Arbitration and Illegality

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Introduction

It is trite to observe that the aim of an arbitrator should be to produce a final, binding and enforceable award.

In that context every element of the authority of the arbitrator, the conduct of the arbitrator, the conduct of the arbitration and the final award are fundamental matters, whether or not challenged during running and subsequently.

Is the arbitrator a private judge, the servant of the parties, or of the truth?[2] Does this matter?

Where issues of illegality are alleged or become evident the answer must be that illegality is a matter that must be addressed by the arbitrator, either publicly or privately, and will determine or affect the parties, the arbitration, the arbitrator, or the outcome.

But illegality is not a singular, overarching concept and has many different faces in arbitration, and the differing character of various forms of possible or actual illegality affects or can affect many aspects of arbitration.

The differing character of Australian domestic arbitration and international arbitration also imposes differing considerations for an arbitrator or an arbitral tribunal.

Forms of Illegality

Illegality may be widely different and attract or require differing conduct on the part of an arbitrator.

Under Australian law illegal contracts may be categorised in two classes defined essentially by the degree of illegality involved and the resulting consequences.[3]

Illegal contracts include those to commit a crime, a tort, or a fraud on a third party; contracts involving sexual immorality; prejudicial to public safety; or to the administration of justice; contracts involving corruption in public life; or contracts to defraud the revenue.

The second group of "illegal" contracts which are void under concepts of public policy includes contracts to oust the jurisdiction of the courts, prejudice the status of marriage, or which provide for unreasonable restraint of trade. The distinction between the two groups is that the first group are patently illegal and the second group are void.

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2 RH Kreindler, *Aspects of illegality in the formation and performance of Contracts* [2003] Int ALR 1.

3 *Bennet v Bennet* [1952] 2 All ER 255 at p256 per Somervell LJ and [1952] 1 All ER 413 at pp 120-1 per Lord Denning.

4 See *Qatar v Bahrain* Decision No 847 (2001) 40 ILM 4.

(a) Illegality of Contract

Generally in an international context contracts may be overtly illegal where the subject matter or purpose is perceived to offend concepts of "public morality" as a result of general consensus flowing from national legal systems, evolving concepts of transnational or international public policy, or governing domestic mandatory laws.

Under most rules of law such overtly illegal contracts would be void *ab initio*.

Some contracts may be illegal, not because of their overtly offensive nature or purpose, but because they did not come into effect for example because one party did not assent to the contract at all, or that signatures are forgeries.[4]

The distinction is that the nullity does not result from the overtly illegal nature of the contract but because of lack of mutual consent, going to the jurisdiction of the arbitrator.[5]

A distinction may also be required in contracts as between private parties providing for commission payments which may be entirely legal and contracts providing for payment to a public official which can be construed as bribery or corruption.

(b) Where the governing law or requirements of recognition and enforcement require an agreement to arbitrate to be in writing to be valid

Some forms of illegality are uniformly condemned and at the other extreme some do nothing more than affect liability and obligation in an arbitral award. Between these extremes are a range of illegalities which the arbitrator may be or is obliged to deal with and which affect the very existence of an arbitration, the arbitrator's power and authority, the arbitrator's conduct or the ultimate enforceability of an award.

The differential nature of illegality and the degree of illegality requires a subjective assessment of the specific illegality in each particular case.[6]

Illegality may also arise as a result of fraud in respect of the arbitration agreement, or the contract, or in the purpose of the contract.

Illegality may also arise because of arbitrator interest in the outcome, corruption of the arbitrator, corruption of a witness, evident partiality or bias, excess of authority, failure to admit evidence, failure to apply proper law, fraud in the proceedings, improper parties, non-signatory parties, punitive damages, or improper ex parte proceedings.

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5 cf Redfern and Hunter "Law and Practice of International Commercial Arbitration" 1st Edition §3-34 at 156 – "… the validity of an arbitration agreement must depend upon the reason for which the contract is found to be null and void. No amount of insistence upon the autonomy of the arbitration clause can make it valid if the respondent was not a party to it."

6 *Westacre Investments Inc v Jugoimport-Spdr Holdings Co Ltd* [1998] 2 Lloyd's Rep 111.

