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Arbitration and Money Laundering; A Study of the Obligations and Risks of Arbitrators

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Abstract

The speedy growth of arbitration and its popularity as a mechanism for resolving disputes has increased the risk of arbitration to encounter money laundering cases. Indeed, a private and enforceable arbitral award issued in terms of dispute settlement between the parties may present the perfect channel to legitimize money flows. Despite this seriousness of this risk, limited studies that are relatively recent in origin have addressed this issue. This thesis aims at analyzing the potential occurrence of money laundering in the context of arbitration along with the role of arbitrators and the risks they may face in addressing such critical issue.

Arbitration may be manifested by money laundering through different scenarios. The main scenarios are: i) real disputes involving funds that are the proceeds of a crime; ii) sham arbitration when arbitration may be conducted with the purpose to launder money. Under these scenarios arbitrators are, in most cases, not complicit in money laundering but they are faced with disputes affected by the criminal conducts. However, money laundering may, in theoretically rare case, occur through a third scenario that involves arbitrators. While the first two main scenarios are more probable and more often discussed, the latter seems to become more prevalent in recent years.

In view of these potential scenarios and the escalating risk of the occurrence of money laundering under the remarkable globalization and technological innovation, it is unequivocal that arbitrators should be among the key actors in combating money laundering.

Arbitrators are required to play an active role towards fulfilling their duties to meet the interests of disputants while protecting public policy, legitimacy and integrity of the arbitration process. When money laundering is alleged by a party, it is indisputable that arbitrators are obliged to examine allegations and rule upon the presence of money laundering to determine the consequences and resolve the dispute in hand. If neither party brings up money laundering as a defense against the tribunal, arbitrators shall address money laundering *Sua Sponte*. In both cases, arbitrators should play an investigatory role following a proper approach. The best options arbitrators have to follow to make a reasonable decision, of whether or not money laundering is involved, are to use circumstantial evidence, red flags and be willing to make adverse inferences. It is crucial that arbitrators invalidate contracts tainted with money laundering based on (a) the

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law chosen by the parties, or (b) principle of international public policy or (c) mandatory law in cases where the contract which involves money laundering, is valid under the chosen law. Arbitrators must also report money laundering to competent authorities as they should not enjoy any privilege which would exempt them from doing so.

Issuing an award that overlooks money laundering provides solid grounds for the award to be annulled at the enforcement stage due to public policy violation. Also, deliberate misconduct or engagement in money laundering may expose arbitrators to the risk of civil and criminal liabilities. It is therefore crucial that tribunals become well informed about the factual and legal issues that they may encounter when addressing issues of money laundering tainted contracts.

As for the case of Lebanon, the country is considered an arbitration-friendly jurisdiction and recognized among the very earliest countries that have responded positively to international arbitration efforts. Despite the recent multiple crises, arbitration jurisprudence in local courts has kept an evolutionary momentum. However, the high corruption levels along with financial crises the country is facing have increased the potential of arbitration to be a suitable target for money laundering. After all, the money that is laundered regularly stems from a foregoing illegal activity, such as corruption. In view of current discussions, it is highly crucial that arbitral tribunals in Lebanon join the country and international efforts to fight money laundering. It is crucial they are well informed and ready to strictly commit to their obligations taking into consideration their duties regarding the enforceability of the award. They should also be highly alert not to issue an award that may be final and enforceable of a contract that involves money laundering.

In conclusion, although arbitrators have in today's world gained remarkable experience in tackling allegations of different criminalities, enhancing their alertness and readiness to address money laundering acts, and perform in accordance is certainly a very delicate and sensitive exercise, but not impossible for arbitrators. Arbitrators should be highly satisfied that this comes under the concerns to maintain arbitration as an ever-great and favorable tool to resolve international disputes.

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List of Abbreviations

ADR	Alternative (Amicable) Dispute Resolution
AML	Anti-Money Laundering
APG	Asia/Pacific Group on Money Laundering
AMF	Arab Monetary Fund
CDD	Customer Due Diligence
CFT	Counter Terror Funding
EAG	Eurasian Group on Combating Money Laundering and Financing of Terrorism
EU	European Union
FATF	Financial Action Task Force
FIU	Financial Intelligence Unit
G-7	Group of Seven Industrialized Countries
ICA	International Commercial Arbitration
ICC	International Chamber of Commerce
LCCP	Lebanese Code of Civil Procedure
LCIA	London Court of International Arbitration
MENA	Middle East and North Africa

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MENAFATF	Middle East and North Africa Financial Action Task Force
New York Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
Palermo Convention	UN Convention against Transnational Organized Crime
PEPs	Politically Exposed Persons
SIC	Special Investigation Commission
Strasbourg Convention	European Council Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime.
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments
Vienna Convention Psychotropic Substances	The UN Convention Against Illicit Traffic in Narcotic Drugs and
VIAC	Vienna Rules of Arbitration and Conciliation
WCO	World Customs Organization

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Introduction

The recent spectacular expansion of arbitration, specifically in its international context, has increased the likelihood of abuse and misconduct of this pragmatic process for civil/commercial dispute resolution. It has also set the chance for criminal matters such as money laundering to infiltrate through it.[1] Such malpractices have presently resulted in growing concerns of business and legal communities as well as arbitration tribunals, commentators and prominent arbitration institutions.

Although the natures of both arbitration and money laundering make the features and extent of their intersection difficult to readily grasp, available evidence on the potential manifestation of money laundering in arbitration has been growing.[2] Arbitration is one of the most preferred Alternative (Amicable) Dispute Resolution (ADR) means in resolving national/international conflicts originating from civil and commercial matters. It is a contract-based form of binding dispute resolution in which parties agree to submit their disputes to one or more independent arbitrators who issue binding and enforceable settlement awards.[3] Arbitration is governed by legal frameworks that are of national and international sources. National sources include national laws of corresponding countries and regulations set up by private national institutions. Whereas, international sources encompass bilateral[4] or multilateral[5] international conventions

[1] Gaillard, E. (2017). Abuse of Process in International Arbitration. ICSID Review, 32(1), pp. 17–37. https://doi.org/10.1093/icsidreview/siw036

[2] Hedberg, C. C. (2016). International Commercial Arbitration and Money Laundering: Problems that arise and how they should be resolved. Uppsala University Publications. http://urn.kb.se/resolve?urn=urn:nbn:se:uu:diva-299071

[3] Bernstein, R., Tackaberry, J. A., Marriott, A. L., and Chartered Institute of Arbitrators (2003). In *Bernstein's Handbook of Arbitration and Dispute Resolution Practice.* Sweet & Maxwell in Conjunction with The Chartered Institute of Arbitrators, p. 20.

[4] Bilateral international conventions deal incidentally with arbitration. Examples of these conventions are treaties of commerce and navigation; treaties of extradition; and treaties of equal treatment of citizens of one country in the other.

[5] Multilateral conventions deal directly and exclusively with arbitration. The New York Convention for the Recognition and Enforcement of Foreign Award of 1958; The European Convention of 1961; The Washington Convention of 1965; The Arab Amman Convention.

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between countries and arbitration rules set up by specialized United Nations commissions or private international institutions.[1] The current legal framework for international arbitration was introduced by Geneva Protocol (1923) and Geneva Convention (1927) which led to signing the New York Convention (1958) and the adoption of the UNCITRAL Model Law (1985) along with the integration of "modern" arbitration laws in many developed jurisdictions from 1980 to the present day.[2]

As for Lebanon, the country is considered among the very earliest countries that have responded positively to international arbitration efforts as part of a wider strategy to strengthen its standing in international finance and trading. Lebanon issued the second chapter of the Lebanese Code of Civil Procedure (LCCP)[3] for arbitration in 1983 and ratified the New York Convention in 1998. In parallel, the Lebanese judiciary has progressively adopted a pro-arbitration approach which supports arbitration laws and practices.

On the contrary, money laundering is defined as the process by which criminals conceal or disguise the original ownership, identity and destination of proceeds of a crime to make them look like stemming from a legal source.[4] Since the term money laundering was coined in 1970s, its profile has experienced a rapid rise and become a key component in the multifaceted transnational crime systems.[5] Typical, money laundering involves three stages which may take

[1] Private international institutions such as, International Chamber of Commerce; The London Court of International arbitration.
[2] Born, G.B and Miles, W. (2015). Review of Global Trends in International Arbitration. *Special Advertising Section*. Wilmer Cutler Pickering Hale and Dorr LLP in London. https://biblioteca.cejamericas.org/bitstream/handle/2015/812/Global-Trends-in-International-Arbitration.pdf?sequence=1&isAllowed=y.
[3] The LCCP was enacted by Decree Law 90/83 and amended by Law No.44 of July 29th, 2002.
[4] FATF (2009). Money Laundering - Financial Action Task Force (FATF). Fatf-Gafi.org. https://www.fatfgafi.org/faq/moneylaundering/.
[5] Schönenberg, R. and Schönfeld, A. von. (2013). Transnational Organized Crime: Analyses of a Global Challenge to Democracy. In *library.oapen.org* (in the series Edition Politik, Transcript Verlag, Vol. 17) http://library.oapen.org/handle/20.500.12657/30364.

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place separately and distinctly, simultaneously or, more frequently, overlap. These stages include; Placement, Layering and Integration.[1]

Through the years, money laundering has found its way to abuse all possible channels including arbitration to proceed and legitimize profits and funds of illegal origin.[2] Today, money laundering provides enormous financial support to drug dealers, terrorists, illegal arm dealers, corrupt public officials, and others to function and develop their criminal enterprises. Money laundering has indeed developed its means to become a worldwide phenomenon which adversely impacts social, economic and political securities of countries all across the globe. Developing countries such as Lebanon, in particular, have apparently over the last decades become more vulnerable and exposed to the exploits of money laundering.[3] In such countries, the impact of money laundering on economy and society can be devastating. It can demolish government budgets severely undermining the integrity and stability of financial systems and social security.[4] These devastating consequences can also affect developed countries.[5]

Due to the devastating consequences of money laundering on economy and society, a breadth of international and national laws has emerged to address this particular form of criminality. The first act that criminalized money laundering making it a federal crime was "Money Laundering

[1] Sheetz, M. (2004). Investigating Global Money Laundering. Law and Order, 52(8), pp. 106-111. https://www.ojp.gov/ncjrs/virtual-library/abstracts/investigating-global-money-laundering. This article examines the stages of a money-laundering operation, the international trends that must be addressed in the investigation of money-laundering schemes, and key components of money laundering detection and investigation.

[2] Global Arbitration Review - The Middle Eastern and African Arbitration Review 2020. Globalarbitrationreview.com. Accessed October 17, 2021, from https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2020/article/lebanon.

[3] Aluko, A. and Bagheri, M. (2012). The Impact of Money Laundering on Economic and Financial Stability and on Political Development in Developing Countries: The case of Nigeria. Journal of Money Laundering Control, 15 (4), pp. 442-457. DOI.10.1108/13685201211266024.

[4] Vaithilingam, S. and Sanggaran Nair M. (2007). Factors Affecting Money Laundering: Lesson for Developing Countries. Journal of Money Laundering Control, 10 (3), pp.352–366. DOI. 10.1108/13685200710763506. Accessed 25 May 2020.

[5] OECD (2014). Illicit Financial Flows from Developing Countries: Measuring OECD Responses. https://www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf.

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Control Act" 1986.[1] This was followed by substantial universal efforts to introduce and develop anti-money laundering (AML) instruments and regulations to combat this crime. Main AML regulations may be listed as follows; "The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances" (Vienna Convention), "European Council Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime 1990" (Strasbourg Convention), "United Nations Convention Against Transnational Organized Crime 2000" (Palermo Convention), Basel Committee on Banking Supervision Statement of Principles, Financial Action Task Force Recommendations (FATF) and EU anti money laundering directives issued periodically by the European Parliament. In Lebanon, the act of money laundering was criminalized through Law No.318 of 20/4/2001 conforming, to a certain extent, to international standards and somehow establishing an effective AML system. This law required the establishment of a financial intelligence unit (FIU), which is the Special Investigation Commission (SIC).[2] Additionally, several other measures and decisions were afterwards developed to further ensure AML compliance. These efforts allowed Lebanon to be in 2002 delisted by FATF from the list of 15-non-cooperative countries in combating money laundering of 2000.[3] In the following years, Law 318/2001 was amended by Law 547/2003 and more recently by Law No.44 of 24/11/2015 "*Fighting Money Laundering and Terrorist Financing*".

The relevancy of money laundering in arbitration is mainly due to the basic principles of arbitration, particularly, privacy and confidentiality along with finality and enforceability of

[1] The Money Laundering Control Act of 1986 (MLCA) is a United States Act of Congress that made money laundering a federal crime for the first time. This Act prohibited individuals from engaging in a financial transaction with proceeds that were generated from specific crimes, known as "specified unlawful activities".

[2] SIC is an independent body of a judicial nature whose mission is to ensure the implementation of laws and regulations on fighting money laundering and terrorism in force. This is done by fostering interagency and global cooperation for fighting domestic and international money-laundering and terrorism financing crimes.

[3] Ismail, S., (2010). "*Money Laundering- Comparative Study".* 2nd ed., p.121.

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arbitral awards. These principles have provided somewhat a suitable environment to potentially attract money launderers. An estimation by the United Nations Office on Drugs and Crime (UNODC) shows that two to five percent of the global GDP (approximately US$ 840 billion to US$ 2.2 trillion) is laundered every year. Thus, it would be illogical to consider that arbitration is unaffected.[1]

Money laundering can abuse arbitration or could be related to the underlying dispute in arbitration proceedings through different scenarios. Main scenarios include, but are not limited to, the following[2]; the first scenario could occur when parties are in a real dispute involving funds that are proceeds of a crime. In the second scenario, the process of arbitration might be approached with the purpose to launder money (sham arbitration). In the former two scenarios, arbitrators or arbitration tribunals are usually not complicit in money laundering but they are faced with disputes affected by the criminal conduct making their task complex and crucially important.

In such matters, arbitrators find themselves in a dilemma between maintaining the confidentiality and privacy principles of arbitration proceedings being a duty owed to the parties, or guarding public policy and interests as a duty owed to the public and justice.[3] Current practice and jurisprudence have taken a path towards imposing several duties and obligations on arbitrators when confronted with such issues.[4] It has become crucial that arbitrators are well informed of

[1] United Nations: Office on Drugs and Crime. Money Laundering. www.unodc.org/unodc/en/money-laundering/overview.html. Accessed on 6 April 2019.
[2] Pieth, M. and Betz, K. (2019). Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators. Publisher: Competence Centre Arbitration and Crime, University of Basel and Basel Institute on Governance (2019). Basel, Switzerland. https://baselgovernance.org/sites/default/files/2019-05/a_toolkit_for_arbitrators_29_05_2019.pdf.
[3] Bernardini, P. (2004). The Role of the International Arbitrator. Arbitration International, 20 (2), pp. 113–122. DOI. 10.1093/arbitration/20.2.113.
[4] The Club des Juristes (2017). The Arbitrator's Liability. pp. 14-15. DOI. https://www.leclubdesjuristes.com/wp-content/uploads/2017/06/CDJ_Rapports_Responsabilité-de-l¹arbitre_Juin-2017_UK_web.pdf .

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applicable AML-laws that may affect them and their professional future.[1] According to a survey by Cecily Rose on the role of international arbitration in the fight against corruption, 50 corruption cases were reported as involved in the commercial disputes under study.[2] While only eight corruption cases were found by arbitral tribunals.[3] Given the intimate relationship between money laundering and corruption whereby the prevalence of one of these offences usually signifies the prevalence of the other, it can be argued that the findings of the survey indicate that tribunals may not easily identify money laundering. Therefore, arbitrators are called to deal with the issue with high responsibility. Any failure by a tribunal in performing its obligations leading to an award that overlooks money laundering provides serious risks on arbitrators. These risks should obviously be imposed on arbitrators in the case of a third scenario with their potential involvement in money laundering.

The potential involvement of arbitrators or arbitration tribunals which is theoretically unlikely may occur when they are aware that the whole process of arbitration is to launder money or to cover laundering and agree on proceeding.[4] Alternatively, arbitrators or arbitration tribunals may under this case have a doubt of money laundering tainting and may even have some reliable knowledge that one or both disputant(s) are conducting the proceedings with the intention of furthering money laundering and still chooses to overlook the issue.[5]

[1] Ibid.
[2] Rose, C. (2014). Questioning the Role of International Arbitration in the Fight against Corruption. Journal of International Arbitration, 31(2), pp. 83–264. https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/31.2/JOIA2014010
[3] Ibid.
[4] Mourre, A. (2006). Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator. Arbitration International, 22(1), pp. 95–118. https://doi.org/10.1093/arbitration/22.1.95.
[5] Hwang, M. SC. and Lim, K. (2011). Corruption in Arbitration -- Law and Reality. Herbert Smith Freehills-SMU Arbitration Lecture Series. https://ink.library.smu.edu.sg/hsmith_lect/1/

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In spite of the adverse consequences of the occurrence of money laundering in arbitration, limited studies that are relatively recent in origin have addressed this issue.[1] Indeed, the available research argues that as money laundering is declared illegal and there are intensified global efforts to combat this serious crime, it is certain that arbitrators have a key role in this battle.[2,3]After all, money laundering stems from preceding illegal activities that are of destructive consequences to society and economy. However, views amongst courts in different countries differ on how the issue should be addressed. There is a need for more studies focusing on the duties and obligations of arbitrators to handle and combat money laundering and the associated risks arbitrators may face when confronted with such criminality.

The main research question of this thesis is; "How should arbitrators respond to disputes involving money laundering?". More specifically, this research addresses the different approaches that arbitrators should take when they are confronted with money laundering and identifies key issues and challenges in view of the definitions and scopes of arbitration and money laundering. It delves into anti-money laundering legislations at both national and international levels; the manifestation of money laundering in arbitration and its scenarios; norms and laws applicable to substance of dispute; the burden of proving money laundering and the necessary standard of proof; the question whether tribunals should investigate money laundering; the legal effects of a positive finding of money laundering; the obligation of

[1] Drlicková, K. (2018). Money Laundering in International Commercial Arbitration. In "*Economic and Social Development (Book of Proceedings)*", (Eds.) Cingula, M., Rhein, D., R., and Machrafi, M. 31st International Scientific Conference on Economic and Social Development - "Legal Challenges of Modern World". Varazdin: Varazdin Development and Entrepreneurship Agency, 2018. pp. 227-234. ISSN 1849-7535.
[2] Ibid, pp. 227-234.
[3] McDougall, A. (2005). International Arbitration and Money Laundering. American University International Law Review 20 (5), pp. 1021-1054.

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reporting money laundering to competent authorities against confidentiality; and the judicial control over awards. Last but not the least; the thesis discusses the risk of liability of arbitrators when they fail in performing their obligations against their immunity. These aspects will be discussed according to the following research plan:

- Part I. The Manifestation of Money Laundering in Arbitration
  Chapter I.1. An Overview of Money Laundering
    Section I.1.1. Criminological Schemes and Impact of Money Laundering
    Section I.1.2. Means to Combat Money Laundering

  Chapter I.2. Attractiveness of Arbitration to Money Laundering
    Section I.2.1. Main Factors of Attractiveness of Arbitration to Money Laundering
    Section I.2.2. Scenarios of Money Laundering Manifestation in Arbitration

- Part II. The Battle of Arbitrators against Money Laundering
  Chapter II.1. Arbitrators' Obligations in Money Laundering Tainted Cases
    Section II.1.1. Preliminary Obligations of Arbitrators
    Section II.1.2. Postliminary Obligations of Arbitrators

  Chapter II.2. Risks of Arbitrators in Money Laundering Tainted Cases
    Section II.2.1. Judicial Control Over Arbitral Awards
    Section II.2.2. Judicial Control Over Arbitrators

- Conclusion

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Part I. The Manifestation of Money Laundering in Arbitration

The spectacular expansion arbitration has recently experienced, specifically in its international context, has increased its likelihood for abuse and misconduct and set the chance for criminal matters such as money laundering to infiltrate through it.[1] At first glance, arbitration and money laundering seem to be two worlds apart with paths that are unlikely to ever intersect. Arbitration is the champion of private law and a favorable mechanism for dispute resolution that aims to adjudicate national and international disputes. It works in equivalence and parallel to litigation to achieve justice and protect individuals' interests. Money laundering on the contrary, is a serious crime that threats national security and has devastating social and economic consequences.[2] Such crime remains, to date, inarbitratible, and the fight against it falls under the competence of jurisdictions and special authorities.[3] Yet, this crime can still find its way to manifest in the process of arbitration undermining the fair and orderly resolution of disputes and severely impacting economic development, social security and justice.[4] Presently, business and legal communities have become critically sensitive towards illegal practices and growing concerns by arbitral tribunals, commentators on arbitration and prominent arbitration institutions, including the International Chamber of Commerce (ICC) are increasingly expressed. [5] These issues will become over the next few years of more importance as economic progress in several parts of Africa and Asia is likely to flourish in the soon future. Disputes over resources such as soil, gas,

[1] Gaillard, op. cit., pp. 17-37.
[2] Hedberg, op. cit, p.1.
[3] Drličková, op.cit., pp. 227-234.
[4] Ibid.
[5] Hiber, D. and Pavic, V. (2008). Arbitration and Crime. Journal of International Arbitration 25 (4), pp. 461-478 https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/25.4/JOIA2008034 .

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land and water are foreseen to become a growing field for arbitration expanding the opportunity for money laundering tainting.[1]

Chapter I.1 of this Part aims to present an overview of money laundering and means to combat it, while Chapter I.2 describes the attractive aspects of arbitration that could turn the arbitral process, in some cases, to a safe harbor for launderers.[2]

[1] Drlickova, op. cit., p.227.
[2] Morillo, J.P., Soledad, G.F. and Leventhal, A.G. (2019). Arbitration Advocacy and Criminal Matters: The Arbitration Advocate as Master of Strategy. Global Arbitration Review. https://globalarbitrationreview.com/guide/the-guide-advocacy/fourth-edition/article/arbitration-advocacy-and-criminal-matters-the-arbitration-advocate-master-of-strategy.

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Chapter I.1. An Overview of Money Laundering

Money economy is a key component of modern economy and international financial systems.[1] It has recently witnessed a remarkable progress through globalization and technological innovation. While facilitating quick transfers of large money sums and expanding the potential for free-market capitalism, this progress has resulted in the emergence of one of the most serious transnational financial crimes known as *"Money Laundering*". This type of crime is defined as every act intended to legitimize funds[2] resulting from crimes to make the funds transnationally usable, transferable, and negotiable through any means.[3] It allows worldwide criminals to escape the legal consequences of criminal actions and enjoy the proceeds of crimes without jeopardizing their sources.[4]

Although it wasn't until to the early 1900s the term "*Money Laundering*" was first coined and criminalized, money laundering can be traced back to Anno Domini times. Pirates of the oceans and seas and wealthy Chinese merchants laundered thieved valuable possessions and smuggled funds offshore to avoid conflicts and legal charges.[5] As a more of an organized crime in today's lens, money laundering became especially prevalent during 1920's and 1930's in the US. The most famous money launderer in American history Alphonse "Al" Gabriel Capone used Laundromats as a front business to disguise his illicit conducts. Despite the interesting and convincing flow of this tale, journalist Geoffrey Robinson, however, regards it as only a myth. He believes that the term "*Money Laundering*" describes what simply takes place through this

[1] Shangquan, G. (2000). Economic Globalization: Trends, Risks and Risk Prevention. CDP Background Papers, United Nations, Department of Economics and Social Affairs. https://ideas.repec.org/p/une/cpaper/001.html. Accessed 30 July 2019.
[2] The term funds, money or profits include tangible and intangible, movable and immovable assets, including legal documents or instruments.
[3] Patel, H. and Thakkar, B. S. (2012). Money Laundering Among Globalized World. In Hector Cuadra-Montiel (Eds.) "*Globalization - Approaches to Diversity*". IntechOpen. DOI. 10.5772/49946.
[4] Aleksoski, S. (2015). Money laundering as a type of organized crime. Journal of Process Management – New Technologies, International, 3 (3), p. 44.
[5] Madinger, J. (2012). Money laundering: A Guide for criminal investigat*ors*. CRC Press, p. 17.

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crime that "illegal or dirty money is put through a cycle of transactions, or washed to become legal or clean money".[1] Later gangsters created other more attractive "front" business such as casinos and pioneered in using numbered Swiss bank accounts to launder money.[2] Since then, money laundering has become an enormous challenge at both national and international levels.

Money Laundering first appeared in a legal context in 1982 in America in the case US v. $4,255,625.39, 551 F.supp.314.[3] relating to the seizure of laundered Columbian drug proceeds.[4] Few years later, the first act that criminalized money laundering making it a federal crime "Money Laundering Control Act" 1986 was issued.[5] This was followed by substantial global efforts to introduce and develop anti-money laundering (AML) measures and regulations to combat this crime. Nevertheless, enforcing strict AML actions has to date been worldwide faced with continuum of innovative money laundering entries. Such entries have been facilitated by gaps and differences among financial systems, laws and jurisdictions especially prevalent in developing countries.

The first international legal measure that embodied and criminalized money laundering was the "United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic

[1] Villányi, B. (2021). Money Laundering: History, Regulations, and Techniques. Oxford Research Encyclopedia of Criminology and Criminal Justice, 26 Apr. 2021. https://doi.org/10.1093/acrefore/9780190264079.013.708.
[2] Michael, L. and Reuter, P. (2006). Money Laundering. Crime and Justice, 34 (1), 292–293. DOI. 10.1086/501508. Accessed on 11 September 2020.
[3] Justia.com, Case Law, Federal Courts, District Courts, Florida, Southern District of Florida, 1982, United States vs. $4,255,625.39.
[4] Gilmore, W.C. (2004). Dirty Money: *The Evolution of Money Laundering Counter-Measures*. 3rd ed., Strasbourg, Council of Europe Publishing, 2004, p. 20.
[5] The Money Laundering Control Act of 1986 (MLCA) is a United States Act of Congress that made money laundering a federal crime for the first time. This Act prohibited individuals from engaging in a financial transaction with proceeds that were generated from specific crimes, known as "specified unlawful activities".

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Substances 1988" (Vienna Convention).[1] Although the convention doesn't explicitly define money laundering, the concept of this crime can be inferred from Article 3(b) that reads;

"*i*) *The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph a) of this paragraph, or from an act of participation in such offence or 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 or offences 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…" and

Article 3(c) (i) that states;

"The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from (a drug trafficking offence) …….".

The Vienna Convention provided the foundation to the latter international conventions such as the "European Council Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime 1990" (Strasbourg Convention) and the "United Nations Convention Against Transnational Organized Crime 2000" (Palermo Convention). These Conventions adopted similar definitions to that of Vienna but didn't link money laundering to drug trafficking only as other criminal activities were also considered.[2]

[1] United Nations (2003). Final act of the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. 2003.

[2] Beekarry, N. (2011). The International Anti-Money Laundering and Combating the Financing of Terrorism Regulatory Strategy: A Critical Analysis of Compliance Determinants in International Law. Northwestern Journal of International Law and Business, 31 (1), 1 Jan. 2011, p. 137, scholarlycommons.law.northwestern.edu/njilb/vol31/iss1/5. Accessed on17 October. 2021.

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Additionally, the "Basel Committee on Banking Supervision"[1] issued their statement of principles on the Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering (December 1988)". Its preamble reads:

"*Criminals and their associates use the financial system to make payments and transfers of funds from one account to another; to hide the source and beneficial ownership of money; and to provide storage for bank-notes through a safe-deposit facility. These activities are commonly referred to as money-laundering".*

Furthermore, the FATF defines money laundering as "*The processing of criminal proceeds to disguise their illegal Origin".*

The following Sections discuss the criminal characteristics and stages of money laundering along with international laws and techniques to combat it. The national case of Lebanon is also presented.

Section I.1.1. Criminological Schemes and Impact of Money Laundering

Since its introduction into the global conventions described above, money laundering has expanded into a subject of criminological inquiry distinct from its underlying crimes.[2] All its schemes have been virtually facilitated through several stages that abuse legitimate processes threatening the integrity of financial systems, economic growth and social prosperity of many countries across the globe.

[1] The Basel Committee on Banking Supervision (BCBS) is a committee established by the central bank Governors of the Group of Ten countries in 1974. This committee is the primary global standard setter for the prudential regulation of banks and provides a forum for regular cooperation on banking supervisory matters.

[2] Simser, J. (2013). Money Laundering: Emerging Threats and Trends. Journal of Money Laundering Control, 16 (1), pp. 41–54. DOI. 10.1108/13685201311286841.

