Czech (& Central European) Yearbook of Arbitration

Czech (& Central European) Yearbook of Arbitration

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Borders of Procedural and Substantive Law
in Arbitral Proceedings
(Civil versus Common Law Perspectives)

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BOOK REVIEWS

NEWS & REPORTS

All contributions in this book are subject to academic review.

List of Abbreviations

AA	arbitration award(s)
AC	Arbitration Court at the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic
ADR	Alternative Dispute Resolution
ArbAct [CZE]	Act [Czech Republic] No. 216/1994 Coll., on Arbitration and Enforcement of Arbitral Awards, as subsequently amended
AUT	the Republic of Austria
BIT	Bilateral Investment Treaty
CC	Act [Czech Republic] No. 40/1964 Coll., as subsequently amended, Civil Code
CC RF	Civil Code of the Russian Federation
CCP	Act [Czech Republic] No. 99/1963 Coll., as subsequently amended, Code of Civil Procedure
CIETAC	*China International Economic and Trade Arbitration Commission*
CISG	Convention on the International Sale of Goods
COA	Cause of Action
CommC	Act No. 513/1991 Coll., as subsequently amended, Commercial Code
ConCourt	Constitutional Court of the Czech Republic
Constitution [POL]	Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. [*Constitution of the Republic of Poland of 2 April 1997*], published in: Dziennik Ustaw [*Journal of Laws*] 1997, No. 78, item 483, as amended

CZE	Czech Republic
ECICA	Egyptian Chamber of International Commercial Arbitration
EConv	European Convention on International Commercial Arbitration, done in Geneva on 21 April 1961
ECJ	European Court of Justice
EU	European Union
ExecProcC	Executory Procedure Code. Act [Czech Republic] No. 120/2001 Coll., on Judicial Executors and Executory Activities
HUN	Hungary
Charter	Charter of Rights and Freedoms of the Czech Republic – Resolution of the Presidium of the Czech National Council No. 2/1993 Coll. of 16 December 1992 on the promulgation of the Charter of Fundamental Rights and Freedoms as a part of the constitutional order of the Czech Republic, as amended by the Constitutional Act of the Czech Republic No. 162/1998 Coll.
ICAC	International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
INCOTERMS	International Commercial Terms
NAFTA	North American Free Trade Agreement
k.c. [POL]	Kodeks cywilny z dnia 23 kwietnia 1964 r. [*Civil Code of 23 April 1964*], published in: Dziennik Ustaw [*Journal of Laws*] 1964, No. 16, item 93, as amended
k.p.c. [POL]	Kodeks postępowania cywilnego z dnia 17 listopada 1964 r. [*Code of Civil Procedure of 17 November 1964*], published in: Dziennik Ustaw [*Journal of Laws*] 1964, No. 43, item 296, as amended
NCC	Act [Czech Republic] No. 89/2012 Coll., Civil Code, effective as of 1 January 2014 and replacing also CC [CZE] and CommC [CZE]

New York Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 [*Konwencja o uznawaniu i wykonywaniu zagranicznych orzeczeń arbitrażowych, sporządzona w Nowym Jorku dnia 10 czerwca 1958 r.*], published in: Dziennik Ustaw [*Journal of Laws*] 1962, No. 9, item 41
NYConv	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the New York Convention
PIL	Act [Czech Republic] No. 91/2012 Coll., on Private International Law, effective as from 1 January 2014 and replacing also some provisions of ArbAct [CZE]
PILP	Act [Czech Republic] No. 97/1963 Coll., as subsequently amended, on Private International Law and Procedure
R	Resolution (rendered in arbitral proceedings or in course of a court litigation)
RC	Regional Court(s) [Czech Republic]
RSP	Part of the dossier numbers of disputes handled by the AC and formerly by the AC at the Czechoslovak Chamber of Commerce and Industry. This abbreviation is followed by the reference number of the case (before the slash) and the year the case was submitted to the AC (after the slash).
SC	Supreme Court of the Czech Republic
SVK	Slovak Republic
UNIDROIT	International Institute for the Unification of Private Law
UNCITRAL	United Nations Commission on International Trade Law
u.z.n.k. [POL]	Ustawa z dnia 16 kwietnia 1993 r. o zwalczaniu nieuczciwej konkurencji [*The Suppression of Unfair Competition Act of 16 April 1993*], consolidated, published in: Dziennik Ustaw [*Journal of Laws*] 2003, No. 153, item 1503, as amended.
VAT	Value added tax

Articles

Andrzej Kubas | Kamil Zawicki

The Scope of Mandatory Provisions of Procedural and Substantive Law Binding upon a Court of Arbitration

Key words:
arbitration agreement | arbitrability | mandatory provisions | private international law | recognition or enforcement of an arbitral award | recourse against the award | conflict-of-laws | choice of law | New York Convention

Abstract *| The scope of binding mandatory provisions of procedural and substantive law seems to be one of the most important problems of arbitration, especially international arbitration. It is connected to various other concerns, e.g. the law applicable to various elements of arbitration, mainly the arbitration agreement, but also arbitrability. Poland, with its Private International Law of 2011, is a party to the European Convention on Arbitration and the New York Convention. It attempted to resolve this issue in a clear manner. Even a confirmed indication of the law governing arbitration – and the arbitration agreement to be specific – does not necessarily signify that there is unambiguity as to which substantive, procedural and public law provisions are mandatory and thus binding upon a court of arbitration. The answer to this question is of paramount importance for the parties as the violation of mandatory provisions of law can lead to the setting aside of an arbitral award or to the denial of its enforcement or recognition. This paper discusses these issues from the perspective of the arbitration background of the Republic of Poland with its relatively new arbitration law and private international law.*

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I. The Place of Arbitration in the Legal System

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1.01 In all countries in the circle of European civilisation, the exercise of justice is a domain of the state, an attribute of its sovereignty and one of the most fundamental manifestations of exercise of the empire. It is so regardless of whether the state holds complex competences of public authority or whether they limit the structures of the state and the scope of their interference in the lives of citizens. The gradual transfer, and more often "wresting" by the state,[1] of the judiciary functions from the hands of people and private organisations sets the direction for the positive civil and social development of a given state. In criminal and administrative cases, with the dominant public interest and authoritarian powers of the state, the state's judicial monopoly became widespread and devoid of any significant exceptions. This is still true, even when taking into account in many countries the frequently postulated and realised decriminalisation of many types of behaviour or transformation of certain areas of social life regulated by provisions of administrative or public law into private law. These phenomena in themselves, however, are not synonymous with the "privatisation" of the administration of justice. After all, their direct result consists only in the fact that due to the change of the legal nature of certain types of social relations, disputes are recognised and settled by state bodies other than previously as a ruling by courts, and in principle, the state courts.

