. 79.

\textsuperscript{341} Lamm et al. 2010, p. 700.

\textsuperscript{342} Rose 2014, p. 216.
the case *Siag v. Egypt* as well as the *Rompetrol v. Romania* case, have taken an adverse position to shifting the burden of proof. In the latter, the tribunal held that it was “not enamoured of arguments setting out to show that a burden of proof can under certain circumstances shift from the party that originally bore it to the other party”.

In an investment arbitration case adjudicated in 2014, *Valerie Belokon v. The Kyrgyz Republic*, the tribunal summarised this position concisely:

> Money laundering is a serious problem. Any adjudicator encountering allegations of money laundering must examine the evidence with punctiliousness. Still the seriousness of the alleged offence does not entail that fundamental principles of due process or burden of proof can, or should, be relaxed when dealing with such claims.

Likewise, the controversial nature of the concept of shifting the burden of proof has led many commentators to criticise this proposition. A quite strong argument is that shifting the burden of proof in such a manner could be contrary to the principle of due process. Furthermore, the basic logical premise of the idea of shifting the burden of proof in corruption or money laundering cases is arguably somewhat flawed. The widely accepted rule of *actori incumit probatio* does have good merit for its place as a general procedural principle since it keeps parties from presenting claims which do not have any real basis. If this essential principle where to be abandoned in every dispute suffering from difficult situations of proof, it would be far too easily eroded. Arguably, upholding this principle is especially important in the face of allegations of criminality such as money laundering, since baseless allegations of money laundering provides for a tempting litigation technique for unscrupulous parties. Thus, the procedural rights of the parties to the dispute as well as the integrity of international commercial arbitration as a reliable form of dispute resolution would be endangered. Moreover, it should be kept in mind that due to the pro-enforcement regime adopted by most jurisdictions, there will be a very limited court review of the substantive rulings of the tribunal. This could result in awards, much like declaring a contract to be valid without initiating a *sua sponte* investigation, being recognised and enforced even though the actual facts of the case have not been rightly established.

There could however be a middle way to be found. Rose argues that one solution to the problem could be to let the burden shift when *prima facie* evidence is presented by the alleg-

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343 *Rompetrol v. Romania*, para. 178.
344 *Valerie Belokon v. The Kyrgyz Republic*, para. 159.
346 Hwang and Lim 2013, p. 608.
348 Blackaby et al. 2015, para. 11.60–11.63.
ing party but, in the case that the burden of proof cannot be fulfilled by the accused party, let the burden return to the alleging party.\footnote{Rose 2014, p. 218.} At first glance, this might seem to be appropriate. There would be two possible outcomes if this approach were to be applied. First, the party could fail to rebut the \textit{prima facie} evidence. At this point, the burden would shift back to the alleging party who would then have to meet a more conventional standard of proof. In this case, the exact same result could be met by encumbering the alleging party with this standard of proof in the first place. Second, if the accused party would successfully rebut the \textit{prima facie} evidence, he would have fulfilled his burden of proof, and the alleging party would have to present new evidence which would counter the rebuttal. In the latter scenario, the result may be somewhat different since the risk of uncertainty would be borne by the accused party. However, this is hardly a solution to any of the problems described above. If the alleging party is able to disprove, or otherwise counter, the evidence which have rebutted the \textit{prima facie} evidence, he would have no problem meeting a higher standard of proof in the first place. The only way the situation would differ would be if the evidence presented by the alleging party after the rebuttal of the \textit{prima facie} evidence would render the evidence presented to rebut the initial \textit{prima facie} evidence questionable to the point that the fact in question is deemed to be uncertain. In this case, the accused party would lose due to bearing the risk of uncertainty, whereas the alleging party would lose if there had been no shift at all. This scenario is unlikely to appear in practice and thus the perceived gains of applying such a model seem to be fairly marginal, on the verge of theoretical. Certainly, the off chance that this scenario would arise is not enough to deviate from the general principle.

An alternative view on the matter is presented by Waincymer, who believes that the burden of proof can never shift and that this idea is a terminological error.\footnote{Waincymer 2012, p. 761.} Waincymer believes that, while the burden of proof is static, the balance of proof, meaning the extent to which the parties can convince the arbitrator that the standard of proof is met or not, shifts throughout the proceedings. Thus, the evidence that the parties present influences the degree to which the burden of proof is fulfilled. In this game of balance, the party that must submit evidence in order to not lose the dispute is said to be encumbered by the \textit{onus of proof}. Having the \textit{onus of proof} requires a responding party, who is not encumbered by the burden of proof but who is faced with evidence meeting the standard of proof, to respond adequately in order to counter the evidence that is working against him and tip the scales in
his favour once again. Evidently, this is not the same thing as shifting the burden on the basis of *prima facie* evidence, since the risk of uncertainty never leaves the alleging party. However, if the burden of proof is met by the alleging party, the accused party will have to present evidence which trumps, or render uncertain, said evidence. Until this is accomplished, the accused party is burdened by the *onus of proof*.