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Various strategies have been used by launderers to fulfil their criminal intentions while defeating any suspicion of money laundering and avoiding AML means. These strategies can be generally classified into few types with many innovative channels being created by the escalating digitalization, introduction of new online payment instruments and new gaming options.[1] Among the common are; ***i. Smurfing***, also called "structuring," in which the amount of dirty money is divided into smaller and less suspicious amounts to be mostly deposited in bank accounts; ***ii. Bulk Cash Smuggling***, this classic approach involves physically smuggling banknotes to another country with less strict jurisdiction where the smuggled money is deposited in an offshore bank that has superior bank secrecy; ***iii. Cash-intensive businesses***, when a front business that legitimately transacts large amounts of cash is created.[2] Such businesses function openly and create cash revenue from the legitimate business mixed with the illicit cash. Car business, bars, restaurants, and casinos are some common examples; ***iv. Investments in Commodities***, in this method launderers buy very expensive commodities of mobile nature such as diamonds and gold to simply have them transferred to other countries; ***v. Trade-based laundering***, this method is among the most sophisticated forms of money laundering. It entails a movement of money with under- or over-valuing invoices to conceal the trail of the dirty money; ***vi. Shell companies and trusts*** that have a legal personality to allow the movement of the dirty money; ***vii. Round-tripping***, where the illicit money is deposited in cross boarder corporation accounts, preferably in a tax haven country where AML inspection is minor. The money is then transacted back as a foreign investment, usually exempted from taxes; ***viii. Bank capture***,

[1] Teichmann, F.M.J. (2017). Twelve Methods of Money Laundering. Journal of Money Laundering Control, 20 (2), pp. 130–137. DOI. 10.1108/jmlc-05-2016-0018. Accessed 18 February 2021.

[2] Gilmour, N. and Ridley, N. (2019). Everyday Vulnerabilities – Money Laundering through Cash Intensive Businesses. Journal of Money Laundering Control, 18 (3), pp. 293–303. DOI. 10.1108/jmlc-06-2014-0019. Accessed on 26 August 2021.

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through which launderers buy high interests in banks, usually in jurisdictions with less strict AML inspection; ***ix. Casinos laundering***, where individuals use large amounts of illicit cash to gamble for relatively short times in casinos. The gambling winnings are regarded as legal and mostly received in cash with a receipt; ***x. Other Gambling***, where launders may bet on some events that have possible outcomes; ***xi. Black Salaries***, though which a business establishment may have employees without contracts and not officially registered. Salaries of dirty money are paid in cash; ***xii. Business Email Compromise***, in this case, launderers establish legitimate business email accounts via social channels or computer invasion techniques to perform unauthorized fund transactions with or without the knowledge of the victim; ***xiii. Transaction Laundering***, in this method, a merchant intentionally or unintentionally processes illicit credit card transfers for a different business; ***xiv. Cyber-laundering***, often referred to as money laundering in the digital age. It takes place through online transactions such as e-commerce, dealing with digital currencies, and online gaming allowing speedy and smooth laundering; ***xv. Real estate laundering***, through dealing with real estate properties.[1]

With the increased use of electronic communications, speedy modern transactions and conversion tools of money and assets, more sophisticated and more complex money laundering approaches are created every day.

A. Laundering Characteristics and Stages

Despite the diversity of methods used, money laundering criminality is characterized by some unique features when compared to the other crimes and is accomplished in three basic involving

[1] Teichmann, op.cit, pp. 130–137.

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transactions that could alert the suspicion of financial institutions to criminal involvement. The process follows three basic stages involving placement, layering, and integration.

Ai. Criminal Characteristics of Money Laundering

Criminal characteristics of money laundering may be summarized as;

a. Frequently an International/ Transnational Crime

Money laundering is often described as an international crime due to the transnational and multi-country nature of its offences and stages. It leads to cross border impacts that violate fundamental values of the international community and raises concerns pertaining to jurisdiction and the extent of authenticity of predicate acts in countries where they initially occurred.[1]

b. Organized Crime

Money laundering is frequently performed at a large scale and is recurrently planned and controlled by enterprises and groups with power and authority.[2]

c. Business Crime (Financial Crime)

Money laundering is one of the most common financial crimes and is often referred to as "*white collar crimes*" since it is committed by business organizations. It is committed for economic reasons and within the normal setting of a business.[3]

[1] Alya, S. and Alya, H. (2012), "*Penal Law of Businesses"*, 1st ed., p.294.
[2] Ismail, op.cit., p.121.
[3] International Compliance Association (ICA). What is Financial Crime? https://www.int-comp.org/careers/your-career-in-financial-crime-prevention/what-is-financial-crime/. Accessed on 15 March 2020.

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d. Separate Crime (Independent Crime)

Money laundering is a crime separate from the underlying predicate offence. Pursuing charges against either doesn't preclude offenders from the legal sanctions of the other crime.[1]

e. Derivative Offence

Money laundering is a derivative offence, which cannot be committed unless the underlying predicate offence of illegitimate funds is accomplished. Thus, money laundering is considered both a dependent and independent offence.[2]

f. Conduct Crime

Money laundering is one of the conduct crimes that have sufficient crime elements without the need to achieve criminal results.[3]

g. Intentional Crime

Money laundering is one of the intentional crimes since launderers know the illicit source of money and still have the will to launder it.[4]

Aii. Stages of Money Laundering

Money laundering process typically involves three stages which may occur separately and distinctly, simultaneously or, more frequently, overlap (Fig.1).[5] Increasingly sophisticated, innovative and complex mechanics created and used by launderers throughout these stages.[1]

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[1] Art.2, Lebanese Law No. 44 of November 24, 2015, Fighting Money Laundering and Terrorist Financing, Official Gazette, issue 48, 26/11/2015, pp. 3313-3318.
[2] Boister, N. (2012). *An Introduction to Transnational Criminal Law, 2nd ed.,* . Oxford, United Kingdom, Oxford University Press, 2012, p. 108.
[3] Alya, op.cit., p.294.
[4] Ismail., op.cit., p.121.
[5] Ferguson, G. (2018). *Global Corruption: Law, Theory & Practice, 3rd ed.,* University of Victoria, Canada, pp. 305-383. Accessed on 17 October 2021.

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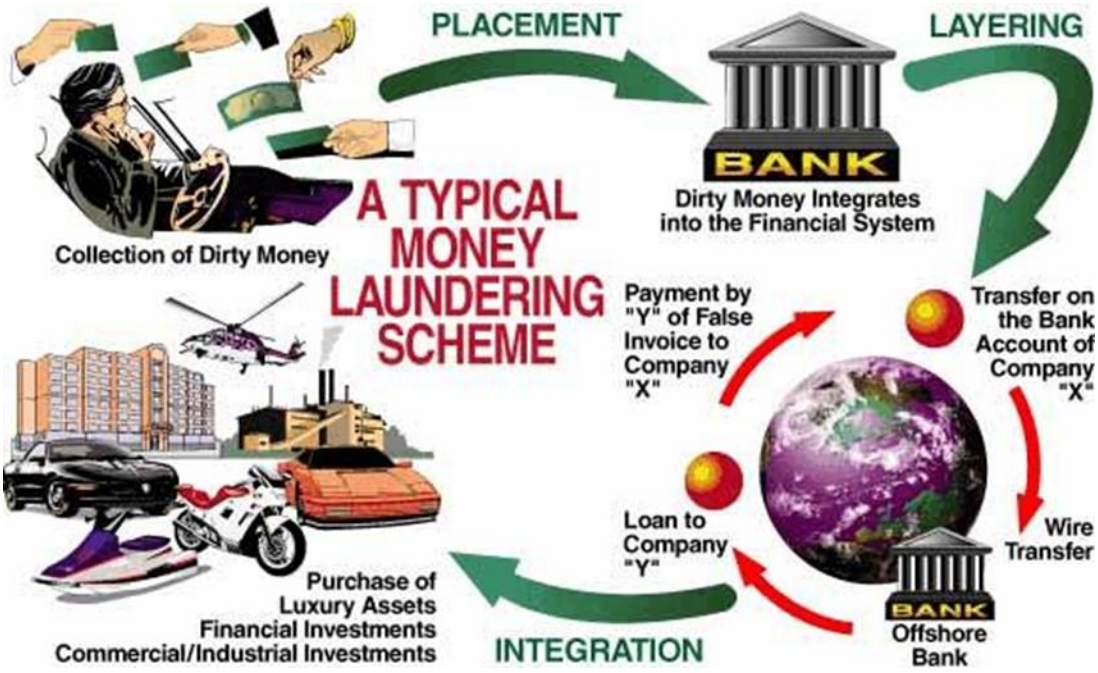

Figure 1. A diagram of the stages involved in a typical money laundering scheme. Source: United Nations Office on Drugs and Crime (UNODC).

Stage1. Placement or Smurfing

Placement represents the initial entry of illegal proceeds into financial systems by their distribution among several individuals, companies or enterprises. This stage generally aims at relieving launderers of holding and guarding large amounts of dirty cash and keeping proceeds away from the scene of crime through transforming them to a form, less suspicious and more appropriate such as purchasing expensive properties and goods.[2] During this stage, launderers are most susceptible to being arrested due to associated high risk and suspicion raised.[3]

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[1] About Business Crime Solutions Inc. Money Laundering: A Three-Stage Process. https://www.moneylaundering.ca/public/law/3_stages_ML.php.
[2] Airplanes, vehicles, real estates, precious stones and metals or a series of monetary instruments.
[3] McDowel, J. and Novis, G. (2001). The Consequences of Money Laundering and Financial Crime. Electronic Journal of the U.S. Department of State, 6 (2), p.6.

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Stage2. Layering or Structuring

Layering represents detaching illicit proceeds from their source and concealing the path that might have occurred in preliminary stages. During this stage, complex layers of financial cross border transactions are carried out through sophisticated instruments and methods in targeted countries. Shell companies, whose managers cover the beneficial owners through restrictive bank secrecy laws and attorney-client privileges, are a common tool in the layering stage.[1]

Stage3. Integration

Integration is the stage at which criminally derived laundered funds are integrated into legitimate financial systems and blended with other assets making it exceedingly difficult to distinguish legal and illegal sources.[2]

B. Impact of Money Laundering

Today, money laundering is recognized to pose international global threats that have potentially serious adverse economic and social consequences.

Bi. Economic Consequences

Money laundering has detrimental impact on economy. It impairs financial integrity, damages reputation of financial institutions and services and thus, discouraging foreign investors. It causes unexpected changes in money demand, high inflation and instability in financial side of international trade and exchange rates.[3] Whilst doing so, money laundering can transfer the

[1] Schneider, F. and Niederländer, U. (2008). Money Laundering: Some Facts. European Journal of Law and Economics, 26, pp. 387-404. 10.1007/s10657-008-9070-x.
[2] Ferguson, op.cit., pp. 305-383.
[3] Schneider and Windischbauer, op.cit., p.14.

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financial power from legitimate businesses and individuals to criminals.[1] This can lead to loss of control of economic policy and economic opportunities, diminished productivity, and slow economic growth and development of countries.[2] Unfortunately, the devastating impact of money laundering tends to be enlarged in emerging markets in developing countries.[3] In such markets, money laundering of illicit proceeds can demolish government budgets severely undermining the integrity and stability of financial systems in these countries.[4]

Bii. Social Consequences

Money laundering is entwined with various types of criminal activities leading to increasing criminality and making crimes more complex and international in scope.[5] The extreme magnitude of the economic power of money laundering can lead to the penetration of corruption and other crimes through all society components effectively weakening the social fabric, rule of law, democratic institutions and justice services. This would inevitably lead to a serious erosion of moral values, social trust and equality among citizens.[6]

Section I.1.2. Means to Combat Money Laundering

Given the central role of money laundering in the world of financial crime, the international community designed a number of AML legal instruments such as conventions, agreements, legislations, or regulations.[7] These instruments range from a variety of soft law (non-binding)

[1] McDowell and Novis, op.cit., pp.6-8.
[2] Ogbodo U.K. and Mieseigha, E.G. (2013). The Economic Implications of Money Laundering in Nigeria, International Journal of Academic Research in Accounting, Finance and Management Sciences, 3 (4): pp. 173-176.
[3] Kumar, V.A (2012). Money Laundering: Concept, Significance and its Impact. European Journal of Business and Management (Online), 4 (2), pp. 113-120.
[4] Ibid., pp. 113-120.
[5] McDowell and Novis, op.cit., pp. 6-8.
[6] Kumar, op.cit., pp.113-120.
[7] Dobrowolski, Z. and Sułkowski, L. (2020). Implementing a Sustainable Model for Anti-Money Laundering in the United Nations Development Goals. Sustainability, 12 (244). DOI. 10.3390/su12010244.

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principles and standards to a more specific binding laws and regulations.[1] In line with these international efforts, countries have also created domestic mechanisms to maintain the integrity and stability of their financial systems. In these legal instruments, the criminality of laundering money is understood in view of the elements of the definitions provided by the instruments. These components entail the subject of crime, the features of criminal acts, and the types of criminal liability.

Annex 1 elaborates on the chronological order of the main AML instruments and legislative efforts adopted internationally, by European Union (EU) countries, Arabic region as well as Lebanon. Particularly, the key features of the legal perspective of money laundering which originates from the 1988 Vienna Convention, Basel Committee Statement of Principles, Financial Action Task Force Recommendations, the 1990 Strasbourg Convention, 2000 Palermo Convention, the European Community Council Directives, as well as the national legal perspective of Lebanon will be discussed below.

A. International Legal Framework

The main international instruments aiming at combatting money laundering will be demonstrated below.

a. Vienna Convention

The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna Convention, was adopted in December, 20, 1988 and put in force in November, 11, 1990. Up to October 2021, 191 parties with Palau being the last, became signatories to the

[1] Alexander, K. (2001). The International Anti Money Laundering Regime: The Role of the Financial Action Task Force, Journal of Money Laundering Control, 4 (3), p.65.

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Convention.[1] This Convention represents the first intensive effort to combat money laundering.[2] It requires in Article 3 the signatory jurisdictions to take specific actions, including steps to enact domestic laws to criminalize drug money laundering.[3] The Convention also promotes international cooperation in investigations and makes extraditions between signatory states valid to money laundering. Additionally, it requires states to provide assistance in obtaining relevant financial records when requested to do so without regard to domestic bank secrecy laws.[4]

b. Basel Committee Statement of Principles

In December 1988, the G-10's Basel Committee on Banking Supervision issued a general statement of ethical principles (Statement of Principles) which encourages banks management to establish effective procedures to ensuring proper recognition and documentation of customers, discouraging suspicious transfer and cooperation with law enforcement bodies.[5] Additionally, The Core Principles for Effective Banking Supervision, approved by the Basel Committee in September 1997, state that "Banking supervisors must determine that banks have adequate policies, practices and procedures in place, including strict "know-your-customer"[6] rules, that promote high ethical and professional standards in the financial sector and prevent banks from

[1] International Narcotics Control Board (INCB), INCB welcomes Palau's accession to the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 2019.
[2] Restrepo, I (2019). Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances. www.unodc.org/unodc/en/treaties/illicit-trafficking.html.
[3] Art.3 (1) (b) requires each signatory state to enact domestic legislation criminalizing money laundering activity and Article 5(1), requires each signatory to adopt measures to enable confiscation of drug trafficking and money laundering offenses.
[4] Scott, D. (1996). Money Laundering and International Efforts to Fight It. World Bank Group, 48, 1 May 1996, p. 2, hdl.handle.net/10986/11622. Accessed 19 October 2021.
[5] Sarigul, H. (2013). Money Laundering and Abuse of the Financial System. International Journal of Business and Management Studies, 2 (1), p.298.
[6] The aim of know-your-customer is to allow the financial institution to properly identify its customers by collecting some information from them. This helps such institutions to prevent the deposit and transfer of illegal funds and to serve their customers better.

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being used, intentionally or unintentionally, by criminal elements".[1] The statement is not a legally obligatory document and its implementation pertains to national practice and law.

c. Financial Action Task Force Recommendations

In response to pressing concerns, the governments of the Group of Seven industrialized countries (G-7) established the Financial Action Task Force on Money Laundering (FATF) in 1989 as an intergovernmental body to promote perception of money laundering and develop standards and policies to fight it.[2] In April 1990, the FATF issued forty recommendations to offer governments a comprehensive framework for anti-money laundering actions based on the criminal justice system and enforcement of law, the role of the financial sector role and government regulators in combating money laundering, and necessity of international collaboration. Although these recommendations do not have an obligatory law force concerning the international law, some of them are present in the articles of the existing conventions for prevention of money laundering.[3]

In the years to follow, the Forty Recommendations have been subject to continuing revision and updating to enhance the complete implementation of the Vienna and Strasbourg Conventions and the lifting of secrecy laws of banking.[4] In 2004, FATF developed additional set of new recommendations in the Ninth Special Recommendations the 40+9 Recommendations.[5] Most recently, in June 2019, FATF published an update of the "International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation". With this, FATF

[1] Sarigul, op. cit., p.298.
[2] The FATF is comprised of 26 countries and two regional organizations including major financial centers of Europe, North America, and Asia. It works both independently and in cooperation with other organizations to establish and strengthen member and nonmember anti-laundering measures.
[3] McDougall, op.cit., pp.1029-1030.
[4] United Nations (2008). International Instruments Related to the Prevention and Suppression of International Terrorism. 8th ed., vol. 2, New York.
[5] Jensen, N. and Cheong Ann P. (2011). Implementation of the FATF 40+9 Recommendations. Journal of Money Laundering Control, 14 (2), 110–120. DOI. 10.1108/13685201111127777. Accessed on 25 June 2021.

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recommendations have evolved to be the accepted international standard instruments of anti-money laundering.[1]

d. Strasbourg Convention

The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg Convention, was an addition to the existing conventions of the European council[2]; it was adopted on November 1990. Up to October 2021, this convention had been signed and ratified by 48 States.[3] This Convention expands the money laundering definition laid down by the Vienna Convection to all serious crimes, encouraging the state parties to adopt laws that authorize the punishment of the proceeds of serious offenses, as well as any instrumentalities of the crime. It also aims at promoting international collaboration.[4]

e. Palermo Convention (UNTOC)

The UN Convention against Transnational Organized Crime, Palermo Convention, was adopted by a resolution of the United Nations General Assembly on 15 November 2000 and came into force on 29 September 2003. Up to October 2021, 190 parties became signatories to the Convention.[5] This Convention adopted the definition of Vienna Convention but didn't link the predicate crime to drugs-related crime encouraging state parties to address a broad range of predicate crimes. The Convention aims to enhance international cooperation in order to prevent and combat transnational organized crime by setting the basis for a more stringent common

[1] Www.fatf-Gafi.org, 2019. The FATF Recommendations." pp. 11-15. www.fatf-gafi.org/recommendations.html. Accessed on 19 October 2021.
[2] The Council of Europe is a regional organization established to strengthen democracy, human rights, and the rule of law in its member states.
[3] Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg, European Treaty Series, 1990, No.141. https://rm.coe.int/168007bd23.
[4] Aleksoski , op. cit., p. 49.
[5] United Nations General Assembly (2003). United Nations Convention against Transnational Organized Crime, New York, United Nations Treaty Series, Vol. 2225, p. 209. https://www.unodc.org/unodc/treaties/CTOC/.

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action against money laundering. This is achieved through synchronized national laws to exclude differences and uncertainties present between countries.[1] The dimensions of this Convention encompass the prevention, investigation, and prosecution of actors in an organized criminal group (Article 5), the laundering of crime proceeds (Article 6), corruption (Article 8), and obstruction of justice (Article 23).

f. European Union Directives

In recent years the EU has set up a package of directives and laws aimed at eradicating money laundering and terrorism financing which influence national laws, banking processes and businesses. These Directives took several stages to evolve.[2] Through the six Directives to date created, key preventative instruments such as the identification of customers and clients active through different financial systems along with the creation of central methods of reporting suspicious transactions were established.[3] Member countries are called to develop a central record of the beneficial or factual owners of business establishments within their corresponding jurisdictions.[4]

The Fifth Anti-Money Laundering Directive (5AMLD) of May 2018, was created to address apparent previous weaknesses and counter terror funding (CFT) and increase transparency. Under the 5AMLD, member countries are required to issue a list of the specific functions

[1] Aleksoski, op. cit., pp. 49-50.
[2] Bergström, M. (2011). EU Anti-Money Laundering Regulation: Multilevel Cooperation of Public and Private Actors. In C. Eckes & T. Konstadinides (Eds.), *Crime within the Area of Freedom, Security and Justice: A European Public Order*, Cambridge: Cambridge University Press, p. 101. DOI:10.1017/CBO9780511751219.005.
[3] European Commission | Choose Your Language | Choisir Une Langue | Wählen Sie Eine Sprache." Europa.eu, 2019, ec.europa.eu.
"European Treaty Series -No. 141." 1990.
[4] European Commission (2005). Adoption of Anti-Money Laundering Directive Will Strike a Blow Against Crime and Terrorism. https://ec.europa.eu.

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conducted by Politically Exposed Persons (PEPs), develop archives of suspicious activity reports and perform Customer Due Diligence (CDD).[1]

The most recent 6AMLD of November 2018 set the minimum requirements for the definition of the crime of money laundering, effectively putting in place the minimum standards for EU countries to combat money laundering based on the criminal law. The 6AMLD aims at improving the synchronization of the criminal liability of money laundering and terrorist financing across the EU. It brings about an imprisonment term of at least four years for money laundering activities. Courts may also apply several sanctions such as fines, exclusion from access to public funding or judicial winding-up. Other measures comprise a permanent banning from participation in commercial activities and state members can also practice confiscation of proceeds. This directive (6AMLD) also emphasizes enhanced enforcement of cooperation in trans-border cases.[2] In this respect, the German Federal Government very recently (October 14, 2020) proposed a Draft Act for the Effective Prosecution of Money Laundering to implement the EU's 6AMLD into German law.[3]

B. Regional and National Legal Frameworks

The Arab region as well as Lebanon took several measures to combat money laundering as will be discussed below.

[1] Customer Due Diligence (CDD). Information comprises the facts about a customer that should enable an organization to assess the extent to which the customer exposes it to a range of risks. These risks include money laundering and terrorist financing.
[2] LexisNexis Risk Solutions | Transform Your Risk Decision Making. LexisNexis Risk Solutions, 2019, risk.lexisnexis.com. Accessed 19 June 2021.
[3] Germany implements the 6th Anti-Money Laundering Directive, What Financial Services Firms Need to Know Now. www.dentos.com.

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Bi. Middle East and North Africa Region FATF (MENAFATF)

Realizing the high threats of money laundering and terrorist financing operations to countries in the Middle East and North Africa Region, a regional meeting at a ministerial level was organized in Manama, Bahrain on the 30th of November 2004. The meeting aimed at establishing a multilateral agreement between participating states to adopt and implement the FATF recommendations and the anti-terrorism treaties and UN Security Council resolutions. It was also agreed to establish the Middle East and North Africa Financial Action Task Force (MENAFATF) that is a FATF-style regional body (FSRB) for countries in the Middle East and North Africa. The establishment of MENAFATF was initiated independently from any other international body, organization or any international treaty. MENAFATF is characterized by being voluntary and co-operative. It has its specific, regulations, rules and procedures and works in collaboration with FATF and several other international bodies to achieve its objectives. States of MENAFATF are required to specify region-specific issues related to money laundering and terrorist financing, and exchange experiences to combat these crimes. They are demanded to work jointly to comply AMF Policy on Anti-Money Laundering and Combatting Financing of Terrorism and adopt an effective system that protects the integrity and stability of the financial markets of member states and international financial systems. While emphasizing collaboration between countries, MENAFATF takes into consideration the cultural values, legal frameworks, or constitutional law of member nations. In addition to Lebanon, MENAFATF presently includes Algeria, Bahrain, Egypt, Jordan, Kuwait, Libya, Qatar, Republic of Iraq, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates, Morocco, among others. Observers of MENAFATF include France, UK, USA, International Monetary Fund, World Bank, Asia/Pacific Group on Money Laundering (APG), World Customs Organization (WCO), Arab Monetary Fund (AMF),

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and Eurasian Group on combating money laundering and financing of terrorism (EAG) and UN. In accordance with its purpose of establishment, MENAFATF sets its objectives as

Adopting and implementing the FATF's 40 Recommendations on fighting money laundering, terrorist funding, and proliferation;

- *Carrying out appropriate United Nations treaties and agreements, as well as Security Council Resolutions;*
- *Jointly increasing compliance with international standards, as well as collaborating with other international organizations, businesses, and agencies for increasing compliance globally;*
- *Setting collaboration to identifying regional money laundering and terrorist financing challenges, and exchanging associated experiences and creating ways to address these criminalities;*
- *Adopting steps across the area for the effective combating of money laundering and terrorist financing while respecting the member nations' cultural values, political frameworks, and constitutional law.*[1]

In response to MENAFATF and international FATF, the AMF issued in 2016 its Policy on Anti-Money Laundering and Combatting Financing of Terrorism declaring its full commitment towards detecting and stopping financial criminalities such as money laundering and potential terrorist financing in particular. They policy emphasizes adherence to relevant applicable laws and regulations in all member states where AMF acts and has business relationships and interests. In addition, the policy offers under the framework of AMF mandate a technical assistance and capacity building programs to member states in the field of AML/Counter Terrorism Financing (CTF).[2]

[1] Middle East and North Africa Financial Action Task Force. http://www.menafatf.org/.
[2] AMF Policy Document on Anti-Money Laundering and Combatting Financing of Terrorism 2016 AMF Policy on Anti-Money Laundering and Combatting Financing of Terrorism. 2016.

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Bii. National Lebanese Legal Framework

In 2001, the act of money laundering was criminalized through Law No.318 of 20/4/2001 conforming, to a certain extent, to international standards and somehow establishing an effective AML system. This law required the establishment of a financial intelligence unit (FIU), which is the Special Investigation Commission (SIC). This Commission (SIC) is an independent body of a judicial nature whose mission is to ensure the implementation of laws and regulations on fighting money laundering and terrorism in force. This is performed by strengthening inter-institution and global cooperation for fighting domestic and international money laundering and terrorism financing criminalities.[1] Additionally, several other measures and decisions have afterwards been developed to further ensure AML compliance. These efforts allowed Lebanon to be in 2002 delisted by FATF from the list of 15-non-cooperative countries in combating money laundering issued in 2000.[2] In the following years, Law 318/2001 was amended by Law 547/2003 and more recently by Law No.44 of 24/11/2015 "Fighting Money Laundering and Terrorist Financing". The latter amendment came within the framework of implementing the agreements related to fighting terrorism and compliance with the recommendations issued by GAFI group. This group (GAFI) is a group composed of several countries and international organizations working with the aim of developing strategies against money laundering and monitoring the global financial system. Law 44/2015 came along with issuing Law 43/2015 "Exchange of Tax Information" (repealed by Law55/2016) and Law 42/2015 "Declaring the Cross-Border Transportation of Money". This was followed by the ratification of the United

[1] Law No 44 of November 24, 2015 Fighting Money Laundering and Terrorist Financing. 24 Nov. 2015 https://sic.gov.lb/sites/default/files/laws-regulations/Law%2044%20En.pdf.
[2] Ismail, op.cit., p.121.

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Nations Convention on the Suppression of the Financing of Terrorism on 29 Aug 2019. Article 2 of Law 44/2015 reads:

"*Money laundering is any act committed with the purpose of:*

1. *Concealing the real source of illicit funds, or giving, by any means, a false justification regarding the said source, while being aware of the illicit nature of these funds.*
2. *Transferring or transporting funds, or substituting or investing the latter in purchasing movable or immovable assets or in carrying out financial transactions for the purpose of concealing or disguising the such funds' illicit source, or assisting a person involved in the commission of any of the offences mentioned in Article 1 to avoid prosecution, while being aware of the illicit nature of these funds. Money laundering is a separate offence that does not necessitate a charge with the underlying predicate offence. Charging the offender with an underlying predicate offence shall not preclude the pursuing of any legal proceedings against the latter for a money laundering offence, in case of variation in the elements of the offences".*

The Article clearly implies that money laundering is an intentional crime which requires, in addition to a general criminal intent,[1] a specific intent represented by the intention to disguise or hide the illegal source, or to assist someone involved in crime to escape responsibility.[2]

The Lebanese Law 44/2015, unlike the French law, limits the prospective of money laundering offences to specific types of predicate offences listed in Article 1 (below);

"… 1. The growing, manufacturing, or illicit trafficking of narcotic drugs and/or psychotropic substances according to the Lebanese laws.

2. The participation in illegal associations with the intention of committing crimes and misdemeanors.

3. Terrorism, according to the provisions of Lebanese laws.

[1] The General Criminal intent in money laundering requires the criminal's knowledge of the illicit source of money and the will to launder it.

[2] Alya, op.cit., p.302.

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4. The financing of terrorism or terrorist acts and any other related activities (travel, organizing, training, recruiting…) or the financing of individuals or terrorist organizations, according to the provisions of Lebanese laws.