7 See, for example, *Robertson v ASVA Holdings Pty Ltd* [1990] V Conv R ¶54 370.

Dealing with alleged, perceived or evident illegality

Illegality may manifest itself or arise in matters to which an arbitration may be relevant in many different aspects.

(i) Aspects going to jurisdiction of the arbitrator

In Australia and other common law countries the general position in respect of jurisdiction requires an arbitrator to decide disputed facts going to a challenge to jurisdiction and deciding whether or not jurisdiction exists which decision is not final and is subject to review for error.[7]

A lack of jurisdiction occurs, among other things, when:

- There is no binding agreement to arbitrate
- The dispute is beyond the scope of the arbitration agreement
- The subject matter of the dispute is non-arbitrable
- The arbitration agreement is no longer in force
- There is invalidity of appointment including lack of specified qualifications
- The contract was originally valid but subsequently becomes illegal
- Conditions precedent have not been satisfied.

This position of preliminary but non-binding determination of jurisdiction in the common law differs significantly from the principle of *Competenz Competenz* in international arbitrations and most civil code jurisdictions[8] which provides in effect that an arbitral tribunal has the power and authority to decide its own jurisdiction.

Relevant to either position is the concept of separability of an arbitration clause from the balance of an agreement. This permits an arbitrator to find a contract null and void in its entirety without destroying the arbitrator's power to do so in first instance given by a contract dispute resolution clause or arbitration agreement.[9]

In Canada, the concept of permitting an arbitrator to establish whether or not there was fraud in inducing a party into an arbitration agreement (which would have impugned the agreement) was maintained in a recent judgment out of the British Columbia Supreme Court.[10]

In public international law arbitrations arising from bilateral investment treaties, or international conventions (for example ICSID), although a resulting contract of itself may be illegal and a claim made under it inadmissible, the illegality cannot affect the validity of the treaty upon which it is based.

To be in a position to assess whether or not there is illegality, and if so the degree and significance of the illegality, the arbitrator must have jurisdiction to assess the merits. Such a subjective assessment implies initially a valid arbitration agreement, even if there is an ultimate later finding of fraud, coercion or other legal prohibition nullifying or voiding the arbitration clause as distinct from the contract as a whole.

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8 An arbitrator has the jurisdiction to determine his or her own jurisdiction.

9 In Australia see *QH Tours Ltd and Sazalo Pty Ltd v Ship Design & Management (Aust) Pty Ltd and Gibbons* (1991) 105 ALR 371.

10 *James Ltd v Thow Ltd* [2004] BCJ No 1292 (SC).

11 See, for example, ICC Rules of Arbitration Art 15(2); UNCITRAL Model Law on Commercial Arbitration Arts 12 and 18.

Is it open to an arbitrator to initiate an investigation of his or her volition? Prima facie, the jurisdiction of an arbitrator only goes so far and is limited to the jurisdiction given by the parties. A further consideration is that reflected by the governing law or the rules governing the arbitration. Does the arbitrator have inquisitorial powers, or is conduct restrained by an adversarial system? This question assumes significant importance when there is a mutual denial of illegality by both parties.

Where there is unilateral allegation of illegality questions of obligations of equal treatment of the parties to the arbitration may arise,[11] questions of burden of proof,[12] or failure of a party to co-operate in an arbitration.[13]

A very recent example of issues of jurisdiction and illegality arose in the case of *Inceysa Vallisoletana SL v Republic of El Salvador*[14] involving an application by Inceysa for some USD 120 million in compensation damages arising out of the cancellation by the relevant arm of the El Salvador government of a 10 year concession agreement.

El Salvador argued that during the bidding process massive fraud was perpetrated by Inceysa and thus the investment was "not in accordance with the law".

The Tribunal found that it had no jurisdiction as the tender representations by Inceysa breached both El Salvadorian law and that a party should not benefit from its own wrongdoing, a general principle inherent in international public order.