To conclude, it is submitted that the burden of proof should not shift. To do so would indeed be too big of an intervention in the principle of due process, which enjoys protection in the New York Convention, the Model Law and the domestic statutes of most jurisdictions. Furthermore, since it is known that allegations of criminal conduct is used in arbitral proceedings as a litigation technique, allowing the burden to shift on the basis of *prima facie*, or another equivalently weak quantum of proof, could indeed allow such techniques to be successful. This would transform them from being a mere time consuming distraction for the tribunal to a serious threat endangering the integrity of the arbitral procedure and the procedural rights of the parties. Such an order cannot be accepted in international commercial arbitration. However, influencing the point at which the *onus of proof* shifts to the accused party by determining an appropriate level of standard of proof seems to be a more reasonable alternative in regards to money laundering. Applying a lower standard of proof in this way does not mean that the burden shift. The risk of uncertainty still lies with the party claiming that the contract in question is tainted by money laundering and it does not matter if this uncertainty is caused by the alleging party not being able to present adequate evidence in the first place, or if the accused party has successfully countered the otherwise sufficient evidence that has been presented. Following this suggestion, the tribunal is able to adjust the procedure in order to reflect the nature of money laundering without compromising the concurrent considerations.

5.4 Standard of Proof

5.4.1 A Higher or Lower Standard of Proof

Whereas the issue of burden of proof is arguably one of risk allocation, the standard of proof is concerned with degree in the sense that the presented evidence must fulfil the burden of proof. It falls within the mandate of the arbitrator to evaluate and weigh the

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351 Waincymer 2012, p. 772.
353 Hobér 2011, p. 239.
proof presented in the dispute.\footnote{See Waincymer 2012, p. 92. This is for example reiterated in Article 19(2) of the Model Law, Article 27(4) of the UNCITRAL Arbitration Rules and Article 34(1) of the 2006 ISCID Arbitration Rules.} As with most rules of evidence, the standard of proof is regulated differently in different jurisdictions.\footnote{Menaker and Greenwald 2015 p. 81. Menaker and Greenwald provides for an investigation into the different standards of proof as they understand them in common law systems, primarily the United States, and civil law systems. It is interesting to note that the standard of clear and convincing evidence is applied by domestic courts in the United States when evaluating civil claims of criminal conduct.} There is no mention of the standard of proof in any institutional rules.\footnote{Rose 2014, p. 193.} Thus, a number of different approaches exist. These differences are not only found in the classical dichotomy between common and civil law systems, but rather the rules on standard of proof varies between jurisdiction within the same legal tradition as well. It is submitted that, like other rules of procedure and evidence, the tribunal should enjoy considerable discretion in determining the standard of proof applicable to the dispute at hand.\footnote{It should be reiterated that this is only true to the extent that the parties have not regulated the standard of proof in their agreement.} Since the conclusion was reached that the burden of proof should not shift, it is arguably even more important that the arbitrator is given the freedom to tailor the standard of proof to properly address the complex issue of money laundering. Thus, arbitrators should not be perceived as bound by the standards of proof as conceived in national legal systems, but should be at freedom to formulate it autonomously and as they see fit on a case-to-case basis.\footnote{Born 2014, p. 2313.}

It is difficult to point to a certain standard of proof as generally prevailing in international commercial arbitration. According to Born however, the general standard as applied by tribunals seems to be a “balance of probabilities” or “more likely than not” standard.\footnote{Blackaby et al. 2015, para. 6.87.} Similarly, Blackaby et al. claim that it is safe to assume that the normal standard of proof required in arbitral proceedings is close to the abovementioned standard.\footnote{Waincymer 2012, p. 765. See also Menaker and Greenwald 2015, pp. 81–82.} According to one view, this standard is more of a common law standard whereas civil law systems apply a standard of “inner conviction” of the adjudicator.\footnote{Blackaby et al. 2015, para. 6.87.} However, according to Waincymer, there ought to be no real difference between the two.\footnote{Waincymer 2012, p. 765.} The balance of probabilities standard can be contrasted to the standard of “beyond reasonable doubt”, which is situated on the opposite side of the spectrum as the applicable standard in criminal proceedings.\footnote{Blackaby et al. 2015, para. 6.87.}

In most publicly available awards concerning corruption, the tribunals have applied a standard of “clear and convincing evidence”, which have been held in the commentary to
be situated somewhere between the normal standard of “balance of probabilities” and the criminal procedural standard of “beyond reasonable doubt”.\textsuperscript{364} For example, the tribunal in the aforementioned \textit{Westinghouse} award employed the standard of “clear and convincing” evidence.\textsuperscript{365} This was also done in the investment arbitration case of \textit{EDF v. Romania}, where the tribunal held that a general consensus among commentators as well as international arbitral tribunals existed that a higher standard of proof were to be employed in corruption cases.\textsuperscript{366} Similarly, in a preliminary award adjudicated in 2008, the tribunal held that it is “commonly accepted by ICC arbitral tribunals that allegations of fraud call for a high standard of evidence”.\textsuperscript{367} In ICC Case No. 6497 the tribunal employed a slightly different standard of proof. The tribunal in this case held that corruption would have to be shown “conclusively” or with a “high degree of probability”. According to Rose, this standard should be approximately the same as “clear and convincing evidence”.\textsuperscript{368} In ICC Case No. 5622, the tribunal went as far as to require that bribery should be proven “beyond doubt”.\textsuperscript{369} Thus, a certain aptitude amongst arbitral tribunals to opt for a higher standard of proof when adjudicating disputes involving allegations of corruption can be discerned.\textsuperscript{370}