5. Illicit arms trafficking.

6. Kidnapping, using weapons or any other means.

7. Insider trading, breach of confidentiality, hindering of auctions, and illegal speculation.

8. Incitation to debauchery and offence against ethics and public decency by way of organized gangs.

9. Corruption, including bribery, trading in influence, embezzlement, abuse of functions, abuse of power, and illicit enrichment.

10. Theft, breach of trust, and embezzlement.

11. Fraud, including fraudulent bankruptcy.

12. The counterfeiting of public and private documents and instruments, including checks and credit cards of all types and the counterfeiting of money, stamps and stamped papers

13. Smuggling, according to the provisions of the Customs Law.

14. The counterfeiting of goods and fraudulent trading in counterfeit goods.

15. Air and maritime piracy.

16. Trafficking in human beings and smuggling of migrants.

17. Sexual exploitation, including sexual exploitation of children.

18. Environmental crimes.

19. Extortion.

20. Murder.

21. Tax evasion, in accordance with the Lebanese laws".

Under Law 44/2015, any person that commits, attempts to conduct, incites, facilitates, intervenes or contributes to money laundering operations is punished by imprisonment for a period of three to seven years and by a penalty not surpassing twice the amount laundered.[1] Despite the

[1] Art.3, Law 44/2015, "Whoever undertakes or attempts to undertake or incites or facilitates or intervenes or participates in:1- Money-laundering operations, shall be punishable by imprisonment for a period of three to seven years, and by a fine not exceeding twice the amount laundered…"

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controversy raised, money laundering is considered a misdemeanor and not a felony, since the classification of a crime according to the Lebanese Criminal Code is based on the nature of the penalty and not on its duration.[1,2] Additionally, movable or immovable assets related to, or derived from, money laundering are subject to confiscation.[3] If committed through a moral person, sanctions against money laundering are imposed according to Articles 210[4], 211[5] of the Lebanese Criminal Code due to the absence of such legal text in Law 44/2015.

[1] Art.179, Lebanese Criminal Code, "…The legal definition is based on the maximum level of the heaviest penalty imposed by law".

[2] Art.39, Lebanese Criminal Code, "The customary penalties for misdemeanors are: 1. Imprisonment with labor; 2. Ordinary imprisonment; 3. A fine".

[3] Art.14, Law 44/2015, "The movable or immovable assets that are proved, by a final Court ruling, to be related to, or derived from, a money-laundering or terrorist financing offence, shall be confiscated to the benefit of the State, unless the owners of the said assets prove in a Court of Law their legal rights thereupon. The confiscated assets may be shared with other countries, whenever the confiscation results directly from coordinated investigations or cooperation between the concerned Lebanese authorities and the concerned foreign body (ies)".

[4] Art. 210, Lebanese Criminal Code, "…. Legal persons shall be criminally responsible for the activities of their directors, management staff, representatives and employees when such activities are undertaken on behalf of or using the means of such persons. They may be sentenced only to a fine, confiscation and publication of the judgment. If the law provides for a primary penalty other than a fine, that penalty shall replace the fine and shall be imposed on the legal persons within the limits set by Articles 53, 60 and 63".

[5] Art. 211, Lebanese Criminal Code, "…. A natural or legal person who has committed an offence shall be deemed to constitute a danger to society if it is feared that the person will commit other acts that are punishable by law. Legal persons shall not be subject to precautionary measures other than those pertaining to property".

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Chapter I.2. Attractiveness of Arbitration to Money Laundering

Being a form of alternative dispute resolution mechanisms, arbitration allows settling disputes in preference to courts. This has led to a wide spread acceptance of arbitration as a popular means to resolve national and international private disputes. In tandem with globalization, competitive liberalization and global free trade, arbitration has experienced a remarkable success especially in international business particularly in regions of emerging markets. Arbitration is well-suited to international cases as it avoids uncertainties of international litigation through applying uniform rules while still relying on powers of national courts to enforce awards.[1] In January 2020, the ICC announced the registration of its 25,000th case recording large increases of in the number of arbitration cases it addressed since its establishment with a notable evolution of the number of business cases from the MENA countries.[2] This remarkable surge along with the increases recorded at other chief arbitral institutions are attributed to the advances in the regulatory framework that controls the legal status, effectiveness and enforceability of arbitration awards.[3]

Although arbitration is well-established and widely practiced, there has been no official recognized definition of the term "*Arbitration*" in most national and international legal instruments. Article 2(1), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), mentions the term without providing a definition of arbitration. It reads "*Each contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration …"*. Arbitration is neither defined in the

[1] The Current State and Future of International Arbitration: Regional Perspectives IBA Arb 40 Subcommittee. 2015., pp.7-8.
[2] Ziade, H. and Plump, A. (2020). Guest Blog: Current Challenges and Opportunities for Arbitration in MENA. ICC - International Chamber of Commerce, iccwbo.org/media-wall/news-speeches/guest-blog-current-challenges-and-opportunities-for-arbitration-in-mena/. Accessed on 19 October 2021.
[3] Born, G. and Miles, op.cit.

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UNCITRAL Model Law on International Commercial Arbitration[1] as the UNCITRAL Working Group deemed that a definition of arbitration was not needed and may be difficult to precisely articulate. By being undefined, arbitration is permitted to be flexible and its domains and boundaries are adjustable to different perspectives.[2] Nevertheless, there is a general consensus that arbitration is a contract-based form of binding dispute resolution. In this context, parties agree to submit their disputes to one or more independent arbitrators who issue binding and enforceable settlement awards.[3]

Arbitration legal frameworks are of two sources; national and international. National sources consist of national laws of corresponding countries and regulations established by private national institutions. Whereas, international sources encompass bilateral[4] or multilateral[5] international conventions between countries and rules of arbitration established by specialized United Nations commissions or private international institutions.[6] The present legal framework for international arbitration was commenced by the Geneva Protocol (1923) and Geneva Convention (1927) that led to signing the New York Convention (1958); European Convention on International Commercial Arbitration (1961); World Bank Convention on the settlement of investment disputes between states and nationals of other states (1966); promulgation of the UNCITRAL Arbitration Rules (1976); adoption of the UNCITRAL Model Law (1985); and

[1] The UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations.
[2] Bergsten, E. E. (2005). Dispute Settlement: International Commercial Arbitration. 5.1, International Commercial Arbitration. New York, Geneva, UN, 2005, p. 4. UNCTAD/EDM/Misc.232/Add.38. https://digitallibrary.un.org/record/566808?ln=en
[3] Bernstein, and Tackaberry, op.cit., p.20.
[4] Bilateral international conventions deal incidentally with arbitration. Examples of these conventions are treaties of commerce and navigation; treaties of extradition; and treaties of equal treatment of citizens of one country in the other.
[5] Multilateral conventions deal directly and exclusively with arbitration. The New York Convention for the Recognition and Enforcement of Foreign Award of 1958; The European Convention of 1961; The Washington Convention of 1965; The Arab Amman Convention.
[6] Private international institutions such as, International Chamber of Commerce; The London Court of International arbitration.

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enactment of "modern" arbitration statutes in various advanced jurisdictions from 1980 to the present day.[1]

The accession of many countries to the aforementioned key international instruments exhibits a change in arbitration culture.[2] Remarkable are the serious steps taken by some Middle Eastern countries through the ratification of the New York Convention and attempts to enact new arbitration provisions according to UNCITRAL Model Law on International Commercial Arbitration that are familiar to foreign entities doing business in the area.

Lebanon is among the very earliest countries that responded positively to international arbitration efforts. The country ratified the New York Convention in 1998. It devoted the Second Chapter of the Lebanese Code of Civil Procedure (LCCP) enacted by Decree Law 90/1983 for arbitration, legal rules of arbitration were specifically stated in LCCP by Law No.44 of July 29th, 2002. The LCCP makes a clear distinction between domestic arbitration (Articles 762-808) and international arbitration (Articles 809-821). Although based on the old French arbitration law[3] and not the UNCITRAL Model Law, the Lebanese provisions of arbitration recognize all the well-developed and concrete principles in international arbitration.[4] In parallel, the Lebanese judiciary offers high familiarity and considerable support of the laws and practices of arbitration. In today's international business lens, Lebanon is recognized as an arbitration-friendly jurisdiction where arbitration is becoming an increasingly acceptable instrument of dispute

[1] Abu Zeid, S. (2010), *"Arbitration in Petroleum Contracts*", 1st ed, Al Halabi Publishing, p.9.
[2] White and Case International Arbitration Group (2018). 2018 International Arbitration Survey: The Evolution of International Arbitration. Australian Corporate Lawyer, 28 (3), pp. 10 – 12.
[3] French decrees No. 80-354 of 14 May 1980 for domestic arbitration and No. 81-500 of 12 May 1981 for international arbitration.
[4] Abdulrahim, W. Arbitration under the Lebanese Law, Private Site for Legal Research and Studies, My Miscellaneous Studies.

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resolution. This is part of a wider vision to strengthen the standing of the country in global finance and international trading.

In spite of the above, arbitration with all its types; Ad hoc[1] or Institutional[2], Domestic[3] or International[4], Investment[5] or Commercial[6], has proved to be one of the most attractive and appealing methods to launderers. Money launderers often develop and design an array of tactics to mask their activities with great ingenuity. Confidentiality and Privacy of arbitration specifically can offer a supreme setting to conceal and disguise the origin of money.[7] Additionally, Finality and Enforceability of Arbitral Awards might be perceived as ultimate approaches to legitimize money flows.[8]

Money laundering can abuse arbitration or could be related to the underlying dispute in arbitration proceedings through different scenarios.[9] Main scenarios comprise, but are not limited to, the following[10]; The first scenario may occur when the parties are in a real dispute involving funds that are the proceeds of crime; the second scenario may arise when arbitration might be

[1] Ad hoc arbitration or do it yourself arbitration is an arbitration agreed on and arranged by the parties themselves, without recourse to an arbitral institution. It is open to the parties to designate arbitrators and adopt the procedure and laws to be used in arbitration.

[2] Institutional arbitration is the arbitration conducted and managed by permanent arbitral institutions, each of which has its own arbitration terms and regulations relating to the constitution of arbitral tribunals, arbitration procedures, applicable laws, etc.

[3] Domestic arbitration refers to arbitration which takes place within one country, wherein parties have the same nationality and are subject to the same jurisdiction. Additionally, the cause of action for the dispute has wholly arisen in one country and is decided in accordance with its procedural and substantive law.

[4] International arbitration aims to settle disputes arising from international commercial contracts. Commercial contracts are considered international based on two criteria, either legal or economic. The legal criterion considers a commercial contract international when it contains a foreign element that is either subjective or objective. On the other hand, the economic criterion views a commercial contract as international when it involves the interests of international trade such as movement of goods, funds, services or investments beyond borders.

[5] Investment arbitration, particularly international (IIA) is a procedure that tackles investment disputes within an investor-state affiliation. It deals with disputes arising from public treaties.

[6] Commercial arbitration, particularly international (ICA) is a procedure to resolve disputes arising out of a commercial contractual obligation between private parties without the interference of the state.

[7] McDougall, op.cit., pp.1021-1054.

[8] Nacimiento, P., Hertel, T. and Gayer, C., Arbitration and Money Laundering: What Are the Obligations Placed On Counsel and Arbitrators and What Risks Do They Face? Kluwer Arbitration Blog, 2017.

[9] McDougall, op.cit., pp.1021-1054.

[10] Nacimiento, Hertel and Gayer, op.cit.

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approached with the purpose to launder money (sham arbitration) and the third, theoretically unlikely, scenario may unfortunately occur with the involvement of arbitrators.[1] In the former scenarios, arbitrators are usually not complicit in money laundering but are faced with disputes affected by the criminal conduct. While these two are more probable and more often discussed, the third case is becoming more prevalent in recent year.[2]

The increased phenomenon of abuse of arbitration by money laundering requires a good systematic analysis of the factors of attractiveness of arbitration to money laundering and scenarios of intersection of money laundering and arbitration as described in the following paragraphs.

Section 1.2.1. Main Factors of Attractiveness of Arbitration to Money Laundering

Generally speaking, the whole process of arbitration with all of its factors is attractive for the parties whether launderers or not.[3] These factors include***; i. Party Autonomy*** that grants parties the autonomy to choose arbitration to settle disputes and rule on the details.[4] Parties have the freedom to decide on all aspects of arbitration to determine how, where, by whom, the language, the law governing the arbitral procedure and the substantive law applicable to the main contract.[5] However, this principle is subject to certain limitations related to public policy, mandatory rules

[1] Park, W. Arbitrator Bias. Papers.ssrn.com, 16 Oct. 2015. Accessed 20 Oct. 2021.
[2] Deringer, F. B. (221). Bribery, Corruption and Money Laundering in International Arbitration. Practical Law, 2021, uk.practicallaw.thomsonreuters.com/4-383-0989? transitionType=Default&contextData=(sc. Default). Accessed on 8 August. 2021.
[3] Khedmati, A. (2021). Financial Crimes and Commercial Arbitration: What Should Arbitrators Do?. Fordham Journal of Corporate and Financial Law Journal, April 21. 2021. news.law.fordham.edu/jcfl/. Accessed on 20 October 2021.
[4] Fagbemi, S. A. (2016). The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?. Journal of Sustainable Development Law and Policy (The), 6 (1), p. 202. www.ajol.info/index.php/jsdlp%20/article/viewFile%20/128033/117583, 10.4314/jsdlp.v6i1.10. Accessed 24 September 2021.
[5] Livingstone, M.L. (2008). Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact? Journal of International Arbitration, *25*, pp. 529-535.

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and rules of arbitrability[1]; ***ii. Consensuality*** as arbitration should be consensual and created based on the agreement of the parties.[2] This principle characteristic has two consequences; Parties must have agreed to arbitrate the dispute that has occurred between them, and the authority of the arbitral tribunal is restricted to resolve only the disputes parties have consented upon.[3] Therefore, the award issued by the tribunal must resolve the dispute that was handed in to it and must not embrace on any issues or other disputes that may have been created between the parties; ***iii. Neutrality*** that allows parties to choose neutral and impartial arbitrator(s) to determine the arbitral process and merits of the dispute.[4] This neutrality can be established with the arbitration's seat in a country which neither of the disputants is connected to. It offers arbitration impartiality and faithfulness chiefly to the disputants and qualifies the tribunal to objectively perform in a non-national way. This is also of a high significance as parties from diverse regions of the world would choose to have an arbitrator or a tribunal that appreciates their backgrounds, philosophies, settings and circumstances. It is regularly conceivable to determine a tribunal by identifying arbitrators with appropriate background and experience along with considerable knowledge and competency. Although they have chief role to practice in supporting and policing the arbitration, courts don't interfere in the arbitral process and decision which assures neutrality[5]; ***iv. Privacy***, ***v. Confidentiality***; ***vi. Enforceability*** and ***vii. Finality*** are of particular attractiveness to money launderers as these elements permit arbitration to become

[1] Madden QC, P., Knoebel, C., Grifat-Spackman, B. (2021). Arbitrability and Public Policy Challenges. Global Arbitration Review, 08 June, 2021. https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/arbitrability-and-public-policy-challenges

[2] Fagbemi, op.cit., p. 202,

[3] Bantekas, I. (2021). Equal Treatment of Parties in International Commercial Arbitration. International and Comparative Law Quarterly, 69 (4), pp. 991–1011. DOI. 10.1017/s0020589320000287. Accessed on 22 March 2021.

[4] Feehily, R. (2019). Neutrality, Independence and Impartiality in International Commercial Arbitration; a Fine Balance in the Quest for Arbitral Justice. Penn State Journal of Law & International Affairs, 7 (1), p. 88, elibrary.law.psu.edu/jlia/vol7/iss1/19. Accessed 20 Oct. 2021.

[5] Klaas, P. (2021). International Commercial Arbitration, College of Commercial Arbitrators, p.2. https://www.maitlandchambers.com/getattachment/Our-People/Barristers/Associate-Members/Paul-Klaas/Paul-Klaas-CV-2021.pdf.aspx?lang=en-GB

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highly appealable and ideal vehicle for launders to proceed with their criminal intentions. As will be highlighted below, privacy and confidentiality of arbitral proceedings diminish all possibilities for outside impartial inspection, whereas finality and enforceability impose arbitral awards and limit ways for appeal against any unsuited decisions.

A. Privacy and Confidentiality of Arbitration

Under the framework of arbitration, privacy and confidentiality don't necessarily have identical meanings. Indeed, they are two different principles with varied implications. However, a misinterpretation of these two principles is very common and many mistakenly believe that the private nature of arbitration implies that the arbitration proceedings will be confidential.[1] While arbitration is confidential, in many cases, the arbitral proceedings are merely private. Actually, the private nature of arbitration does not inevitably imply that disputants are obliged to uphold confidentiality all through arbitration.[2] Confidentiality may be violated, even when all participants of concern are initially determined to maintain it. For example, the parties or non-party may choose to utilize one element of previous arbitral proceedings in a later arbitral or court proceedings.

Ai. Privacy

Privacy in arbitration offers parties a platform where disputes can be kept "away from the intrusiveness of the media and the prying eyes of their competitors".[3] It is stated that "the informality attaching to a hearing held in private and the candour to which it may give rise is an

[1] Collins QC, M. (1995). Privacy and Confidentiality in Arbitration Proceedings. Arbitration International, 11 (3), pp. 321–336. DOI. 10.1093/arbitration/11.3.321. Accessed 20 March 2021.
[2] Cremades, B. M. and Cortés, R. (2021). The Principle of Confidentiality in Arbitration: A Necessary Crisis. Journal of Arbitration Studies, 23 (3), pp. 25–38. DOI. 10.16998/jas.2013.23.3.25. Accessed on 12 July 2021.
[3] Avinash, P. and Feehily, R. (2017). Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance. In "proceedings Poorooye2017ConfidentialityAT".

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essential ingredient of arbitration". Also that "International commercial arbitration is not a public proceeding. It is essentially a private process, and therefore, has the potential for being a confidential process".[1] Arbitration is a private instrument for the settlement of disputes. Thus, arbitration proceedings should not open to the public as it is the case of court proceedings. Privacy is associated with the exclusive right of disputants, arbitral tribunal, and witnesses who are involved in the process and hearings of arbitration. It indicates that no third party can attend any arbitral meetings and hearings. However, this does not necessarily impose confidentiality obligations to the parties. Actually, only the parties to the proceedings are allowed and should be present at the hearing or to acquire copies of the communications and submissions. As stated above, privacy does not inevitably imply that parties are prohibited from revealing facts about the arbitration or employing resources shared during the arbitration for other drives. Somewhat, the privacy of the proceedings sets constrains on the individuals eligible to be present and to be involved in the proceedings while arbitration is still in progress. But, privacy does not extend to cover activities beyond the proceedings.[2]

Aii. Confidentiality

Confidentiality is usually referred to as one of the primary advantages and attractive key characteristics of arbitration.[3] Parties legitimately assume their arbitral case not to be disclosed or

[1] Blanke, G. (2016). Book Review: Redfern and Hunter on International Arbitration, 6th ed. by Nigel Blackaby and Constantine Partasides QC with Alan Redfern and Martin Hunter, (Oxford: Oxford University Press, 2015). An Overview of International Arbitration in The International Journal of Arbitration, Mediation and Dispute Management, 82 (4), pp. 475-476. https://kluwerlawonline.com/journalarticle/Arbitration:+The+International+Journal+of+Arbitration,+Mediation+and+Dispute+Management/82.4/AMDM2016069.

[2] Michaels, R. (2020). International Arbitration as Private and Public Good. The Oxford Handbook of International Arbitration, 10 Sept. 2020, 397–420. DOI. 10.1093/law/9780198796190.003.0016. Accessed 20 Oct. 2021

[3] Cremades and Cortés, op.cit., pp. 25–38.

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reach third parties or the general public.[1] Although confidentiality is not automatically guaranteed characteristic of International Commercial Arbitration (ICA), most scholars and practitioners agree that a presumption of confidentiality, whether implied or explicit, should exist through the arbitration process.[2] However, there is a mismatch between this presumption and practice, and the extent to which confidentiality applies is an issue far from settled.[3] This may be due to the fact that the New York Convention and the UNCITRAL Model Law on ICA adopted by many countries, don't contain any provision in this regard.[4] The situation varies among the countries and national legislations. New Zealand is the only country that has set a code off the duty of confidentiality in either domestic or international arbitration.[5] In contrast, many other countries don't include a confidentiality provision in their national legislations.[6] In the United States, the Federal Arbitration Act and the Uniform Arbitration Act adopted by most States do not enforce confidentiality requirements allowing the duty of confidentiality to be waived by parties' agreement and judicial consideration.[7] Whereas, France has recently settled the duty of confidentiality for domestic arbitration, but not for ICA unless an agreement between parties exist and confidentiality clause is expressly incorporated.[8]

[1] Garimella, S.R. (2016). Revisiting arbitration's confidentiality feature. In "*Harmonising Trade Law to Enable Private Sector Regional Development*". Eds. Muruga Perumal Ramaswamy and João Ribeiro with the collaboration of: Tony Angelo & Yves-Louis Sage. CLJP Hors Serie Vol. XX, 2016.

[2] Hofmeyr, C.D. (2017). Confidentiality of International Arbitral Proceedings: The Limits for State-Owned Entities. Dispute Resolution Alert 14 June 2017. https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2017/dispute/downloads/Dispute-Resolution-Alert-14-June-2017.pdf

[3] Brown, A. C. (2001). Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration. American University International Law Review, 16(4), pp. 969-1025.

[4] Meza-Salas, M. (2018). Confidentiality in International Commercial Arbitration: Truth or Fiction? Kluwer Arbitration Blog, 2018.

[5] Garimella, op.cit.

[6] Lee and Ko (2021). Confidentiality in International IP Arbitration | World Trademark Review.Www.worldtrademarkreview.com, 2021, www.worldtrademarkreview.com/confidentiality-in-international-ip-arbitration. Accessed 5 May 2021.

[7] Noussia, K. (2010). Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French Law (2010), pp. 22–23.

[8] French Code of Civil Procedure, Art. 1464(4).

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In Lebanon, the LCCP contains no provisions related to confidentiality of arbitral proceedings. However, in practice, arbitral proceedings are addressed confidentially as long as parties conform on specific confidentiality obligations.[1]

Additionally, most of institutional arbitral rules either do not explicitly protect confidentiality at all, or inadequately do so. In contrast, the London Court of International Arbitration Rules are an exception in this regard.[2]

Accordingly, parties aiming at meeting a provision for confidentiality, must include an explicit arbitral clause in their arbitration agreement.[3] This in turn, may present unique challenges and dilemmas in some arbitration cases where unlawful activities such as money laundering are committed.[4] In such cases, confidentiality hides the fact that the arbitration might be preferred by launderers aiming at abusing the process, evading the suspicion of law enforcement agencies and not parting a trace of incriminating evidence.[5] Confidentiality of the proceedings diminishes the chance for outside impartial inspection and jeopardizes the accessibility and transparency innate to international law and public policy. To this end, several procedural values, markedly the accessibility to disputants' written and oral submissions and public approachability to hearings and communications stand as key features of international law and public policy instruments.[6] In fact, the duty of confidentiality extends to all reports, orders, exhibits, expert correspondence, documents or software, partial, interim and final awards, etc…[7]. The principle of confidentiality

[1] Obeid, N. (2020), Global Arbitration Review - The Middle Eastern and African Arbitration Review https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2020/article/lebanon.
[2] Brown A. C., op. cit., p.1025.
[3] Brown A. C., op. cit., p.992.
[4] Khedmati, op.cit.
[5] Lee, and ko, op.cit.
[6] Noussia, op.cit, pp. 22–23.
[7] Arroyo, M. (2018). *Arbitration in Switzerland: The Practitioner's Guide*, Alphen Aan Den Rijn, Wolters Kluwer, 2018.

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agreed upon would enable launders to meet their goal and proceed without raising the suspicion of courts, thus, reaching the enforcement of the arbitral awards successfully.[1]

Nevertheless, if tribunals themselves suspect the presence of money laundering, they clash into principles of confidentiality and privacy of arbitration, if required. What are arbitrators supposed to do in such case? This question is addressed in Section II.1.2., B (p.21).

B. Finality and Enforceability of Arbitral Awards

Finality and enforceability are two main prerequisites of arbitral awards. While finality ensures the absolute ending of a dispute and determines the rights and obligations of disputants, extensive enforceability guarantees the execution of arbitral awards in national courts.

Arbitral awards are defined as "*decisions or determinations rendered by arbitrators or commissioners, or other private or extra-judicial deciders, upon a controversy submitted to them; also writings or documents embodying such decisions*".[2] They result in the relinquishment of the case from the hands of arbitrators.[3] They may be monetary or performance awards.[4] While the amount of money awarded, time and subject to payment must be specified in the first case, details and the time by which the award is to be performed must be specified in the second case.[5] Legislations of countries emphasize the elements of finality and enforceability of national and international arbitral awards and major trading countries have entered into many conventions to

[1] Hwang M. SC. and Chung, K. (2009). Defining the Indefinable: Practical Problems of Confidentiality in Arbitration. Journal of International Arbitration 26(5), pp. 609–645.
[2] Cremades, B.M. (2008). The arbitral award. In "*The Leading Arbitrators' Guide to International Arbitration – 2nd ed.*". pp.483-500. Eds. Lawrence W. Newman and Richard D. Hill. Kindle Edition.
[3] Hope, J., and Vinge, A. KB (2021). Global Arbitration Review - the Guide to Challenging and Enforcing Arbitration Awards ". 2nd ed., *Globalarbitrationreview.com*, 2021, globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/awards-form-content-effect. Accessed on 20 Oct. 2021.
[4] Mundi, Jus (2021). Jus Mundi: Wiki Notes for Investment Law and Arbitration. Jusmundi.com, 2021, jusmundi.com/en/document/wiki/en-elements-of-an-award. Accessed on 20 Oct. 2021.
[5] Chartered Institute of Arbitrators (2016). *Drafting Arbitral Awards Part, I — General. International Arbitration Practice Guideline*. guideline-10-drafting-arbitral-awards-part-i-general-2016.pdf.

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facilitate them.[1] Once domestic arbitral awards are rendered they shall be enforced on basis of the relevant national law (LCCP in the case of Lebanon), international arbitral awards on other hand, should be recognized and enforced by countries signatories to the New York Convention, unless they do not meet the requirements of arbitration agreements and procedures, or contradict public policies and mandatory rules of contracting states.[2,3]

In Lebanon, arbitral awards have to be delivered with respect to original agreements, otherwise according to LCCP Article 773 after 6 months from the date of the last arbitrator's acceptance of the arbitration mission. Arbitral awards have to be announced in confidentiality and given by unanimous decision or by a majority vote according to LCCP Article 788. They must be in writing, and shall include, according to LCCP Article 790: The name(s) of the arbitrator(s); Date and place of awards; Full names and denominations of the parties and their legal counsel; A summary of the parties' positions and relevant supportive documents; and Motives for the awards and the dispositive parts. Also, according to LCCP Article 791, arbitral awards have to contain the signature(s) of arbitrator(s). The LCCP states that the aforementioned Articles apply in international arbitrations also unless the parties have agreed otherwise.

As may be indicated, the nature of arbitral awards raises a number of concerns related to the potential abuse of the enforcement of arbitral awards domestically and internationally under the New York Convention to facilitate money laundering and other unlawful acts.[4] Actually, finality and enforceability can provide a highly appealing option to money launderers which can lead to

[1] Blackaby, N., Partasides, C., Redfern, A., Hunter, J.M. (2015). An Overview of International Arbitration. In "*Redfern and Hunter on International Arbitration*", Oxford University Press 2015.
[2] Mundi, op.cit.
[3] Chartered Institute of Arbitrators. Drafting Arbitral Awards Part I - General. International Arbitration Practice. 2016.
[4] Yaraslau K., and Davydenko. D. (2015). Consent Awards in International Arbitration: From Settlement to Enforcement. Brooklyn Journal of International Law, 40 (3), Article 3. https://brooklynworks.brooklaw.edu/bjil/vol40/iss3/3.

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serious consequences, particularly under the growing prevalence of arbitration agreements internationally and the potential risk of money laundering in international commercial and business contracts.[1]

Finality and enforceability have the same purpose and lead to the same result, they are usually inseparable and complementary. Enforcement of arbitral awards can't be achieved without finality, and finality has no value itself if it doesn't lead to the enforcement of awards. Despite this intimate relationship, finality and enforceability are not the same, they have different meanings. It's important to point briefly the meaning of each before turning to reveal how and why both features together integrally are abused and considered attractive to money launderers.