(ii) Illegality ex post facto

Whilst a finding that an arbitration clause was void *ab initio* will, upon such finding, destroy the arbitrator's ongoing jurisdiction, circumstances may arise where illegality going to arbitrability is exposed *ex post facto*, for example a finding that there was in fact no agreement in respect of an arbitration clause or a contract in which it is incorporated; or that the nature of the purported obligations under, or the purpose of, the contract was illegal.

A sham arbitration agreement which otherwise might satisfy all requirements of legality, but which was created for an ultimately illegal purpose,[15] may become exposed or suspected during the conduct of an arbitration.

(iii) Proceeding in the face of ex post facto *illegality*

Where an arbitration proceeds to a conclusory award and the arbitral tribunal suspects but does not have satisfactory proof of illegality when neither party asserts illegality, can the tribunal be subject to allegations of complicity? The pragmatic answer would appear to turn on the level of proof required to support a finding of illegality and the nature of such illegality, but it is open as a possibility.

12 ICC Award No 6497 ICA 1999 at 71.

13 ICC Award No 3916 ICC Awards 507 Vol 1.

14 ICSID Case No ARB/03/06 August 2 2006 (unreported).

15 For example, avoidance of currency control, avoidance of taxation and the like.

16 Redfern and Hunter "Law and Practice of International Commercial Arbitration": 1st Edn § 3-28 at 153.

(iv) It is widely accepted that an arbitrator is a servant of the parties. That is, that appointment, jurisdiction and powers are by the agreement of the parties, whether directly or by the adoption of rules, or by submission to an arbitral institute.

To go beyond that power and authority exposes the arbitrator to illegality of process (*ultra petita*).

But where illegality of purpose or conduct of a contract exists or is suspected of existing in appropriate circumstances does an arbitrator have a duty to search for the truth even although this may mean going beyond the authority given by the parties?

The answer to this question turns upon the particular facts and circumstances of each case and the governing law or rules.

Early English commentators observed:

> *"… it is not the duty of an arbitral tribunal to assume an inquisitorial role and to search officiously for evidence of corruption where none is alleged."*

but applied the caveat that

> *"… the tribunal should not allow itself to be used by the parties to sanction conduct which is illegal."*[16]

Conversely, whilst the ICC Rules[17] at Article 6(2)

> *"If the Respondent does not file an Answer, as provided by Article 5, or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement, the Court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is prime facie satisfied that an arbitration agreement under the Rules may exist. In such a case, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself. If the Court is not so satisfied, the parties shall be notified that the arbitration cannot proceed. In such a case, any party retains the right to ask any court having jurisdiction whether or not there is a binding arbitration agreement."*

and Article 6(4)

> *"Unless otherwise agreed, the Arbitral Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is non-existent provided that the Arbitral Tribunal upholds the validity of the arbitration agreement. The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract itself may be non-existent or null and void."*

expressly prohibit a tribunal from engaging in an investigation of its own volition and are consistent with the English position, and the obligations under Art 35

> *"In all matters not expressly provided for in these Rules, the Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the Award is enforceable at law."*

17 ICC International Court of Arbitration Rules of Arbitration in force as from 1 January 1998.

18 See for example Art 32.1 of the rules of the London Court of International Arbitration (1998).

imposes an obligation on a tribunal to investigate where avoidance of arbitral conduct or a resulting award violate concepts of public policy.

Similarly, other institutional rules reflect the obligations upon an arbitral tribunal under the ICC Rules.[18]

The modern view generally by consensus is thus that an obligation to investigate illegality rests upon an arbitral tribunal even where no allegation of illegality is raised by the parties.

Obligations of international legality

Globalisation and the continuing and rapid development of transnational trade has given rise to an expanding body of international private law or conventions, some of which are relevant to or may govern aspects of transnational commercial disputes.[19]

The expansion of aspects of international public law and obligations upon individuals, corporations and nation states of compliance with concepts of international legality is assuming more significance. Matters such as money laundering, slavery, human rights, illicit drug dealing, arms dealing, corruption, child abuse, prostitution and the like, may be the subject of international conventions or bi-lateral treaties going beyond and supplanting national sovereignty.

Thus, in dealing with international disputes and, where relevant, domestic disputes where certain types of illegality are alleged, suspected or found, an arbitrator should have regard to or rely upon norms of international legality to ensure validity of outcome.