1.02 However, for many years the state courts' exclusiveness in the scope of exercise of the judiciary power has been successfully challenged in civil cases in the broad meaning of this notion. This was exercised when many states accepted the broad scope in which "civil cases" can be heard and adjudicated by courts of arbitration. Such a status constitutes an institutional manifestation of recognition of autonomy of will as the foundation for the shaping and functioning of legal transactions in relations between entities enjoying equal rights. Therefore, according to the principle of freedom of contracts, parties can shape their civil law

[1] The state was at first embodied by the monarch and the structures dependent upon him. It is worth noting that initially the judiciary competence was vested upon feudal lords and the Church. It was later taken back by the state.

relationship by means of an agreement. In the same scope, as a rule, they can submit disputes arisen or likely to arise from a legal relationship remaining within the limits of their discretion to a "private court" of their own choice, to arbitration, thus eliminating the competence of state courts. Admittedly, this pertains generally to the sphere of social life regulated by civil law, namely binding relations (agreements), but from the point of view of economy, this is the most vital domain.

1.03 Nonetheless, a possibility of the contractual exclusion of state courts' jurisdiction over a dispute does not implicate that the state surrenders all control over the contractually "privatised" judiciary. This is because the rule of law defines, in a binding manner, the scope of arbitrability, minimal procedural requirements for appointment of arbitrators, the course of proceedings, powers and authority of participating entities, legal instruments allowing for the control of compliance of arbitral awards with the mandatory substantive and procedural law provisions in force in the country of the award's issuance (a recourse against an arbitral award) and finally, the procedure of recognition or enforcement of an arbitral award, necessary for the equalling of effects of such an award with a state court judgment. This renders possible the use of state coercion in enforcing awards or the realisation of its legal effect not requiring the execution.

1.04 Hence, the courts of arbitration are tied with diverse and impossible to eliminate bonds to the legal system of the state where they sit or where their awards are to be executed. This also includes the law applicable in the case and at times (particularly true in international arbitration) also the standards of international law.

1.05 The limits and the intensity of these ties, in principle, are determined, first, by the autonomy of will of the parties in shaping the arbitration agreement. Second, they are determined by measuring the scope in which the court of arbitration is bound with the provisions of law within the framework of and on the basis of which it acts and rules. It is already possible to note, especially in international arbitration, a tendency to extend the scope of competence of courts of arbitration[2] and to render them independent of the interference of the mandatory *legis fori arbitri* and the law of the place of enforcement (recognition) of arbitral awards. This pertains in particular to the public law, especially when based on axiological premises, which are alien to the democratic or free-market legal order in which the autonomy of will of parties to legal transactions is not a dominating notion.

[2] As far as Polish scholars are concerned, see in particular: TADEUSZ ERECIŃSKI, KAROL WEITZ, SĄD ARBITRAŻOWY (*Court of arbitration*), Warszawa: LexisNexis 15-26 (2008) and further extensive references to Polish and international authorities contained therein.

1.06 This phenomenon results in the necessity to develop theoretically correct and practically useful directives which will provide the basis for a compromise between the sovereignty of the state realising its diverse tasks and interests with the use of the mandatory public law standards and private law. This "private judiciary", which is admittedly directly independent of state authorities, nevertheless,[3] is still "composed into" the frame of the state judiciary and functions in the frame of the state's legal system by normative and institutional ties. Mandatory provisions, both in the scope of the public and private law, are an inseparable component of these ties.

1.07 Within the limited frame of this essay, we confine ourselves to considering and indicating several issues, which in our opinion are of particular significance in this area, at the same time drawing attention to the regulations to be found in Polish law. The latter deserves attention not only because it is a native law for the authors, but also because it is a relatively new and extensive regulation, taking into consideration both solutions adopted or postulated in international law as well as views expressed by arbitration, especially European, scholars.[4]

II. Arbitration Regulations of the Republic of Poland

1.08 By force of the Amending Act of 28 July 2005,[5] the Polish Code of Civil Procedure (CCP) was enriched by Part V – a new extensive regulation

[3] See for instance: Marc Blessing, *Mandatory Rules of Law versus Party Autonomy in International Arbitration*, 14 (4) J. INT'L ARB 23, 23, specifically references made in footnote 3 and arbitral cases cited at 24-26 (1997); Jeff Waincymer, *International Commercial Arbitration and the Application of Mandatory Rules of Law*, 5 (1) AIAJ 1, 2 et seq. (2009); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 705 et seq. (1999); Alexander K. A. Greenawalt, *Does International Arbitration Need a Mandatory Rules Method?* 18 AM REV INT ARB 103, 105 et seq. (2007). Polish authorities: TADEUSZ ERECIŃSKI, KAROL WEITZ, *supra* note 2, at 322-324; Przemysław Ballada, *Zagadnienia obowiązku stosowania prawa materialnego w postępowaniu przed sądem polubownym* (*Problems concerning the duty of applying substantive law in the arbitral proceedings*), 64 (1) RUCH PRAWNICZY EKONOMICZNY I SOCJOLOGICZNY 87 et seq. (2002).

[4] Jerzy Rajski, *W zgodzie ze światowymi standardami. Projekt ustawy o międzynarodowym arbitrażu handlowym* (*In line in international standards. Draft law on international arbitration*), (1363) RZECZPOSPOLITA 15, 15 (1998); Piotr Bielarczyk, *Nowelizacja Kodeksu postępowania cywilnego w zakresie sądownictwa polubownego* (*Amendment of the Code of civil procedure in the scope of arbitration*), 13 (22) MONITOR PRAWNICZY – DODATEK SPECJALNY 1, 2 et seq. (2005); TADEUSZ ERECIŃSKI, KAROL WEITZ, *supra* note 2, at 34-35; 5 KODEKS POSTĘPOWANIA CYWILNEGO. KOMENTARZ (*Code of civil procedure. Commentary*), Warszawa: LexisNexis 348-349 (T. Ereciński ed., 2007).

[5] Act of 28 July 2005 on amendment of the Code of civil procedure, (178) Journal of Laws, item 1478, in force from 17 October 2005.

on arbitration (Articles 1154 – 1217 of the CCP). The regulation replaced the provisions so far in force, originating from half a century ago and from a different *époque* altogether, failing to comply with contemporary demands. The amendment of Polish arbitration law was largely based on UNCITRAL Model Law on International Commercial Arbitration. As a result these regulations are similar to those in force in more than 60 countries who followed this universal act. This renders the Polish arbitration judiciary more comprehensible and easier to accept by foreign investors. At the same time, the similarity of Polish provisions to the regulations of other European countries enables the use of the extensive case law of other countries in interpretation and application of Polish provisions and in the practical operation of Polish courts of arbitration, especially the most frequently selected permanent courts of arbitration.