Bi. Finality

The finality of an arbitral award appears after its signing by the arbitrators, it implies that the judgment made by the arbitral tribunal on the substance of the dispute must be considered terminal, and shall not leave any prospect for re-questioning the issues related to arbitral tribunals, providing the principle of legal certainty. Finality ensures integrity, authority and irrefutability of arbitral awards. The country were the enforcement of an arbitral award is expected may accept the arbitral award as a whole or refuse to recognize its legal force completely based on some exceptional grounds not connected with the substance evaluation.[2]

There are both benefits and drawbacks to the absence of appellate review mechanisms.[3] Dispensing appellate reviews prevents re-litigation of issues already determined in arbitration

[1] Hwang and Lim, op.cit.
[2] Kurochkin, op. cit., p.122.
[3] Ten Cate, I.M. (2012). International arbitration and the Ends of Appellate Review, International Law and Politics, 44, pp. 1110-1114.

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reducing costs and delays.[1] On the other hand, denying the ability to appeal awards means that an odd, or incorrect arbitral award cannot be amended.[2] This can, most importantly, lead to the creation of a direct tension between the principle of finality of awards and public policy which covers a broader spectrum of state interests outreaching beyond the policy goals essential to the protection of award finality.[3] Today, judicial review of awards in most advanced countries is limited to issues of equality, fairness and public policy.[4]

In Lebanon, as previously discussed, two separate sets of rules apply to domestic arbitrations and international arbitrations. As a consequence, finality is also administrated by two separate sets of rules applied to the of arbitral awards. Article 799[5] LCCP states that domestic awards can be appealed unless other terms are agreed upon by the parties in the arbitration agreement. The opposite principle applies in absolute arbitration. As for international awards, they cannot be appealed before Lebanese courts. A party dissatisfied with the output of an international arbitration seated in Lebanon can only request the annulment of the award under the grounds set out in LCCP Article 817.[6]

[1] Platt, R. (2013). The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?. Journal of International Arbitration, 30 (5), pp. 531-560. kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/30.5/JOIA2013034. Accessed on 20 October 2021.
[2] Platt, op.cit., pp.531-560.
[3] Schmitthoff, C.M. (1987). Finality of Arbitral Awards and Judicial Review. In: *"Contemporary Problems in International Arbitration"*. Clive M. Schmitthoff. Springer, Dordrecht (Eds.). https://doi.org/10.1007/978-94-017-1156-2_21.
[4] Gelander, J.L. (1997). Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations. Marquette Law Review, 80 (2), Article 4, pp. 625-644. http://scholarship.law.marquette.edu/mulr/vol80/iss2/4.
[5] Art. 799, LCCP: *"The arbitral award can be appealed unless the litigants have dismissed this right in the arbitration agreement. The arbitral award issued by an absolute arbitrator can't be appealed unless the litigants have expressly reserved the right to file this appeal in the arbitration agreement, in this case the appeal court considers the case as an absolute arbitrator".*
[6] Obeid, op. cit.

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Bii. Enforceability

The ultimate test of any arbitration proceeding is its capacity to establish an award which, will be accepted and enforced in relevant national courts.[1] For decades, the enforceability prospect of arbitral awards has set considerable incentives to conform with arbitral awards voluntarily.[2] Enforceability is one of the well-recognized good returns of arbitration and the perceived certainty that the national courts of the New York Convention member states will impose an arbitral award unless one of the restricted grounds for refusal under Article V of the Convention is encountered.[3] Nevertheless, literature from recent years has reported that voluntary compliance with arbitral awards is no longer extreme. Parties which have lost in arbitral proceedings are progressively protecting their interests in enforcement proceedings.

Enforcement of awards is facilitated by the New York Convention.[4] A contracting state is obliged to recognize arbitration awards as binding and to enforce them in accordance with its procedural rules.[5] The Convention is 62 years old, yet it continues to form the bases for the foundation of international arbitration globally. Over 160 countries have ratified the Convention, including most of the prominent trading nations worldwide. Its reach is impressive since 1959 although not all state members have a worthy archiving of compliance with their obligations under the Convention. Up to October 2021, 169 countries became signatories to the convention with Belize being the last. Several important Middle Eastern countries have ratified it. These

[1] Martinez, R. (comment) (1990). Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: The "Refusal" Provisions. THE INTERNATIONAL LAWYER, VOL. 24, NO. 2

[2] Pursuant to QMUL International Arbitration Survey 2015, there was still a high degree of voluntary compliance with arbitral awards in 2008.

[3] The New York Arbitration Convention. https://www.newyorkconvention.org/

[4] Gaillard E., and Siino B. (2021). Enforcement under the New York Convention. https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/enforcement-under-the-new-york-convention

[5] Course On Dispute Settlement, Module 5.7- Recognition and Enforcement of Arbitral Awards: The New York Convention, United Nations Conference on Trade and Development, New York and Geneva, 2003, pp. 21-23.

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include Egypt (1959); Syria (1959); Lebanon (1998)[1]; Oman (1999); Iran (200); Qatar (2002); and The United Arab Emirates (2006).

Through the enforcement stage, the arbitral award must endure precise statutory conditions for it to be fruitfully enforced. Once an arbitral award has been issued, national courts may not in specific cases allow its enforcement. In Lebanon the annulment of domestic awards is only possible in cases listed in Article 800 LCCP[2]: "*The recourse against an arbitral award by annulment is not permissible except in the following cases:*

1. *The arbitral award was delivered without an arbitration agreement or on the ground of an agreement that was void or had expired;*
2. *The arbitral award was delivered by arbitrators not appointed according to law;*
3. *The arbitral award was delivered in exceeding the mission conferred upon the arbitrator or arbitrators;*
4. *The arbitral award was delivered without respecting the litigants' right of defense;*
5. *The arbitral award did not contain all the compulsory indications related to litigants' demands and supporting reasons and means, to the names of arbitrators, to the reasons, summing up and date of the award, and to signatures of arbitrators;*
6. *The arbitral award violated a rule related to public policy*".

In the case of international awards, Article 819 states that an award can be annulled according to one of the grounds specified in Article 817 LCCP which are:

1. *Where the award has been rendered without an arbitration agreement or on the basis of an agreement which is null or void due to the expiry of the relevant time limit for rendering the award;*

[1] Lebanon is a party to the New York Convention, which entered into force in Lebanon on 9 November 1998. Lebanon has made a reciprocity reservation under the Convention, declaring that it will apply the Convention on a reciprocal basis to the recognition and enforcement of awards made only in the territory of another contracting state.

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2. *Where the award has been rendered by arbitrators not appointed in accordance with the law;*
3. *Where the arbitrators ruled without complying with the mission conferred upon them;*
4. *Where the award has been delivered in violation of the rights of defense; and,*
5. *Where the award has violated a rule of international public policy.*

These conditions have been set in compliance with Article V of the New York Convention which reads[1]

"1. *Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) 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, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

[1] Course On Dispute Settlement, Module 5.7- Recognition and Enforcement of Arbitral Awards: The New York Convention, United Nations Conference on Trade and Development, New York and Geneva, 2003, pp. 29-34.

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2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

With the above concerns, while finality and enforceability are the general principles of arbitral awards and the ability of appellate and annulment are only exceptions, arbitration process raises concerns for potentially creating a suitable opportunity for money laundering and other criminal conducts in the context of contractual claims.[1] Launderers chase the fact that there is a high possibility that the court's supervisory powers in this respect are not very powerful and arbitral awards will most probably be enforced. They seek to obtain arbitral awards which are free from scrutiny to transfer illicit funds under the cover of legitimate decisions.[2] Creating a dispute and a process to satisfy the technicalities of New York Convention, launderers would circumvent the exact reason that result in the creation of the Convention, i.e. to give recognition to decisions made in arbitration, potentially harming the arbitration reputation as a preferable legitimate process.[3] The potential for a smooth abuse and misuse of such opportunities could negatively impact the success of the Convention and jeopardize the recognition of otherwise valid awards.[4] Despite the consensus that arbitration must not be misused for illegal purposes, the process may be abused and riddled with money laundering.[5] Courts may most probably enforce arbitral awards without being aware of the laundering purpose especially in two cases. The first case

[1] Betz,K., Bonifassi, S., Darwazeh, N., Pieth, M. (2019). Navigating Through Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators and Counsel. Journal of International Arbitration, 36 (6), pp. 671-678. https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/36.6/JOIA2019033.
[2] McDougall, op.cit., pp.1021-1054.
[3] Drličková, op.cit., pp. 227-234.
[4] Hwang and Lim, op.cit., pp.70-72.
[5] Nacimiento, Hertel and Gayer, op.cit.

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occurs when arbitrators can't themselves discover the criminal intent of the parties or one of them; and the second case when strict confidentiality is required for the arbitration process and there is a mutual agreement between the arbitrator and parties to launder money. In the latter case, it would be very difficult for a court to investigate and control what's taking place during arbitration occurring abroad under various complicated terms.[1]

Section I.2.2. Scenarios of Money Laundering Manifestation in Arbitration

There is a myriad of ways in which parties may import a money laundering dimension into arbitration taking different guises and scenarios in appearance before the tribunal. The identification of such cases can be very challenging especially if both dispute parties are involved and interested in concealing their criminal conduct.[2] In this context, allegations or suspicions of money laundering raise difficult legal and procedural issues at almost every stage of the arbitral process.[3] Unfortunately, money laundering may also occur during the arbitration with the involvement of arbitrators.

Although, a detailed narrative of all possibilities of intersection between money laundering and arbitration falls outside the scope of this thesis, a brief description of the main scenarios is below discussed.

A. Real Disputes Involving Money Laundering

In this first scenario, parties might be in a real dispute involving funds that are the proceeds of a crime. For example, a dispute might occur between parties over assets stemming from predicate

[1] Khedmati, op.cit.
[2] Drličková, op.cit., pp. 227-234.
[3] Betz, K. (2017). Proving Bribery, Fraud and Money Laundering in International Arbitration. In "*Proving Bribery, Fraud and Money Laundering in International Arbitration: On Applicable Criminal Law and Evidence*, Cambridge: Cambridge University Press, pp. I-Ii.

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offences and an arbitral award issued would impose the diversion of such assets for the benefit of one of the parties.[1] Obtaining convincing evidence of the illicit origin of the funds can potentially make a vast variance to the final resolution of the parties' dispute. Such evidence can have further implications at the enforcing stage of the arbitral awards which can be declared as null and void. These evidence should also impose several obligations on arbitrators that will be discussed in Chapter II.1.[2] A party might also seek to obtain certain legitimate assets through arbitration that is financed by illicit money, e.g. the security for costs is paid by laundered money.[3] The problem is that laws have not evolved yet to catch up with this emerging issue, and there is no requirement that the origin of funds should be disclosed, or obtained through due diligence.[4] Since many legal offshore companies are becoming engaged in money laundering, launderers wonder why not to drive their illicit money to fund arbitration, or litigation as well. They either pay arbitrators their costs in advance, making them happy not to examine their source, or they could create companies that look like legitimate businesses, to lend out arbitral institutions money to support their financial needs.

Despite the considerable efforts made by AML institutions and regulatory authorities around the world to combat money laundering, this organized crime continues to expand and become more complicated.[5] Innovative money launderers are continually watchful and in search for novel and safe approaches of cleaning their proceeds of crime.[6] Money launderers have become extremely daring to penetrate and take control over many public and private sectors, including arbitration

[1] Drličková, op.cit., pp. 227-234.
[2] Ashford, P. (2-14). *Handbook on International Commercial Arbitration*, 2nd ed., JurisNet, 2014, p. 159.
[3] Nacimiento, Hertel and Gayer, op. cit.
[4] Minaeva, T. (2006). The place of arbitrators in combating money laundering**.** Originally from: Stockholm International Arbitration Review. https://arbitrationlaw.com/library/place-arbitrators-combating-money-laundering-siar-2006-1
[5] Khedmati, op.cit.
https://news.law.fordham.edu/jcfl/2021/04/21/financial-crimes-and-commercial-arbitration-what-should-arbitrators-do/
[6] Rijock, K. (2015). Analysis and Commentary on Money Laundering, Terrorist Financing and Financial Crime. Kenneth Rijock's Financial Crime Blog, 2015.

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itself leading to proliferation of erroneous arbitration practices and undermining the effectiveness and integrity of the arbitral process.

B. Sham Arbitration

In this scenario, the whole arbitration process is fabricated in order to launder money.[1] Parties simulate a "fake" dispute in order to get a domestic enforceable arbitral award, presenting an apparently legitimate title for transferring illicit funds. Both parties are aware that the funds are of illicit origin and arbitrators are used as instruments to legitimize illegal activities.[2,3] This scenario can be potentially identified when an arbitral tribunal suspects the illegitimacy of the presented dispute or the supposed transaction underlying that dispute.[4] This scenario was explicitly indicated by Vladimir Khvalei, head of Baker & McKenzie's CIS dispute resolution group in Moscow, who stated that "*Some arbitration courts are used in criminal schemes for raider attacks, launder money and to legitimize debts in bankruptcy proceedings*".[5] Parties concerned utilize privacy and confidentiality being principle features of arbitration to cover up their laundering act eliminating any possibility of unveiling the existence of sham arbitration.[6] They also abuse the finality and enforceability of awards and chase vulnerabilities of credit and legal systems to seek benefits brought by unfair awards. Objectively noting, the arbitration tribunal tends to make an erroneous award based on false statement of facts. In this scenario disputants hide information, fabricate dispute settings, falsify evidence, and create legal dispute

[1] Jones, T. (2019). Arbitrators convicted in Egypt over "sham" award. Global Arbitration Review. https://globalarbitrationreview.com/arbitrators-convicted-in-egypt-over-sham-award
[2] Wirth, M., Rouvinez, C., and Knoll, J. (2011). Search for Truth in Arbitration: Is Finding the Truth What Dispute Resolution is About?, ASA special series, No. 35, JurisNet, 2011, p.115.
[3] Pieth, M. and Betz, K. (2019). Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators. AC Competence Centre Arbitration and Crime, Basel Institute on Governance, 2019, p.19.
[4] McDougall, op. cit., pp.1023-1024.
[5] Moore, T. (2013). Crime and punishment for Russian arbitrators. Commercial Dispute Resolution, 2013. https://iclg.com/cdr/litigation/crime-and-punishment-for-russian-arbitrators.
[6] Nacimiento, Hertel and Gayer, op.cit.

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framework leading to erroneous award that facilitates money laundering.[1] Consequently, sham arbitration compromises the credibility of arbitration and impairs the legitimate rights and interests of public and third parties.

The following case can provide useful insight on the scenario with a brief description of the fictitious framework that was created by disputants to serve the purpose of money laundering and tax evasion while achieving pure economic gain.

On 7 July 2010, a Russian court, Federal Arbitrazh, Tomsak Obslat, denied the enforcement of an ICC award, finding that the dispute was sham.[2] The case started as two subsidiaries of the same company entered into three loan agreements, Tomskneft (OAO and Tomskneft VKN), received monetary amounts from Yukos Capital (S.A.R.L) on 24 April 2004, 27 July 2004 and 24 August 2004. On 2 November 2005, the parties modified the original choice-of-jurisdiction clause and chose the ICC to settle disputes arising between the two companies. Yukos Capital started ICC arbitration in Paris against Tomskneft and its controlling company (ZAO Yukos EP) which participated in the arbitration without Tomskneft. On 12 February 2007, an ICC sole arbitrator rendered an arbitral award in favor of Yukos Capital, it ordered Tomskneft to pay US$ 275, 225,84 to Yukos Company. The latter started the enforcement proceedings in the Russian Federation. The Federal Arbitrazh rejected the enforcement because the Russian defendant did not get part of the correspondence concerning the arbitration, specifically, the notification of the arbitration hearing, and because disputants were both Yukos Group companies and entirely managed by the same company. Thus, a modest transfer of funds would have served to repay the

[1] Karsten, K. (2002). Money Laundering: How It Works and Why You Should Be Concerned, in ICC PAPERS, 22 Annual Mtg., 2002, p.19.

[2] Russian Federation NO. 000. Federal Arbitrazh Court, Tomsk Oblast, 7 July 2010, Case No. A67- 1438/2010. Parties: Petitioner: Yukos Capital S.A.R.L. (Luxemburg) Respondent: OAO Tomskneft VNK (Russian Federation).

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loans at issue without resorting to arbitration. The arbitration was identified as sham and to be part of an illegal scheme set up by the Yukos group to evade tax liabilities and expropriation by the Russian government and to transfer the illicit money attained from tax evasion (predicate offence) to another company under the framework of an ICC arbitral award.[1]

With respect to the arbitrators' involvement in money laundering tainted scenarios, arbitrators may potentially be involved (frequently in ad hoc arbitration). In this scenario, there could be a mutual agreement prior to the arbitration between the arbitrator(s) and one of the disputants or both. The arbitrator (s) and one of the disputants or both in such a case know that the whole process of arbitration is to launder money or cover laundering and agree on proceeding. The arbitrator agrees on doing so in return to promise benefits. The arbitrator may also have a doubt of the presence of money laundering or may obtain reliable knowledge that the parties are conducting the proceedings with the intention of furthering money laundering and decides to overlook the issue. In the latter case, the arbitrator may become an unwilling participant in money laundering and consequently potentially liable.[2] In order to avoid such risk, an arbitrator must act appropriately when confronted with different forms of illegality, particularly, money laundering. This issue was debated following the turning point arbitral decision in 1963 of Judge Lagergren in ICC Case No. 1110.96 presenting an analogy case of a claim of corruption. Challenged with allegations and proofs that the dispute contract between a British company and an Argentine intermediary was associated with bribing Argentine public officials. Judge Lagergren, being as the sole arbitrator of the case, declared the decision that he did not have the

[1] Decision of the Commercial Court of Tomsk, Reported by S. Perry in Global Arbitration Review, article of 9 August 2010.
[2] Nacimiento, Hertel and Gayer, op. cit.

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jurisdiction to decide the merits of the case.[1] He stated that in such contract, disputants "*have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunal) in settling their disputes*."[2] For a few decades, this decision supported the position that illegality tainted cases, are not arbitrable. Nevertheless, recent views seem to have changed, because such refusal of jurisdiction offered deceitful disputants with a worthy opportunity of delay tactics by merely alleging illegalities of corruption, bribery and money laundering also.[3] For example, in 1993, the Swiss Federal Tribunal denied the Lagergren approach to jurisdiction and held that the arbitral tribunal had the jurisdiction to decide whether acts of corruption had in fact occurred in Nat'l Power Corp. v. Westinghouse case. Upon a thorough examination of evidence records, the Swiss Federal Tribunal dismissed the corruption allegations brought against the arbitral award. Additionally, the High Court of England and Wales took a similar decision in 1998 with the ICC award of case Westacre Investments Inc. v. Jugoimport SPDR Holding Co. Ltd., as to the claim of Jugoimport that the agreement contemplated bribery. In enforcing the award, the High Court of England and Wales specified that: *"It is necessary to consider both on the one hand the desirability of giving effect to the public policy against enforcement of corrupt transactions and on the other hand the public policy of sustaining international arbitration agreements. One consequence of the arbitrators being accorded jurisdiction might be that they gave effect to a contract which on the face of the award was held to involve the payment of bribes. It would then be a matter for consideration at the enforcement stage whether, although the arbitrators had jurisdiction to determine the issue, the award should*

[1] ICC Case No. 1110, Award, reprinted in J. Gillis Wetter, Issues of Corruption Before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case. No. 1110, Arbitration international, pp. 277-291, 1994.

[2] Schuch, Y. (2019). Tackling corruption in international arbitration – Key issues and challenges. Young Arbitration Review, pp. 53-58.

[3] Uluc, I. (2016). Corruption in International Arbitration. SJD Dissertations. Paper 1. https://elibrary.law.psu.edu/sjd/1

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be enforced because they had exceeded their jurisdiction in giving effect to an illegal contract or had misconducted themselves or because enforcement would be contrary to public policy. . .. Insofar as it involves determination of questions of fact, that is an everyday feature of international arbitration .... If much weight were to be attached to that consideration it is difficult to see that arbitrators would ever be accorded jurisdiction to determine issues of illegality."

In view of the above, it now seems agreeable that arbitrators have jurisdiction over disputes relating allegations or evidence of corruption or with money laundering.[1] Indeed, some authors believe, that based on the reasonable analogy with corruption and in the absence of compelling reasons why this should not also be the case for money laundering, arbitral tribunals should not decline jurisdiction simply because of allegations or evidence of money laundering, but they have a crucial role to play despite the delegation of their obligations and the current absence of detailed codes. This will all be discussed in the upcoming Part.

To summarize Part I of the present study, the recent spectacular expansion of international arbitration has increased the susceptibility of the process to be infiltrated by criminal matters such as money laundering which present a very serious risk. Despite the fact that arbitration and money laundering are two wide apart processes, money laundering has found its way to abuse arbitration as a channel to legitimize illicit funds. Privacy, confidentiality of arbitration along with the finality and enforceability of arbitral awards have attracted launderers. Main scenarios of the manifestation of money laundering in arbitration typically include real disputes involving

[1] McDougall, op.cit., pp.1021-1054.

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funds of money laundering and sham arbitration. These may occur with or without the potential involvement of arbitrators. Various conflicts of interest arise when criminal matters, mainly money laundering enter the arbitral proceedings. General interests of fighting this phenomenon, combined with the fact that it is highly challenging to prove, oblige arbitrators to play a crucial role in this battle despite the delegation of arbitrator's obligations and the current absence of detailed codes. Part (II) will set the steps and obligations arbitrators must follow when faced with any form of criminality, particularly money laundering, it will also indicate risks they face when they fail to act upon their obligations.

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Part II. The Battle of Arbitrators against Money Laundering

With the increasing confrontation of arbitrators to criminal offences in their arbitral cases, major global concerns are accordingly rising to consider what actually constitutes the role of arbitrators. Unlike several other transnational crimes, the tools and instruments relevant to how tribunals should deal with issues of money laundering are still absent. In 1963, Judge Lagergren issued an award in ICC Case No.1110 by which he declared himself incompetent to rule in arbitration where issues of corruption and illegality had been raised.[1] This has shed light on the factual and legal issues that arbitrators face with the occurrence of criminal offences. Since then the practice and jurisprudence have taken a very different path towards imposing several duties and obligations on arbitrators when confronted with such issues.[2] It has also become critical that arbitrators are aware and well informed of applicable AML laws that may bite on them. A mistake or negligence in the tribunal's performance can make an enormous difference to the final resolution of party disputes. Any failure to act in accordance with AML legislations may jeopardize the whole process and expose the tribunal to risks.[3]

The role of arbitrators is to deal with a particular commercial transaction or investment relevant to the case of dispute and not to decide on a possible criminal conduct of disputants. However, arbitrators have to deal with issues of illegality for the purposes of arbitration, not for the purposes of conviction.[4] The challenges this presents for arbitrators are significant and of a high sense of urgency in today's globalized world. It is currently globally agreed that money

[1] ICC Case No. 1110, Argentine engineer v. British Company, Award, 1963 in Albert Jan van den Berg (ed.), Yearbook of Commercial Arbitration, Vol. XXI, Kluwer Law International 1996, pp. 47–53.
[2] The Club des Juristes (2017). The Arbitrator's Liability. pp. 14-15. DOI. https://www.leclubdesjuristes.com/wp-content/uploads/2017/06/CDJ_Rapports_Responsabilité-de-l¹arbitre_Juin-2017_UK_web.pdf
[3] Uluc, op.cit., p.1.
[4] Hedberg, op.cit., p.71.

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laundering is a serious international crime, and that international arbitration ought not to or overlook it. However, as arbitrators have limited powers and mandate, the implementation of these principles in the real practice is highly challenging. While arbitrators have to respond to initial queries relevant to their obligations to address any suspension of money laundering, the risks they face are highly serious.

This Part of the thesis aims at analyzing these queries. Chapter II.1 focuses on obligations of arbitrators when confronted with issues of illegality, particularly money laundering and Chapter II.2 addresses the risks arbitrators face if they fail to meet their obligations or when they are involved in money laundering.

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Chapter II.1. Arbitrators' Obligations in Money Laundering Tainted Cases

Despite the remarkable success of arbitration, no universally recognized set of standards governing arbitrator conduct exist.[1] This is possibly due to the private and autonomous principles of arbitration. However, there are sets of ethical and legal duties arising from different sources, e.g., legislations, conventions or institutional rules to guide the professional practice of arbitrators. These duties are rooted to the rights of parties, contract terms, conduct rules of arbitration institutions, courts or the governing national or international public policy.[2] These standards include the duty to maintain the principle of privacy, the duty to disclose conflicts of interest,[3] the duty to address cases of dispute with competence and diligence[4], the duty of impartiality and fairness.[5] As a universally binding body of criminal law doesn't exist, the question of what an arbitrator should do when faced with money laundering instances. Arbitrators face conflicting issues as they have legal and ethical duties towards parties within the context of the arbitration agreement, and other duties stemming from public policy concerns in addressing criminal activities.[6]

When arbitrators are confronted with money laundering, several essential aspects need to be considered.[7] The aspects are related to i) whether the case is arbitrable or not, ii) whether there is satisfactory evidence of a relationship between the contract and money laundering; and ii) the consequences of the presence of money laundering.[8]

[1] Weston, M.A. (2004). Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration, Minnesota Law Review, 2004, p. 458.
[2] Ibid., p.206.
[3] Menkel-Meadow, C. (2002). Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not. University of Miami Law Review, 56, (4), p. 949.
[4] Ibid.
[5] Ibid.
[6] Hedberg, op.cit., p.8.
[7] Hedberg, op.cit., p.17.
[8] Khedmati, op.cit.

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Nevertheless, despite the growing agreement towards the valuable role arbitrators can play in combating money laundering, there has been an extensive debate as to whether AML regulations or directives apply to arbitrators when they suspect money laundering or when it's alleged by parties. Consequently, a global divergence among arbitrators has emerged; whether to avoid or to delve into the complexity of relevant factual and legal issues and take an active role in tackling such illegality.[1] The subjectivity of the choice of either options relies on the schools of thought stemming from the theories of arbitration. Generally speaking, four different theories have been considered by various commentaries;[2] The Jurisdictional Theory: The Contractual Theory; The Hybrid Theory (or the mixed theory) and The Autonomous Theory. These theories define the mechanism of arbitration and the kind of relationship that should exist between arbitration and national courts as well as the nature and scope of the arbitrator's power and their relationship with disputants.[3]

Accordingly, one school of thought considers arbitrators, unlike judges in national courts, are servants of disputants who are obliged to exercise the authority conferred to them by disputants and by relevant applicable laws. Under this framework, arbitrators should demonstrate party autonomy focusing on the sole task of meeting contractual duties and tackling aspects specified by the parties only. Thus, this school of thought seems not to consider addressing money laundering as a key element of the entire scope of the arbitral process.[4] In line with this view, Alexis Mourre, President of the ICC International Court of Arbitration, states:

[1] Khedmati, op.cit.
[2] Yu, H. (2008). A theoretical overview of the foundations of international commercial arbitration. Contemporary Asia Arbitration Journal, 1 (2), pp. 255-286. http://www.law.ntu.edu.tw/center/wto/NewsDetail.asp?tb_index=97
[3] Ibid.
[4] Uluc, op.cit., pp. 245-250.

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"Although there is no doubt that arbitrators should be sensitive to states' legitimate interests, they should not turn themselves into investigators, policemen or prosecutors. As opposed to the state judges, the primary role of an arbitrator is to enforce the contract, and not to defend public policy. It is submitted, as a consequence, that an arbitrator has no duty to investigate possible breaches of criminal law of which there is no evidence at all and which were not raised by the parties in their submissions."[1]

Further, Gary Born, one of the world's prominent authorities on international commercial arbitration and the leading arbitration practitioner in London, considers:

".....the tribunal should not proceed as a sort of private attorney general or investigating magistrate to seek out evidence of wrong-doing, detached from the arbitrators' original mandate."[2]

Thus, this school of thought supports restricting the arbitrator role to the duties stated by parties and intensely depresses any *sua sponte* (of one's own will) investigation by the tribunal beyond this duty context.

In contrast, the complete opposite view falls in the second school of thought that supports arbitrators to serve, not only the parties of disputes, but also the international rule of law. Lord Neuberger, the President of the U.K. Supreme Court, considers that:

"*Any increase in freedom or power carries a concomitant increase in responsibility, and an increase in arbitral powers must be accompanied by an increased responsibility to observe fundamental rights*."[3]

[1] Mourre, A. (2009). Part II Subtantive Rules on Arbitrability, Chapter 11 – Arbitration and Criminal Law: Jurisdiction, Arbitrability and Duties of the Arbitral Tribunal. In "*Arbitrability: International and Comparative Perspectives*". Loukas Mistelis and Stavros L. Brekoulakis (Eds.) , pp. 207-229.
[2] Born, G.B. (2014). *International Commercial Arbitration*, 2nd ed., Vol. 2 International Arbitration Procedures. Publisher: Kluwer Law International, p. 1626.
[3] Neuberger, D. (205). Keynote Speech: Arbitration and Rule of Law. Asian Dispute Review, 17 (4), pp. 180 – 191.