Effect of culture, tradition or domestic notions of illegality

As expressed in public policy or domestic law, culture, tradition, and sometimes religion, what is or is not illegal is defined or established.

Whilst the commercial law of most nation states is similar to or a reflection of the general commercial law of most other nation states there is developing more and more commonality. However, that is not universally so in respect of illegality.

Codified law is in some circumstances as much open to interpretation as precedent law, and culture and tradition is as much relevant to interpretation as to application.

Whilst a desirable aim in the formation of an arbitral tribunal to deal with transnational disputes involving not only different systems of law but differing cultures of the disputing parties is overall a neutral tribunal, absent an understanding of culture in considering illegality there may be misinterpretation or misapplication.

It is possible in certain developing nation states for the governing law to be cited in an arbitration agreement as being traditional law, and not a definable system of law imposed upon or adopted by a nation state.[20] In such circumstances culture becomes a fundamental consideration in interpretation.

What may be illegal under one national law may not be illegal under another.

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19 For example UNCITRAL Convention on Contracts for the International Sale of Goods (The Vienna Convention) 1980; ICSID International Centre for the Settlement of Investment Disputes (Washington Convention promoted by the World Bank) 1965.

20 For example in Pacific Islands.

Arbitrability issues of criminal law

As a matter of public policy in almost all jurisdictions in the world, among other things, breaches or alleged breaches of criminal law are non-arbitrable.

An enquiry into arbitrability initially involves two processes, the first whether or not there is an enforceable agreement to arbitrate, and secondly whether the scope of the agreement is of sufficient amplitude to cover the claim.[21] However there is a further overriding element and that is whether or not the subject matter of the arbitration is arbitrable on public policy grounds.

An element of this is the concept that society would suffer if arbitration of public law claims was permitted.[22]

Under some legal systems a dispute is arbitrable if:

- the dispute is in relation to righs that the parties themselves may dispose of[23]
- or rights or assets of patrimonial nature.[24]

Art 34(2)(b) of the UNCITRAL Model Law recognises in effect the non-arbitrability of matters not capable under the law of settlement by arbitration.

In the USA securities laws, competition laws, antitrust laws,[25] matrimonial status, bankruptcy, certain intellectual property rights and criminal law are not arbitrable.

An example of an exception to this principle in respect of criminal law, although only applicable to international arbitrations, exists in the USA in respect of Racketeer Influenced Corrupt Organisation law (RICO).[26]

In Australia the liberalisation of arbitrability has been extended following the principles adopted in the United States in *Mitsubishi*[27] among other things permitting arbitration of a claim for rectification of a contract.[28] An arbitrator can award specific performance, deal with claims under trade practices and fair trading statutes and arguably award injunctive relief.

Under Sharian (Islamic) law[29] there are two categories of matters which are not arbitrable, but as an overall position the Shari ‘a forbids any contract or clause the purpose of which would be uncertain or random.[30]

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21 *Meadows Indemnity Co Ltd v Daccula and Shoop Insurance Services* 760 F Supp 1036 DNY 1991); see also section 2 supra.

22 WW Park “National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration”: (1989) 63 Tulane Law Review at 648.

23 France (Articles 2059 and 2060 of the French Civil Code); Belgium (Article 1676 of the Belgian Code Judiciare); Italy (Article 806 of the Italian Code di Procedura Civile); Spain (Article 2 of the Arbitration Act 60/2003); Denmark (Art 704 of Act No 181 of 24th May 1972).

24 Switzerland (Art 177 Swiss Federal Statute on Private International Law); Germany (S1025ZPO German Code of Civil Procedure).

25 But see *Mitsubishi Motors Corporation v Solar Chrysler Plymouth Inc* 473 US 614.

26 18 USC 1864 See S*hearson/American Express v McMahon* 482 US 220.

27 *Mitsubishi Motors v Soler Chrysler-Plymouth* 105 S Ct 3347 (1985).

28 *IBM Australia Ltd v National Distribution Services Pty Ltd* (1991) 100 ALR 361.