1.09 Moreover, for the first time in the history of Polish codification, the new Polish Private International Law of 2011[6] features specific statutory conflict-of-laws norms for an arbitration agreement (Articles 39 and 40 of the PIL). The regulation seems to be convergent with what is accepted in the practice of international arbitration and scholars.[7] The regulation is concise and constitutes a starting point for further deliberations.[8] The provision itself explains a lot, but not everything.

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[6] (80) Journal of Laws, item 432.

[7] Andrzej Mączyński, *O potrzebie, zakresie i sposobie reformy polskiego prawa prywatnego międzynarodowego* (*On the necessity and the means of amending Polish private international law*), *in* PRAWO PRYWATNE CZASU PRZEMIAN. KSIĘGA PAMIĄTKOWA DEDYKOWANA PROFESOROWI STANISŁAWOWI SOŁTYSIŃSKIEMU (*Private law in times of change. Anniversary book dedicated to Professor Stanisław Sołtysiński*), Poznań: Wydawnictwo Naukowe UAM 851 et seq. (Aurelia Nowicka ed., 2005); Paul Lagarde, *La formation progressive du droit international privé communautaire* (*Progressive formation of the private international law of the EU*), *in* ROZPRAWY PRAWNICZE. KSIĘGA PAMIĄTKOWA PROFESORA MAKSYMILIANA PAZDANA (*Legal discussions. Anniversary book dedicated to Professor Maksymilian Pazdan*), Kraków: Zakamycze 176 et seq., 182 et. seq. (L. Ogieło, W. Popiołek, M. Szpunar eds., 2005).

[8] Article 39 of the PIL (*unofficial translations of the authors*):

1. Arbitration agreement is governed by the law chosen by the parties.

2. In a case when no law is chosen, an arbitration agreement is governed by the law of the state of the chosen seat of arbitration. If such a place was not agreed upon, the arbitration agreement is governed by the law applicable to the legal relationship on the basis of which or in connection with which the dispute arose. It is sufficient if the agreement is effective according to the law of the state in which the proceedings took place or in which the court of arbitration rendered an award.

Article 40 of the PIL: The form of the arbitration agreement is governed by the law of the state of the place of arbitration. It is sufficient if the form of the law which governs the arbitration agreement is maintained.

1.10 The issue of the mutual relationship between the law applicable to the arbitration agreement, chosen by the parties or indicated by the conflict-of-laws norm, and the law of the country where the arbitration proceedings (or possibly where the state courts' interventions in arbitration) are ongoing or the law of the state where the award is to be enforced or recognised, remains an open question. It may not be clear if an admissible scope of arbitrability clause is narrower in the country where the arbitration takes place or in the country where the award is to be enforced (recognised) than in the law applicable to the arbitration agreement. It is so because not all legal systems are equally "pro-arbitration" in nature. In other words, how is a court of arbitration (or a state court, in certain situations) supposed to behave if the mandatory provisions of law of the state of the seat of arbitration or the law of the enforcement state exclude given types of cases from under the competence of arbitration. The same pertains to the meaning of the mandatory norms of public law in force in the state of enforcement or recognition of an award or to provisions of a similar nature issued by any other third state, if their regulations remain in connection with the case covered by the arbitration agreement. Further explanations are also required for the impact of international law standards contained in international agreements or following from decisions of international organisations (e.g. sanctions enacted by the UN, orders, bans and numerous – and at times outright comically casuistic – regulations produced by EU bodies).

III. Choice of Law Applicable to Specific Elements Related to Arbitration

1.11 A fundamental question that may arise in international commercial arbitration involving many potentially applicable law systems, in which delimitation of substantive law from procedural law can play a relevant role, is to determine how far-reaching is the parties' freedom in the choice of the law applicable to specific legally relevant elements related to submission of the case to arbitration. Also, where no law was chosen, it must be established which rules apply to identify the applicable law. There are numerous opinions on these issues,[9] depending on the type

[9] Marc Blessing, *supra* note 3, at 27 et seq.; Stephen J. Ware, *supra* note 3, at 718 et seq.; TADEUSZ ERECIŃSKI, KAROL WEITZ, *supra* note 2, at 322-324; Maciej Zachariasiewicz, Łułkasz Żarnowiec, *Dorozumiany wybór prawa. Glosa do wyroku Sądu Najwyższego z dnia 8 stycznia 2003 r., II CKN 1077/00* (*Implied choice of law. Comments on the judgment of the Supreme Court of 8 January 2003, file ref. no II CKN 1077/00*), (1) PROBLEMY PRAWA MIĘDZYNARODOWEGO PRYWATNEGO (*Problems of private international law*) 158 et seq. (2007).

of the legal system (continental, common law) or the legal or historical tradition (states with an established and well-developed "pro-arbitration" system or legal systems only "learning" about arbitration after political and economic transformations).

1.12 We shall perform the analysis from the point of view of various stages of arbitration proceedings: in the initial phase, even before the commencement of the arbitration, prior to the issuance of the award, at the stage of the proceedings for the setting aside of an arbitral award and at the stage of enforcement or recognition.

1.13 To begin with, one should examine the legal nature of the arbitration agreement. There exist multiple controversies and opinions which cover an entire array from designating it with the nature of a sui generis agreement through the recognition of its exclusive substantive law nature and further through mixed variants of all sorts to end with the sheer procedural nature.[10] The scholars and case law of each legal system familiar with the institution of commercial arbitration have formed their own output – sometimes supported by experiences and ideas of other jurisdictions, frequently also mutually exclusive. There is no unified position and one should not expect a common opinion of both arbitration courts and scholars, just like in the case of numerous other issues related to international arbitration. Hence, the view dominating the international science of arbitration law[11] that admissibility of identifying the applicable law and the manner of identification thereof are to a great extent independent of the legal qualification of the arbitration agreement, seems a bit too optimistic. It will be the case in the majority of "pro-arbitration" jurisdictions (also in Poland, especially after the introduction of the unambiguous new regulations of the PIL); however, this dogmatic problem cannot be totally disregarded.

1.14 The second fundamental question – and doubt – relates to the multiplicity of laws which can be applicable to the assessment of individual elements related to the broadly understood "submitting of the case to international arbitration". These include the conclusion of an arbitration agreement, the existence and validity thereof, arbitrability, the parties' ability to conclude an arbitration agreement, defects of the parties' declaration of will as well as the form, effects, and interpretation.[12] It is rather common to distinguish two separate groups of issues: the so-called statute of the arbitration agreement *sensu stricte*

[10] TADEUSZ ERECIŃSKI, KAROL WEITZ, *supra* note 2, at 79-87 and further references contained therein.

[11] *Ibid.*, at 90 and further references contained therein.

[12] *Ibid.*, at 91.

and the statute(s) of other issues related to submitting a dispute to arbitration and seeking appropriate links for them separately. However, the assessments of which elements belong to which of those categories is far from uniform.[13] After all, it is precisely the qualification of a given element to the former or the latter of these categories that is of fundamental significance for the indication of the manner and results of the identification of the applicable law.