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Likewise, Born maintains that:

"…insofar as arbitrators are requested to make a binding arbitral award through an adjudicative process, either awarding monetary sums or declaratory relief, it is a vital precondition to the fulfillment of this mandate that they consider and decide claims that contractual agreements are invalid, unlawful, or otherwise contrary to public policy."[1]

With the vastly escalating arbitration for investment and commercial disputes in the world of international business and communication technology, there is a urgent necessity to maintain the integrity of arbitral process, and yet to enforce presumptive obligations and make compliance with the rule of law, public policy, ethics and social justice mandatory.

In view of the modern trend of arbitration, arbitrators are becoming more obliged than ever to develop integrated tactics based on the principles of two schools of thoughts described above while safeguarding of the rights of disputants and public policy.[2] Arbitrators need to create a balance of the obligations stemming from the contract between dispute parties, their legal and ethical duties, and principles of public policy.[3] This approach may be viewed as the finest tactics, however, it doesn't represent a clear cut response to the relevant AML conventions, laws and arbitral rules. Thus, arbitral tribunals would need to follow a competent and watchful strategy based on the principles of party autonomy and *non ultra petita* "not beyond the request" to reach an enforceable award.[4] Such strategy clearly would reveal the readiness of arbitrators to join efforts against money laundering highlighting the importance of their role in this battle. It is highly significant, however that arbitrators have a strong and careful grasp of how to address cases tainted with money laundering. The issue may deceptively appear straightforward and

[1] Born, op.cit., p.2183.
[2] Uluc, op.cit., p.251.
[3] Khedmati, op.cit.
[4] Khedmati, op.cit.

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simple, but practice shows a high extent of complexity of legal questions and serious risks the issue may provoke.

This Chapter focuses on discussing the fundamental questions that arise before an arbitrator tribunal relating to their obligations when encountering money laundering tainted cases. The Chapter also proposes feasible theoretical and practical tactics to some of the existing debates and challenges on the issue.

Section II.1.1. Preliminary Obligations of Arbitrators

As previously stated, when confronted with money laundering suspicions or allegations, arbitral tribunals must determine whether or not they have jurisdiction, i.e., whether there is sufficient linking between the contract and a criminal conduct, thus several investigatory duties may need to be conducted. They need to practice best performance to ensure the eligibility and enforceability of awards while protecting the integrity of the arbitration process and public policy interests. This Section addresses the preliminary obligations imposed on the arbitral tribunal and on the factual and legal issues encountered by it in a manner which is most likely to occur during the course of the arbitration.

A. Responding to Allegations of Money Laundering or Raising them Sua Sponte

When money laundering is alleged by a party in objection to the enforcement of a contract in dispute, it is indisputable that arbitrators are obliged to examine allegations as arbitrators need to rule upon the presence and consequences of money laundering to resolve the dispute in hand. With respect to scenarios above presented when money laundering may arise in real disputes or

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sham cases,[1] it is, however, not clear whether a tribunal should address the issue of money laundering *Sua Sponte* and rule upon their consequences. In such scenarios, facts on records may trigger the suspicion of tribunals that money laundering may be involved, while neither party alleges money laundering. In such cases, the investigative role of arbitrators is not directly addressed in most arbitration laws and rules. For example, ICC Rules, the UNCITRAL Arbitration Rules are silent on the issue.[2] On the contrary, the London Court of International Arbitration (LCIA) rules follow the English Arbitration Act 1996 in explicitly stating that the tribunal may perform inquiries on issues of law after offering the parties the occasion to respond:

"*The Arbitral Tribunal shall have the power … to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute."*[3]

Article V(1)(c) of New York Convention notes that an arbitral award may be challenged on the basis that the tribunal has "*deal[t] with a dispute not contemplated by or not falling within the terms of the submission to arbitration*".

Despite such note, no clear indication reveals that addressing money laundering *sua sponte* violates such provision. Moreover, Article V (2) of the same convention stipulates that:

"*Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that… the recognition or enforcement of the award would be contrary to the public policy of that country".*

[1] Toolkit for Arbitrators, op.cit., p.19.
[2] Hwang and Lim, op.cit., p.10.
[3] LCIA Arbitration Rules, Art. 22.1(iii).

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Thus, courts may be curious to conduct certain enquiries to confirm the presence of money laundering. They may also challenge tribunal awards based on public policy grounds and may further impose liabilities on arbitrators. Aiming to avoid such complications, tribunals should be certainly obliged to address issues of law *Sua Sponte* as long as the matters identified or the proofs found and dependent upon in the awards are connected to the resolution of the dispute in hand. Tribunals are also obliged to notify the parties of any additional issues of the law intended to be addressed to allow parties the chance to respond.[1]

The aforementioned mentioned discussion is essentially in full alignment with the conclusion of the International Law Association (ILA):

"*In disputes implicating rules of public policy or other rules from which the parties may not derogate, arbitrators may be justified in taking measures appropriate to determine the applicability and contents of such rules, including by making independent research, raising with the parties new issues (whether legal or factual), and giving appropriate instructions or ordering appropriate measures in so far as they consider this necessary to abide by those rules or to protect against challenges to the award*."[2]

Prominent commentators are also in accord with this view. Born notes that:

"—[*A]n arbitral tribunal does not exceed its authority... [merely] by relying on arguments or authorities not raised by the parties to support their claims. Doubts about the scope of the parties' submissions are resolved in most legal systems in favor of encompassing matters decided by the arbitrators"*.[3]

[1] Baizeau, D. and Hayes, T. (2017). The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte. In "*International Arbitration and the Rule of Law: Contribution and Conformity*". Andrea Menaker (ed), ICCA Congress Series, Vol. 19 (© Kluwer Law International; Kluwer Law International 2017), pp. 225 – 265.
[2] ILA, "Final Report: Ascertaining the Contents of the Applicable Law", p. 23 (Recommendations 6, 13); ILA Resolution No. 6/2008 from the Biennial Conference in Rio de Janeiro, August 2008, "Ascertaining the Contents of the Applicable Law in International Commercial Arbitration," Annex: International Law Association Recommendations on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration (Recommendations 6, 13).
[3] Born, op.cit., pp. 2608-2609.

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As money laundering dealings by one or both parties can risk the enforceability of claims submitted to the tribunal, and are therefore connected to the resolution of the dispute between the parties, it is rational to believe that pursuing of issues of money laundering lays well within the tribunal's obligations, and even if neither party brings up money laundering as a defense against the tribunal, it shall address money laundering *Sua Sponte*. However, it is crucial that tribunals should only rise the issue of money laundering where there is adequate *prima facie* evidence (enough evidence) or red flags of the offence, and not "…… *every suspicious element in the execution or performance of the contract should set the tribunal off on an inquisitorial exercise of its own irrespective of the wishes of the parties*".[1]

Rather, it may be justified for a tribunal to ask for an explanation from a party if there is only a slight indication of money laundering. It should be relatively smooth for a party to obtain evidence and clear itself as innocent in the case of laundering absence. The tactic tribunals are advised to adopt is to follow considerate and discreet approaches to address any likelihood of money laundering, at minimal cost to the competent course of proceedings. Ultimately, functional and flexible approach that puts the need for effective proceedings in balance with tribunals' duties to protect justice is required.[2]

B. Establishing Evidence and Facts of Disputes

In the case money laundering is suspected by the arbitrator *Sua Sponte*, or when it is alleged by a party, the tribunal must identify a proper approach to address this sensitive issue. Such task may not be smoothly performed especially if both parties object to the suspicion of the arbitrator.

[1] Cremates, B. and Cairns, D. (2003). Transnational Public Policy in International Arbitral Decision Making: The Cases of Bribery, Money Laundering and Fraud. In Kristine Karsten and Andrew Berkeley, "*Arbitration, Money Laundering, Corruption and Fraud, Dossiers*". ICC Institute of World Business Law (September 2003), p. 81.
[2] Uluc, op.cit., p.269.

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Article 20 of the ICC arbitration rules states that the tribunal shall proceed to establish the facts of the case by "*all appropriate means*".[1]

If money laundering allegations are absent, arbitrators base their decisions on facts and evidence provided by the parties without reference to rules of evidence. Therefore, the burden of proof and standard of proof are not debated in such case.[2] On the contrary, when allegations of money laundering exist, arbitrators should pursue by identifying the rules that govern and conceive the burden and standard of proof.

In principle, parties have the freedom to agree on applicable arbitration laws and on rules of evidence. If this is not achieved in the main or subsequent arbitral agreement, the task is passed to the discretion of arbitrators. In this case, different views concerning the law applicable to determine the burden and standard of proof related to proving money laundering are expressed by commentators belonging to various jurisdictions. Some believe that such issues shall be ruled by the applicable substantive law as they affect the claim of the parties directly.[3] Others argue that the burden and standard of proof should be identified based on procedural law.[4] A third approach perceived as flexible and satisfying in most situations prefers customizing rules that adhere to the governing law. In the latter option, evaluation of evidence and facts are performed based on the rules autonomously identified and modulated by tribunals.[5]

[1] The Chamber of Arbitration of Milan Rules: A Commentary 546, Ugo Draetta & Riccardo Luzzatto eds., 2012.
[2] Uluc, op.cit., p.160.
[3] Waincymer, J. (2012). Book Review: Procedure and Evidence in International Arbitration (Alphen aan en Rijn: Wolters Kluwer, 2012). Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, 82 (4), pp. 474-475.
[4] Hedberg, op.cit., p.52.
[5] Wilske, S., and Fox, T. J. (2013). Corruption in International Arbitration and Problems with Standard of Proof: Baseless Allegations or Prima Facie Evidence? Transnational Dispute Management, 10 (3), p. 495. www.transnational-dispute-management.com/article.asp?key=1950. Accessed on 25 Oct. 2021.

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According to scholars 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*".[1]

Bi. Burden of Proof

The "Burden of Proof" is the obligation which rests on a party claiming a particular issue in a civil or criminal case to demonstrate that it is valid or invalid based on facts and evidence presented.[2] The burden of proof being a key stage of arbitral proceedings has not received enough attention particularly in the context of international commercial arbitration. Despite the complexity of this issue, limited rules exist to govern it. Among them is the 2013 UNCITRAL Arbitration Rules that provide that each party shall have the burden of proving the facts required to support its claim or defense.[3] Such rule is of extreme importance in order to prohibit parties from making false allegations and accusations, it serves justice and due process.[4] In fact, it was considered a general principle of international law by the tribunal in the investment treaty arbitration case Metal Tech v. Uzbekistan.[5]

In this context, scholarly attention on matters connecting to the burden of proof in cases of illegalities and allegations of corruption, bribery and money laundering in international arbitration has recently grown. This is chiefly significant in the case of money laundering due to sophisticated approaches and great ingenuity used by launders to mask their activities. Various

[1] Ibid.
[2] Allen, C. (2008). *Practical Guide to Evidence, 4th ed.,, Rouledge and Cavendish, London and New York*, 2008, p.151.
[3] General Assembly Resolution 68/109, art. 27.
[4] Waincymer, op.cit., p. 761.
[5] Metal-Tech Ltd. v. Republic of Uzbekistan, ISCID Case No. ARB/10/3 of 4 October 2013.

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arbitral tribunals have expressed this view describing money laundering as "notoriously difficult" to prove.[1]

Some tribunals and commentators have shown that the burden to produce evidence may shift to the allegedly opposing party by requesting this party to disprove its involvement in money laundering dealings under certain circumstances when *prima facie* (reasonable) clues of money laundering exist.[2]

In the ICC Case No. 6497 concerned with corruption, the arbitral tribunal found 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 provide 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 amendment in the burden of proof is only to be conducted in special circumstances and for very good reasons.[3]

On the contrary, an opposing position to shifting the burden of proof was held by the tribunal of Rompetrol v. Romania case as it was "*not enamored 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*".[4] Another case is that of Valerie Belokon v. The Kyrgyz Republic in 2014 where the tribunal raised a similar attitude and explicitly presented it as: "*money laundering is a serious problem. Any adjudicator encountering allegations of money laundering must examine the*

[1] Hedberg, op.cit., p.1.
[2] Rose, op.cit., p. 216.
[3] ICC Case No. 6497, Consultant v. Contractor, in Albert Jan van den Berg (ed.), Yearbook of Commercial Arbitration, Vol. XXIV, Kluwer Law International, p.72.
[4] Rompetrol Group N.V v. Romania, award in ICSID Case No. ARB/06/3 of 6 May 2013.

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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." [1]

Actually, the shifting of the burden has also been criticized by many commentators on the ground that it represents a major intervention in the principle of due process, which is respected by New York Convention, the Model Law and the domestic statutes of most jurisdictions.[2] On the other hand, such approach would carry an enormous pressure on that party if the proof required may not be most certainly available. In line with this, it is proposed that money laundering must be proved by the party making the relevant assertion. Such a position not only supports the arbitrators in their decisions on the dispute, but also diminishes the risk of the award being taken as unenforceable under the New York Convention while safeguarding the integrity of arbitration process.

Bii. Standard of Proof

The standard of proof is concerned with level of evidence required to meet the burden of proof.[3] In the early stages of arbitration, the arbitral tribunal should make sure that the parties are well informed of the standard of proof that applies to each claim. If the party required to present the burden of proof is not able to establish a fact under the applicable standard of proof, the allegation will be considered unproven. It falls within the mandate of the arbitrator to evaluate and weigh the proof presented in the dispute. Unfortunately, international arbitration conventions, national arbitration laws, arbitration institutions' rules and decisions of arbitral tribunals are all deprived of the general rules or principles related to the standard of proof.

[1] Valerie Belokon v. The Kyrgyz Republic, UNCITRAL, Award of 24 October 2014.
[2] Hedberg, op.cit., p.60.
[3] Hobér, K. (2021). International Commercial Arbitration in Sweden. Oxford, Oxford University Press, 2021, p. 239.

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The gravity of illegalities analogues to money laundering such as corruption allegations has obliged tribunals in certain cases to request "*clear and convincing evidence*" of corruption or "*beyond reasonable doubt evidence*".[1] These standards dictate the presence of conclusive and final evidence that lead to a strong belief that the defendant is guilty.[2] Other tribunals have practiced the ordinary balance of probabilities standard, without openly requiring more convincing evidence for allegations of corruption or money laundering. This standard requires demonstrating that a contested fact is more likely true than not true.[3] In *Union Fenosa v. Egypt,* for example, the tribunal explained, that there was no reason to elevate the standard as "*this is not a criminal proceeding*".[4] Such decisions, however, represent a minority. Nevertheless, other commentators believe that it is more appropriate to apply the European Continental tradition of "*inner conviction*" to avoid the risks associated with both the higher and lower standards of proof.[5] According to this practice, the threshold standard is whether submitted evidence is satisfactory enough to convince the judge or arbitrator of the presence of a fact.[6]

Actually, when suspicion of money laundering entails further inquiry, there is no unified application of standard of proof and it is not clear what standard of proof arbitral tribunals should practice. Rather, arbitral tribunals have different available options leading them to apply various standards of proof. The levels applied generally reveal legal and educational background of

[1] Schwartz, D. and Seaman,C. (2013). Standards of Proof in Civil Litigation: An Experiment from Patent Law. Harvard Journal of Law and Technology 26 (2), p. 437.
[2] U.S. Supreme Court, Jackson v. Virginia, 443 U.S. 307, 1979.
[3] Born, op.cit., p. 2313.
[4] Unión Fenosa Gas, S.A. v. Arab Republic of Egypt ICSID Case No. ARB/14/4, 2014.
[5] Hedberg, op.cit., pp. 62,63.
[6] Uluc, op.cit., p. 186.

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tribunals and their professional experience, applicable law, along with the specific circumstances of the case at hand.[1] But what evidence is admissible?

Biii. Admissible Evidence

Due to the limited investigatory powers of tribunals to collect evidence, it is very rare that direct proof of money laundering is available.[2] Practically, such direct evidence is not easy to reach and evidence obtained is expected to be minimal and circumstantial.[3] Thus, indirect evidence i.e. red flags, inferences and circumstantial evidence proofing a very high probability of money laundering should be satisfactory enough.[4] This tactic would indeed allow arbitrators to play an influential role in their fight against money laundering and it offers parties a better chance to substantiate their money laundering allegations. Furthermore, with the implementation of this tactic, the tribunals strengthen the legitimacy of the award and the steps followed in reaching the award while minimizing the chance of judicial intervention.[5]

a. Circumstantial evidence

A distinct difference is made between direct evidence and circumstantial evidence. Direct evidence proves a fact which is not certain. Whereas, circumstantial evidence proves a certain circumstance linked to a fact, but doesn't prove the fact itself. The latter, is adequate in proving a certain fact from which a person may reasonably infer the presence or absence of another fact.[6] This circumstantial evidence is extensively considered in the criminal law context of money

[1] Uluc, op.cit., p.181.
[2] Bell, R.E. (2020). Proving the Criminal Origin of Property in Money Laundering Prosecutions. Journal of Money Laundering Control, 4 (1), Mar. 2000, p. 12. DOI. 10.1108/eb027258. Accessed on 12 Apr. 2021.
[3] Bell, op.cit., pp. 12-13
[4] Schwartz, op.cit., pp. 429-480.
[5] Uluc, op.cit., p. 181.
[6] Abdulhay, S. (2004). "*Corruption in International Trade and Commercial Arbitration"*. Kluwer Law International, 2004, pp. 93-94.

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laundering and most jurisdictions have come to contemplate that most of prosecutions will be grounded on circumstantial evidence and have adopted the use of such evidence.[1] For example, in ICC Case No. 8891, the tribunal considered that an agency agreement delivered a case of corruption and that it was consequently null and void. The tribunal got to this decision on the ground of a number of circumstantial elements of evidence. This entailed, among other components, the size of the compensation of the agent in connection to the settled work and the fact that the agent was not able to deliver an adequate justification of the details of his services.[2] Similarly, in ICC Case No. 15668, the tribunal held a circumstantial evidence adequate to decide that the real drive of an agency agreement was bribery.[3] Based on the analysis of the awards regarding corruption, arbitral tribunals should be fair and keen to base their award on circumstantial evidence in disputes occurring in contracts that involve money laundering. Indeed, this strategy presents a convincing rationality especially it can be reasoned that money laundering might be even more challenging and tougher to prove than corruption.

b. Red Flags

It is generally accepted to say that arbitrators confronted with allegations or suspicions of economic crimes face very serious challenges. These challenges stem from their duties to create a balance between the rights of parties and public policy rules combined with the lack of the investigative powers. As above discussed, proofing money laundering in arbitration is not easy task and requires enormous effort, legal knowledge and appropriate experience. In this context, some red flags may provide indications of whether money laundering is likely associated with

[1] Ibid., pp. 93-94.
[2] ICC Case No. 8891, Journal du droit international 2000, No. 4, p. 1076.
[3] ICC Case No. 15668, Middle-East agent (claimant) v. European contractor (respondent), Unpublished Award dated 23 March 2011, referenced in Crivellaro, Antonio, The Course of Action Available to International Arbitrators to Address Issues of Bribery and Corruption, in Journal of Transnational Dispute Management, 10 (3), p. 3.

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disputes at hand. They can help arbitrators address these challenges in a comprehensive manner and find solutions in accordance with applicable laws. Although the lists are not all-inclusive, it is important to be aware of, and act properly upon them.

Different organizations and institutions have issued certain money laundering red flags. For example, FATF has released some reports where specific red flags are identified in regards to certain sectors or fields. Furthermore, according to the FATF 40 recommendations aiming at assisting financial institutions to identify and combat money laundering, countries are required to adopt certain guidelines.[1] Similarly, leading private actors have also developed indicators of money laundering.[2] Arbitrators, however, need to take good care when applying such guidelines in arbitral proceedings as these guidelines are intended to be used by financial sectors rather than arbitral tribunals. It is nonetheless agreeable that arbitrators should employ such instruments, provided they are performed in the context of suitable approaches. A number of guidelines have also been introduced by some commentators. In this respect, the Competence Centre Arbitration and Crime of the Institute on Governance of the University of Basel, presented a toolkit entitled "*Corruption and Money Laundering in International Arbitration*" during the International Arbitration and Corruption Conference, Basel, Switzerland, January 2019. The toolkit provides a number of steps arbitrators may follow and tools they may use to address alleged or suspected corruption or money laundering.[3] Arbitrators are free to tailor these steps and tools to the specifics of cases to allow them lead and make decision independently. The toolkit presents red flags designed for "Real Disputes involving funds of money laundering" which mainly include;

[1] Recommendation 25 of the FATF 40 recommendations.
[2] The Wolfsberg Group (2012). Anti-Money Laundering Principles for Private Banking. Wolfsberg Group, p. 5. https://www.wolfsberg-principles.com/sites/default/files/wb/pdfs/wolfsberg-standards/10.%20Wolfsberg-Private-Banking-Prinicples-May-2012.pdf
[3] Toolkit for Arbitrators, op.cit., p.19.

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- Unidentified beneficial owners behind accounts or private investment companies, trusts etc.;
- Unusual transactions, e.g. large cash payments;
- Persons or funds involved that originate from countries with a well-known risk for crime and corruption;
- Unknown origin of the funds at stake without plausible explanation how those funds were earned legally and absence of records which include details about the funds used in the transactions between the parties.[1]

The other presented red flags are specific for "sham arbitration" which mainly include;

- A non-participating respondent or a participating one, but acknowledges liability or agrees to a settlement immediately;
- A lack of documentation for the background of the dispute;
- A lack of business transactions and activities of the involved companies.

c. Adverse Infers

Arbitral tribunals may infer to adverse inferences which are evidentiary rules allowing for the creation of indirect evidence.[2] In identifying an adverse inference, tribunals may consider a party's refusal to provide a direct evidence as un indirect evidence of a fact. The inference should be in alignment with the facts already established and "*logically related to the evidence being withheld*". A tribunal intending to draw an adverse inference should beforehand give a clear warning to parties.[3] Thus, arbitrators can obtain adverse inference of the fact that one of the parties, after requesting to respond, does not unjustifiably submit evidence or follow an order that could elucidate the issue of money laundering. This allows the tribunal to take such

[1] Toolkit for Arbitrators, op.cit., p.19.
[2] Houtte, V. (2009). Adverse Inferences in International Arbitration. In "*Written Evidence and Discovery in International Arbitration: New Issues and Tendencies"*. Eds. Alexis Mourre & Teresa Giovannini. Publisher: International Chamber of Commerce, p.195.
[3] Crivellaro, A. (2013). The Course of Action Available to International Arbitrators to Address Issues of Bribery and Corruption, Transnational Dispute Management, 10 (3), p.18.

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unjustified behavior as a form of proof when assessing the evidence and defining whether the standard of proof has been drawn.[1] However, arbitrators should be watchful to only draw adverse inference, while maintaining a good understanding of the nature of money laundering, there is no other rational clarification for the element under questioning.

As a concluding remark on the standard of proof on money laundering occurrence, arbitral tribunals do not have the legal authority courts possess to obtain direct evidence when encountering such criminality. Neither, they can enforce parties to provide truthful details and documents. The best options tribunals have to follow to make a reasonable decision, of whether or not money laundering is involved, are to use circumstantial evidence, red flags and be willing to make adverse inferences.[2]

Section II.1.2. Postliminary Obligations of Arbitrators

A very important matter to consider at the postliminary stage is whether arbitrators have obligations to invalidate and report to relevant public authorities' money laundering tainted contracts revealed to their attention during an arbitration process. If so, would this be considered a violation of their obligation to maintain finality and confidentiality principles of proceedings?

A. Invalidating Money Laundering Tainted Contracts

In an analogy with cases involving claims of corruption, some commentators consider that arbitration tribunals should have the option to refuse jurisdiction or deny arbitrability of money laundering tainted disputes. This option is no longer recognized as viable under current practice of arbitration. In light of ICC Case No. 1110, the arbitral decision in 1963 of Judge Lagergren

[1] Waincymer, op.cit., p. 623.
[2] Hedberg, op.cit., p.67.

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previously mentioned Part II(p.49), it seems now that disputes connecting with allegations or evidence of corruption are arbitrable and that arbitrators have jurisdiction over them. Reasonably, this should also be the case for money laundering.[1]

When money laundering with regard to the underlying dispute is proven, other options present before arbitrators are to consider declaring all claims involving illicit funds inadmissible, or holding contracts invalid or unenforceable. The latter option depends on the present situation and (a) the law chosen by the parties to govern the dispute, or (b) a principle of international public policy or (c) a mandatory law in cases where the contract comprising money laundering is valid and enforceable under the chosen law.[2]

It is generally accepted that the beginning point falls in determining the applicable law to the substance of the dispute chosen by the parties.[3] In line with this, the arbitrator must resort to the law that criminalizes money laundering in order to identify the elements that have to be proven to reveal the presence of this crime.[4] The following precise elements must be determined according to the latter law: (a) the existence of a predicate offence sourcing the funds received by the accused party; (b) the criminal intent of the latter party; and (c) the transfer or use of funds through the contractual relationship set by the main dispute contract to mask criminal sources. Thus, it is mandatory that arbitrators identify such law in order to decide whether the offence at hand qualifies as money laundering or not.[5]

[1] Toolkit for Arbitrators, op.cit., p. 19.
[2] McDougall, op.cit., p. 1026.
[3] Kreindler, R. (2013*). "Competence-Competence in the Face of Illegality in Contracts and Arbitration Agreements"*. Hague Academy of International Law, p. 169.
[4] Sayed, A. (2004). Corruption in International Trade and Commercial Arbitration, Kluwer Law International.
[5] Hwang and Lim, op.cit., p.37.

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In most cases, if money laundering is present, contracts including this form of illegality would be contrary to the law chosen by the parties to govern the dispute. Nevertheless, in cases that there is no law selected by the parties, or if the chosen law is considered by the arbitrator insufficient or inadequate, the arbitrator has a wide discretion to proceed with the dispute at hand on the basis of public policies and mandatory rules reasoned appropriate.[1] It is generally accepted that public policy and mandatory rules may invalidate the choice of law agreement of the parties.[2]

According to scholars 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]

Ai. International Public Policy

The notion of public policy is imprecise that the specification of the constituents of a matter of public policy may not be easy to point out.[4] Further, public policy varies between different countries and jurisdictions and continues to be exposed to change over time. Despite these concerns, violation of public policy certainly assumes a clear denial of fundamental legal principles. The basis for public policy can be viewed as reflections of justice and moral.[5]

Nevertheless, courts have, in practice, used national and international interpretations of public policies in different ways. National public policies are created by national governments from sets

[1] Hedberg, op.cit., p.19.
[2] Born, op.cit., p. 2682.
[3] Gaillard, E. and Savage, J. (1999). "*Fouchard Gaillard Goldman on International Commercial Arbitration",* Kluwer Law International, p. 1533.
[4] Hedberg, op.cit., p.20.
[5] Lamm, C., Pham, H. and Moloo, R., (2010). Fraud and Corruption in International Arbitration in "*Miguel Angel Fernandéz-Ballesteros and David Aria*s" (Eds.), Liber Amoricum Bernardo Cremades, pp. 699–731, Wolters Kluwer Espana; La Ley 2010.

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of rules and principles applicable to all citizens of the relevant country. Expectedly, public policy of each country seems to be set by the economic, religious, social and political standards that define its legal system.[1] On the other hand, international public policy is grounded on convergence and universally shared values.[2] It is not restricted to a single jurisdiction, but rather constitutes the public policies of a majority of countries and globally standard values and rules.[3]

Money laundering is a part of national public policy in most or all countries including Lebanon. In the Lebanese context, money laundering is identified as a criminality that violates public policy and Law No.44 of 24/11/2015 "*Fighting Money Laundering and Terrorist Financing*" specific for combatting this criminality. However, the answer to the question whether money laundering forms part of international public policy, many be found through various analogies with the arbitration cases of corruption. For example, in the case World Duty Free v Kenya 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."*[4]

Additionally, ICC Case No. 8891 stated that consultancy agreements with the object of corruption are contrary to international public policy and therefore left the tribunal with no

[1] Moses, M. (2017). The Principles and Practice of International Commercial Arbitration, 2nd ed. Cambridge University Press, New York, 2017, pp. 173-174.
[2] Jagusch, S. (2015). Issues of Substantive Transnational Public Policy. In "*International Arbitration and Public Policy*". Eds. Bray, Devin and Bray, Heather L. Juris Net publishing, pp. 24-25.
[3] Ibid., p. 25.
[4] World Duty Free v. Kenya, award in ICSID Case No. ARB/00/7 of 4 October 2006.

