

**Czech (& Central European)
Yearbook of Arbitration®**

Czech (& Central European) Yearbook of Arbitration[®]

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Independence and Impartiality of Arbitrators

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List of Abbreviations

AAA	American Arbitration Association
ABA	American Bar Association
ADR	Alternative dispute resolution
ARIAS UK	United Kingdom AIDA Insurance and Reinsurance Arbitration Society
CAM	Chamber of Arbitration of Milan
CEFAREA	French Reinsurance and Insurance Arbitration Centre
CESL	Common European Sales Law
CPC	Czech Code Procedure Civil
DAB	Dispute Adjudication Board
DCFR	<i>Draft Common Frame of Reference</i>
DIS	Deutsche Institution für Schiedsgerichtsbarkeit
DRB	Dispute Resolution Board
ECHR	European Convention on Human Rights
FIDIC	International Federation of Consulting Engineers
GCCP	German Code of Civil Procedure
GDDKiA	General Directorate of National Roads and Motorways
IBA	International Bar Association
ICAC	International Commercial Arbitration Court
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ICT	Information and communication technology
JRPRRD	Joint Resolution, LLC Procedures for the Resolution of US Reinsurance Disputes
LCIA	London Court of International Arbitration
NYC	New York Convention of 1958
RIDSP	Resolution of Intra-Industry US Reinsurance and Insurance Disputes Supplementary Procedures

SCC	Stockholm Chamber of Commerce
SCCI	Slovak Chamber of Commerce and Industry
UMA	Uniform Mediation Act
UNCITRAL	United Nations Commission on International Trade Law
VIAC	Vienna International Arbitral Centre
WIPO	World Intellectual Property Organization

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The Influence of Violation of the Independence and Impartiality Rules on the Enforceability and Effectiveness of the Arbitral Award

Key words:

arbitrator's disqualification | arbitrator's misconduct | challenge of arbitrator | enforcement proceedings | impartiality of arbitrators | New York Convention | Polish arbitration law | public policy (*ordre public*) | recognition or enforcement of foreign arbitral awards

Abstract | *The rules of independence and impartiality of arbitrators are guaranteed by various mechanisms. These include the duty imposed upon an arbitrator to disclose any circumstances likely to give rise to doubts as to their impartiality or independence or the parties' right to challenge an arbitrator. A procedural error that leads to the violation of the principles of independence and impartiality of arbitrators may constitute grounds for refusal of the recognition or enforcement of an arbitral award as specified in Article V of the New York Convention (NYC). Depending on what kind of procedural error has occurred, a different ground for the refusal of the recognition or enforcement may come into question. The power of the recognition and enforcement court to refuse the recognition of an arbitral award ex officio regardless of the initiative of the parties to the proceedings is, however, crucial. If a violation of the rules of the arbitrator's independence and impartiality in the course of the arbitral proceedings turns out to be an infringement of the principles of due process of law, then not only does the refusal of the recognition of an arbitral award support the protection of the public policy of the state in which the recognition is sought, but it also contributes to the increase of trust of the parties to the arbitration as an alternative and fair method of dispute resolution.*

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I. Importance of the Rules of Independence and Impartiality of Arbitrators – General Remarks

- 8.01.** The possibility of shaping the composition of an arbitration court by parties to the proceedings is of decisive significance for the attractive nature of arbitration in comparison to the state court system. For this very reason, it is particularly important for the parties to be certain that their dispute will be heard by impartial and independent arbitrators. The independence and impartiality of the arbitrator is one of the fundamental principles of arbitration.¹ The arbitrator, much like a state court judge, should possess these characteristics, which guarantee parties a fair trial and an award capable of being vested with the force equal to that of verdicts issued by state courts.

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II. Mechanisms Guaranteeing the Issuance of an Award by Independent and Impartial Arbitrators

- 8.02.** Both the national regulations pertaining to proceedings before arbitral tribunals and the rules of procedure of permanent courts of arbitration provide for mechanisms intended to guarantee the issuance of awards by impartial and independent arbitrators. First, it is the duty of a person proposed to be appointed as an arbitrator to disclose all and any circumstances capable of raising justifiable doubts as to their impartiality and independence. It is followed by the arbitrator's duty to immediately disclose such circumstances as of the moment of their appointment throughout the duration of the entire arbitration proceedings.² In turn, upon selection of the arbitrators, each of the parties has the possibility to move for the exclusion of an arbitrator if there are reasonable doubts regarding their independence or

¹ Cf. ALAN REDFERN, MARTIN HUNTER, NIGEL BLACKABY, CONSTANTINE PARTASIDES, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION*, Sweet & Maxwell 4.75 et seq. (2008).