1.15 Another issue to be tackled is to what extent and to which elements of so-called "submitting of a dispute to international arbitration" the international arbitration conventions apply at a specific stage of the proceedings.

1.16 Hence, we shall focus on two elements – the statute applicable to the arbitration agreement and the statute applicable to the assessment of arbitrability and the mutual relationship of these notions, which is not always as straightforward as it could seem *prima facie*. In the face of the lack of any conventional regulation of the limits of arbitrability (the notion obviously appears in the conventions, although not in the Polish PIL), it is precisely here that national legal orders enjoy full autonomy and frequently intervene with internal, procedural regulations of a liberalising or limiting nature.

1.17 Let us assume that a claimant (for the needs of this study, let us point to the invalidity of an arbitration agreement and the lack of a dispute's arbitrability) instigates the proceedings before a Polish state court despite the "physical" existence of an arbitration agreement. Let us add that Poland is not the seat of arbitration stipulated in the arbitration agreement while the agreement either contains no explicit choice of law (especially for the assessment of arbitrability) or the choice points to other than Polish law. The claimant's choice is questioned by the defendant (potential respondent in arbitration) by raising an appropriate procedural challenge, demanding that the statement of claim be rejected (Article 1165 § 1 of the CCP) and requesting that the case be settled in arbitration. On the basis of what principles should the Polish state court decide on the law applicable to the assessment of validity of the arbitration agreement and in what relation thereto is the examination of the dispute's arbitrability?

1.18 As far as the issue of validity of an arbitration agreement is concerned, the indications of applicable law are to be found both in Article VI.2. of the European Convention[14] and in Article 39 of the PIL. These

[13] *Ibid.*, at 90 et seq. and further references contained therein.

[14] European Convention on International Commercial Arbitration signed in Geneva on 21 April 1961, published in the (40) JOURNAL OF LAWS, item 270 (1964), in force in Poland since 7 January 1964.

regulations are not identical. However, this does not have to constitute a fundamental problem – even in the situation of competition between these two acts. This is because Article 91 of the Constitution of the Republic of Poland points to the principles of priority of international acts over national law.[15] Also, Article V.1 of the New York Convention[16] features a suitable regulation, but whether it should be applied when we are not dealing with the recognition or enforcement of the already issued arbitral award is a rather controversial issue.[17]

1.19 In the Polish legal system, arbitrability is regulated directly in Article 1157 of the CCP, which indicates that insofar as the specific provision does not provide otherwise, the parties can submit disputes on property rights or non-property rights to arbitration that are able to be resolved by means of a settlement in court, save for alimony cases. Hence, we have here a significant limitation, referring to the "judicial settlement capacity", which is a classic internal category of Polish procedural law. In turn, under Article 1154 of the CCP the provisions of the CCP concerning arbitration are applicable when the seat of the arbitral proceedings is located in the territory of the Republic of Poland and only in the cases stipulated in the following Articles – when it is located outside the territory of the Republic of Poland or is not specified. Article 1157 of the CCP (scope of arbitrability) does not contain *expressis verbis* such an indication, however, it can be found in Article 1165 § 4 of the CCP which orders rejecting the statement of claim lodged before a state court after the effective request of the defendant to refer parties to arbitration. In turn, this request is not effective, inter alia, by the *invalidity* [authors' emphasis, inoperativeness, incapability of being performed or the loss of force of the arbitration agreement (Article 1165 § 2 of the CCP). Hence a

[15] Under art. 91 of the Constitution of the Republic of Poland of 2 April 1997, (78) JOURNAL OF LAWS, item 483:

1. After promulgation in the Journal of Laws of the Republic of Poland (Dziennik Ustaw), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.

2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.

3. If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.

[16] Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York on 10 June 1958, published in the (9) JOURNAL OF LAWS, item 41 (1962), in force in Poland since 3 October 1961.

[17] As to the New York Convention, see: TADEUSZ ERECIŃSKI, KAROL WEITZ, *supra* note 2, at 351-362.

question arises of whether Article 1157 of the CCP can be qualified merely as a part of procedural law, applicable only in the case of domestic arbitration or whether it is a provision (of procedural or substantive law) of a mandatory nature and decisive of the issue of the validity of an arbitration agreement itself. Does it thus give power to the Polish state court to assess the arbitrability of the dispute in accordance solely with Polish law also when the arbitration takes (or should take) place outside of the territory of the Republic of Poland? These questions lead to another query: if the Polish regulation ("forcing" of jurisdiction of Polish courts by the Polish procedural act over the issue of arbitrability of a dispute submitted to arbitration in a third state and the simultaneous determination within the Polish procedural act of the limits of arbitrability), in consequence, does not then implicate that deliberations over the indication of the law applicable to the assessment of arbitrability are entirely pointless since in that situation it will always be Polish CCP? Would such a stance (which literally seems to stem from the Polish regulation) not be in contradiction with Article VI.2 of the European Convention and Article 39 of the PIL, giving priority to the will of the parties? The answers are not so unambiguous as they might seem *prima facie*. In particular, it is not clear whether the lack of arbitrability is an element that results in invalidity of an arbitration agreement in the meaning of Article 1165 § 2 of the CCP. If so, then in the "situation involving international arbitration" in the assessment of validity of an arbitration agreement should the Polish court apply the applicable law following from Article VI.2 of the European Convention, Article V.1 of the New York Convention, Article 39 of the PIL, or only the Polish CCP (Article 1157 in conjunction with Article 1154 and 1165 of the CCP)? In keeping with the terminology and systematics of the New York Convention (compare Article II, V.1 and V.2.a) and the CCP itself (compare Articles 1214 and 1215 of the CCP) the invalidity of the arbitration agreement is distinguished from the lack of arbitrability. However, still bearing in mind the international obligations adopted by Poland in the scope of arbitration, for the purposes of assessment of arbitrability by the Polish state court of a dispute submitted (or which may be submitted) to arbitration in a third country, the state court should look for an appropriate statute, without limiting the analysis to only the Polish procedural act.

1.20 A similar situation is when the court of arbitration with its seat in Poland (Polish law as *lex loci arbitri*) which, in the framework of international arbitration, decides on issues of validity of an arbitration agreement and arbitrability of the case on the basis of other than Polish law. In light of established principles of international arbitration

(competence – competence) expressed also in Polish civil procedure (Article 1180 § 1 of the CCP) it is clear that the court of arbitration may rule on its competence, including the existence, validity or effectiveness of the arbitration agreement, still the question of on what grounds such a court is to rule on arbitrability, remains open.