An illustrative survey was carried out by one commentator in 2003. In this survey, a number of international commercial award concerning corruption was examined which showed that a higher than normal standard of proof was applied in fourteen out of twenty-five cases, whereas a lower than normal standard of proof was employed in only one case.\textsuperscript{371}

Moreover, well-renowned commentators have deemed the application of a higher standard of proof to be viable and appropriate.\textsuperscript{372} There are two conceivable arguments as to why a higher standard of proof would be appropriate to apply in cases where money laundering, or other forms of criminality is alleged. The first argument is one of prevention, a high standard means that an unscrupulous party would be less inclined to use false allegations of criminality as a litigation strategy. The second argument is based on the nature of corruption or money laundering. Since the allegation of criminal conduct is grave and the civil

\textsuperscript{364} Rose 2014, p. 195.  
\textsuperscript{365} ICC Case No. 6401. See also Menaker and Greenwald 2015, pp. 85–86.  
\textsuperscript{366} \textit{EDF v. Romania}, para. 221 and 232.  
\textsuperscript{367} \textit{X. Firm v. Y. Ltd, Preliminary Award}. However, the tribunal in this case, which concerned fraud, determined that the law applicable to the merits was also applicable to the burden of proof, p.92, and consequently applied the English standard of proof, which was balance of probabilities, p.98.  
\textsuperscript{368} Rose 2014, p. 195.  
\textsuperscript{369} ICC Case No. 5622, p. 111 at para. 23.  
\textsuperscript{370} This trend has also been identified by a number of commentators. See Rose 2014, p. 195 as well as Hwang and Lim 2013 p. 609.  
\textsuperscript{371} Crivellaro, 2003, p. 114.  
\textsuperscript{372} See for example Born 2014, p. 2314. Born deems a higher standard of proof to be “sensible” in the face of allegations of wrongdoing.
consequences serious, a number of tribunals and commentators have perceived that there is a need to employ a higher standard than that applicable to civil claims.

The first argument is indeed valid but it does not outweigh the arguments against a higher standard of proof. A standard which makes it near impossible to prove money laundering would not only prevent false allegation, but it could also have a disincentivising effect on the willingness of parties to raise genuine suspicions of money laundering or for arbitrators to initiate *sua sponte* investigations.\(^{373}\) In regards to the second argument, it must be kept in mind that while adjudicating disputes involving money laundering concerns criminal law matters to a certain extent, neither the proceedings themselves, nor the sanctions following from the resolution of the dispute, are criminal in nature. As was mentioned above, the task of the tribunal is not to rule on culpability and criminal sanctions. Hence, the concrete consequences following a criminal sentence are not felt even if a finding of money laundering were to be made. Neither are the stigmatising effects that are normally associated with criminal sanctions, since the proceedings are private and to a certain degree confidential.

Set against this background and being conscious of the fact that arbitral tribunals do not possess the coercive powers of state judiciaries, it would seem rather misguided to apply a standard of proof corresponding to that used in criminal trials. The same can be said for the somewhat milder “clear and convincing proof” standard, or corresponding alternatives. Arguably, applying the standard of proof of “clear and convincing evidence” adds a layer of difficulty which makes in near impossible to prove money laundering. In light of this, and taking into account that the burden of proof should not shift, it would be appropriate for arbitrators to apply the balance of probabilities standard. Even though money laundering might call for an even lower standard to be applied, applying such a standard would make it too easy to put forth and encumber the arbitral procedure with baseless allegations of money laundering. Moreover, applying such standards would be highly objectionable from the perspective of due process. Thus, the middle way will have to do in most cases.

Additionally, the balance of probabilities standard does have some flexibility in itself. Generally, the graver the accusation, the more robust evidence will be required by the tribunal in order to reach the balance of probabilities standard.\(^{374}\) It is thus possible for the tribunal to require more or less evidence depending on the specific circumstances of the case at hand.\(^{375}\) Finally, it is possible to fulfil the standard of balance of probabilities through cir-

\(^{373}\) This view was for example expressed during a recent discussion on corruption hosted by the Global Arbitration Report. See Watchdogs or Bloodhounds – Is it an Arbitrator’s Role to Sniff out Corruption?, p. 12.

\(^{374}\) Blackaby et al. 2015, para. 6.87.