² This duty was underlined in the UNCITRAL Model Law on International Commercial Arbitration from 1985. It is stipulated also in domestic regulations, see, e.g., Article 1174 of the Polish CCP, § 1036 of the German ZPO, § 588 of the Austrian ZPO; Article 179.2 of the Swiss PIL in conjunction with Article 363 of the Swiss ZPO, Article 24.1.a) of the English Arbitration Act 1996.

impartiality.³ If the motion is unsuccessful, a party may challenge the arbitrator before a state court. However, this does not result in staying the proceedings before the arbitral tribunal until the state court issues the decision on the motion.⁴ These regulations are intended to prevent the issuance of an arbitral award with the participation of an arbitrator who does not comply with the requirements of impartiality and independence. Cases may still occur due to reasons on the part of arbitrators or both arbitrators and parties to the proceedings. Hence, it is necessary to consider whether a violation of the principle of the arbitrator's impartiality and independence may provide grounds for the refusal to recognize or enforce an award and, if so, which of the reasons for refusing the recognition (enforcement) specified in Article V of the New York Convention of 1958 (NYC)⁵ might substantiate the state court's refusal. This is an issue because the grounds for non-recognition of an award specified in the NYC do not include provisions directed specifically at a lack of independence or an arbitrator's misconduct.

III. Consequences of the Violation of the Principle of the Arbitrator's Impartiality and Independence

III.1. Violation of the Disclosure Duty

- 8.03.** The issuance of an award with the participation of an arbitrator failing to comply with the requirements of impartiality and independence may occur in cases where an arbitrator candidate fails to disclose to the parties any and all circumstances able to influence their impartiality or independence, or where the arbitrator fails to notify the parties of circumstances which emerge in the course of the proceedings. If the party does not acquire knowledge of such circumstances from other sources by the end of the proceedings, an award may be issued by a

³ In the domestic regulations, legislators as a rule grant priority to the will of the parties themselves who may determine the mode of proceedings for the exclusion of an arbitrator (see: Article 1176 § 1 of the CCP, § 1037(1) of the German ZPO, § 589(1) of the Austrian ZPO, Article 180.3 of the Swiss PIL). The above mentioned procedure applies if there is not such an agreement.

⁴ See § 1037(2)-(3) of the German ZPO, § 589(2)-(3) of the Austrian ZPO; Article 1176 § 4-6 of the CCP, similarly Article 180.3 of the Swiss PIL. See also Article 13(2)-(3) UNCITRAL Model Law on International Commercial Arbitration; Article 24.3 of the English Arbitration Act 1996, however, see also Article 20.4 of the Vienna Rules 2013.

⁵ Deliberations included in this article are based on the NYC provisions due to the fact that it is one of the most widespread legal acts in the world on recognition and enforcement of foreign arbitral awards and the statutes implementing the NYC in each state primarily reproduce the terms of the Convention.

- partial arbitrator.⁶ Furthermore, the party may also not be aware of the arbitrator's partiality during the recognition proceedings.
- 8.04.** Article V(1)(d) of the NYC may constitute grounds for the refusal to recognize or enforce an arbitral award issued under such circumstances. Under this provision, the recognition of an arbitral award may be refused at the request of a party if 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.
- 8.05.** If the provisions applicable to a given type of proceeding provided for a duty of an arbitrator to disclose all and any circumstances capable of causing doubts as regards their impartiality, the violation of this duty must be regarded as a violation of the provisions on arbitral procedure enacting this duty and pertaining to the court of arbitration's composition and the rules of procedure before such a court.⁷ However, the Supreme Court of Poland stated in its judgment of 9 September 2010⁸, that the arbitrator's failure to disclose circumstances pointing to their connections with one of the parties to the proceedings does not constitute a violation of the requirements for the arbitration court's composition or the basic principles of proceeding before such a court, stemming from a statute or specified by the parties. This is because such a violation pertains neither to the requirements related to the arbitration court's composition nor to the basic rules of procedure adopted in the court of arbitration. The Supreme Court found that the court should consider these circumstances within the framework of the award's contradiction with the public policy clause.⁹

⁶ As regards the manner of establishing by the state court in the course of the recognition proceedings whether a given arbitrator was partial, cf. 3 GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, Alphen aan den Rijn: Kluwer Law International 2804-2806 (2009).