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choice but to declare agreements null and void.[1] In ICC Case No. 3916, the tribunal declared a commission agreement as void due to the purpose of bribing a state official.[2]

Comparable with the precedent arbitration cases involving corruption contradictory to international public policy, and in view of the ever-growing international legal instruments to combat money laundering (Vienna Convention, Palermo Convention, EU Directives… etc. discussed in Section I.1.2.), there is a solid ground to claim that money laundering falls under the international public policy.[3]

However, due to the controversy in what precisely constitutes "money laundering" and due to the absence of an international consensus regarding the scope of predicate offenses, arbitrators can avoid such uncertainty through applying mandatory rules other than *lex contractus* to hold contracts void.[4]

Aii. Mandatory Rules

Mandatory rules have been defined as rules of a certain jurisdiction which have pressing public policy issues and must be implemented even if they controvert with the country's law.[5] In arbitration, direct and indirect types of application of mandatory rules seem to be available for arbitrators.

[1] 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".
[2] Lamm et al., op.cit., p. 730.
[3] Baizeau, Domitille, and Hayes. op.cit., p. 232
[4] Hedberg, op.cit., p.25.
[5] Mayer, P. (1986). Mandatory Rules of Law in International Arbitration. Arbitration International, 2 (4), pp. 274–275. DOI. 10.1093/arbitration/2.4.274.

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Mandatory rules can be indirectly practiced, if a provision in the *lex contratus* offers such opportunity.[1] In such cases, arbitrators should assess whether resorting to foreign mandatory rules would lead to adequate outputs.

Mandatory rules can also be directly implemented. This approach has been a topic of a wide academic and practical discussions due to its interference in party autonomy and prevalence over the law chosen by the parties.[2] Nevertheless, this approach is often submitted under specific circumstances. Some commentators believe that resorting to foreign mandatory rules is justified if the *lex contractus* is too tolerant of money laundering conduct. Others, rely on a common conflict-of-laws rule established in several legal systems permitting the application of foreign mandatory rule only if it has a close connection to the contract and is of a necessity to condemn contracts involving money laundering.

However, in proceedings under this approach, a new task for arbitrators would rise, arbitrators should consequently choose which rules apply. Commentators have different opinions on how this choice should be done. According to Born, Hwang and Limm, arbitrators who most likely have the power to apply mandatory rules are faced with a conflict of laws issue when determining applicable mandatory rules.[3]

Mandatory laws of the place of contract implementation, or the law of the arbitral seat representing the primary candidates which may substitute the parties chosen law. Arbitrators may also consider the law of the place where money laundering occurred or had its effects.[4]

[1] McDougall, op.cit., p. 1047.
[2] Sayed, op.cit., pp. 254–255.
[3] Born, op.cit., p. 2706.
[4] Hwang and Lim, op.cit., pp. 37-38.

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Irrespective of the approach chosen, the output would be similar in most cases due to the global condemnation of money laundering.[1]

Perhaps, the supreme option of action would be to consider the international public policy concerns of money laundering whilst being willing to refer to foreign mandatory rules in situations where the problem of definition is found too difficult to overcome.

B. Reporting Money Laundering Findings

Another critical concern that raises different arguments and opinions is whether arbitrators must/should report to public authorities money laundering revealed to their attention during an arbitration process. Arbitrators find themselves in a dilemma between maintaining privacy and confidentiality of proceedings being the principle rights of parties, and guarding public policy and interests as a duty owed to the public and justice.[2]

As above discussed, confidentiality is a fundamental feature of arbitration that encourages parties to resort to this particular mechanism to settle their disputes. Such principle obliges arbitrators not to report their suspicions or findings of money laundering and to respect their duty of loyalty.[3] Those in favor of this opinion strongly debate that arbitrators have obligations only towards the parties. The Working Group of the ICC concludes that it would be "*contrary to the nature of arbitration, contrary in particular to the trust that the parties place in [the] arbitrator, for an arbitral tribunal to report to the authorities the offences found"*.[4]

[1] Hedberg, op.cit., p.32.
[2] Uluc, op.cit., p.265.
[3] Arroyo, op. cit.
[4] Blackaby, N., Partasides, C., Redfern, A., Hunter, J.M., op.cit.

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Additionally, although the FATF 40 recommendations provide that certain legal professionals are obliged to report reasonable suspicions of money laundering,[1] arbitration seems not to be among the professions indicated. According to the explanation of the provision, the reporting obligation does not apply where legal or professional secrecy apply.[2] The Fourth EU Directive demands "*notaries and other independent legal professionals*" to file a report "*where the obliged entity knows, suspects or has reasonable grounds to suspect that funds, regardless of amounts involved, are the proceeds of criminal activity*". The applicability of this directive to arbitrators has been much debated.[3] Nevertheless, most EU Member States consider that arbitrators are not subject to this Directive due to the fact that only legal professionals assisting in financial and corporate transactions are covered by the directive.[4]

Other commentators find that public interest is superior to principles of privacy and confidentiality. They believe that criminals should not be allowed to benefit from the confidential character of arbitration to commit crimes such as money laundering, and that arbitrators must notify public prosecution authorities of such cases.[5]

In fact, the discussion whether an arbitrator has the obligation to report suspicions of money laundering in national or international arbitration depends on the applicable laws governing confidentiality and reporting obligations or the ethical rules.[6] The arbitrator will be subject to four different schemes based on the relevant legislations.[7]

[1] Recommendations 20 and 23 (a) of FATF 40 Recommendations.
[2] Interpretative note to recommendation 23 of the FATF 40 recommendations and p. 85 of the FATF 40 recommendations.
[3] Minaeva op.cit., pp. 37–39
[4] Meza-Salas, op. cit.
[5] Arroyo, op. cit.
[6] Pavic, V. (2012). Bribery and International Commercial Arbitration – The Role of Mandatory Rules and Public Policy. Victoria University Wellington Law Review, 43, p. 671.
[7] Hedberg, op. cit., pp.69-71.

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In the first scheme, the relevant applicable laws acquire both the principle of confidentiality and an obligation to report money laundering. The answer to whether the arbitrator has the obligation to report will be based on the arbitrator's own assessment of the related principles involved. This choice will be dependent on the circumstances surrounding the dispute at hand. The same solution will be carried in the second scheme when laws are silent on the issue of confidentiality as well as the obligation of reporting.

In the third scheme, the relevant rules impose a duty of confidentiality, but no duty of reporting suspicions of money laundering. In this case arbitrators should be bound by duties of confidentiality to safeguard the integrity of the arbitral proceedings. It is important to note that launderers in most cases find this scenario most favorable. Finally, in the fourth scheme, the relevant statutes impose an obligation to report suspicions of money laundering, but, do not impose confidentiality. This situation shall not create a problem since the harmonization of interests has already been conducted at the legislative level.

In Lebanon, the LCCP, does not include provisions concerning the confidentiality of arbitral proceedings, nor does the Law 44/2015 impose any obligation on arbitrators to report suspicion of money laundering. In Articles 4 and 5 of this law, arbitrators are not listed among companies, institutions that have due diligence and/or reporting requirements. Nor Lawyers were obliged by the reporting requirements of Law 318/2001 as they are bound by their professional secrecy requirements. However, in amendments of 2015, lawyers became subject to reporting requirements, Article 5 of Law 44/2015 reads, "…*The same obligations shall apply to lawyers when they carry out any of the above-mentioned activities. The implementation rules of these obligations shall be specified pursuant to a mechanism to be set by the Beirut Bar Association*

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and the Tripoli Bar Association, taking into account the particularities and rules of the Legal Profession".

Furthermore, Articles 398 and 399 of the Lebanese Penal Code (LPC) provide that judges are also bound to informing competent authorities of any form of illegality they face *"…Any public official who fails to inform or delays informing the competent authority of a felony or a misdemeanour that comes to his knowledge during or in connection with the performance of his duties shall be punishable by the aforementioned fine…"*.

Hence, if lawyers and judges who are themselves bound to professional secrecy requirements are obliged to report to public authorities relevant criminal violations, arbitrators should indeed be also bound to such obligation.

During the conference on "*Legal Consequences of Corruption and Money Laundering in International Arbitration*", held in January 2020 Basel, Switzerland in which aspects of the role and risks of arbitrators were discussed. Alexis Mourre, President of the ICC International Court of Arbitration, identified "

"……. three areas where solutions are still uncertain and will need to evolve. The first is whether arbitrators have a duty to report to the authorities facts of corruption or money laundering that may emerge in the arbitration. This question his often dealt with in terms of the confidentiality of the arbitration. First of all, however, arbitration is not always confidential. Second, it is doubtful that confidentiality can be a valid objection to the duty to report a criminal offense. The question is in my view better posed in terms of the arbitrators' duty of impartiality. Until when a final decision is made on the existence of corruption or money laundering, it is not conceivable for the arbitrators to report anything. Once a decision has been made, however, the

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question becomes one of transparency: why should that award be concealed from the public authorities in charge of fighting corruption? If the award is published, as it should, then its content becomes public and the relevant authorities will be made aware of the tribunal's findings. So the answer to the difficult question of the duty to report perhaps lies in the need to move towards greater transparency through the systematic publication of arbitral awards. The second question I wanted to highlight is whether arbitrators should be bound to stay the arbitration in presence of a parallel criminal proceedings. The answer to that question, I submit, should be no."[1]

As a final remark, arbitration must be mindfully conducted so that it does not become a vehicle to facilitate money laundering or any other criminal or fraudulent activity. Arbitration and arbitrators should not enjoy the privilege which would have them exempted from the responsibility to testify or report any criminal activity. On the contrary, this duty must switch from an ethical obligation to become a legal obligation regulated and enforced by national laws and international conventions. Confidentiality should not liberate arbitrators from taking actions when encountering criminal matters. It should rather defend legitimate business welfares and public interests, and not any illegitimate purpose of evading inspection and prosecution. Confidentiality should not be perceived as a way to cover arbitrators' misconduct, unethical or illegal decisions. Therefore, there is a necessity for juridical convergence with respect to traditional notions of confidentiality.[2] This comes in line with the growing demands for some

[1] Keynote speech of Alexis Mourre, President of the ICC International Court of Arbitration, at the Workshop Legal Consequences of Corruption and Money Laundering in International Arbitration in Basel, Switzerland, 10 January 2021.
[2] Poorooye and Feehily, op.cit., pp. 278-281.

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degree of transparency, predictability and certainty of the arbitration process and its players.[1] Recent years have seen an increasing trend towards greater transparency often driven by the objectives to enhance confidence in the due process of the justice system and improve the quality of awards. The QMUL International Arbitration Survey 2015 by School of International Arbitration, Queen Mary University of London[2] illustrates that participants stated discontent with the absence of deep insight into the decision making of arbitral institutions and the efficiency and performance of arbitrators. This suggested a welcomed increased transparency by respondents in institutional decision making. The survey also notes that respondent "*feel that arbitral institutions should contribute to the improvement of international arbitration by publishing data not only on the average length of their cases, but also on the time taken by individual arbitrators to issue awards. Respondents also welcome increased transparency in institutional decision-making on the appointment of, and challenges to, arbitrators*".[3] In response, most arbitral institutions took steps to enhance the transparency of the arbitral process as well as their decision making. For example, the ICC announced in 2015 a number of steps and confirmed that part of its "*overarching strategy*" is to enhance the transparency and predictability of the arbitration process. The amended Article 11(4) of the ICC Rules now licenses the ICC Court to deliver reasons for its decisions in certain matters such as appointment, removal, challenge, or replacement of an arbitrator. Another strike example is the opt-out provision of Article 41 of the Rules of Arbitration and Conciliation of VIAC (Vienna Rules), which permits the VIAC to announce anonymized summaries or extracts of awards, unless parties object. However, this

[1] Cossgrove, E. and Hosking, A. (2015). Open Up! How Far Should Transparency in International Commercial Arbitration Go?. King & Wood Mallesons. https://www.kwm.com/en/knowledge/insights/how-far-should-transparency-in-international-commercial-arbitration-go-20180412

[2] Queen Mary University of London International Arbitration Survey: Improvements and Innovations in International Arbitration, 2015.

[3] Bassi, R. and Newman, J., (2016). Increased Transparency in International Commercial Arbitration. Kirkland and Ellis International LLP, London, 2016.

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trends for greater transparency raises the inevitable question: how should it be done? and the answer to this question remains a challenge. It is expected that most arbitral institutions favor reaching a sensible dynamic balance as the protection of confidentiality of arbitral proceedings continues to be a key characteristic of arbitration that makes it favorable. This was confirmed by the findings of QMUL International Arbitration Survey 2015 as 33 percent of respondents cited "confidentiality and privacy" as most valuable characteristics of international arbitration.[1] It is believed that if commercial arbitration brings about mandatory transparency of proceedings similarly to the UNCITRAL regime, parties may turn to mediation or state courts to resolve their disputes.[2] Therefore, a sensible dynamic equilibrium between the main advantages that attract commercial parties to arbitration and the coexisting need for equity and justice would be the answer. Indeed, this balance would have to be based on different factors such as the context and the type of proceedings, nature of dispute, and associated facts inherent to the relevant proceedings.[3]

Therefore, arbitral tribunals must perform several obligations when confronted with money laundering despite the extensive debate. They shall be bound by few preliminary and postliminary obligations and any failure in performing such obligations may impose risks on tribunals as will be below discussed (Chapter II.2).

[1] QMUL International Arbitration Survey 2015.
[2] Rogers, C.A. (2006). Transparency in International Commercial Arbitration. Kansas Law Review, 54, pp. 1321-1326.
[3] Poorooye and Feehily, op. cit., p.321.

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Chapter II.2. Risks of Arbitrators in Money Laundering Tainted Cases

As a result of the increasing susceptibility of arbitration to money laundering and party manipulation, the task of arbitral tribunals to resolve disputes between private parties have become extremely complex. As pointed in Chapter II.1, arbitrators can no longer shy away from addressing and investigating disputes when confronted with money laundering or other criminalities tainted cases. Arbitrators are obliged not only to function on private aspects and resolve the dispute at hand, but also to equally consider public policy and play a proactive role in protecting it. Thus, it is crucial that arbitrators are well informed of their obligations when confronted with money laundering and all risks associated with any failure to perform in accordance. The issue of legitimacy of arbitration relies heavily upon the soundness of arbitrators and arbitration institutions along with the independence and impartiality of arbitrators.[1]

It is no doubt that any failure by a tribunal in performing its obligations leading to a tribunal award that overlooks money laundering provides solid grounds for the award to be challenged at the enforcement stage due to public policy violation.[2] Additionally, the liability of arbitrators also represents a serious risk when deliberate misconducts or criminal acts are committed. It's perceived today, that such situations threaten arbitrators and expose them to different forms of liabilities.[3] Recent literature shows that despite the complexity of judicial interpretation, raising civil or criminal liability claims against arbitrators breaching their obligations and aiding

[1] Cremates and Cairns, op.cit., p.79.
[2] Course On Dispute Settlement, Module 5.7- Recognition and Enforcement of Arbitral Awards: The New York Convention, United Nations Conference on Trade and Development, New York and Geneva, 2003, pp.21-23.
[3] The Arbitrator's Liability Report from the CLUB DES JURISTES, op. cit., p.14.

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criminalities have become a recurrent feature.[1] Although the New York Convention and the UNCITRAL Model Law are silent regarding laws applicable to arbitrators' liability, the arbitration doctrine quite clearly addresses this issue. Yet, this has resulted in considerable variations between countries in their perspectives of arbitrator liability or immunity. Aside from the current controversy around this issue, it is globally agreed that liability plays a key role in the effective use of arbitration and deters arbitrators' misconduct when suspicions of money laundering or money laundering concerns are raised before them.

This Chapter aims to address the judicial intervention in the arbitral process mainly through the annulment or rejection of arbitral awards. The liability that arbitrators might be subject to in contrast to their immunity when dealing with money laundering tainted cases will also be discussed.

Section II.2.1. Judicial Control over Arbitral Awards

The first risk arbitrators may be subject to when confronted with money laundering is the judicial intervention and annulment of arbitral awards rendered by them. The topic of judicial intervention in arbitration is an intriguing topic and somewhat controversial both in conceptual and practical terms. It is an area in which challenging ideas are generated triggering legal scholars and disputants to have more questions than answers. Actually, judicial intervention has always played a highly important role, yet paradoxical role in arbitration.[2] On one hand, judicial intervention is viewed as important towards protecting the soundness of arbitration awards and

[1] Franck, S. (2000). The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity. Articles in Law Reviews and Other Academic Journals. 1581. https://digitalcommons.wcl.american.edu/facsch_lawrev/1581

[2] Banerji, G. (2009). Judicial Intervention in Arbitral Awards: A Practitioner's Thoughts. National Law School of India Review, 21 (2), p. 39, www.jstor.org/stable/44283802.

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ensuring legal precision of arbitration.[1] On the other hand, judicial intervention may result in negating the benefits of arbitration and undermining the entire process.[2] The confidentiality feature of the process may also be failed as issues relevant to disputes become public.

While a high level of intervention may undermine the principle of finality and may create a new avenue of appeal for unsuccessful parties, too little intervention may render the whole process of arbitration attractive to criminalities and misconduct causing a failure in ensuring fairness and justice in the arbitral process.[3] To strike a balance between these two important considerations, a degree of judicial scrutiny of arbitral awards seems inevitable. Nevertheless, practicing unnecessary judicial intervention over arbitral process and exercising annulment of arbitral awards may eliminate the finality of resolution depriving disputants of the opportunity to protect their interests. In his article "*Court Intervention in Arbitration: Support or Interference",* commentator John Lurie expresses:[4]

"*The courts have an important role to play through their intervention at various stages of the arbitral process. In the absence of such intervention the fair resolution of disputes before an impartial tribunal, without unnecessary delay or expense, may not be achieved. Whether court intervention is viewed as supporting or interfering with the arbitral process will depend upon a range of factors including the timing, manner and degree of such intervention. Much will also depend upon the relative importance of the competing concepts of party autonomy and due process. Consequently, the question of whether intervention supports or interferes with the arbitral process is often hotly debated*."

[1] Lew, J. D. M. (2006). Achieving the Dream: Autonomous Arbitration. Arbitration International, 22 (2), 179-204. DOI. 10.1093/arbitration/22.2.179. Accessed 14 May 2021.
[2] Goode, R.M. (2001). The Role of the Lex Loci Arbitration in International Commercial Arbitration. Arbitration International, 17, 19-40., pp. 20-21.
[3] Ibid.
[4] Lurie, J. (2019). Court Intervention in Arbitration: Support or Interference. The International Journal of Arbitration, Mediation and Dispute Management, 76 (3), pp. 447- 448. https://kluwerlawonline.com/journalarticle/Arbitration:+The+International+Journal+of+Arbitration,+Mediation+and+Dispute+Management/76.13/AMDM2010062.

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Today, most courts have virtually developed some arbitral jurisdictions that can guarantee some degree of supervisory and enforcement jurisdiction over arbitration. Courts intervention has, no doubt, perceived a crucial measure to protect public policy and the legitimacy of the arbitration process. Some countries have started to consider the need for greater control over arbitral awards particularly when criminal activities are involved. For example, French courts have recently decided that it is necessary, at least when important issues of are at stake, to review all relevant legal and factual elements of dispute cases rather than merely relying on the arbitral tribunal's findings. This reconsideration has opened the door to greater control over arbitral awards when public policy violations such as corruption and money laundering are alleged. The rational is the belief that absence of courts intervention may have negating consequences to the developing jurisprudence of arbitration.

This view has been further supported by litigator, Stéphane Bonifassi and founder of BONIFASSI Avocats, during the recent conference on arbitration and crime held the Basel University, Switzerland, 2018. Bonifassi expressed that expanding judicial review of arbitral awards, is an appropriate approach that safeguards public-policy issues when elements of corruption and money laundering are involved. He emphasized that judicial review should be maintained as an efficient mechanism to secure justice in the international forums.[1]

Money laundering, like corruption, vitiates arbitration agreements despite the variability in the definition of money laundering given by different national courts. Consequently, the treatment of contracts aimed at money laundering are uniformly illegal and are therefore null and void.

[1] Bonifassi, S (2020). France: Expanding involvement of courts in arbitration makes sense. Mondaq Collecting Knowledge and People. https://www.mondaq.com/france/trials-appeals-compensation/880824/expanding-involvement-of-courts-in-arbitration-makes-sense.

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However, arbitration proceedings may continue under the principle of separability of arbitral clauses from the underlying allegations of money laundering and arbitrators may negligibly or even deliberately fail to address the illegality of money laundering posing the tribunal awards under the risk of annulment. Thus, it becomes clear that court intervention is curial and inevitable if arbitrators fail to consider money laundering tainted contracts null or void and proceed in issuing an arbitral award. In such cases, the refusal of rendering the award enforceable is, no doubt and naturally, justified under the New York Convention, UNCITRAL Model Law and under the various domestic arbitration statutes.[1] National courts can legitimately be expected to address money laundering as an issue which falls against the essence of public policy and may refuse to allow the enforcement of an award.[2] However, how courts can approach the difficult issue of balancing the principles of finality and enforceability of arbitral awards while protecting public policy continues to be a challenge to arbitrators.

According to litigator Stéphane Bonifassi, comprehensive scrutiny is, undoubtedly necessary in issues related to public policy and courts have not to only inspect arbitral awards but also practice arbitral jurisdictions where awards involve financial improprieties. Bonifassi emphasizes that arbitrators should not only tolerate judicial review, but welcome it. A tribunal award supporting a contract tainted by money laundering where such money laundering is forbidden by the law of the seat would expose the award to annulment and would violate the enforceability and finality of arbitral awards. Moreover, enforcing a tribunal award of a contract knowingly

[1] Schmitthoff, op.cit.

[2] Madden QC, P., Knoebel, C. and Grifat-Spackman, B. (2021). Public Policy Challenges. In "*The Guide to Challenging and Enforcing Arbitration Awards*". 2nd ed., General Ed. J William Rowley QC. Eds Emmanuel Gaillard, Gordon E Kaiser and Benjamin Siino Law Business Research 2021, pp. 35-47. Publisher David Samuel. https://www.gibsondunn.com/wp-content/uploads/2021/06/Madden-Knoebel-Grifat-Spackman-Arbitrability-and-Public-Policy-Challenges-Global-Arbitration-Review-05-2021.pdf .

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tainted by money laundering prohibited by the law of the seat runs the risk of liability of arbitral tribunals by "*facilitating*" the process.[1]

This Section aims at examining the risk associated with court intervention that would occur in the case of money laundering with focus on the annulment of arbitral awards at the enforcement stage. Before delving into the issue, it is essential to highlight the instruments that authorize such court intervention.

A. The Legal Basis of Court Intervention

Despite the autonomous nature of arbitration, there is a global consensus that national courts have an significant role to play in an arbitration, though the exact extent of that role may vary between different jurisdictions.[2] The importance of the role of courts stems from the essential requirement of national laws to recognize arbitration contracts, enforce tribunal awards and support the arbitration process. It is also supported by the fact that international arbitration has developed certain essential standards that necessitate policing at the national level.[3] These standards are acknowledged by the international community and evidently revealed in international instruments, international public policy and process of concern.

Although a high level of agreement over the role of courts in the recognition and enforcement of foreign awards is brought by the New York Convention despite the differences of its interpretations by different countries, delving into analysis of Articles II(c)[4]and V (previously mentioned) of the convention reveals fundamental principles of court intervention in

[1] Ibid.
[2] Gaillard, op.cit., p.258.
[3] Park, op.cit. p.23.
[4] Article II(c) reads: "*The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed*".

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international arbitration only. Court intervention is necessary to endorse arbitral process and recognize and enforce the arbitration agreements and awards. It, at the very minimum on the level of enforcement, confirms that the arbitration process and tribunal awards are in alignment with the essential principles of natural justice enforced by both the New York Convention and the UNCITRAL Model Law.[1]

Under these articles (II(c) and V of New York Convention, any other national court intervention in the process is questionably considered illegitimate. This includes interventions to safeguard national or jurisdictional interests, or merely when courts decide they are more suitable to decide on a dispute than an arbitral tribunal. Also, the only courts that can intervene in the arbitration process are those at the seat of arbitration or the place of enforcement.

The UNCITRAL Model Law, entails similar provisions to the New York Convention but is more extensive with respect to the role of the courts. Article 5 states that "*no court shall intervene except where so provided in this Law"*. The key purpose of this Article (5) is not to bar court intervention altogether, but rather to limit the extent of court intervention. Arbitration can't be possible without the provision of courts and at particular circumstances the intervention of courts stand as essential for the integrity of the arbitration system.[2]

Article 6 describes capacities for court intervention in an arbitration within its jurisdiction.[3] Articles 11.3, 11.4, 13 and 14 provide for court assistance to safeguard the proper appointment of

[1] Brady, D. (2013). Review of Arbitral Awards for Breach of Natural Justice: An Internationalist Approach. LLB(HONS) Research Paper LAWS 521: International Arbitration. Faculty of Law. Victoria University of Wellington, pp. 1-53. Accessed 25 May. 2021.
[2] Lew, op.cit., p. 489.
[3] Course On Dispute Settlement, Module 5.7- Recognition and Enforcement of Arbitral Awards: The New York Convention, United Nations Conference on Trade and Development, New York and Geneva, 2003, pp. 21-23.

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a tribunal where the appointing mechanism is not successful, independence and impartiality of an arbitrator is challenged, or an arbitrator becomes unable to meet arbitral commitments professionally. Article 16(1) of the Model Law adopts the principle of *competence-competence*. However, the arbitral tribunal's competence to rule on its own jurisdiction, on the very basis of its mandate and power, is, subject to court control. Article 16.3 empowers the court with the authority to examine issues related to the tribunal's jurisdiction in view of the terms of the arbitration agreement. Article 34 elucidates the exclusive conditions where the court may deny or annul an award. Similarly, to the New York Convention, these are restricted to whether the issues addressed fall within the prospect of the arbitration agreement or there is some procedural offense in the performance of the arbitration. There is no provision to allow national courts to review the tribunal's decision on the merits. Finally, Articles 35 and 36 of the Model Law hold provisions for the acknowledgement and enforcement of foreign awards that are almost alike to those of New York Convention.

As is evident from the brief representation of the New York Convention and the UNCITRAL Model Law above, judicial control may occur with respect to the arbitral proceeding (1) prior to the establishment of a tribunal; (2) at the initiation of the arbitration; (3) through the arbitration process; and (4) at the enforcement stage. In modern views, the judicial involvement at these phases, should be supportive, and not disturbing. It should take place only when necessary and under certain circumstances and in illegality cases such as money laundering.[1]

Judicial intervention may begin as early as prior to the establishment of a tribunal and at the initiation of arbitration. It is at this stage that the court's capacity and authority to assist reveals,

[1] Lew, op.cit., p. 496.

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particularly if the parties do not succeed to agree on procedures that include issues of appointment, replacement, or removal of arbitrators, arbitration venue and choice of applicable law among other procedural aspects.[1] Judicial intervention can also be practiced if a disputant pledges proceedings to put the validity of the arbitration clauses subject to challenge, which is sometimes faulty and unconscionable, or objects to agree to the referral to arbitration.[2] The court's duty in these cases is to uphold the agreement in hand and address the issues in accordance to the New York Convention, i.e., refer the matter to arbitration if there is a valid arbitration agreement.[3] Despite the differences between national laws, courts can review arbitration agreements and give them effect by identifying a suitable tribunal to take over and address the dispute in hand [4]. Article 8(1) of the UNICTRAL Model Law states that courts shall refer to the parties to arbitration except if the arbitration agreement is null and void, inoperative, or doesn't qualify for implementation. It must be acknowledged that the Model Law provides no discretion to the ruling court as is indicated by the use of the word "*shall*". However, in cases where a party seeks court proceedings for urgent protection that cannot await the appointment of a tribunal, the court pursues the issue until the tribunal is established to protect the *status quo* (existing condition).

One approach that is often practiced by an averting disputant, is impeding the procedure of assigning an arbitrator(s) by declining to take a choice, or by raising irrational objections to the arbitrator(s) suggested by the other disputant. In such cases, disputants need to appeal to a court

[1] Lurie, op.cit., pp. 447-453.
[2] Ibid.
[3] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958, United Nations Treaty Series, Vol. 330, No. 4739.
[4] Nafta Prods. Ltd. v. Fili Shipping Co. (2007) UKHL 40, ¶ 19 (U.K.) (holding that English courts will refrain from an overly technical approach to the determination of the validity of arbitration clauses, and seek to uphold the agreement to arbitrate wherever this is practically possible).

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to perform such appointment.[1] On the other hand, if the choice of an arbitrator(s) by a court is considered inappropriate, then disputants must be able to object by specified procedures. By permitting such court intervention, the disputant seeking the arbitration can at least reach the appointment of an arbitral tribunal and thereby the arbitration process can be initiated despite the hampering tactics attempted by the other disputant.