\(^{375}\) Blackaby et al. 2015, para. 6.87.
cumstantial evidence whereas the same cannot be held to the same extent for the “clear and convincing” standard.376

5.4.2 Circumstantial Evidence and Adverse Inferences

When evaluating the evidence presented by the parties, different weight is assigned to different types of evidence. In this process, a distinction is made between direct and circumstantial evidence. Direct evidence is evidence that proves a certain fact which was previously uncertain. Circumstantial evidence is adequate in proving a certain circumstance that is connected to a fact, but is not enough to prove the fact in itself. Naturally, direct evidence has a higher probative value in the weighing operation.377 One of the greatest difficulties associated with proving money laundering, corruption or any other crime which is conducted with the aim of appearing legal, is the unavailability of direct evidence.378 This fact is widely recognised in the criminal law context of money laundering and most jurisdictions have come to accommodate the fact that the majority of prosecutions will be based on circumstantial evidence and have accepted the use of such evidence.379 Consequently, the party submitting the claim of money laundering, or the tribunal investigating the issue sua sponte, will in the majority of cases have to rely on circumstantial evidence.

In the abovementioned Westinghouse award, the tribunal held that the standard “clear and convincing evidence” was to be understood as requiring direct evidence.380 The case concerned an agency agreement with an alleged true purpose to bribe the president of the Philippines. According to the tribunal, direct evidence could for example be proof of payments to the president himself or a contract between the defendant and the president. Even though the award was later overruled by an American court, which concluded that the circumstantial evidence provided was sufficient to prove that the agency commission contemplated bribery,381 the arbitral award poses as an example of a strict stance towards the significance of circumstantial evidence. This point of view seems to have softened in subsequent awards. In the investment treaty arbitration case Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines the tribunal applied the standard of clear and convincing evidence but also held, whilst taking note of the difficulties of evidence associated

376 See section 5.4.2.
380 ICC Case No. 6401 and Crivellaro 2013, p. 3.
381 Crivellaro 2013, p. 3 and n. 4.
with corruption, that circumstantial evidence was adequate to reach this standard. Similarly, two ICC tribunals have also accepted that corruption can be established solely on the basis of circumstantial evidence, even when applying relatively high standards of proof. Overall, tribunals have indeed displayed openness towards accepting circumstantial evidence as adequate proof. For example, in ICC Case No. 8891, the tribunal held that an agency agreement provided for corruption and that it was therefore null and void. The tribunal reached this conclusion on the basis of a number of circumstantial pieces of evidence. This included, among other elements, the size of the remuneration in proportion to the agreed work and the fact that the agent could not provide an adequate explanation of the content of his services. Likewise, in ICC Case No. 15668 the tribunal considered circumstantial evidence to be adequate to declare that the true purpose of an agency agreement was bribery. The tribunal reasoned that such evidence was sufficient by acknowledging the near impossibility of producing direct evidence in support of corruption claims and that the presented circumstantial evidence provided “consistent and harmonious indicia”. Both arbitral awards and legal commentators have identified different red flags of corruption, which are accepted as relevant indicia of the fact that a seemingly valid contract is in fact tainted by corruption. One enumeration of such red flags can be found in a set of guidelines published by the ICC.

As was discussed above, it is argued that money laundering might be even harder to prove than corruption. Therefore, following the reasoning of the awards concerning corruption, arbitral tribunals should be just as willing to base their award on circumstantial evidence in disputes arising out of contracts tainted by money laundering. In terms of warning signals similar to the red flags of corruption, a variety of organisations have issued certain red flags that could be indicators of money laundering. For example, FATF has issued a number of

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382 Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, para. 479.
383 See ICC Case No. 12990 and ICC Case No. 13515. In the latter case the standard was set to “a strong degree of certainty”. See also Menaker and Greenwald 2015, p. 90.
384 Menaker and Greenwald 2015, pp. 92–94. These authors account for a number of awards where circumstantial evidence was used in corruption cases.
386 ICC Case No. 15668, which is unpublished but referenced by one commentator who was involved in the case, See Crivellaro 2013, p. 3 n. 5.
387 Mennaker and Greenwald 2015, pp. 90–91 and Metal Tech v. Uzbekistan, para. 293. The tribunal in this investment treaty arbitration case held that such red flags had been developed by the international community. These for example included a request for a high and urgent agency fee and that the agent lacked experience in the advisory field. See also Sayed 2004, p. 125 who views these circumstances as legal presumptions of corruption. According to Rose, arbitrators should make use of red flags identified in secondary literature when assessing circumstantial evidence, see Rose 2012, pp. 214–215
388 Menaker and Greenwald 2015, p 90.
publications where certain red flags are identified in regards to specific sectors or areas.\textsuperscript{389} Furthermore, according to the FATF 40 recommendations, countries should adopt guidelines aimed at assisting financial institutions in fighting and identifying money laundering.\textsuperscript{390} Similarly, influential private actors have also issued indicators of money laundering.\textsuperscript{391} Seeing as how these guidelines are meant to be used by the financial sector rather than arbitral tribunals, an arbitrator needs to take care when applying them in arbitral proceedings. It is nonetheless submitted that arbitrators should use such tools, as long as this is done in a contextually appropriate manner. A number of similar factors have also been presented by a few commentators. Among these factors are the involvement of suspicious bank accounts, transactions involving goods sold at a much higher price than market value, complex transactions which are not profitable, cash payments, the utilisation of off shore companies and transactions with unusual sources of funding and transactions involving blacklisted or high risk jurisdictions.\textsuperscript{392} To perceive these red flags of money laundering to be, using Sayed terminology, presumptions, would be going too far. Their practical value has yet to be proven in arbitration and the different red flags cannot be assigned the same relevance or probative value. Nonetheless, it is submitted that arbitrators should be inclined towards inferring factual circumstances from an adequate collection of such red flags and other circumstantial evidence where it is appropriate to do so.\textsuperscript{393} A conclusion based on circumstantial evidence that money laundering is indeed tainting the main agreement should preferably be reached in combination with adverse inferences.