29 Applicable in Iraq, Iran, Saudi Arabia, United Arab Emirates, Qatar, Arab Republic of Egypt, Kuwait, Sudan, Libya.

30 “Arbitration and Criminal Law”, Alexis Mourre, *Arbitration International*, Vol 22 No 1 2006.

The 'Figh' doctrine voids (and therefore makes non-arbitrable) contracts or clauses containing interest or which provides additional profit to one of the parties which would correspond in general concept to interest. Contracts or clauses resulting in "risk" (ie analogous to betting or gambling contracts) are non-arbitrable.

The 'Hanbali' doctrine prohibits arbitration of any matter which is prohibited by any special text or by the Shari 'a.

Under English law arbitrability extends to disputes in relation to civil rights in which damages are claimed, disputes in relation to real property, questions of law, questions of fraud and questions affecting charities.[31] Matters not arbitral include void or illegal transactions, restraint of trade, or issues arising out of penal statutes.

In general, domestically in most jurisdictions non-arbitrability applies to matters of status, contracts which are *fraudem legis* or *contra bonos mores*, patents, trademarks and copyright disputes, bankruptcy, receivership or winding up of a company, securities, and trade boycotts, public order or winding up of a company.

Rules of criminal law are a mandatory rule to which an arbitrator may have regard or be bound by in particular circumstances, but as a matter of public policy the arbitrator cannot impose penal sanctions in the same manner as a municipal court.

In circumstances where an arbitrator is faced with an allegation of fraud on the part of one party, or it appears that both parties had a fraudulent intent, what is the test to be applied to the evidence? In the common law system the distinction between being satisfied on the "balance of probabilities" or "beyond reasonable doubt" requires the arbitrator to have a detailed knowledge of the elements of civil and criminal law.

In any case, there must be "clear and convincing proof".[32]

The obligation for an arbitrator to deal with allegations of illegality in an agreement is authoritatively opined as mandatorily existing and require the arbitrator to consider the allegation and to decide whether or not it is proved. If it is proved, then under most systems of law the agreement would be regarded as illegal and accordingly unenforceable.[33]

Arbitration and International Public Policy

As well as domestic public policy limiting arbitrability, international public policy may act to establish arbitrability or non-arbitrability.

In the oft cited and now sometimes criticised decision of Judge Lazergren, acting as a sole arbitrator in 1963 in a matter where one party was seeking to enforce an agreement for payment of bribes, he relied upon "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".[34]

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31 But only with the approval of the Attorney-General.

32 *Lunik v Soliman ASA Bull* 1998,210.

33 Redfern & Hunter *International Commercial Arbitration* §3-28 at 153.

34 ICC Case No 1110 (1994) 10(3) *Arbitration International* 227.

Judge Lazergren found that fraud voids the contract including the contained arbitration agreement in its entirety.

Initially this finding was interpreted as establishing a principle of non-arbitrability of fraud allegations.[35]

The modern international arbitral view is that fraud, giving rise to an illegal contract, makes a claim under the contract inadmissible but not non-arbitrable.[36]

Arbitrator Disclosure of Illegality and Obligations of Confidentiality

The term 'confidentiality' and the requirements for maintaining or supporting confidentiality in an arbitration turns inter alia on the governing substantial and procedural law and, where relevant, upon governing rules whether created by agreement of the parties in an ad hoc arbitration or by an institution governing or supervising an arbitration by the subscription of the parties.

The International Bar Association Rules of Ethics impose obligations of confidentiality on an arbitrator.[37]

For an arbitrator obligations of confidentiality are variously proposed and in the past accepted as a duty not to disclose the very existence of an arbitration, the parties to an arbitration, the nature and extent of the dispute, and the outcome.

However, the now common practice of some arbitrators or prospective arbitrators to publish in CVs information on arbitrations conducted would seem to temper any absolute rule but does not necessarily make such disclosure proper practice.

At least in Australia, the position in relation to confidentiality of material produced in an arbitration being confidential is well settled in the *Esso/BHP* case.[38]

Maintenance of confidentiality as between the parties or other actual or prospective parties would appear to require an express agreement on confidentiality and not just to rely on an implied term of confidentiality.