As for the court intervention through the arbitration process, the involvement appears in many types and is infrequently dealt with in arbitration statutes.[2] It takes the form of interlocutory orders (provisional and not final), such as orders for the inspection of evidence, protecting and taking evidence, security for costs, interim applications to maintain the *status quo*, and other similar applications.[3] Article 27 of the UNICTRAL Model Law offers the court the authority to support the tribunal in taking evidence.[4] Thus, properly implemented court intervention during arbitration involves the support of courts in making procedural orders that arbitrators cannot order or enforce.

At the enforcement stage after an award is settled by the tribunal, courts have authority of enforcement in circumstances where one party is unwilling to accept the terms of award. The party pursuing to enforce the award seeks the court intervention to turn the tribunal award to an order of court. Failure to comply with the order, then has the effect of a "*contempt of court*" by

[1] Gaillard, op. cit., pp. 1–21.
[2] Lew, op. cit., pp. 489-537.
[3] Pizzurro, J.D., García, R.B., and Perla, J.O. (2019). Substantive Grounds for Challenge. In "*The Guide to Challenging and Enforcing Arbitration Awards*". General Ed. Rowley QC, J.W. Gaillard, E. and Kaiser (Eds.), G. E. London, UK, Law Business Research Ltd, 2019, pp. 74–85.
[4] Article 27 of the UNICTRAL Model law provides: "*The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence".*

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the party breaching the order.[1] Under certain circumstances, the court may set aside the award or send the award back to the arbitrators in order to correct defects in the award.[2] Such intervention may take action at two venues: (i) at the place of enforcement, where the winning disputant pursues the recognition and enforcement of the award; or (ii) at the place of arbitration as a disputant challenges and endeavor to set aside the award, or presents an appeal against the award under the applicable arbitral law or regime. The venue of arbitration has important considerations as influences from the national courts play significant roles. The international treaties scheming enforcement of international arbitration awards recognize the capacity of national courts to set aside or suspend an arbitration award on different grounds.[3]

In the Lebanese context, domestic courts can interfere in the arbitral process in different cases. Few will be presented. The president of the first-instance court may interfere to provide support in the designation of arbitrators where parties have not succeeded to do so, or where no designation has been carried out by relevant arbitral institutions. The LCCP further implies the courts' assistance when a party alleges forgery of documents during a domestic arbitration process. In such a case, the arbitrator shall hold the proceedings until the competent court renders its decision.[4] In international arbitration, unless parties agree otherwise, the previous principle also applies.[5] Additionally, domestic courts are competent to grant exequatur pertaining to the nature of the dispute. Exequatur requests if civil and commercial matters are presented before the president of the first-instance court. On the other hand, exequatur requests in administrative

[1] Gaillard, E. and Siino, B. (2019). Enforcement under the New York Convention. In "*The Guide to Challenging and Enforcing Arbitration Awards*". General Ed. Rowley QC, J.W. (Eds.) Gaillard, E. and Kaiser, G. E. London, UK, Law Business Research Ltd, 2019, pp. 86-99.
[2] Hunter, M. and Redfern, A. (1991). Law and Practice of International Commercial Arbitration, 2nd ed., 1991. Publisher: Thomson Professional Pub Canada; 2nd ed., (February 1, 1991).
[3] Kantor, M. (2003). Local Court Intervention in International Arbitration. Oil and Gal Law Intelligence, 1 (2), 2003. www.ogel.org. URL: www.ogel.org/article.asp?key=156.
[4] Article 783 of the LCCP.
[5] Article 812 of the LCCP.

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matters shall be presented before the State Council.[1] A court decision denying recognition or enforcement of a domestic, or international arbitral awards issued in Lebanon may be subject to appeal. On the other side, a decision permitting the enforcement of domestic or international awards is not appealable. Domestic and international arbitral awards may also be set aside on different bases mentioned in Article 800 and Article 819 as previously discussed (Section I.2.1).

Escalating international efforts aimed at creating equilibrium between the law and practice regarding judicial intervention and its exclusivity to courts will set up the way for a relevant international unified regime. This may, in turn, avoid requests of the enforcement of arbitral awards previously annulled by judicial decisions.

B. Annulment of Arbitral Awards

Despite the high rate of enforceability of arbitral awards achieved by arbitration, the risk of non-enforcement and annulment, even in very rare cases, continues to pose a grave threat to the entire process of arbitration. It is universally perceived that without the ability to have awards set aside through a challenging process, there is a risk that arbitration could become dismissed due to different irregularities and criminalities. The principles of the annulment of arbitral awards are stated in the New York Convention 1958 and the UNCITRAL Model Law, as well as national arbitration legislations.[2] Nevertheless, of all the grounds available to the court to vacate or refuse the recognition or enforcement of an arbitral award, public policy being undefined in both the New York Convention and the Model Law, remains highly debated aspect (Section II.1.2.,

[1] Articles 770, 775, 793, 795 and 810 of the LCCP.
[2] Wilske. S., Michou, I and van Houtte V. (2008). What's New in European Arbitration? Dispute Resolution Journal, 68 (1), p.10.

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Ai(p.66)).[1] An annulled or a set aside arbitral award by a court may still be enforced by a court with secondary enforcing jurisdiction.[2] In the late 1990s, the Hilmarton case in France and the Chromalloy decision in the United States brought front a topic that highly preoccupied the arbitration world. In these cases, the courts enforced awards that had been annulled in their place of origin, not pursuant to the New York Convention, but on the ground of the more favorable provisions of domestic arbitration law. Nevertheless, since then, the French and U.S. courts have pursued entirely deviating prospective. U.S. courts have increasingly refused to enforce awards that are set aside at the place of arbitration as long as annulment decisions doesn't fundamentally violate U.S. public policy. Whereas, French courts have continued to entirely overlook foreign annulment decisions, and enforce international arbitration awards irrespective of national jurisdictions.[3]

As an initial point for any discussion about the annulment of arbitral awards, it is of importance to provide an overview of both the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the UNCITRAL Model Law on International Commercial Arbitration.

According to article V of the 1958 New York Convention and Article 34 of the UNICTRAL Model Law, the enforcement or recognition of a foreign award may be denied by the

[1] Koch, C. (2009). Enforcement of Awards Annulled in Their Place of Origin, The French and U.S. Experience. Journal of International Arbitration, 26 (2), pp. 267-292. Kluwer Law International, 2009.

[2] Hwang. M. SC. and Lee. S, (2014). Public Policy as Grounds for Annulment of or Non-Recognition or Enforcement of Arbitral Awards in East Asia - Chapter 10 -International Arbitration and Public Policy. JURIS Legal Information, Arbitration Law, 2014.
https://arbitrationlaw.com/library/public-policy-grounds-annulment-or-non-recognition-or-enforcement-arbitral-awards-east-asi-0.

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enforcement court. An arbitral award may be annulled by a national authority based on limited grounds as previously discussed in Section I.2., 1, Bii(p.39), public policy is one of the main grounds of annulment.

Article V (2)(b) of the New York Convention provides: "*Recognition and enforcement of an arbitral award may … be refused if the competent authority in the country where recognition and enforcement is sought finds that…the recognition or enforcement of the award would be contrary to the public policy of that country."* That country here clearly refers to the country where recognition and enforcement are practiced.

In the Lebanese context, Article 800 LCCP provides that domestic awards may be annulled: "*Where the award has violated a rule of public policy".* On the other hand, Article 817 and 819 LCCP provide that international awards, may be annulled: "*Where the award has violated a rule of international public policy*".

Despite the different legal texts, courts of some arbitration-friendly countries, have narrowly interpreted the scope of public policy while enforcing international arbitral awards. Annulment of arbitral awards requires a "*flagrant, effective and concrete*" violation of public policy.

Given the seriousness of money laundering combined with the fact that it is illegal in international law and recognized as contrary to public policy worldwide, as previously discussed (Section II.1.2., Ai (p.66)) arbitrators are currently subject to different obligations. When confronted with suspicions or allegations of money laundering, arbitrators have to investigate the issue, and consequently, invalidate contracts tainted with such form of criminality in case evidence are present. However, if an arbitrator validates a contract as based upon money laundering and fails to act appropriately, the court of place of enforcement will most probably annul the award and the arbitrator may be at risk of liability.

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The case of Valerie Belokon (Latvia) vs. The Kyrgyz Republic demonstrates a clear example. On 21 February 2017, the Paris Court of Appeal annulled a UNCITRAL arbitral award issued by the tribunal against Kyrgyzstan Republic for the violation of Latvia-Kyrgyzstan Bilateral Investment Treaty.[1]

Valeri. Belokon, a citizen in Latvia, attained Insan Bank in Kyrgyzstan in 2007 and renamed it Manas Bank. In spring 2010, political conflicts in Kyrgyzstan resulted in the change of the presidential regime, and the Kyrgyz authorities put Manas Bank into temporary administration. The starting temporary administration period was prolonged several times. On 2 August 2011, Belokon initiated UNCITRAL arbitration proceedings under article 9.2(d) of the Kyrgyzstan-Latvia BIT, alleging that the enduring extension of the temporary administration period led to indirect expropriation. Throughout the arbitral proceedings Kyrgyzstan alleged that the claimant had engaged in money laundering activities through its investment violating the Kyrgyz law. The arbitral tribunal dismissed all the money laundering accusations and rejected the presented allegations by Kyrgyzstan for lack of evidence and rendered an award in favor of Belokon which ordered Kyrgyzstan to pay $15.2 million. It followed that Kyrghizstan started annulment proceedings in 2015, and argued through the arbitral proceedings that the award would facilitate money laundering and violate criminal law and public policy.

The Paris Appeal Court considered the factual elements the arbitral tribunal relied on as well as other evidence to evaluate the case. It concluded a different decision to that of the arbitral tribunal, thus, setting the award aside. This was on basis that the enforcement of an arbitral

[1] Burova, Y. (2017), Money Laundering Allegations by Kyrgyzstan against Latvian Investor Resurface in Paris Cour d'Appel. CIS Arbitration Forum, 2017.

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award benefiting the claimant from illicit activities would obviously, extremely and precisely violate international public policy.

The ICC tribunal relatively emphasizes that in cases of corruption:

"……. 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".[1]

A similar decision was rendered in 2019 by The Paris Appeal Court in *Alstom Transport v. Alexander Brothers*. The court issued a decision for annulment of ICC arbitral award as it decided that the enforcement of such award would cover corruption which is viewed as contrary to international public policy. Between 2004 and 2009, the French company *Alstom Transport SA* and *English company Alstom Network UK Ltd (Alstom)* signed 5 consultancy contracts with *Alexander Brothers Ltd* (ABL) located in Hong Kong. ABL was to assist Alstom in preparing proposals of a contract to deliver railway equipment to the Chinese government. The contracts required ABL to provide Alstom with written evidence of its activities to request payment. Alstom's contract with the Chinese government was successful. Alstom paid ABL only for two out of five consultancy agreements and only partial payment for the remaining three agreements. In 2013, ABL resorted to ICC arbitration proceedings against Alstom in Geneva seeking to receive the remaining payment with a compensation for damages of €5,475,480 in respect of the unpaid amounts. The tribunal reached that since Alstom made previous payments within two contracts without requesting additional evidence, although ABL didn't provide sufficient evidence in light of contractual requirements, however, it means that Alstom implicitly

[1] ICC Case No. 14920, ICC International Court of Arbitration Bulletin, Vol. 24, 2013, p. 94.

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consented to the amendment of the evidentiary requirements stated in the contract. Moreover, the tribunal dismissed Alstom's allegations of corruption, and made an order that Alstom should pay the remaining amounts and costs. In resistance to commit to the award, Alstom appealed for the annulment of the award, but its request was denied by the Federal Court in Lausanne. At the same time, the Paris Court of First Instance enforced the award in France. Alstom appealed this decision before the Paris Court of Appeal on varied grounds. It objected that dismissing allegations of corruption, and failing to act properly against them constitutes a violation of international public policy.

Although the court did not rule on this point directly in 2018, it extended several decisions emphasizing that it would not be bound by the arbitral tribunal's previous findings. Moreover, the court established a list of red flags to examine the case of corruption. Based on new evidence brought, the court set aside the arbitral award in 2019.

To put the above annulment decisions into context, both cases involved allegations of money laundering or corruption, topics that are subject to ever growing worldwide scrutiny and legislation. The Paris Court of Appeal's approach may be seen detested, but the court cannot be faulted for taking a proactive role in confronting corruption or money laundering allegations. The enforcement of corrupt or illegal contracts through arbitration poses the risk of bringing arbitration as a dispute resolution mechanism to discredit. Thus, arbitrators should therefore be prepared to see more frequent allegations of violation of public policy at the enforcement stage. Therefore, the fulfillment of their obligations completely is the best professional and ethical tact to follow.

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Section II.2.2. Judicial Control Over Arbitrators

The second risk arbitrators may be subject to when confronted with money laundering is liability. The issue of liability of arbitrators continues to be controversial despite the considerable attention it has been receiving through the years. Liability of arbitrators is one of the key features of arbitration as it governs the legal relationship between arbitrators and disputants. It also governs the judicial obligations of arbitrators to provide a fair, equal and legal settlement.[1] More than twenty years ago, Sir Michael Kerr, one of Britain's most prominent judges and international arbitrators, expressed what he correctly regarded a key question on the arbitrator's liability: "*Whether arbitrators provide a service just like any other person, and are therefore liable for any failure in its reasonable performance, or whether they are immune from such claim because of the judicial character of the service they perform*."[2] Despite the global growing attention to the subject since, there is still a stark lack of an international unified scope of liability for international arbitrators.

International conventions and the UNCITRAL Model Law on International Arbitration are silent on this matter.[3] The question of arbitrators' liability is closely linked to the dual nature of arbitration that it is contractual by origin but judicial by mission and practice. Duties of arbitrators stem from private contracts with disputants as they get paid to provide professional services and resolve certain disputes. In addition, arbitrators also act as judges and issue

[1] Viscasillas, P. (2013). Civil Liability of Arbitrators and Arbitral Institutions in International Commercial Arbitration: The Development of the Arbitration Laws and Rules in the Last 30 Years. World Arbitration and Mediation Review (WAMR), 7 (2), pp. 1-16.

[2] Kerr, M. (1990). Preface of the Immunity of the Arbitrator, J. LEW (ss. dir.), Loyd's of London Press; Th. CLAY, L'arbitre, Dalloz, 2001, n° 931.

[3] Model Law of International Commercial Arbitration, U.N. Commission on International Trade Law, 18th Session, U.N. Doc., 1985.

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impartial binding decisions. Accordingly, there can be different types of liability claims, namely; criminal, civil and disciplinary liabilities.

In civil liability, dissatisfied parties bring civil lawsuit actions before State courts against arbitrators, who have breached their contractual obligations or committed misconduct. Apparently, this type of liability primarily concerns disputants who are bound to the arbitrator's decision. The arbitration process has unfortunately come under increasing attack through civil actions against arbitrators due to their potential misconduct and the risk of party manipulation.[1] Nonetheless, the principle of civil liability may clash with the privilege of immunity granted to arbitrators which is even equal to the immunity of state judges in some legal legislation.

In criminal liability, arbitrators fall subject to all general law offenses that specifically relates to their judicial mission. It is brought when arbitrators themselves deliberately or unintentionally get involved in criminal matters such as fraud, corruption, and money laundering.[2] The risk of criminal liability guarantees arbitrators' proper conduct and protects arbitration proceedings against the perceived increase of criminal abuse, while safeguarding the legitimacy and integrity of arbitration. Despite the increasing criminal abuse there is frequent failure to ascertain all the conditions of arbitrator's criminal liability. Although the arbitrators' civil liability is restricted, criminal liability can in no way be limited due to the fact that a criminal liability is in principle so grave that it cannot pass without punishment under any legal system. There is no rational to limit the scope of arbitrators' criminal liability, which seldom arises but has inhibitive effect, as such liability assures the morality and legitimacy of arbitration.[3]

[1] Franck, op.cit.
[2] Mundi, Jus (2021). Jus Mundi: Wiki Notes for Investment Law & Arbitration. Jusmundi.com, 2021, jusmundi.com/en/document/wiki/en-arbitrator-responsibility. Accessed on 2 October 2020
[3] The Arbitrator's Liability Report from the CLUB DES JURISTES. op.cit., p. 39.

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Additionally, another type of liability appears in the world of arbitration when arbitrators may face disciplinary actions.[1] Disciplinary liability occurs due to breaching of arbitration institutional instructions and could result in sanctions imposed by arbitral institutions or other legal professional bodies such as a dismissal or a failure to receive payments.[2]

As arbitrators often operate in a quasi-legal environment, most jurisdictions offer certain degree of immunity to arbitrators in the case of civil liability when arbitrators professionally and lawfully practice their dual contractual role and judicial mission. The extent of immunity ranges between nearly judicial absolute to qualified immunity largely depending on the law of the appropriate jurisdiction and relevant institutional rules. In absolute judicial immunity, arbitrators as quasi-judicial figures are offered the same immunity privilege as judges. Whereas, qualified immunity allows protection of arbitral decision making but not for non-decisional acts, failure to apply administrative or procedural rules, or grievous offence, breach of ethics, fraud, money laundering or legal violations. Even if there are various opinions as to the arbitrators' immunity, it is not disputed that arbitrators are not immune from criminal liability.[3]

As arbitrators at present are confronted with disputes tainted with money laundering, it is not disputed that judgments on criminal sanctions and penalties stay exclusively in the hands of national courts. However, this does not preclude arbitrators from playing a role when confronted

https://www.leclubdesjuristes.com/wp-content/uploads/2017/06/CDJ_Rapports_Responsabilit%C3%A9-del%C2%B9arbitre_Juin-2017_UK_web.pdf

[1] Fuyong, Z. (2008). On the Possibilities and Limitations of Arbitration Punishment. Journal of Arbitration Studies, 28(3), pp. 3-20. http://dx.doi.org/10.16998/jas.2018.28.3.3.

[2] Mullerat, R. (2006). The liability of Arbitrators: A Survey of Current Practice. International Bar Association Commission on Arbitration, Chicago, 2006, p.8.

[3] The Arbitrator's Liability Report from the CLUB DES JURISTES, op.cit., p.17.

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with such form of criminality and performing their obligations, under the risk of being liable in some situations.

As previously discussed, there are, typically, three potential scenarios of how money laundering can arise in relation to the underlying dispute. In the first scenario, one of the parties might allege that the other party was involved in money laundering using this as a defense against the enforcement of the arbitral award of the dispute in hand.[1] In the second scenario, the arbitration might be sham where the whole process is abused for laundering of illicit assets. A very important consequence in terms of the risk of criminal liability of arbitrators is placed on this differentiation. In both scenarios, one or both parties may manipulate a fair arbitrator to unknowingly facilitate money laundering in order to issue an award that legalizes their criminal activity. Alternatively, a third scenario might occur, where arbitrators may be – at least to some extent – part of this abuse. Therefore, it is of major importance to distinguish whether the parties abuse a fair arbitrator or whether an arbitrator is willingly involved with the parties. The AML legislations and national courts can hold no liability against arbitrators except when they are involved in money laundering, or in the case where money laundering is very clear and the arbitrator turns a blind eye and does not appropriately perform the necessary obligations. Thus, turning a blind eye on the allegation or suspicion of money laundering or even in the potential case of the intentional involvement may potentially not only threaten the enforceability of the arbitral award, but also – in extreme cases – expose the tribunal to a criminal and/or civil liability. [2] After all, money laundering is a serious criminality. However, different jurisdictions will differ in views of arbitral liability when being faced with this illegal activity.

[1] Betz, op.cit., p. 49.
[2] Weston, op.cit., p. 458.

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The below paragraphs particularly examine the risk of civil and criminal liabilities arbitrators face in the case of money laundering tainted cases, after explaining such liabilities and their underlying causes in general.

A. Civil Liability of Arbitrators

Civil liability is a legal responsibility that obliges a party to pay another for injury, damage or loss.[1] It differs from criminal liability that is usually submitted by state courts for violating criminal codes. Civil liability is usually divided into contractual liability and tort liability.[2] While contractual liability arises from breaching of contractual obligations, tort liability on the other hand, stems of damages affecting the interests of the right holder. A civilly liable defendant who loses in a civil action only owes remedies to the plaintiff and does not face the risk of imprisonment or fines, unlike the case of criminal liability. The standard of proof in a civil liability case is lower than that of criminal liability. While in a criminal case the standard of proof is "*beyond a reasonable doubt*", "*preponderance of the evidence*" is usually sufficient in a civil liability.

The arbitrators' civil liability occurs in the case of misconduct manifested as a failure in impartiality, failure to render an enforceable award, and a delay of the proceedings, or other situations. Subsequently, civil liability of arbitrators may be brought by unsatisfied parties who in many cases blame arbitrators for the damages incurred.[3] It is not often that parties succeed in proving all the requirements of arbitrators' liability as the standard of proof is very high and as

[1] Franck, op.cit..
[2] Brown, J. (2009). Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion. Journal of Dispute Resolution, Issue 1, Article 10. https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1572&context=jdr.
[3] Rogers, C.A. (2005). Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct. Stanford Journal of International Law, 41, pp. 53-121.

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arbitrators are provided with certain degree of immunity that is to a great extent equal to the immunity of a state judge in some jurisdictions. The rational of such immunity stems of the need to protect the impartiality of arbitrators, decision-making process along with the integrity and finality of arbitral award from the hit back of dissatisfied parties.[1]

Although conventions and regulations are silent, the arbitration doctrine provides quite a clear answer on the law that should govern arbitrators' civil liability. According to Born, "*the better view is that arbitrators' status, rights and obligations are the result of a contract which operates within, and incorporates, a specialized legal regime – that regime being the international and national law framework governing the international arbitral process.*" [2]

Most of authors also believe that it is the applicable law chosen by the parties and the contract between them that govern civil liability.[3]

Over the years, immunity of arbitrators to civil liability has been offered based on a presumed analogy between public state judges and private arbitrators.[4] Some courts largely extend absolute judicial immunity to cover arbitrators and provider institutions. According to Butz, a prominent commentator, the role of an arbitrator is "*functionally equivalent*" to the role of a judge enjoying a full immunity.[5] The scope of this immunity largely depends upon the law of relevant jurisdictions and applicable institutional rules.[6] There is a lack of harmonization worldwide as to

[1] Weston, op.cit., p. 458
[2] Born, op.cit., p.1973.
[3] Varapnickas, T. (2019). The Law Applicable to Arbitrators' Civil Liability from a European Point of View, Kluwer Arbitration Blog, 2019. http://arbitrationblog.kluwerarbitration.com/2019/03/25/the-law-applicable-to-arbitrators-civil-liability-from-a-european-point-of-view/
[4] Kerr, M. (1990). Preface of the Immunity of the Arbitrator, J. LEW (ss. dir.), Loyd's of London Press, 1990.
[5] See Butz v. Economou, 438 U.S. 478, 511-12 (1978) (Establishing the Principle that the Extension of Judicial-Like Immunity to Non-judicial Officials is Properly based on the "Functional Comparability" of the Individual's Acts and Judgments to the Acts and Judgments of Judges).
[6] Weston, op.cit., p. 713.

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how the immunity should be granted.[1] Neither the 1958 New York Convention nor the 1985 UNCITRAL Model Law on Arbitration provides any provision regarding immunity. However, 25 years after the Model Law, UNCITRAL reconsidered arbitral immunity when drafting its new UNCITRAL Arbitration Rules 2010.[2] Article 16 of the UNCITRAL Arbitration Rules 2010 on Exclusion of Liability provides: "*Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration". ".* Additionally, it is noteworthy that Article 41 of the ICC rules offers an even wider protection for arbitrators and completely excludes them of any liability.[3] The Article provides "*The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law"*.

While some countries estimate arbitral immunity based on contractual obligations, others determine the perspective of arbitral immunity on the basis of arbitrator's similarity to state judges. The "*contractual theory*" followed by some civil law European countries believe that civil liability is based on the arbitration contract implying that "*it is the agreement to arbitrate that alone gives the arbitrators the authority to make the award*."[4] In this theory arbitrators fall

[1] Tsakatoura, A. (2002). The Immunity of Arbitrators, Inter-Lawyer Law Forum Directory**,** Lex E-Scripta.
[2] Cevc, A. (2019). Civil liability of arbitrators, Slovenia, p.406.
[3] International Centre for Dispute Resolution (2021). International Dispute Resolution Procedures (Including Mediation and Arbitration Rules). Rules Amended and Effective March 1, 2021. P.36. available online at icdr.org. https://www.adr.org/sites/default/files/ICDR_Rules_0.pdf.
[4] Brown, op.cit.

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under *absolute liability* **(***no immunity*).[1] Thus, dissatisfied disputants can challenge the finality of the arbitral process and arbitrators can be held accountable by national courts. Following this theory, arbitrators and judges are not observed as equivalents. Arbitrators are professionals and should be liable for any damage they may cause.

On the contrary, the "*jurisdictional theory"* focuses on the view that judges and arbitrators are functionally similar offering arbitrators "*absolute arbitral immunity"*. Pursuant to this theory, arbitrators are free from civil liability for their decisions.[2] The United States is the only country that offers nearly absolute immunity for arbitral acts. Arbitrators are immune from all civil liabilities arising from decision-making function. The underlying rational is to encourage the use of arbitration as an alternative dispute resolution forum.[3] However, despite such immunity to arbitrators, courts have recently been setting out limitations to such immunity.[4]

The last relevant theory is "*qualified immunity*" that supports a hybrid approach based on the reality that complete immunity defeats the finality feature of arbitration and bring many cases challenging awards and arbitrator decisions to courts and that granting absolute immunity is also inappropriate.[5] Qualified immunity falls somewhere at midpoint between contractual and jurisdictional theories. Qualified immunity provides a form of uniformity and balances the need of arbitrators to function independently and render just decisions without concern for party reprisal against the need to avoid bad-faith, misconduct and illegality involvement by

[1] Mullerat, op.cit. p.8.
[2] Brown, op.cit.
[3] El-Ahdab, A.H. (1999). "*Arbitration with The Arab Countries"*, 2nd ed., 1999; (Lebanon) pp.348-349, (Libya) p. 430, (Morocco) p.457, (Qatar) p.520, (Yemen) p.755.
[4] Mullerat, op.cit. p.8
[5] Agata Cevc, op.cit., pp. 409-410.

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arbitrators.[1] Arbitrators can be held liable for their actions during arbitral proceedings, issuing of an award, only under restricted conditions, and for misconducts or omissions that are reasoned avoidable at a sensible level.[2] The United Kingdom offers arbitrators' immunity only to a certain extent as arbitrators are viewed as more professionals who may incur liability under restricted circumstances.[3] Using the words of the French Constitutional Council, it is expressed that "*nobody can by general provision of law be exempt of any personal liability whatever the nature or the seriousness of their misconduct*".[4] Arbitration Act 1996 governing arbitrations in England and Wales that came into force in 2010, empowers the court to remove an arbitrator if the applicant can prove substantial injustice and evidence for circumstances giving rise to justifiable doubts as to the arbitrator's impartiality or failure of proper performance in tribunal proceedings.[5] Similarly, an arbitrator under *Spain's Ley de Arbitraje*, is offered total immunity except from damages caused by fraud or negligence.[6] In France, arbitrators are liable if they commit "*personal misconduct equivalent to serious misconduct or constituting fraud, gross negligence or denial of justice*" according to French Supreme Court ("*Cour de cassation*").[7] Arbitrators may be liable through lawful claim brought by dissatisfied parties who are negatively affected by damages from breaches in arbitrators' duties and obligations or as arbitrators misuse their authority and don't commit to the trust granted to them by parties.[8]

[1] Sponseller, M.A. (1993). Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators. Hastings Law Journal, 44 (2), pp. 421-447. https://repository.uchastings.edu/hastings_law_journal/vol44/iss2/5
[2] Ibid.
[3] Mullerat, op.cit. p.8.
[4] French Constitutional Council, decision n° 88-248 DC, January 17, 1989.
[5] Arbitration in the United Kingdom: The 1996 Arbitration Act.
[6] Mullerat, op.cit., pp. 13, 14.
[7] Mullerat, op.cit. , p.20.
[8] Tsakatoura, op.cit.

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As a matter of Lebanese law, arbitrators can be subject to civil liability and are not offered immunity. Article 770 LCCP states that arbitrators may be challenged on the same grounds of challenging judges which are reasons of impartiality and independence as exclusively indicated in Article 120 LCCP. Additionally, arbitrators may be liable for gross fault as it is the case of local judges pursuant to Article 741 LCCP.[1]

To summarize, there is no uniform approach to civil liability for arbitrators. The positions diverge between different jurisdictions due to dissimilarities in perceptions of the nature of the relationship between the arbitrator and disputants. Accordingly, arbitrators are under some jurisdictions offered absolute immunity while under others, arbitrators are fully liable. The additional approach is the qualified immunity that offers arbitrators a certain degree of immunity within their judicial role to ensure their independence, impartiality and the finality of their awards. Yet, arbitrators are only liable in exceptional cases.