As was mentioned above, international arbitral tribunals do not have the coercive powers of national courts and cannot force the parties to tell the truth.\textsuperscript{394} However, arbitrators can require the production of evidence.\textsuperscript{395} Additionally, one tool that is available to arbitrators is to draw adverse inference from the fact that one of the parties, after a request to do so, does not submit evidence or follow an order that could clarify the issue of money laundering without providing a good explanation for it.\textsuperscript{396} This tool allows the tribunal to take such uncooperative behaviour into account as a form of proof when weighing the evidence and

\textsuperscript{389} These include for example trade based money laundering, money laundering using new payment methods, ways of laundering money in gold dealings and affairs involving politically exposed persons.
\textsuperscript{390} Recommendation 25 of the FATF 40 recommendations.
\textsuperscript{391} For example, such indicators can be found in the abovementioned Wolfsberg Anti-money Laundering principles. See Wolfsberg Anti-Money Laundering Principles, p. 5.
\textsuperscript{392} Karsten 2003, pp. 19–23 and Cremades and Cairns 2003, p. 80.
\textsuperscript{393} Drawing such inference from a ”collection of concordant circumstantial evidence” generally falls within the discretion of the arbitrator, see Sayed 2004, p. 94.
\textsuperscript{394} Rose 2014, p. 194.
\textsuperscript{395} Crivellaro 2013, p. 18.
\textsuperscript{396} Lamm et al 2010, pp. 703–704.
determining whether the standard of proof has been met.\textsuperscript{397} Adverse inferences can be drawn from the conduct of both parties, notwithstanding whether the party in question is encumbered by the burden of proof or not.\textsuperscript{398} This approach is not as controversial as the idea of adjusting the standard of proof and shifting the burden of proof. Rather, the practice of drawing adverse inference when, and only when, a party who is likely to be in control of evidence relevant to the case refuses to submit such evidence without any justification, is nothing new in arbitral procedures.\textsuperscript{399} An example of evidence which could be of relevance in the money laundering context and which is commonly within the exclusive control of the accused party is information regarding the origin of the funds as well as any record which contain information about the funds that was used in the transaction between the parties. Information pertaining from the red flags of money laundering is also of interest. Within the context of corruption, a number of tribunals have used adverse inference in combination with circumstantial evidence of corruption by drawing such inference from the fact that a party has not been able to provide a reasonable explanation for the circumstances comprising a red flag of corruption.\textsuperscript{400} This method should be employed in disputes involving money laundering as well and preferably, adverse inferences should be drawn from a number of red flags of money laundering.\textsuperscript{401} However, the arbitrator should take care to only draw adverse inference when, whilst attaining a clear understanding of the nature of money laundering, there is no other rational explanation for the questionable element.

5.5 Reporting Suspicions, a Way Out of the Conundrum?

Finally, even if a tribunal would be willing to adjust the rules of evidence in order to better accommodate the specific difficulties associated with proving money laundering, such adjustments might not significantly improve the chances of a tribunal making a finding of money laundering. According to Rose, who in her article surveyed fifty cases where corruption has been involved in the dispute, the tribunals only made a finding of corruption in