1.21 It seems that these doubts, arising at earlier stages of the proceedings, do not occur in the "post-arbitration phase" of proceedings for setting aside and recognition/enforcement of the award.[18] The first situation is simple insofar as it pertains solely to arbitral awards issued in the Republic of Poland (Article 1205 § 1 of the CCP), while the directly and separately mentioned reason for the setting aside of such an arbitral award comes as the lack of arbitrability in accordance with the Polish law (Article 1206 § 2 point 1 of the CCP). The same pertains to the recognition or enforcement proceedings, regardless of whether the issue pertains to the arbitration award issued in Poland (Article 1214 § 3 point 1 of the CCP) or abroad – and regardless of the application or non-application of the New York Convention (Article V.2.a. of the Convention and Article 1215 § 2 of the CCP). In each of these situations, the Polish law as *lex fori* applies to the assessment of the arbitrability.

1.22 Concluding, these examples indicate that the distinction between provisions of procedural and substantive law as well as establishment of the scope of their binding effect for an arbitration court and a state court involved in an "arbitration situation" can be a controversial and complicated task entailing fundamental consequences for the fate of the whole arbitration proceeding and its outcomes.

IV. Mandatory Provisions of Substantive Civil Law

1.23 Mandatory legal provisions are those whose application are based on the legal system applicable for the assessment of a legal relationship or mode of proceedings and that cannot be eliminated by parties by means of a contractual regulation. They are dominant in public law and civil law where the principle of autonomy of will is not a dominating principle. On the other hand, on the grounds of statutory law (and almost all legal systems of the continental Europe are statutory law systems), the regulation of obligation agreements covered by civil codifications mostly consists of dispositive provisions. However, if parties fail to regulate a given issue differently in an express or tacit manner (most often they fail to regulate it in general), then the dispositive provisions apply with the same intensity and the same effect

[18] But compare to the New York Convention and European Convention: TADEUSZ ERECIŃSKI, KAROL WEITZ, *supra* note 2, at 96 and further references contained therein.

as the provisions of *iuris cogentis*, supplementing the contents of the agreement concluded by the parties (in Poland: Articles 56 and 353(1) of the Civil Code).

1.24 This mechanism has such an effect that agreements concluded on the grounds of codified civil law systems can be and, as a rule are, shorter than in the common law systems since the omission of an express regulation of a certain problem in the agreements does not signify a "loophole" in the contents of the agreement, but this defect, whether intended or resulting from an overlooking, is supplemented by the provisions of statutory law.

1.25 Therefore, if the parties to a given legal relationship submitted to arbitration choose as the law applicable to this relationship the codified law of a given country, the arbitrators ought to apply this law in full. This should include both the mandatory and dispositive provisions (if there are grounds to do so), following the interpretative directives, scholars' views and case law formed on the grounds of the applicable law chosen by the parties. In our opinion, it is inadmissible to indicate several applicable laws for specific categories of legal problems occurring in an assessment of a given legal relationship.

1.26 The choice of law can be performed, as provided by Article 4 of the PIL, only in the cases stipulated by the Act. The principle of freedom of choice of applicable law pertains, first and foremost, to contractual obligations. Other legal relationships are governed by the law indicated by the Act with other links (e.g. the law applicable to property and property rights, the law applicable to the status of natural persons or legal persons) also when these rights, relationships or legal situations are related to a contractual legal relationship where the parties made use of the possibility to choose the law. The same pertains to the situation where the parties fail to choose the law and the court of arbitration "does this for them"

1.27 Article 1194 § 1 of the CCP does not specify which conflict-of-laws rules the court of arbitration is to follow in the choice of the applicable law. If the parties fail to indicate them, it must be assumed that the arbitrators ought to apply these conflict-of-laws rules which they find appropriate to a given case (Article VII.1 of the European Convention). Most often it is the conflict-of-laws norms belonging to the system of this law which is in "the closest relationship" with a given dispute that are recognised as such.[19] The parties can contractually authorise the arbitrators to issue an award based on principles of equity if the law applicable to arbitration proceedings (as a rule the law of the seat of the

[19] TADEUSZ ERECIŃSKI, KAROL WEITZ, *supra* note 2, at 323-324.

proceedings) permits them to do so. In the lack of such an authorisation, the court of arbitration is obligated to settle the dispute based on the applicable substantive law chosen by the parties or by the court, applying it fully in the same manner as it is done by the state court. This implies applying in particular both the mandatory provisions (e.g. pertaining to the statute of limitations, preclusion, defects of declarations of will and representation) and the dispositive provisions (e.g. pertaining to the time and venue of performance, prerequisites and scope of the liability for breach of the obligation, withdrawal from the agreement or termination thereof) if the lack of a different contractual regulation substantiates their use. The court of arbitration is thus obligated to apply the law while it can rule *ex aequo et bono* only exceptionally and on the grounds of the express authorisation of the parties. As a result, an award of the court of arbitration has an analogical level of predictability like the verdict of a state court. Considering the advantages of arbitration courts in comparison with state courts, in areas such as confidentiality, having as a rule a one-instance nature as well as substantially lower formality of the arbitration proceedings, make arbitration courts a true alternative to the state judiciary.

1.28 Hence, in our opinion, there is no significant difference between a court of arbitration and a state court in terms of existence and content of the obligation to apply the applicable substantive law as the grounds for adjudication as to the merits of the case. However, the effects of an offence against this obligation are fundamentally different. A violation of substantive law by a state court by an erroneous interpretation or non-application or improper application, if it impacted the judgment, constitutes grounds for an appeal. This may lead to the change or reversal of a judgment by a court of higher instance. A violation of substantive law provisions by a court of arbitration, as a rule, does not entail such consequences. Firstly, due to the fact that arbitration proceedings as a rule are of a one-instance nature and, secondly, if the award is challenged by recourse against the award of a court of arbitration, the state court can set the award aside for this reason only when the offence of the substantive law was so grave that the award of the court of arbitration contradicts the basic principles of public policy (Article 1206 § 2 point 2 of the CCP).