⁷ This is also how this matter is qualified by Andrzej W. Wiśniewski, *Niezależność i bezstronność arbitrow w świetle prawa polskiego i praktyki międzynarodowej (Impartiality and independence of arbitrators in light of Polish law and international practice)*, in 2 AUREA PRAXIS AUREA THEORIA. KSIĘGA PAMIĄTKOWA KU CZCI PROFESORA TADEUSZA ERECIŃSKIEGO, Warszawa: Lexis Nexis 1966-1967 (J. Gudowski, K. Weitz eds., 2011). Similarly: TADEUSZ ERECIŃSKI, KAROL WEITZ, SĄD ARBITRAŻOWY (COURT OF ARBITRATION), Warszawa: Lexis Nexis 204 (2008); KARL-HEINZ SCHWAB, GERHARD WALTER, SCHIEDSGERICHTSBARKEIT, Munich: C.H. Beck 116 (2005). See also: Justyna Szpara, *Setting Aside an Arbitration Award*, in ARBITRATION IN POLAND, Warszawa: Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej 118 (2011). However, a contrary conclusion must be derived from the ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION. A HANDBOOK FOR JUDGES 95-98, 89 and 110 (P. Sanders ed., 2001).

⁸ File ref. no I CSK 535/09, LEX no. 602748.

⁹ See also OLG Stuttgart in the judgement of 6 December 2001. The position expressed in the judgement of the Supreme Court of Poland of 9 September 2010 brought a change

Influence of Violation of the Independence and Impartiality Rules on the Award

- 8.06.** According to yet another view, an impartial decision by the arbitrator constitutes one of the elements of the right to a fair hearing. For this reason, the participation of a partial arbitrator in issuing an award may be regarded as a circumstance preventing the party from a chance ‘to present its case’.¹⁰ Hence, the issuance of an award by a partial arbitrator, in certain cases, may fulfill the premise set forth in Article V(1)(b) NYC.
- 8.07.** It seems, however, that the notion of ‘the composition of the arbitral authority’ should also encompass the procedure for appointment of arbitrators, which extends as well to the disclosure duties imposed on the persons proposed to be appointed as arbitrators. In turn, the duties imposed on arbitrators in the course of the proceedings constitute an element of ‘the arbitral procedure’. For this reason, the party whom the award is invoked against may seek the refusal of the recognition of an arbitral award due to the arbitrator’s concealment of their connections with one of the parties.¹¹ It is also necessary to consider cases where the parties are not aware of the circumstances influencing the arbitrator’s impartiality or independence in the course of proceedings for recognition and enforcement. It is not clear whether a court deciding on the recognition or enforcement of an award may allow these circumstances *sua sponte* (as the facts the court is familiar with *ex officio*), if the court acquires knowledge thereof in a manner other than as a result of an argument raised by the parties to the proceedings.
- 8.08.** The adoption of a specific solution in the cases above depends on whether a recognition court may allow the prerequisites for the refusal of the recognition or enforcement of an arbitral award indicated in Article V(1) NYC *ex officio*. The wording of Article V(1) NYC introduces a specific rule for the distribution of the burden of proof. In the scope of the circumstances listed therein, it imposes this burden on a party to the proceedings.¹² Therefore, a court should allow the

of the case-law line of this court (see, *e.g.*: the judgement of the Supreme Court of 3 September 2009, file ref. no I CSK 53/09, LEX no. 527154 and the judgement of the Supreme Court of SN 3 September 1998, file ref. no I CKN 822/97, LEX no. 34448).

¹⁰ The judgement of the United States Court of Appeals for the Seventh District, quoted without a more specific reference in: Pieter Sanders ed., *supra* note 7, at 89.

¹¹ It is, however, obvious that not every disclosed connection between the arbitrator and the party will result in their recognition as a partial arbitrator; See, *e.g.*: JULIAN LEW, LOUKAS MISTELIS, STEFAN KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION*, Alphen aan den Rijn: Kluwer Law International 271, 305-306 (2003).