\textsuperscript{397} Lamm et al 2010, p. 705.
\textsuperscript{398} Menaker and Greenwald 2015, p. 81.
\textsuperscript{399} For example, Article 9(5) of the IBA Rules of Evidence provides for a possibility for the arbitrator to infer that documents which a party fails, without a satisfactory explanation, to produce on the request of the tribunal are adverse to the interest of that party. See Rose 2014, p. 213, Menaker and Greenwald 2015, p. 81 and Hobér 2011, p. 238.
\textsuperscript{400} Menaker and Greenwald 2015, pp. 92–94.
\textsuperscript{401} Waincymer 2012, p. 623. Adverse inference in itself will be inadequate in most cases, Hobér 2011, p. 238.
eight cases.\textsuperscript{402} Due to the many difficulties associated with evidence, coupled with the fact that disputes in arbitral tribunals are private, and to a certain extent confidential, it could be argued that international arbitration might not be the right forum to handle the complex issue of money laundering.\textsuperscript{403} Following this line of reasoning, a possible solution might be for the arbitrator to report suspicions of money laundering to the appropriate authorities, thereby directing the issue to entities better equipped to handle such matters. It can be assumed that state mechanisms have more coercive tools at their disposal, as well as a more extensive investigative mandates, than arbitrators.\textsuperscript{404} The option of reporting suspicions of corruption has been discussed by a few commentators.\textsuperscript{405} Such discussions might be even more relevant within the context of money laundering since anti-money laundering regulation commonly contain an obligation for certain professionals to report suspicious activity. The discussion as to whether arbitrators should report their suspicions or findings of money laundering originates from the conflict between the principle of confidentiality and party autonomy on the one hand and the interest of fighting money laundering and not letting arbitration become a safe haven for money laundering on the other.

In conducting this discussion, it is important to keep in mind that even though confidentiality is often held to be a core characteristic and advantage of international arbitration,\textsuperscript{406} it is not absolute.\textsuperscript{407} In fact, the existence and extent of the arbitrators’ duty of confidentiality will largely depend upon the relevant applicable laws or ethical rules.\textsuperscript{408} In practice, there are multiple laws which could be shaping the arbitrators duty of confidentiality in a specific case. The most important ought to be the law of the seat of the arbitration since the majority of the duties and powers of arbitrators are governed by this law. If the parties have contractually agreed upon the extent of the arbitrators confidentiality, the arbitration agreement as well as the law governing this agreement is relevant. The law governing the substance of the dispute and norms which applies to the arbitrators due to their vocation are also relevant. Besides laws, the latter category could also include ethical rules, for example issued by a relevant bar association. Finally, laws of other jurisdictions might provide man-

\textsuperscript{402} Rose 2014, p. 196. Of these eight, six of the cases were adjudicated more than a decade ago. However, it should be kept in mind that one possible reason for this could be the use of baseless corruption allegations as a litigation technique.

\textsuperscript{403} This is for example the opinion of Rose, who believes that criminal matters are essentially mismatched with the private dispute resolution form of international commercial arbitration. See Rose 2014, p. 221.

\textsuperscript{404} See for example Gans and Bigge 2013, pp. 3–6. The authors elaborate upon the potential shortcomings of arbitration as compared to states when dealing with corruption.

\textsuperscript{405} See for example Sprange 2015, Gans and Bigge 2013 and Nadeau-Séguin 2013.

\textsuperscript{406} Blackaby et al. 2015, para. 1.105.

\textsuperscript{407} The conception that it is probably stems from confusing it with the concept of privacy. See Ziadé 2015, p. 123.

\textsuperscript{408} Pavic 2012, p. 671.
datory exceptions from confidentiality, for example through imposing reporting obligations. Such provisions affect confidentiality as well.\footnote{ILA Report 2010, p. 12 and Ziadé, p. 124.} Obligations to report money laundering can be imposed by the same laws,\footnote{Such an obligation can be sanctioned or sanctionless depending on the applicable law. See Pavic 2012, p. 673.} and the applicability of the relevant provisions of these laws depends solely on the shape and reach of the relevant provisions.\footnote{With the exception of the law governing the arbitration agreement as the agreement will probably not regulate this issue.} A comparative examination of such rules lies outside of the scope of this thesis and it would be futile to try to reach a general conclusion that is universally viable in its application. Nonetheless, a brief examination of how this issue has been regulated in the relevant international instruments is appropriate. According to the FATF 40 recommendations, certain legal professionals are obliged to report reasonable suspicions of money laundering.\footnote{Recommendations 20 and 23(a) of the FATF 40 recommendations. However, since only legal professionals assisting in financial transactions are covered, arbitrators are likely to be excluded from the scope of these provisions.} However, according to the interpretative note to the relevant provision, the reporting obligations do not apply if the information giving rise to their suspicion was obtained under circumstances where legal or professional secrecy apply. In the past, it has been discussed whether the previous EU anti-money laundering directives imposed a duty for arbitrators to report suspicions of money laundering.\footnote{Interpretative note to recommendation 23 of the FATF 40 recommendations and p. 85 of the FATF 40 recommendations.} According to the fourth anti-money laundering directive, legal professionals as defined by member states are covered by the directive as long as they are participating in financial or corporate transactions. As with the FATF 40 recommendations, arbitrators do not seem to belong to this category. Moreover, the directive exempts the reporting of suspicions which are based on information obtained “before, during or after judicial proceedings”.\footnote{Minaeva 2006, pp. 37–39.} When the arbitrator examines his duties of confidentiality and reporting obligations under the relevant national laws, four possible scenarios can occur. In the first scenario, confidentiality is not imposed by the relevant statutes, but they impose an obligation to report suspicions of money laundering. Naturally, this situation does not pose a problem since the balancing of interests has already been done at the legislative level. In the second scenario, the relevant applicable laws prescribe that there is indeed a duty of confidentiality as well as...
an obligation to report money laundering. In this scenario there is a conflict between the two. In some institutional rules, this issue is resolved by provisions which allow for the setting aside of confidentiality in such situations.\textsuperscript{416} However, if the arbitration is not governed by one of these institutional rules, the arbitrator must give precedence to one of the principles. It has been held by the International Law Association that, generally, an obligation of disclosure required by law poses a reasonable exception to a duty of confidentiality.\textsuperscript{417} The arbitrator’s decision in this regard will depend upon how he perceives his role as an adjudicator. An arbitrator with a more traditional view will be less inclined to abandon his role as an agents of the parties, whereas an arbitrator with a clear repressive attitude against money laundering might be more comfortable in doing so. The same balancing operation will have to be carried out in a third scenario, where the relevant statutes are silent on the issue of confidentiality as well as that of an obligation to report. An arbitrator who considers reporting to be the best course of action might find it easier to report his suspicions in this case since there is no statutory confidentiality standing in the way. However, the fact is still that such a way of conduct would mean that the arbitrator would deviate from his primary role, which is to adjudicate the dispute as envisaged by the parties. Furthermore, the choice will very much depend on the circumstances surrounding the dispute at hand. If the domestic legal system and authorities is not fit to deal with allegations of money laundering, the advantages of reporting money laundering certainly does not outweigh the sacrifices that must be made. In a fourth and final scenario, the relevant rules impose a duty of confidentiality, but no duty of reporting suspicions of money laundering. If there are no normative sources (statutory, institutional or contractual) saying otherwise, the arbitrator should be bound by his duty of confidentiality in this case.