In connection with money laundering, in the absence of any intentions of involvement, arbitrators are not held civilly liable under any type of jurisdiction. On the other hand, when arbitrators get intentionally involved in money laundering or when they are confronted with apparent and observable tainted cases and neglect their obligations, they become not only civilly liable towards damaged persons, but also criminally liable (as will be discussed below). Thus, turning a blind eye on party allegation or their own suspicion of money laundering, arbitrators may potentially not only threaten the enforceability of the arbitral award but it may also – in extreme cases – expose themselves to civil liability and criminal investigation.[2]

[1] Obeid, op.cit.
[2] Weston, op.cit, p. 458.

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B. Criminal Liability of Arbitrators

In criminal liability, states usually prosecute defendants before courts.[1] The basic principle of this liability is based on the presence of both physical and moral elements of the offence.[2] The standard of proof for criminal offences is that of "*beyond reasonable doubt*". Penalties pertaining to the classification of Criminal Offenses often include felonies, misdemeanors, and contraventions. Criminal liability has a purpose that cumulatively combines the objectives to identify, acknowledge, punish and educate the greater community and offenders about the consequences of their actions.[3] Criminal liability extends to cover individuals, corporations, businesses, organizations and professionals who may get unintentionally or willingly engaged in organized criminalities such as corruption, fraud and money laundering.[4] Arbitrators are not any exception. Particularly, criminal liability of arbitrators is highly valued in the realm of economic crimes. This does not come as a surprise, bearing in mind the intensive AML international efforts to combat this serious criminal offence and the roles played by many multinational companies in bribing foreign officials or laundering the proceeds of crime.[5]

Criminal liability imposed on arbitrators is of enormous advantage to parties, and the whole arbitration process. It guarantees that arbitration proceedings run smoothly and therefore, indirectly, ensures the morality and reputation of arbitration proceedings.

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[1] Card, R., and Molloy, J. (2016). Introduction to Criminal Liability. Card, Cross and Jones Criminal Law, 1 Jan. 2016, pp. 33–40. https://doi.org/10.1093/he/9780198753094.003.0002. Accessed on 8 July 2021.

[2] Mousourakis, G. (1998). Character, Choice and Criminal Responsibility. Les Cahiers de Droit, 39 (1), pp. 51–73. https://doi.org/10.7202/043479ar. Accessed on 12 September 2021.

[3] Swindle, J. (2014). The Five Objectives of Criminal Laws. Swindle Law Group. https://www.swindlelaw.com/2014/01/the-five-objectives-of-criminal-laws/

[4] Day, J., Schultz, B., Chung, T.T., Ahern, C., Hewitt, K.P. et. al. (2020). 2020 Cross-Border Corporate Criminal Liability Survey. Lexology, 17 Dec. 2020, www.lexology.com/library/detail.aspx?g=8f84d289-c60e-4500-86e4-0c1ff3a3942e. Accessed 15 April 2021.

[5] Kyriakos-Saad, N., Esposito, G., Schwarz, N. (2012). The Incestuous Relationship between Corruption and Money Laundering. Revue Internationale de Droit Pénal, 83 (1), pp. 161-172. DOI. 10.3917/ridp.831.0161. Accessed on 11 Jan. 2021.

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Criminal liability, however, could itself be used under criminal law by a party in a completely unjustified and abusive manner to block the arbitration. It is not uncommon for a dissatisfied disputant to produce some documents to criminalize an arbitrator during arbitration proceedings potentially resulting in disabling the arbitration proceedings. The fact that a party could bring criminal liability of a fair arbitrator leads to doubt about the arbitrator's impartiality and neutrality towards this party. Therefore, the scope of the arbitrator's liability must not be limited as it secures the integrity of arbitral proceedings; however, it could be necessary to restrict its implementation to very specific cases to avoid any risk of manipulation by parties.[1]

Criminal liability of arbitrators is often a complex issue. It affects the legal relationship between arbitrators and parties and relates to some essential issues on the nature of the arbitrator's mandate.[2] As part of their mission, arbitrators may be accused of committing corruption, fraud, bribery, forgery, money laundering and others. These crimes endanger arbitration, arbitrators, parties and society as whole. Issuing of arbitral awards that by some means facilities money laundering or the complicity of this offense committed by parties exposes arbitrators to the risk of criminal liability.[3] Even if there are various opinions as to the arbitrators' immunity, it is not disputed that arbitrators are not immune from criminal liability.[4] Yet, criminal liability for arbitrators is a challenging objective as a sound proof needs to be produced that an arbitrator has acted in a criminally illegal manner. It is undisputed that criminalization of arbitrators remains

[1] The Arbitrator's Liability Report from the CLUB DES JURISTES, op.cit., p.53.
[2] Karrer, P.A. (2014**).** Responsibility of arbitrators and arbitral institutions. In "Leading Arbitrators' Guide to International Arbitration – 3rd Ed". Newman, L.W. and Hill, R.D. Juris Publishing, Inc. pp. 161- 174.
[3] The Arbitrator's Liability Report from the CLUB DES JURISTES, op. cit., p.50.
[4] Moses, op.cit., p. 163.

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absolutely the decision of national courts.[1] Although the arbitrators' civil liability may be generally comprised, specifically because of the judicial mission of arbitration, the criminal liability of arbitrators is not in any way undermined even under nearly absolute immunity jurisdictions. The rational is that a conduct subject to criminal liability is in principle so serious and results in moral and physical threats of public interests which cannot be overlooked and allowed to pass with no punishment. Nevertheless, instances where arbitrators are subject to criminal proceedings are very few and exceptionally infrequent.[2] This may be attributed to the deterrence purpose of criminal liability along with the moral, professional and ethical qualities of arbitrators. Added to this is the fact that finding an arbitrator criminally liable is a serious act and no prosecutor or judge would wish to start criminal investigations proceedings against an arbitrator without solid factual evidence.[3]

In all jurisdictions, criminal laws of countries have evolved and incriminated money laundering. Seen from the standpoint of specific substantive aspect, especially criminal justice policy, there are variations between criminal codes of states to such offence. Article 324-1 of the French Criminal Code provides that: "*money laundering is an act of facilitating, by any means, the false justification of the origin of goods or revenues from the perpetrator of a crime or an offense which provided the latter with a direct or indirect profit…Money laundering is punished by five years' imprisonment and a fine of 375,000 €*." Therefore, according to the *Report of Le Club de Juristes* (Ad Hoc Committee)[4], an arbitrator who knowingly participates in money laundering acknowledging the resolution agreed upon by disputants could be sentenced for money laundering, and the arbitral decision issued would constitute a *"dissimulation (…) operation"* or

[1] Lew, op. cit., pp. 489-537.
[2] Mullerat, op.cit. p.8
[3] The Arbitrator's Liability Report from the CLUB DES JURISTES, op. cit. p.39.
[4] The Arbitrator's Liability Report from the CLUB DES JURISTES, op.cit., pp.50-51.

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an act *"falsely justifying the origin"* of a revenue a disputant would receive. Other examples of criminal liability of arbitrators can be found in other countries. In Argentina, arbitrators may be criminally liable in specific cases of misconduct (Article 269 Criminal Procedure Code) and in Czech Republic (Sections 216 and 217 of Criminal Code).

Inversely, the latest amendment of Article 257 of UAE Penal Code in 2018 has exempted arbitrators, arbitration experts and arbitration proceedings from the application of this Article (257) that imposed criminal liability on arbitrators under the UAE's Penal Code for a failure (or perceived failure) to act with "*objectivity and integrity*" when acting in UAE-seated arbitration.[1,2] The recent amendment has removed a weighty barrier to arbitrators accepting appointments and has restored the UAE as the "*seat of choice*" for arbitration. It has also brought UAE closer in line with international best practice in arbitration.[3]

As for Lebanon, Article 2 of Lebanese Law 44/2015; "*Money laundering is any act committed with the purpose of: 1. Concealing the real source of illicit funds, or giving, by any means, a false justification regarding the said source, while being aware of the illicit nature of these funds. 2. Transferring or transporting funds, or substituting or investing the latter in purchasing movable or immovable assets or in carrying out financial transactions for the purpose of concealing or disguising the such funds' illicit source, or assisting a person involved in the*

[1] Turrini, M., Roshan, A. (2018). Criminal Liability of Arbitrators Repealed in the UAE. 2018. https://www.whitecase.com/publications/alert/criminal-liability-arbitrators-repealed-uae.

[2] The old version of article 257 of the UAE Penal Code (as had been introduced by Federal Code No. 7 of 2016) read as follows: "*Any person who issues a decision, gives an opinion, submits a report, addresses a case or proves an incident for the benefit or against a person, failing to maintain the requirements of integrity and impartiality, in his capacity as an arbitrator, expert, translator or investigator, appointed by administrative or judicial authority or selected by parties, shall be sentenced to temporary imprisonment. Said subjects shall be banned from being re-assigned to such tasks, and shall be subject to the provisions of Article 255 of the present Law."*

[3] The new version of article 257 UAE Penal Code reads*: "Any person who, while acting in the capacity of an expert, translator or investigator appointed by a judicial authority in a civil or criminal case, or appointed by an administrative authority, confirms a matter contrary to what is true and misrepresents that matter while knowing the truth about it, shall be sentenced to imprisonment for a minimum term of a year and a maximum term of five years".*

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commission of any of the offences mentioned in Article 1 to avoid prosecution, while being aware of the illicit nature of these funds." Under this article, money laundering is viewed as a misdemeanor and not a felony, since the classification of a crime according to the Lebanese Criminal Code is based on the nature of the penalty and not on its duration.[1,2] Any person that undertakes or attempts to undertake or incites or facilitates or intervenes or participates in money laundering operations is punished by imprisonment for a period of three to seven years and by a fine not exceeding twice the amount laundered.[3] Additionally, movable or immovable assets related to, or derived from, money laundering are subject to confiscation.[4] Within this context of abuse of arbitration, it is important to distinguish between cases of abusive acts by disputants of a rational and impartial arbitrator or cases of cooperation of arbitrators to some extent with the parties. In the latter case an arbitrator can be liable under Article 2, Law 44/2015. For example, by issuing the award incorporating a settlement between parties, an arbitrator would be *facilitating* and *assisting* another person(s) to conceal the origin of the property. In this case, the arbitrator's intention can be proven by a body of supporting evidence or by presumption[5] given the abnormal nature of the proceedings. On the other hand, in the former case, it can be supposed that the arbitrator would not be aware of the intention of the parties using the arbitration process in order to conceal the origin of money. Thus, the intention of the arbitrator would not be

[1] Art.179, Lebanese Criminal Code, "…The legal definition is based on the maximum level of the heaviest penalty imposed by law".

[2] Art.39, Lebanese Criminal Code, "The customary penalties for misdemeanors are: 1. Imprisonment with labor; 2. Ordinary imprisonment; 3. A fine".

[3] Art.3, Law 44/2015, "Whoever undertakes or attempts to undertake or incites or facilitates or intervenes or participates in:1- Money-laundering operations, shall be punishable by imprisonment for a period of three to seven years, and by a fine not exceeding twice the amount laundered…"

[4] Art.14, Law 44/2015, "The movable or immovable assets that are proved, by a final Court ruling, to be related to, or derived from, a money-laundering or terrorist financing offence, shall be confiscated to the benefit of the State, unless the owners of the said assets prove in a Court of Law their legal rights thereupon. The confiscated assets may be shared with other countries, whenever the confiscation results directly from coordinated investigations or cooperation between the concerned Lebanese authorities and the concerned foreign body (ies)".

[5] Dupeyre, R. (2014). Les Arbitres et Centres d'Arbitrage Face à leurs Responsabilités: Le Droit Français à son Point d'Équilibre. Bulletin ASA, 32 (2), pp. 265 – 285.

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present. Consequently, no liability may be imposed against the arbitrator. Additionally, criminal liability may be imposed if an arbitrator has a *prima facie evidence* that money laundering could be at stake during any stage of proceeding, but no further investigation is conducted. Rather, the arbitrator proceeds with the proceeding justifying the origin of money and helps in disguising it.

Given the above mentioned, it can be concluded that an arbitrator who fails to meet the obligations discussed in Chapter II.1, and neglects addressing and acting appropriately upon obtaining solid evidence of money laundering or who intentionally participates in money laundering could be subject to criminal liability and sentenced accordingly. It follows that in such case, civil liability and the annulment of arbitral award would be, as previously discussed, an inevitable consequence.

To summarize this Part II of the present study, arbitrators have both preliminary and postliminary obligations when confronted with any form of criminality, particularly money laundering. Preliminary obligations include: *i)* Responding to allegations of money laundering or raising them *Sua Sponte*; and *ii)* Establishing evidence and facts of disputes through using circumstantial evidence, red flags and adverse inferences. On the other hand, postliminary obligations encompass: *ii)* Invalidating contracts tainted with money laundering based on (a) the law chosen by the parties, or (b) principle of international public policy or (c) mandatory law in cases where the contract which involves money laundering, is valid under the chosen law; and *ii)* Reporting money laundering to competent authorities as tribunals must not enjoy any privilege which would exempt them from doing so.

Issuing an award that overlooks money laundering provides solid grounds for the award to be annulled at the enforcement stage due to public policy violation. Also, deliberate misconduct or

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engagement in money laundering may expose arbitrators to the risk of civil and criminal liabilities.

It is therefore crucial that tribunals become well informed about the factual and legal issues that they may encounter when addressing on issues of money laundering tainted contracts and the potential impact of this criminality on the validity and admissibility of awards. It is also highly important to learn about the serious risk and liabilities they may be exposed to in case of failure to meet their obligations or in cases of intentional/unintentional involvement.

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Conclusion

With the expanding growth of the global economy, arbitration has become the preferred mechanism for resolving international disputes. This popularity has increased the risk of arbitrators to face money laundering tainted contracts. Arbitration may be seen by money launders as a suitable environment to conceal and disguise the origin of money. Indeed, a private and enforceable arbitral award issued in terms of dispute settlement between the parties may present the perfect channel to legitimize money flows.

The occurrence of money laundering in the context of arbitration may be manifested through different scenarios. These include but may not be limited to the following; The first scenario may arise especially where parties are in a real dispute involving funds that are the proceeds of crime. In the second scenario, arbitration may be conducted with the purpose to launder money (sham arbitration). Arbitrators are, in most cases, not complicit in money laundering but they are faced with disputes affected by the criminal conduct. However, money laundering may, in theoretically rare case, occur through a third scenario with the involvement of arbitrators. While the former scenarios are more probable and more often discussed, the latter seems to become more prevalent in recent years.

In view of the growing concern of potential occurrence of money laundering in arbitration and the intensified international efforts to combat this crime, it becomes necessary for arbitrators to be part of this universal battle. Current practice requires arbitrators to play an active role towards fulfilling their duties to meet the interests of disputants while protecting public policy, legitimacy and integrity of the arbitration process.

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In response to these duties, pressing issues may arise as critical in practice. These issues relate to: How should arbitrators respond to highly objectionable contracts such as those involving money laundering? What are the obligations of arbitrators and what are the risks in case of failure to meet them?

Analyzing the various aspects of the potential occurrence of money laundering in arbitration and to answer the many pressing issues that relates to arbitrators' obligations and risks, the present thesis draws the following points;

In the nearly 60 years since Judge Lagergren delivered his decision in ICC Case No.1110 by which he declared himself incompetent to rule in arbitration where issues of corruption and illegality had been raised.[1] Arbitral tribunals and courts have taken different paths in analyzing the role and competence of arbitrators to resolve claims of illegality, including bribery, corruption and money laundering. In today's arbitration practice, it is widely accepted that arbitrators should not "*turn a blind eye*" but, rather, they should accept jurisdiction and find the means to refuse to give effect to such a highly questionable contract.

Arbitrator's role should be focused on dealing with the contact in hand and not to decide on a party's possible criminal conduct. Thus, arbitrators have to deal with the issue of illegality to serve the process of arbitration and not for the purposes of conviction.

It is unquestionable that arbitrators are obliged to examine allegations of money laundering that might be raised by one of the parties. However, in the absence of any allegations, it is agreed upon that an arbitrator could, and in most cases should, raise and identify money laundering *Sua*

[1] ICC Case No. 1110, Argentine engineer v. British Company, Award, 1963 in Albert Jan van den Berg (ed.), Yearbook of Commercial Arbitration, Vol. XXI, Kluwer Law International 1996, pp. 47–53.

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Sponte if the parties do not do so when necessary. Certain red flags, issued by public and private organizations can be of assistance in this regard.

As for the burden of proof, there is a consensus that it should be brought by the party alleging money laundering and that it should not shift. The means to be followed by arbitrators to identify the rules of evidence appropriate to the nature of money laundering, in the context of the main contract, are the standard of proof and assessment of evidence. As for the standard of proof, there is no well-defined approach currently available to apply to such allegations. As money laundering is by its nature extremely difficult to prove as launders typically mark no evidence behind, it is certainly reasonable to consider that the standard of proof applicable in arbitration shouldn't be any higher than the standards required in other civil cases. Nevertheless, in the assessment of evidence, a tribunal should take into consideration the nature of the money laundering offence during the identification of the significance of circumstantial evidence. Drawing adverse inferences from uncooperative behavior of disputants when appropriate should also be an option to be considered by arbitrators.

Arbitrators ought to invalidate contracts tainted by money laundering on the basis *(i)* the law chosen by the parties, or *(ii)* to a principle of international public policy or (iii) mandatory provisions of another law over the governing substantive law of the contract. Each of these options features certain strengths and weaknesses.

With reference to the applicable rules of confidentiality and reporting obligations as provided in the relevant AML rules, arbitrators must have the obligations to report suspicions or findings of money laundering to competent authorities. Arbitrators should not disregard the possibility of reporting any relevant suspicions even when the relevant applicable laws leave such decision to

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their discretion. This action would set a serious sacrifice of the principle of confidentiality for the purpose of public greater interests.

Any failure by arbitrators in performing their obligations leading to a tribunal award that overlooks money laundering provides solid grounds for such award to be challenged at the enforcement stage due to public policy violation. It is therefore crucial that tribunals become well informed about the factual and legal issues that they encounter when deciding on issues of money laundering and the potential impact of this criminality on the validity and admissibility of awards.

Additionally, the liability of arbitrators also represents a serious risk when deliberate misconducts or criminal acts are committed. It is perceived today, that such situations threaten arbitrators and expose them to different forms of liabilities that govern the legal relationship between arbitrators and disputants. It also governs the obligations of arbitrators to provide a fair, equal and legal settlement.

In connection with the above, Lebanon has already taken some considerable steps to assume an increasingly important role in the world of arbitration being a significant means of development and to attract financial foreign investments. As for any country, the establishment of recognized arbitral centers in Lebanon reflects the potential of political and legal stability that gives comfort to foreign investors. However, the issue of money laundering occurrence in the context of arbitration in the country presents a serious concern under the unprecedented corruption levels and lack of confidence and transparency to sufficiently share information necessary to conduct any relevant investigations. Thus, in order to obtain recognition to the established arbitral centers in the region, arbitration in Lebanon needs to demonstrate that it can offer a reliable and efficient

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alternative for parties assuring that the national judiciary will support the arbitral process. With improved legal frameworks sustaining international commercial and investment arbitration, and better resourcing and training of arbitrators, Lebanon can find for itself a place on the global arbitration map.

The above conclusions reflect the significance of the role of arbitrators in combating money laundering. Addressing the illegal acts and performing in accordance is certainly a very delicate and sensitive exercise, but not impossible for arbitrators.

Although arbitral tribunals are gaining more experience of tackling allegations and suspicions of different criminalities, they need to enhance their readiness and alertness when faced with such matters. Arbitrators should be highly satisfied that this comes under the concerns to maintain arbitration as an ever-great and favorable tool to resolve international disputes.

The issue regarding the impact of the occurrence of money laundering in arbitration on the national and international legal frameworks will continue to evolve at a rapid pace. The question still to be answered, is whether there is a necessity to set specific unified legal regulations that can directly pinpoint the obligations and identify the risks of arbitrators more explicitly.

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Annex 1

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Year	Globe	Europe	Arabic region	Lebanon
1988	• UN (Vienna) Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. • Statement of Principles (Basel Committee).			
1989	• Financial Action Task Force (FATF) established.		• Regional Agreement on Legal and Judicial Cooperation between the Countries of Arab Cooperation.	
1990	• FATF Forty Recommendations released.	• (Strasbourg) Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (CoE).		
1991		• First Money Laundering Directive (European Union).		
1994	• The Inter-American Drug Abuse Control Commission (CICAD-OAS) Declaration of Principles and Plan of Action at Summit of the Americas.		• The Arab Interior Ministers Conference • Amman Conference	
1995	• Egmont Group of Financial Intelligence Units of the World founded • Ministerial Conference (The Buenos Aires Declaration) concerning the Laundering of Proceeds and Instrumentalities of Crime (CICAD-OAS).	• Europol Convention signed • Europol Drugs Unit (EDU) established.		

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1996	• FATF Forty Recommendations revised for the first time.		• Tunis Security Conference.	• Ratification of Vienna Convention (11 Mar 1996) • The Association of Banks in Lebanon approved: "The Prudence and Caution Agreement"[1]
1997	• OECD Convention on Combatting Bribery of Foreign Officials in International Business Transactions • Asia/Pacific Group on Money Laundering (APG) established.	• Action Plan to Combat Organized Crime (European Union) • Council of Europe (CoE) established the Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures (PC-R-EV).		
1998	• UN Political Declaration and Action Plan against Money Laundering.	• Joint Action on Corruption in the Private Sector (European Union).		• Passing Law No.673 of 16/3/1998 on: "Narcotic Drugs, Psychotropic Substances and Precursors Law"[2] • The Association of Banks in Lebanon issued: "Circular No.30 of 25/8/1998".[3]
1999	• UN Convention for the Suppression of the Financing of Terrorism**.**		• OAU Convention on the Prevention and Combatting of Terrorism.	• Passing Law No.154 of 27/12/1999: "Illicit Enrichment Act"
2000	• FATF Report on Non-Cooperative Countries and			• Listing Lebanon as one of the 15 non-cooperative

[1] The prudence and caution agreement defined the frameworks and means to support prevention of money laundering by: avoiding the use of banks for the purposes of money laundering resulting from illicit drug trafficking, verifying the identity of the contractor pursuant to the principle of "Know Your Customer", and identifying the economic right holder, Monitor operations and their characteristics, and train bank employees.

[2] The term money laundering has entered for the first time in Lebanese legislation in Article 2 of the Narcotic Drugs, Psychotropic Substances and Precursors Law, and it has been limited to funds resulting from drug trafficking. This article has been canceled by virtue of the Anti-Money Laundering Law No. 318/2001.

[3] Circular No. 30 includes standardized control procedures for combating money laundering within the framework of the prudence and caution agreement.

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	Territories (NCCT) • UN (Palermo) Convention Against Transnational Organized Crime • Wolfsberg Global Anti-Money Laundering Principles for Private Banking published.			countries by FATF • The Lebanese Central Bank issued: "The internal control on banks decision No.7737. of 15/12/2000" • The Lebanese Central Bank issued: " Decision on the Conditions of Establishment of Banks in Lebanon. No.7739 of 21/12/2000" • The Lebanese Banking Control Commission issued: "Circular No.26 of 25/1/2001"[1] • The Lebanese Central Bank issued: "Circular No.1873 of 15/12/2000"[2] • The Lebanese Central Bank issued: "Circular No. 1792 of 21/1/2000".[3]
2001	• Report on Customer Due Diligence for Banks (Basel Committee). • FATF Eight Special Recommendations on Terrorist	• Second Money Laundering Directive (European Union).		• Lebanon still had its name on the List of Non-Cooperative Countries • Passing Law No. 318 of 20/4/2001 "FIGHTING

[1] Circular No. 26 requests the supervisory commissioners of banks to prepare annual special reports on the extent to which banks adhere to anti-money laundering procedures, send a copy thereof to the competent committee, carry out audit procedures in accordance with international auditing standards, and mention the compliance or non-compliance of banks with them.

[2] Circular No. 1873 relates to internal control of banks, by establishing administrative units and setting up internal control systems for them, establishing an internal audit unit that is completely independent of bank management, or assigning a specialized institution to carry out internal auditing tasks under specific conditions. This is in addition to several procedures that enhance the effectiveness of internal control.

[3] Circular No. 1792 requires all banks operating in Lebanon to abide by the provisions of the Prudence and Caution Convention regarding the obligation to combat money laundering operations.

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	Financing released.			MONEY LAUNDERING"[1] • The Lebanese Central Bank issued decision: "No. 7818 of 18/5/2001[2]
2002	• Wolfsberg Global Anti-Money Laundering Principles for Private Banking revised for the first time. • FATF Consultation Paper on Revisions to Forty Recommendations released. • FATF/IMF/ World Bank Agreement on AML Pilot Project for Assessing Compliance with Anti-Money Laundering and Combatting the Financing of Terrorism Standards.	• Europol Mandate expanded.		• Delisting Lebanon by FATF from the List of Non-Cooperative Countries in Combating Money Laundering. • The Lebanese SIC issued: "Notification (1) of 4/7/2001[3] Notification (2) of 20/7/2001[4] Notification (3) of 16/10/2001."[5]
2003	• New FATF Forty Recommendations released. • UN Convention Against Corruption (UNCAC).			• Passing Law 547/2003[6] • Lebanese SIC joined Egmont Group • Issuing the Annual Report of

[1] Law 318/2001 was the first Lebanese/Arab legislation to combat Money Laundering.
[2] Decision No. 7818 was concerned with monitoring financial and banking operations to combat money laundering, it was amended on 2002 and 2003.
[3] Notification No. (1) asks all institutions not subject to the Banking Secrecy Law of 1956, including individual institutions, to adhere to the provisions of the Anti-Money Laundering Law No. 318/2001, and to oblige them to keep records of transactions whose value exceeds the sum of ten thousand US dollars or its equivalent, and to report for suspicious money laundering operations.
[4] Notification No. (2) asks all banks and institutions to send details on information related to operations suspected of concealing money laundering, in an envelope clearly bearing the phrase "top secret", and directed to the SIC.
[5] Notification No. (3) sets a form for reporting money laundering operations along with all documents related to the operations.
[6] Law 547/2003 amended Article 1 of Law 318/2001.

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				the SIC to Combat Money Laundering 26/3/2003[1] • Ending the observation period on Lebanon through GAFI decision.
2004	• FATF Ninth Special Recommendations on Strengthening agreed International Standards for Combating Money Laundering and Terrorist Financing published. (40+9 Recommendations).		• Launching of the Financial Action Task Force between Middle East and North Africa "MENAFATF".	
2005	• IMF/UNODC Model Legislation on Money Laundering and Financing of Terrorism.	• Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. (Warsaw Convention) • Third Money Laundering Directive (European Union).		• Ratification of UN (Palermo) Convention Against Transnational Organized Crime on 5 Oct 2005 • Second meeting of MENAFATF in Beirut on 11/4/2005.[2]
2006			Establishing an Initiative (Private Sector Dialogue) between the United States of America and the Middle East and North Africa region MENA (PSD).	

[1] The 2003 report referred to the lifting of bank secrecy for 79 out of 103 cases that were subject to investigation, related to terrorism crimes, embezzlement of public and private funds, counterfeiting of currency and drugs, illegal arms trafficking and organized crimes. Account balances were not frozen, unlike in 2001, when about 9.7 billion LBP were frozen. ($ 2.5 million), and the volume of suspicious operations reached about $ 8.18 million.

[2] MENAFATF previously met in Bahrain.

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2010	• Salvador Declaration on Comprehensive Strategies for Global Challenges.		• Signing the Arab Agreement for Combating Money Laundering and Financing of Terrorism.	
2012	• Wolfsberg Global Anti-Money Laundering Principles for Private Banking revised again. • FATF Recommendations-International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation adopted.			
2015		• Forth Money Laundering Directive (European Union).		• Passing Law No.43 of 24/11/2015 "Exchange of Tax Information" • Passing Law No.42 of 24/11/2015 "Declaring the Cross-Border Transportation of Money" • Passing Law No.44 of 24/11/2015 "Fighting Money Laundering and Terrorist Financing".
2016				• Repealing Law No.43 of 24/11/2015 by Law No.55 of 27/10/2016 "Exchange of Information for Tax Purposes".
2017	• Guidelines on the Sound Management of Risks related to Money Laundering and Financing of Terrorism (Basel Committee).			

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2018		• Fifth Money Laundering Directive (European Union). • Sixth Money Laundering Directive (European Union).		
2019	• FATF Recommendations - International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation updated June 2019. • Introduction of Guidelines on Interaction and Cooperation between Prudential and AML/CFT supervision (Basel Committee).	• European Commission adoption of Communication to the European Parliament and the Council Towards better implementation of the EU's AML and CFT framework.		• Ratification of UN Convention for the Suppression of the Financing of Terrorism1999 on 29/8/ 2019.

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