¹² ANTON G. MAURER, *THE PUBLIC POLICY EXCEPTION UNDER THE NEW YORK CONVENTION*, New York: Juris 69 (2012), Patricia Nacimiento, *Article V(1)(a), in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION*, Alphen aan den Rijn: Kluwer Law International 210 (H. Kronke, P. Nacimiento et al. eds., 2010) and the case-law quoted therein.

grounds for the refusal of the recognition of an award indicated in Article V(1) NYC on the motion of a party whereas the court may allow *ex officio* solely the grounds for the refusal of the recognition or enforcement of an arbitral award listed in Article V(2) NYC. This, in turn, brings yet another question as to whether the court is able to qualify the violations fulfilling the grounds for the refusal of the recognition of the award listed in Article V(1) NYC as the circumstances allowed *ex officio*, listed in Article V(2) NYC, i.e. as circumstances having the result that the recognition of the award would stand in contradiction with the 'public policy of that country' (Article V(2)(b) NYC).¹³

- 8.09.** This issue is controversial. The literature emphasizes that the public policy clause should be resorted to only in exceptional circumstances.¹⁴ Most authors think (based mainly on the literal interpretation of Article V NYC) that until specific grounds for the refusal of the recognition or enforcement of an arbitral award apply, the public policy clause may not be applied.¹⁵ It is emphasized that the initiative regarding the prerequisites indicated in Article V(1) NYC is left to the parties to the proceedings. Hence, if a party does not refer to these prerequisites, then, in compliance with the principle *volenti non fit iniuria*, neither should the court. Therefore, even if a state court examining the motion for the recognition or enforcement of an arbitral award notes the existence of the grounds for refusal set forth in Article V(1) NYC, it may not replace the decision of the aggrieved party and refuse the recognition upon the public policy of its country.¹⁶

¹³ As regards the notion of the public policy, cf. e.g. Dirk Otto, Omaia Elwan, *in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION, Alphen aan den Rijn: Kluwer Law International 365 et seq. (H. Kronke, P. Nacimiento et al. (eds), 2010). Cf. also ANTON G. MAURER, *supra* note 12, at 53 et seq.

¹⁴ Tadeusz Ereciński, *Postępowanie o stwierdzenie wykonalności zagranicznego wyroku arbitrażowego (zagadnienia wybrane) (Proceedings for enforcement of foreign arbitral award (selected issues))*, 5(1) ADR ARBITRAŻ I MEDIACJA 71 (2009); 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)*, 12(1) KWARTALNIK PRAWA PRYWATNEGO 172-175 (2003), at 176.

¹⁵ ANTON G. MAURER, *supra* note 12, at 67, 70. In Polish literature, this stance is supported by Mateusz Pilich, *supra* note 14, at 171, TADEUSZ ERECIŃSKI, KAROL WEITZ, *supra* note 7, at 401, Tadeusz Ereciński, *supra* note 14, at 70; RAFAŁ MOREK, MEDIACJA I ARBITRAŻ (ART. 183¹-183¹⁵, 1154-1217). KOMENTARZ, Warszawa: C.H. Beck 269 (2006); Karol Weitz, *Klauzula porządku publicznego jako podstawa uchylecia wyroku sądu polubownego na tle praktyki sądów*, (1) BIULETYN ARBITRAŻOWY 19 (2010).

¹⁶ ANTON G. MAURER, *supra* note 12, at 67-71.

- 8.10.** This position is, among others, presented in German literature. It is emphasized that if the provisions on the recognition of arbitral awards applied by the recognition court provide for specific grounds for the refusal of the recognition of an arbitral award, it is possible to find that the violation of the principle of an arbitrator's impartiality and independence is covered by this specific basis,¹⁷ which excludes the possibility to call upon the public policy clause.¹⁸ An example of this is Article V(1)(b) NYC, which extends to the violation of the right to present the case, a violation of the right to raise charges and rely on a procedural means of defense.
- 8.11.** According to the opposite position, the overlapping of the grounds for the refusal of the recognition (enforcement) of the award allowed *ex officio* and on the motion is not ruled out. In truth, it depends on the gravity of the violation of the rules of procedure.¹⁹ This view assumes that the public policy clause is useful in cases where the violation of the procedural rules included within the grounds of the refusal allowed only upon a parties' request is gross in nature. Then, the court should take the violation of these rules into consideration, even when there is no motion of a party. If a court adopts the position on the separate nature of the prerequisites listed in Article V(1) and (2) NYC, where no party files a motion, the court would be unable to refuse the recognition of an award affected with the violations set forth in Article V(1) NYC, despite the fact that the violation leads to consequences irreconcilable with the domestic public policy.²⁰

¹⁷ PETER SCHLOSSER, *DAS RECHT DER INTERNATIONALEN PRIVATEN SCHIEDSGERICHTSBARKEIT*, Tübingen: Mohr 615 (1989).