Esso/BHP did not deal with obligations of confidentiality resting with the arbitral tribunal.

The IBA Rules of Ethics appear to limit disclosure by an arbitrator only to misconduct or fraud on the part of the other arbitrators.

Can then an arbitrator of his or her own volition disclose illegality and if so what might be the possible or likely consequences on the arbitrator, the parties, and the arbitration?

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35 A Sayed, Corruption in International Trade and Commercial Arbitration (Kluwer, International Arbitration Law Library 2004).

36 See, for example *ICC Award 3193 – Collection of ICC Arbitral Awards* 498 Vol 1, 1974-1985.

37 IBA Ethics for International Arbitrators Rule 9.
"The deliberations of the arbitral tribunal, and the contents of the award itself, remain confidential in perpetuity unless the parties release the arbitrators from this obligation. An arbitrator should not participate in, or give any information for the purpose of assistance in, any proceedings to consider the award unless, exceptionally, he considers it his duty to disclosure any material misconduct or fraud on the part of his fellow arbitrators."

38 *Esso BHP v Plowman* (1995) 128 ALR 391.

A useful guide on the limits of a general duty of confidentiality under English law is given in *Hassneh Insurance*[39] which provides for the following exceptions:

- disclosure under compulsion of law
- disclosure is reasonably necessary in the public interest
- disclosure is reasonably necessary for fulfilling the recipient's duties to other persons
- disclosure is reasonably necessary for protecting or pursuing the recipient's rights against other persons.

Informing Penal or other Authorities

In the face of the normally very limited role and authority given to the arbitrator by the agreement of the parties, which not only defines the jurisdiction of the arbitrator but may govern the procedure to be adopted by the arbitrator[40] and which prima facie does not extend to a power or authority to the arbitrator to go beyond jurisdiction and which may be further or independently restricted by express or implied obligations of confidentiality, can or should an arbitrator driven by the arbitrator's own moral or ethical standards, advise penal, fiscal or enforcement authorities of perceived or actual infringement of the law?

Could failure to do so be of itself a criminal offence to which sanctions upon the arbitrator could apply?

There is no single or simple answer for the arbitrator. An aggrieved party would appear to be in a better position to advise relevant authorities or to expose illegality before a court.

The arbitrator might facilitate this by express and explicit findings in the award, or by referring the matter to the governing arbitral institution where such exists or, depending on the governing substantive or procedural law, may be able to refer or facilitate a matter directly to a court.[41]

Arbitrator corruption

Illegality in an arbitration is not restricted to the conduct of the parties, either pre- or post arbitration agreement, or to the nature of the agreement.

In all systems of law, corruption of the arbitrator can be grounds for vacating an award or voiding an arbitration with or without sanctions against the arbitrator.

The difficulty is that conduct which is corrupt in one regime or under the national laws of a particular jurisdiction may not constitute corruption under another system of law.

In Australia, under the Uniform Acts, corruption as defined by the common law amounts to misconduct.[42]

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39 *Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd's Rep 243.

40 For example, the adoption of institutional rules, by the specific adoption of a system of law governing the arbitration, by the adoption of a substantive law which may be a national system of law, or may be trade law (*lex mercatoria*).

41 for example, pursuant to s 39 of the Australian Uniform Acts with the application of a party to the arbitration. It may also be possible for an arbitrator to make a unilateral application under s 47 of the Uniform Acts.

42 Section 4 Definitions Uniform Arbitration Acts.

But even in some other common law jurisdictions conduct which would be corruption in Australia is not so categorised.[43]

Where an arbitrator or arbitral tribunal as a whole receives an undisclosed payment by a party to achieve or produce a specific outcome this would likely be condemned in any jurisdiction.

However, where an arbitral tribunal is composed of more than one person a rare, but not unknown, practice of each party paying its own nominated arbitrator is not perceived as corruption provided this is transparent.[44]

Consequences of illegality on an arbitration

Whilst a finding that an arbitration clause is void for illegality without more removes the jurisdiction of the arbitrator from the dispute and aborts the arbitration, allegations, suspicion or findings of illegality arising through an arbitration pose different problems for the arbitrator.