1.29 The conflict of an arbitral award with a public policy clause due to the violation of substantive and mandatory law provisions in Polish arbitration practice is a relatively rare phenomenon.[20] The Polish

[20] Tadeusz Ereciński, *Uchylenie przez sąd państwowy orzeczenia wydanego w międzynarodowym arbitrażu handlowym* (*Setting aside by the state court of an award*

authorities emphasise that only the violation of absolutely binding norms and only those which are fundamentally significant can substantiate the recourse to the public policy clause.[21] The content-related examination of the award of the arbitration court by the state court is limited to an assessment as to whether the issued verdict violates public policy. The phrase "basic principles of public policy" used in Article 1206 § 2 point 2 of the CCP explicitly states that this refers to such infringements of provisions of substantive law that lead to the violation of the rules of the state under the rule of law and the issued arbitration verdict violates the principal legal rules in force in the Republic of Poland, damaging the public policy in force, meaning it violates the systemic–political and socio–economic principles.[22]

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rendered in international commercial arbitration), *in* PROCES I PRAWO. ROZPRAWY PRAWNICZE. KSIĘGA PAMIĄTKOWA U CZCI PROFESORA JERZEGO JODŁOWSKIEGO (*Trial and law. Legal discussions. Anniversary book dedicated to Professor Jerzy Jodłowski*), Warsaw: Ossolineum 92-93 (E. Łętowska ed., 1989); TADEUSZ ERECIŃSKI, KAROL WEITZ, *supra* note 2, at 400 et seq.; Mateusz Pilich, *Klauzula porządku publicznego w postępowaniu o uznanie i wykonanie zagranicznego orzeczenia arbitrażowego* (*Public policy clause in recognition and enforcement proceedings of a foreign arbitral award*), XII (1) KWARTALNIK PRAWA PRYWATNEGO 157, 158 et seq. (2003).

[21] TADEUSZ ERECIŃSKI, KAROL WEITZ, *supra* note 2, at 399–402 and references to case law and scholarly writings (also critical) contained therein.

[22] A short presentation of recent case law can be a good illustration of the trends in courts' interpretation of the notion of public policy. At the same time it indicates the lack of precise criteria used by the courts (*all translations below are unofficial translations of the authors*):
"*The term "principles of the public policy" (art. 1206 § 2 point 2 of the CCP) used by the legislator indicates clearly, that this provision concerns only such violations of substantive law which lead to a disregard of the principles of the state of the law (the rule of law) and the rendered award endangers the most important principles of the Republic of Poland, it is opposed to the existing law order and it violates the systemic-political and socio-economic principles.*" Judgment of the Supreme Court of 11 June 2008, file ref. no V CSK 8/08. An analogous stance was presented by the Supreme Court in other judgments, i.e. judgments of 11 July 2000, file ref. no IV CKN 1211/02, of 28 April 2000, file ref. no II CKN 267/00, of 3 September 1998, file ref. no I CKN 822/97 and of 11 May 2007, file ref. no I CSK 82/07.
"*The violation of substantive law can be a justified basis for setting aside an arbitral award only if this violation led to the decision openly breaching the leading principles of the rule of law or the principles of social coexistence, although this last prerequisite cannot be found in art. 1206 § 2 point 2 of the CCP. The defectiveness of the award has to result from the wording of the decision rather than from the violations of the procedural rules (see also the Judgments of the Supreme Court of 31 March 2006, file ref. no IV CSK 93/05 and of 3 September 2009, file ref. no I CSK 53/09).*"
Judgment of the Appellate Court of Wrocław of 8 February 2012, file ref. no I ACa 26/12.
"*The term "principles of the legal order" – being a basis for evaluating the arbitral award – includes not only constitutional rules, but also principal rules from the particular branches of law. The following violations were regarded as contrary to public policy in the meaning of art. 1206 § 2 point 2 of the CCP: a breach of the principle of the autonomy of the parties and the principle of the freedom of business, granting damages if no damage has been done and*

1.30 It can be noted, on the grounds of the analysis of the published judgments of the Supreme Court and Courts of Appeal,[23] that it is difficult to establish some general, universally or most frequently applied criterion for the assessment of identified violations of substantive law as standing in contradiction with the public policy clause. It seems that each time the judgment constitutes an expression of the court's assessment, free and formulated in certain circumstances of a given case, regarding the gravity of the violation, the principles recognised as fundamental for the legal order and relation of violations of the substantive law to the legal order principles articulated *ad casum* are recognised as "fundamental".

1.31 In our opinion, the far-reaching tolerance of Polish state courts to the sometimes even grave irregularities in the application of substantive law by domestic courts of arbitration and even a sporadically expressed view on the court of arbitration not being bound by this law[24] is not "a good practice". It does not serve the purpose of raising the level of arbitration courts. It also undermines the trust in them. The fact that erroneous judgments of courts of arbitration are equalled in effects, as a result of their recognition or enforcement, with verdicts of state courts, in itself violates the rule of law.[25]

1.32 The same liberal assessment is applied by state courts in the proceedings for the recognition or enforcement of an arbitral award. A violation, even blatant, of substantive law impacting the contents of an adjudication, as a consequence undoubtedly erroneous, as a rule does not constitute grounds for the refusal of recognition or enforcement of a domestic arbitral award. Under Article 1214 § 3 point 2 of the CCP, the refusal of recognition or ascertainment of enforceability may occur only when "… the recognition or enforcement of an award of a court of arbitration or a settlement concluded before such a court would be contrary to the basic principles of the legal order of the Republic of

finding set-off effective when it was excluded by the specific provisions." Judgment of the Supreme Court of 30 September 2010, file ref. no I CSK 342/10.

"*Case law regards as elements of public policy: the principle of the freedom of business and freedom of contracts (see Judgment of the Supreme Court of 4 October 2006, file ref. no II CSK 117/06), the principle of the autonomy and the equality of parties (see Judgment of the Supreme Court of 9 March 2004, file ref. no I CSK 412/03) or the principle of the social solidarity (see Judgment of the Supreme Court of 28 April 2000, file ref. no II CKN 267/00).*" Judgment of the Supreme Court of 9 March 2012, file ref. no I CSK 312/11.

[23] See case law review, *supra* note 22.

[24] See Judgment of the Supreme Court of 28 April 2000, file ref. no II CKN 267/00.

[25] Przemysław Ballada, *supra* note 3, at 103; TADEUSZ ERECIŃSKI, KAROL WEITZ, *supra* note 2, at 401.

Poland (the public policy clause)."[26] The analysis of the jurisprudential practice as well as the authors' own experience allow us to state that the liberalism of Polish state courts in assessment of courts of arbitration's violations of substantive law in recognition or enforcement proceedings is even bigger than in proceedings for setting aside of such an award. Our assessment of such a state of affairs is equally critical as the assessment related to "leniency of assessment" of the state courts deciding on potential setting aside of arbitral awards.

The recognition or enforcement of awards of foreign courts of arbitration is regulated by the New York Convention. The grounds for the refusal of recognition, stipulated in Article V and VI of the Convention as a result of the amendment of 2005, have been implemented in full within the provisions of the Code of Civil Procedure (Articles 1214 § 3 and 1215 § 2 of the CCP), as they were based on a similar regulation of the UNCITRAL Model Law on International Commercial Arbitration. In keeping with the dominant stance, represented in international arbitration and in extensive literature on the subject, the refusal to recognise a foreign arbitral award should be a rarity and an exception – and such is the case in Poland. In particular, the refusal of recognition or enforcement of a foreign arbitral award due to violations of substantive law and a resultant content-related erroneousness of it, can occur only when the recognition or enforcement of the award or a settlement concluded before the foreign court of arbitration would be in contradiction with fundamental, basic principles of the legal order of the Republic of Poland. What is more, on the grounds of the New York Convention, the Court of Appeal of Warsaw, referred to the stance of the European Court of Justice and French legal doctrine, expressing the view that the contradictoriness of the foreign arbitral award or a settlement concluded before a foreign court of arbitration can substantiate the refusal of recognition only when it is a contradictoriness of higher rank, i.e. contradictoriness with fundamental principles of transnational, international legal order which as a rule cannot take place in relations between the EU Member States.[27] Nevertheless, it seems to us that an extremely "pro-European" stance of the jurisprudence of the Supreme Court goes sometimes too far.