¹⁸ *Ibid.*, at 599 and 615.

¹⁹ JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958. TOWARDS A UNIFORM JUDICIAL INTERPRETATION*, London: Kluwer Law and Taxation Publishers 62 (1981), Ulrich Haas, in *PRACTITIONER'S HANDBOOK ON INTERNATIONAL ARBITRATION*, Munich: C.H. Beck 530 (Frank-Bernd Wiegand ed., 2002), Bernard Hanotiau, Olivier Caprasse, *Public Policy*, in *ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS. THE NEW YORK CONVENTION IN PRACTICE*, London: Cameron May 799 (E. Gaillard, D. di Pietro eds., 2008). In Polish literature see: Maciej Łaszczuk, Justyna Szpara, *Postępowania postarbitrażowe*, in *8 SYSTEM PRAWA HANDLOWEGO, ARBITRAŻ HANDLOWY (8 SYSTEM OF COMMERCIAL LAW. COMMERCIAL ARBITRATION)*, Warszawa: C.H. Beck 612 (A. Szumański ed., 2010); Marek Neumann, *Klauzula porządku publicznego a treść wyroku sądu polubownego (Public policy clause and the content of the arbitral award)*, 2 GŁOSA 2001 66-67.

²⁰ Marek Neumann, *supra* note 19, at 67. Cf. Andrés Jana, Angie Armer, *et al.*, *Article V(1)(b)*, in *RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION*, Alphen aan den Rijn: Kluwer Law International 297-298 (H. Kronke, P. Nacimiento *et al.* eds., 2010).

- 8.12.** It is significant to determine the relationship between the prerequisites for the refusal or the recognition of an award set forth in Article V(1) NYC and those stemming from Article V(2)(b) NYC and hence the contradiction of the recognition with the public policy of the recognizing country. This is particularly significant where, in the course of the recognition or enforcement proceedings, parties (or one of the parties) are not aware of the existence of circumstances which may substantiate the refusal of the recognition or enforcement of the award but which circumstances the adjudicating court is familiar with. It is difficult to call upon the *volenti non fit iniuria* principle if the party is not aware it is suffering an *iniuria*. It is also problematic when parties are not interested in raising the arguments listed in Article V(1) NYC such as when both parties find the award suitable to their interests and they are interested in its speedy recognition. This may be the case even if the award is burdened with the defects listed in Article V(1) NYC. Perhaps even the circumstances indicate that both the arbitration proceedings and the state court proceedings are collusive. Adopting the position which allows the court to resort to the public policy clause solely in the cases not mentioned in Article V(1) NYC means that despite the full awareness of occurrence of the circumstances listed in this provision, the court is unable to refuse the recognition of the award, thus vesting with the force of the state judgment an award, which from the point of view of its correctness, is dubious, to say the least. The view according to which the grounds of the refusal, which are allowed *ex officio* overlap with those allowed upon a motion, would permit the court to refuse the recognition of the award by calling upon the contradictory nature of the judgment with the public policy of the country where the recognition is sought. The public policy clause would constitute a type of a safety valve permitting the court to refuse the recognition of an award which is dubious from the point of view of its compliance with the law of the state where the recognition or enforcement proceedings are pending. A compromise solution is to assume that the circumstances substantiating the refusal of the recognition or enforcement of an arbitration court award allowed only upon a request (Article V(1) NYC) may be allowed *ex officio* as well, but only in exceptional cases. These would be where the violations listed in Article V(1) NYC are of such a nature that the public policy of a given country would object to vesting the award burdened with such defects with a force equal to that of judgments of this state and would object to the observance of such an award by the bodies of a given state.
- 8.13.** Such an interpretation would mean that not every circumstance capable of substantiating the refusal of the recognition (enforcement)