The final submission to this discussion must simply be that whether an arbitrator has the obligation or discretion to report suspicions of money laundering in the case at hand depends on the applicable laws governing confidentiality and reporting obligations. In the scenarios where there is no statutory conflict, or no clear obligation towards either principle, the answer to whether the arbitrator has the possibility to report will depend on the arbitrator’s own weighing of the relevant principles involved. It is however, somewhat controversially, submitted that the arbitrator should view the reporting of suspicions of money laundering as a viable alternative in some rare scenarios.\textsuperscript{418} This is not an optimal solution

\textsuperscript{416} See for example Article 30.1 of the LCIA Arbitration Rules and Article 75 of the WIPO Arbitration Rules.
\textsuperscript{417} IIA Report 2010, p. 12. This can be compared to the IBA Rules on Evidence Article 3(13).
\textsuperscript{418} This does also seem to be the view of Blackaby et al. See Blackaby et al. 2015, para. 5.86. Whilst acknowledging the fact that reporting suspicions of money laundering would be contrary to the nature of arbitration,
and it should not be employed glibly. Rather, a restrictive approach is called for due to the act being vastly contrary to the will of the parties. However, in situations where the arbitrator harbours strong and substantiated suspicions, but is under the impression that the limitations of arbitration hinders the facts of the dispute to be seen in their true light, it is submitted that such conduct is justified. In practice, this could only happen when the evidence of money laundering is very close to being conclusive or perhaps when a finding has already been made.\textsuperscript{419} This should not be seen as throwing in the towel. To the contrary, it should be perceived as the responsible and prudent choice aimed at safeguarding the integrity of the arbitral proceedings.

6 Conclusions

International commercial arbitration is a dispute resolution mechanism based on party autonomy. Various conflicts of interest emerge when criminal law matters, which are of mandatory nature and characterised by the restriction of the freedom of disposition, enter the arbitral proceedings. This is especially true for money laundering where a general interest of suppressing this phenomenon, coupled with the fact that it is very difficult to prove, might warrant an interventionist approach towards the principle of party autonomy. In accepting such an approach, it is important to not assimilate the role of an arbitrator to that of a state judge or prosecutor. This conflict of interest presents itself in all of the general issues that have been discussed in this thesis and it has thus permeated the analysis of the research questions that were formulated above. Answering these questions has resulted in the following conclusions.

Contracts providing for money laundering ought to be illegal and thus invalid according to the laws and public policies of most jurisdictions. However, whether all forms of money laundering is contrary to the narrowly construed concept of transnational public policy is perhaps not as clear as it is sometimes held to be in the commentary. This cautious point of view is warranted due to the divergence in regards to the criminalisation of predicate crimes that is presumed to exist throughout jurisdictions. Perhaps, with the entering into force of the fourth anti-money laundering directive, which obliges member states to crimi-

\textsuperscript{419} These authors opine that it would be wrong for arbitrators to let the mechanisms of international commercial arbitration become a safe harbor for criminality. 