[26] See art. 1214 § 3 point 2 of the CCP.

[27] Judgment of the Appellate Court of Warsaw of 18 September 2008, file ref. no I ACz 1240/08. On the existence and importance of the international public policy see ECJ Judgment of 28 March 2000, C-7/98, *Dieter Krombach* v. *André Bamberski*, [2000] ECR I-01935.

V. Mandatory Procedural Provisions

1.33 The statutory regulations contained in the Polish CCP, similar to all Polish provisions on courts of arbitration apply generally only if the seat of arbitration is located in Poland (Article 1154 of the CCP also contains exceptions). The parties can agree on the principles and the manner of proceeding before the court of arbitration. By submitting the dispute to the jurisdiction of a permanent court of arbitration *eo ipso* the parties accept the rules of procedure of such a court. These rules are most often concise and free of the casuistry characteristics of the complex procedural provisions used in proceedings before state courts. If the parties failed to contractually determine the rules and manner of proceedings or if they determined them in an incomplete way, then the court of arbitration can, without prejudice to provisions of statutory law, conduct the proceedings in a manner it sees fit and shall not be bound by the provisions on the proceedings before a state court (Article 1184 § 2 of the CCP). The understanding of this lack of binding effect is such that the arbitration court does not have to apply these provisions, but there are no obstacles for the arbitration court to find the regulation included in the procedural act (CCP) as "applicable" in a given case and to conduct the proceedings in keeping therewith (e.g. as regards the manner of conducting evidentiary proceedings).

1.34 As follows from the wording of the analysed provision, statutory law can provide for exceptions from the rule that the court of arbitration is not bound with the provisions on the proceedings before a state court and it does stipulate such exceptions. First and foremost, the provisions of Article 1183 of the CCP, imposing on the court the obligation of equal treatment of the parties, must be recognised as a mandatory one. Furthermore, the court of arbitration is obligated to hear each of the parties, to enable each of the parties to present their case and the evidence in its support. This means that each manner of proceeding before a court of arbitration, whether provided for by the parties in the agreement or which in the face of the lack of an agreement was found applicable by the arbitration court, must comply with the statutory requirements. The provisions defining the prerequisites of exclusion of arbitrators enjoy the same binding nature (Article 1174 § 1 of the CCP). The significance attached by the legislator to these admittedly not numerous, but momentous limitations on the freedom of shaping the rules of procedure before the court of arbitration is best attested to by the strict legal consequences provided for by the statutory law in the event of their violation. The violation of the mentioned statutory principles provides the grounds for the recourse against the arbitral

award and also the grounds for the refusal of recognition or enforcement of the award issued in the proceedings afflicted with such defects (Articles 1206 § 1 points 2 and 4 and 1215 § 2 points 2 and 4 of the CCP).

1.35 By agreeing on the principles and manner of proceedings before a court of arbitration, the parties can include in their contractual rules certain regulations or legal constructions patterned after the law of another country; the same pertains to the situation when these rules are determined by the court of arbitration itself. In the practice of Polish permanent courts of arbitration, these are entirely exceptional cases. The authors are familiar with only one example of such an "implementation" when the parties excluded the possibility to present and make use of evidence obtained against the law. The court of arbitration accepted this provision despite the fact that Polish civil procedure gives no grounds to apply the doctrine disqualifying such evidence as "the fruit of a poisonous tree". The party can refer to the violations of the rules of proceedings following from the abovementioned mandatory provisions in the recourse against the award issued in given proceedings regardless of whether in the course of the proceedings it reacted in any way to the violation of these provisions. The violation of other provisions of a dispositive nature in the proceedings before the court of arbitration can be referred to in the complaint only when the party raised a suitable charge "… without delay or within the deadline set by the parties or by the provisions of this part" (Article 1193 of the CCP).

1.36 Hence, as can be seen from the above presentation of the legal status created in Poland by virtue of the Amendment of 2005, the current status complies with the regulations of other European countries and the dominant stance of authorities in this scope.

VI. Mandatory Public Law Provisions

1.37 Numerous commentaries on international arbitration point to the theoretical doubts and practical difficulties presented by the problem of taking (or not taking) into consideration public law provisions in force in the state whose law is applicable to the settlement of the dispute, where the award is to be enforced or where it is to have its legal effects resultant from its content.[28] This includes provisions of a diverse nature. Some of them are the manifestation of the monetary or fiscal policy of a given state, others are connected to the protection of public

[28] See references made *supra* note 3.

security and consequences of the state's foreign policy (e.g. a ban on sale of certain goods, weapons in particular or an embargo pertaining to the commercial relations with a given country), still others are to secure the honesty and transparency of stock-exchange transactions, consumer protection, freedom of business activity, to counteract unfair competition or to protect the life and health of citizens by strict rigours pertaining to transactions in medications or food products. Bans and limitations can result also from the norms of international law. Numerous arbitral awards quoted in the literature point to the variety of such provisions and also to different attitudes displayed by courts of arbitration.[29]

1.38 The court of arbitration should not ignore analogical provisions in force in the state where the award is to be enforced or recognised. The parties concluding an arbitration agreement are driven by practical considerations. They choose this manner of protection of their rights or interests since they consider it more advantageous and at the same time sufficiently effective. Hence, it seems obvious that taking into consideration such a pragmatic intention of the parties, the court of arbitration should render such an award as to make it recognisable and enforceable in the state where the venue of performance is located or where such an award is to be effective. We are not convinced that the court of arbitration should, first and foremost, issue an award which is firstly correct and compliant with the law, leaving aside the issue of its enforcement or effectiveness as remaining outside the scope of its interest since the parties may carry the execution of the award without the need to use state coercion.[30] Such a view appears to us as a manifestation of exaggerated faith in the decency and sense of honour of the parties. The reality – both domestic and international – is a lot more mundane.

1.39 The limited framework of these remarks do not allow for more detailed deliberations in the area of significance of public law provisions as the casuistry, both in the domestic and international case law as it is too extensive to be engaged in. Therefore, the provisions which are unconditionally in force and very numerous in modern legal systems, cannot be devoid of legal importance in arbitration case law. Efforts are taken in international arbitration in the direction of becoming independent from mandatory provisions, especially those that are part of public law, not always acceptable in democratic public policies or

[29] From the authors quoted above, see in particular: Marc Blessing, *supra* note 3, at 24 et seq.; Alexander K. A. Greenawalt, *supra* note 3, at 110 et seq.