of an award due to the charge raised by a party on the grounds of Article V(1) NYC may also substantiate the refusal of the recognition (enforcement) of the award would be in contradiction with the public policy of the country in which the recognition is sought. Fundamental principles of the NYC are a pro-enforcement bias and limiting to the indispensable minimum the admissibility of revision by a state court of an award issued by a foreign court of arbitration.²¹ Therefore, one must assume that the cases of violation of procedural standards falling within the category of the premises listed in Article V(1) NYC may substantiate the refusal of the recognition (enforcement) of an arbitral award *ex officio* when the violated rule of procedure is of such a type that the violation thereof would cause a threat to the public policy of the recognizing country in the event of the recognition of the award issued in such proceedings.

- 8.14.** From this point of view, it is not important whether a party to the arbitration proceedings decides to call upon a given offense of the rules of procedure or whether it abandons this possibility since, in light of the public policy exception, it is not the interest of the party, but that of the recognizing country that is decisive in terms of the admissibility of the recognition (enforcement) of the award.²² Hence, referring to the *volenti non fit iniuria* principle in such cases finds no grounds. Referring to the distribution of the burden of proof specified in Article V(1) NYC is also not convincing, because since the public policy exception is to serve the protection of the public policy of the country where the recognition is sought, then ensuring the protection of this policy may not be rendered dependent on the fact of whether a party to the arbitration proceedings decides to raise a specific charge and whether it is capable of proving it sufficiently. Therefore, the burden of detecting a threat to the public policy and preventing it by refusing to recognize (enforce) a foreign arbitral award rests with the state court.
- 8.15.** Referring these comments to a violation related to the arbitral authority's composition or procedure by the arbitrator's (arbitrator candidate's) default on the disclosure duties, it is worthwhile to highlight that the requirement of impartiality and independence stems from the nature of the role fulfilled by arbitrators and, more broadly, from the nature of the function realized by the arbitral judiciary.²³ This

²¹ See: ANTON G. MAURER, *supra* note 12, at 61-67.

²² See, e.g.: Pieter Sanders ed., *supra* note 7, at 104.

²³ Anna Krysiak, Marek Wierzbowski, *Bezstronność i niezależność jako kluczowe cechy każdego arbitra (Independence and impartiality as key features of every arbitrator)*, in

requirement is also decisive for the admissibility of the existence of arbitration courts as a forum for a method of dispute resolution competitive with state courts.²⁴ Impartiality and independence constitute the statutory premises for the admissibility to entertain the function of the arbitrator.²⁵ The requirement that tribunals be impartial falls within fundamental procedural principles.²⁶ Therefore, the lack of an arbitrator's independence and impartiality violates the right of access to the courts.²⁷ In this context, it is reasonable to find that the provisions guaranteeing the impartiality and independence of the arbitrator are of such importance, that their violation allows the state court to refuse the recognition of an arbitral award on the basis that recognition of such an award poses a threat to the public policy of that country.²⁸ Therefore, the very fact that a party did not rely upon a given violation of the disclosure duties or another violation of the duty of the arbitrator's independence and impartiality, may not be decisive for inadmissibility of allowing such a circumstance by the court *ex officio*.

KSIEGA PAMIĄTKOWA 60-LECIA SĄDU ARBITRAŻOWEGO PRZY KRAJOWEJ IZBIE GOSPODARCZEJ W WARSZAWIE (FESTSCHRIFT: 60 YEARS ARBITRATION COURT AT POLISH CHAMBER OF COMMERCE IN WARSAW), Warszawa: Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej 359 (J. Okolski, A. Całus, M. Pazdan, S. Sołtysiński, T. Wardyński, S. Włodyka eds., 2010).

²⁴ Michał Romanowski, *Znaczenie niezależności i bezstronności arbitra w postępowaniu arbitrażowym w świetle konstytucyjnego prawa do sądu (The meaning of impartiality and independence of an arbitrator in arbitration proceedings in light of a constitutional right to court access)*, in KSIEGA PAMIĄTKOWA 60-LECIA SĄDU ARBITRAŻOWEGO PRZY KRAJOWEJ IZBIE GOSPODARCZEJ W WARSZAWIE (FESTSCHRIFT: 60 YEARS ARBITRATION COURT AT POLISH CHAMBER OF COMMERCE IN WARSAW), Warszawa: Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej 376 (J. Okolski, A. Całus, M. Pazdan, S. Sołtysiński, T. Wardyński, S. Włodyka eds, 2010).