\textsuperscript{419} However, if a finding has been made the arbitrator should arguably impose the relevant civil consequences and render a binding award instead.
nalise tax crimes, and with increased global cooperation, the international regulatory framework is getting closer to comprehensive coherency. Until this perception of legal reality can be established as fact, arbitrators ought to be particularly wary of invalidating contracts tainted by money laundering on the basis of transnational public policy when the money laundering operation target funds from certain ambiguous predicate crimes. However, it is safe to assume that the laundering of funds from some predicate crimes is contrary to transnational public policy. When the results reached through an application of the *lex contractus* is deemed to be non-satisfactory by the arbitrator, a better solution for the unclear cases might be to apply a foreign mandatory rule. In doing so, the problem of definition is avoided. However, applying another law than the *lex contractus* entails a greater deviation from party autonomy. Presuming that this method presents a valid course of action for the tribunal, there are two different approaches towards how the applicable foreign mandatory provision should be chosen. The determination can be made by utilising the choice of law rules of the seat of the arbitration or more freely by identifying the law with the closest connection to the dispute at hand. The former seems preferable since there is no clear view as to when and under what circumstances the rules of foreign legal orders, especially of the law of the place where the contract is to be performed, can be applied. However, both approaches will probably lead to similar results in most cases.

Proceeding to the issue of jurisdiction, the view that disputes which arise out of contracts allegedly tainted by money laundering is arbitrable should be adhered to. Thus arbitral tribunals should in the majority of cases claim jurisdiction over disputes involving money laundering. The possible invalidity of the main contract should not change this in the majority of cases. Due to the principle of competence-competence, the tribunal can rule on its own jurisdiction and as a result of the doctrine of separability, the arbitration agreement remains valid even in the face of such invalidity. However, there are two ways in which the doctrine of separability might be set aside. First, when the purpose of the arbitration agreement in itself is to launder money. Second, when the arbitration agreement is, due to the sheer gravity of the predicate offence involved, impeached by the invalidity of the main agreement. The latter case is not as clear or substantiated as the first.

It is submitted that an arbitrator could, and in most cases should, raise the issue of money laundering *sua sponte* if the parties do not do so when appropriate. However, the arbitrator needs to harbour a suspicion which is given substance by *prima facie* evidence or relevant indicia. Certain red flags, issued by FATF and other public and private organisations can be
of assistance in this regard. It is argued that raising and investigating these matters \textit{ex officio} should not be seen as constituting an excess of mandate.

In establishing the facts of the dispute, it is submitted that arbitrators are at considerable discretion to tailor the rules of evidence to the case at hand. It is argued that the burden of proof should be borne by the party alleging money laundering and that it should not shift. The tools that can be used by the arbitrator to tailor the rules of evidence to the nature of money laundering is thus the standard of proof and the way in which the evidence is weighed. Regarding the standard of proof, it ought to not be lower, nor higher, than the normal standard applied by tribunals in international commercial arbitration. However, in weighing and evaluating the presented evidence, a tribunal should consider the nature of the money laundering offence in their determination of the significance of circumstantial evidence. Arbitrators should also be open toward drawing adverse inferences from uncooperative behaviour of the parties when appropriate. Finally, depending on the applicable rules of confidentiality and reporting obligations as enshrined in the relevant anti-money laundering rules, an arbitrator might be obliged to report suspicions or findings of money laundering to state authorities. Even when the relevant laws leave it to the discretion of the arbitrator to make this decision, the arbitrator should not categorically disregard the possibility of reporting his suspicions. As a last resort in cases where extraordinary difficulties of proof and the inadequacy of coercive tools might cause the dispute to not be represented in its true light, even though the arbitrator harbours strong and well based suspicions, the arbitrator should consider the possibility of reporting money laundering to the appropriate authorities. However, it is necessary to keep in mind that this course of action would constitute the ultimate sacrifice of party autonomy on the altar of the public greater good. Whether an arbitrator is willing make such a sacrifice depends on how he perceives his role as an adjudicator.

All of these conclusions have come to mirror an underlying approach that arbitrators should not look the other way when money laundering is, or is alleged to be, involved in the dispute. As was mentioned in the introduction, the aim of this thesis is not to reflect upon the role of arbitrators as private adjudicators. However, in answering the main research question of how arbitrators should handle disputes involving money laundering it seems inevitable to reach the conclusion that arbitrators should claim an active role and recognise the public policy significance of money laundering.\textsuperscript{420} Such a role entails applying transnational norms, claiming jurisdiction, investigating money laundering and letting the

\textsuperscript{420} See Cremades and Cairns 2003, p. 84.
nature of money laundering be reflected in the standard of proof and weighing of evidence. This attitude ought to be in the general interest of the international community but also in the interest of arbitrators since letting international arbitration become a safe port for criminal contracts is certain to affect the credibility and relevance of international arbitration as the prevailing form of dispute resolution in the long term. Moreover, adopting a suppressive and active role in regards to the topics that have been discussed in this thesis seems to be in line with other duties and obligations encumbering the arbitrator. Many more detailed issues are still ripe for consideration and it is the hope of this author that these could be subject to further discussion in the near future.
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