When, during an arbitration, the arbitrator is satisfied that there is compelling evidence of illegality, either in respect of the subject matter of the dispute, or of a party's conduct in prosecuting or defending a claim in the arbitration, a number of courses would appear open to the arbitrator:

- where a party attempts or succeeds by illegal activity to creating impediments to the arbitration proceeding[45] a full or truncated tribunal can and should proeed to issue an award on the merits;[46]
- where the agreement, the subject of the arbitration, is exposed as illegal the arbitrator might proceed to render an award, however such award would likely not be enforceable or enforced, making proceeding to conclusion a futile exercise.

A party, upon becoming aware during an arbitration hearing of an illegality on the part of the other party, can take such action as it deems appropriate in the circumstances, including inter alia removing itself from the arbitration, advising authorities, and/or making application to a court.

If an arbitrator resigns because of illegality and the personal repugnance or moral standards of the arbitrator, is this an abrogation of the duty and obligation on the arbitrator to act in the arbitration? Certainly if those personal convictions are of such effect as to deny the arbitrator the ability to act impartially and without bias resignation would appear to be the only course and justifiable.

But otherwise could resignation be interpreted as sanctioning and in some way supporting or abetting a fraud or other illegality?

The likelihood of exposure of fraud or illegality is high, whether arising from court action generally or when recognition and enforcement is sought. In such circumstances it would appear an arbitrator might be doomed for proceeding or doomed for not proceeding.[47]

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43 For example, absent agreement by both parties, an arbitrator being paid a percentage of a monetary award was found by the Supreme Court of USA not to be fatal to the award or affect the arbitrator or the fees payable.

44 This is reasonably common in some maritime arbitrations with a tribunal composed of two persons only, and rare in three or more member tribunals.

45 For example, by kidnapping an arbitrator member of a tribunal.

46 see *Himpurna California Energy Ltd and Government of Indonesia*; *Patuha Power Ltd and Government of Indonesia* Mealeys International Arbitration Reporter – Lexus Nexus Feb 2003.

47 An adventurous means of protecting the standing and reputation of arbitrators acting as a truncated tribunal in the cases of *Himpurna* and *Patuha supra* where evidence of illegality was secured in a safety deposit box in the Banca Nationale de Paris in Paris to be only accessed by Court Order or the President for the time being of the Paris Bar.

48 *QH Tours Ltd and Sazalo Pty Ltd v Ship Design and Management (Aust) Pty Ltd and Gibbons* (1991) 105 ALR 371.

Conclusion

Illegality other than initially in respect of jurisdiction is not normally a matter to the forefront of the minds of arbitrators within Australia.

With the adoption in Australian jurisprudence of the concept of separability of an arbitration clause from a contract as a whole[48] that a contract or agreement giving rise to the arbitration might be found on the merits to be illegal, either by statute or at common law, or that a lawful contract at inception was used for an unlawful purpose, does not destroy the arbitrator's jurisdiction to proceed.

Illegality under a particular governing law is not necessarily limiting.

In transational disputes concepts of illegality in international public or private law can also arise, for example bribery, corruption or despotism may not be specifically prohibited under a particular governing law, but nevertheless may be issues argued or arising out of certain disputes. Silence on these particular aspects is a characteristic of the laws of some developing countries.

The question of the role and amplitude of the powers and obligations of the arbitrator in the face of actual or perceived illegality is not well settled and in a continuous state of flux as new issues and considerations arise.

In Australia the broader spectrum of illegality of agreement, or process and of outcome and the possible obligation on an arbitrator to investigate and report on illegality has not been the subject of any definitive law.

However, the many faceted aspects of illegality in arbitration and the effect upon arbitration are more widely exposed by experience in both public and private law in international arbitrations.

Dealing with illegality is not a simple exercise, but provided an arbitrator is knowledgeable, well informed and diligent, issues of illegality can be dealt with in an appropriate manner without subjecting or exposing the arbitrator to action by a party or the parties to the arbitration, or to criminal or fiscal authorities, or to condemnation from the arbitration community.

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