²⁵ The requirement of preservation of impartiality and independence of the arbitrator is stipulated *e.g.* by the IBA Guidelines on Conflicts of Interest in International Arbitration and by Article 12 UNCITRAL Model Law on International Commercial Arbitration. It is also stipulated in domestic regulations on arbitration proceedings (see, *e.g.*: Article 1173 et seq. of the Polish CCP, § 1036 and 1037 of the German ZPO, § 588 and 589 of the Austrian ZPO; Article 179.2 of the Swiss PIL in conjunction with Article 363 and 367 of the Swiss ZPO, Article 24.1.a) of the English Arbitration Act 1996).

²⁶ See: recommendation no. 1(e) of International Law Association Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards (Resolution 2/2002) adopted by the 70th Conference of the International Law Association held in New Delhi, India, 2-6 April 2002.

²⁷ Michał Romanowski, *supra* note 24, at 384.

²⁸ See: Maciej Zachariasiewicz, *Public policy as a ground of refusal of recognition or enforcement of the arbitral award in Poland*, 5 MIGALHAS ON INTERNATIONAL ARBITRATION 2 (2010).

III.2. Preclusion (Waiver) of the Reasons for Removal of an Arbitrator in an Action to Stop Enforcement of an Award

- 8.16. An award may be issued with the participation of an arbitrator who has been non-compliant with the requirements of impartiality and independence. It may also be issued where the parties had admittedly acquired the knowledge, from the arbitrator or from other sources, of the circumstances capable of influencing the arbitrator's impartiality and independence. However, before the award was issued they had not engaged in any activities capable of causing the exclusion of the arbitrator or such action had not been engaged in within the prescribed time limit. Hence, the award was issued with the participation of a partial arbitrator.
- 8.17. In principle, the removal of the arbitrator may take place only if a party comes forth with an appropriate demand. Therefore, a question arises whether in the case where the party is familiar with the circumstances substantiating the exclusion of an arbitrator, yet fails to file an appropriate motion or files such a motion outside of the prescribed time limit, can this issue be raised in the proceedings for the recognition (enforcement) of an arbitral award either on the parties motion or alternatively, *ex officio* by the court. It is assumed that, in principle, the failure to demand the removal of the arbitrator causes the preclusion of the reasons for removal. It is recognized as equivalent with a party's resignation from referring to these circumstances in post-arbitration proceedings.²⁹
- 8.18. In light of the Polish provisions on arbitral proceedings, failing to raise the charge of an offense of the provisions on proceedings before the court of arbitration at the right time precludes the party who was aware of this violence from raising the charge of such an violation before the arbitration court or in the action to set aside the arbitral award. Nonetheless, commentators indicate that this preclusion does not extend to the mandatory provisions of the Code of Civil Procedure on proceedings before a court of arbitration.³⁰ Although this issue has not been settled anywhere, it seems also that the provisions concerning the impartiality and independence of arbitrators must be regarded as having a mandatory character.³¹

²⁹ See: JULIAN LEW, LOUKAS MISTELIS, STEFAN KRÖLL, *supra* note 11, at 308-309, 315-316; see also: GARY BORN, *supra* note 6, at 2615 and the case law quoted therein, in particular US, French, Swiss and English case law.

³⁰ See, in relation to the grounds of setting aside of an arbitral award, Justyna Szpara, *supra* note 7, at 118.

³¹ See also: Justyna Szpara, *supra* note 7, at 118.