[30] On the issue of the voluntary execution of arbitral awards compare: 3 GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, Alphen aan den Rijn: Kluwer Law International 2327 (2009) and further references contained therein.

varied and dictated by diverse motives.[31] It seems that this implies the creation in arbitration practice of certain rules of procedure and a basis for adjudication on a super-national nature, referring to the values of a democratic state under the rule of law, the autonomy of will, economic freedom and honesty. One can only hope that these efforts will succeed, however, presently, if only for pragmatic reasons, the provisions of law unconditionally in force in the state of the arbitration court's seat of the country of enforcement or recognition of the award cannot be – in the interest of the parties and in compliance with the objective of the arbitration agreement concluded by them – ignored.

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Summaries

DEU [***Zum Umfang der notwendig anzuwendenden, für das Schiedsgericht verbindlichen Bestimmungen des Prozessrechts und materiellen Rechts]***

Die Frage des Anwendungsbereichs von zwingend bindenden Vorschriften des prozessualen und materiellen Rechts scheint eine der wichtigsten Probleme der Schiedsgerichtsbarkeit, besonders der internationalen Schiedsgerichtsbarkeit, zu sein. Diese Frage ist mit vielen anderen Problemen verbunden, z.B. mit dem auf verschiedene Elementen des Schiedsverfahrens, besonders auf Schiedsvereinbarung aber auch auf die Schiedsfähigkeit, anwendbaren Recht. Polen versuchte mit seinem Internationalen Privatrecht aus 2011 und als eine der Parteien des Europäischen Abkommens über Schiedsgerichtsbarkeit und des New Yorker Abkommens, diese Sache auf klare Art und Weise aufzulösen. Sogar ein bestätigter Hinweis auf das die Schiedsgerichtsbarkeit regulierende Recht – und auf das Recht anwendbar auf die Schiedsvereinbarung – bedeutet nicht unbedingt, dass es klar ist, welche materiellen, prozessualen und öffentlichen Vorschriften zwingend und damit bindend für das Schiedsgericht sind. Die Antwort auf diese Frage ist für die Parteien von riesengroßer Bedeutung, denn die Verletzung des geltenden Rechts kann entweder zur Außerkraftsetzung eines Schiedsurteils oder zur Ablehnung seiner Vollstreckbarkeit bzw. seiner Anerkennung führen. Alle diesen Probleme werden in diesem Dokument in der Perspektive des schiedsgerichtlichen Hintergrunds der Republik Polens samt ihrem – relativ neuen – Schiedsgerichtsbarkeitsrecht sowie internationalen Privatrecht diskutiert.

[31] See references made *supra* note 3.

CZE [***Rozsah nutně použitelných ustanovení procesního a hmotného práva závazných pro rozhodčí soud***]

Rozsah nutně použitelných ustanovení procesního a hmotného práva je patrně jedním z nejzávažnějších problémů rozhodčího řízení, především pak mezinárodního rozhodčího řízení. Je propojen s řadou dalších otázek, například právem použitelným na řadu aspektů rozhodčího řízení, především rozhodčí smlouvu nebo též otázku arbitrability sporu. Polsko přijalo v roce 2011 zákon o mezinárodním právu soukromém a je smluvní stranou Evropské úmluvy o mezinárodní obchodní arbitráži a Newyorské úmluvy. Tento problém se pokusilo vyřešit jednoznačným způsobem. Ani potvrzené stanovení práva rozhodného pro rozhodčí řízení – a konkrétně rozhodčí smlouvu – nemusí nutně znamenat jednoznačné určení kogentních ustanovení hmotného, procesního a veřejného práva, kterými by byl rozhodčí soud vázán. Odpověď na tuto otázku je pro strany nanejvýš důležitá, neboť porušení nutně použitelných právních norem může mít za následek zrušení rozhodčího nálezu nebo odepření jeho výkonu či uznání. Předmětem tohoto příspěvku je rozbor těchto otázek z hlediska úpravy rozhodčího řízení v Polské republice, s přihlédnutím k jejímu relativně novému zákonu o rozhodčím řízení a zákonu o mezinárodním právu soukromém.

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POL [***Zakres bezwzględnie obowiązujących przepisów prawa procesowego i materialnego, wiążących dla trybunału arbitrażowego***]

Określenie zakresu związania sądu arbitrażowego bezwzględnie obowiązującymi przepisami prawa jest niezwykle istotne. Z racji faktu, że naruszenie tych przepisów może doprowadzić do uchylenia wyroku arbitrażowego, albo odmowy jego uznania lub wykonania, zarówno sądy arbitrażowe jak i strony postępowania powinny mieć ten problem na uwadze na każdym etapie postępowania. Niniejszy artykuł stanowi próbę przybliżenia opisywanego zagadnienia z perspektywy polskiego prawa arbitrażowego.

FRA [***L'ampleur des décisions contraignantes de droit procédural et matériel pour les tribunaux arbitraux***]

Dans le cadre de l'arbitrage, il est très important de déterminer de la sphère des règles du droit obligatoires imposées au tribunal arbitral. Vu que la violation de ces règles se peut amener à l'annulation de la sentence arbitrale ou le refus de la reconnaissance ou de l'exécution, les tribunaux arbitrals et aussi que les parties doivent considérer ce problème à toutes les étapes de la procedure. Cet article constitute un essai de synthèse de cet problème dans le cadre du droit polonais d'arbitrage.

RUS [***Диапазон обязательно применимых положений процессуального и материального права, обязательных для арбитражного суда***]
Определение спектра обязательства арбитражного суда совершенно существующему закону является крайне важным. В связи с тем, что нарушение этих законов может привести к отмене постановления арбитражного суда, отказу в его признании или приведении в исполнение, как арбитражный судь так и участники уголовного процесса должны иметь ввиду этот вопрос на каждой стадии судебного разбирательства. Данная статья является попыткой описать эти вопросы с точки зрения польского арбитражного законодательства.

ESP [***Extensión de las disposiciones del derecho procesal y sustantivo sujetas a aplicación por el tribunal de arbitraje]***
Ámbito de la vinculación del tribunal arbitral con las normas imperativas es excepcionalmente importante. Tomando en cuenta, que la violación de estas normas puede resultar en la revocatión del laudo arbitraje o en la denegación de su reconocimiento o su ejecución, los tribunales arbitrales y los partes deben tener en consideración de este problema en todas las fases del proceso. Este artículo constituye la prueba para presenter la cuestión descrito desde la perspectiva del derecho polaco.

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