- 8.19.** The Polish literature presents a view according to which the preclusion in relation to the grounds for the exclusion of an arbitrator is not effective where the arbitrator's participation in issuing the award could be found to substantiate the contradiction of this award with the fundamental principles of public policy.³² For example, the arbitrator who was a party to the proceedings or whose rights or obligations were impacted by the outcome of the arbitration proceedings had participated in the issuance of the award. In such cases, the *nemo iudex in casua sua* principle is violated.³³ Therefore, if the arbitration proceedings are conducted according to the provisions of the Polish Code of Civil Procedure, the charge related to the lack of impartiality or independence of the arbitrator may be found not to be subject to preclusion. Thus a party's failure to raise such a charge in the course of the arbitration proceedings does not exclude the possibility of taking this procedural defect into consideration in the course of the recognition or enforcement proceedings.
- 8.20.** The German literature adopts the stance that in the event of the issuance of an award with the participation of a partial arbitrator, the recognition or enforcement court carries out a two-step examination. First, it examines whether under the provisions on arbitration proceedings applicable in the given case, the proceedings are defective and whether under these provisions this defect may be called upon, or whether the preclusion has already occurred. If the preclusion occurred in light of the appropriate provisions on arbitration proceedings it is also effective in the recognition or enforcement proceedings before a German court. Next, however, the recognition or enforcement court must assess whether, according to the German standards, the arbitrator was sufficiently impartial and independent. The assessment is carried out from the viewpoint of the public policy exception if the specific violations do not fall under another, specific prerequisite for the refusal of the recognition (enforcement) of the arbitral award or if the provisions on the recognition of arbitral awards applied by the recognition or enforcement court provide for no special prerequisites.³⁴ However, the assessment of a potential violation of the German public policy by a specific violation to the provisions on arbitration

³² KAROL POTRZOBOWSKI, WŁADYSŁAW ŻYWICKI, SĄDOWNICTWO POLUBOWNE. KOMENTARZ DLA POTRZEB PRAKTYKI (ARBITRAL JUDICIARY. PRACTICAL COMMENTARY), Warszawa: Wydawnictwo Prawnicze 35 (1961); RAFAŁ MOREK, *supra* note 15, at 190; TADEUSZ ERECIŃSKI, KAROL WEITZ, *supra* note 7, at 204.

³³ See: the judgement of the Supreme Court of 24 September 1999, file ref. no. I CKN 141/98, LEX no. 38857.

³⁴ PETER SCHLOSSER, *supra* note 17, at 615.

proceedings is not without significance where in the course of the arbitration proceedings the party had the opportunity to raise the arbitrator's impartiality and independence. If the party did have such an opportunity, then their failure to take advantage thereof should have the consequence that only exceptionally manifest violations of the principle of the arbitrator's impartiality and independence, first and foremost the violation of the principle that no-one may act as a judge in their own case, can result in the refusal of the recognition or enforcement of the award.³⁵

- 8.21.** From a preclusion viewpoint, the above-mentioned concept of the two-step examination of the admissibility of allowing the charge of the lack of an arbitrator's impartiality and independence must be found convincing. The admissibility of raising the charge related to the violation of the rules of procedure should be examined in the light of the provisions applicable to the given arbitration proceedings. Yet, even in the case when in light of these provisions a party does not entertain such a possibility anymore, the country where the recognition is sought may not be forced to enforce or recognize such an award on its own territory if, due to this offense, the recognition of the award would contradict the public policy of that country.

III.3. Admissibility in an Enforcement Proceeding of Exclusion Charges that Were Not Allowed in the Arbitration Proceedings

- 8.22.** It is also worthwhile to examine those cases where the party raised the charges related to the arbitrator's impartiality and independence within the prescribed time limit, but the court of arbitration refused to exclude the arbitrator, recourse to the state court did not result in the exclusion of the arbitrator and the award was issued with the participation of the questionable arbitrator. Then a question arises whether the lack of impartiality and independence of the arbitrator whom these rulings concerned may provide the grounds for the refusal of the recognition or enforcement of the arbitral award issued in these proceedings.
- 8.23.** Some authors find that if the arbitrator's exclusion because of their lack of impartiality and independence raised by the party, is refused, then often this decision excludes the setting aside of the arbitral award based on the same circumstances which were not allowed in the proceedings for the arbitrator's exclusion, or such a decision at least constitutes

³⁵ *Ibid.*, at 616. See also: the verdict of the BGH of 1 February 2001, XXIX Yearbook of Commercial Arbitration (2004), at 700-714.

convincing evidence in the proceedings for setting aside the arbitral award.³⁶ At times, state courts hearing motions to set aside an arbitral award refer to the fact that an earlier state court decision refusing the arbitrator's exclusion enjoys substantive validity and therefore it may not be revised in later proceedings before the state court if the charge raised in the post-arbitration proceedings is based on the same grounds as the previously dismissed motion for the arbitrator's exclusion.³⁷ Also, where provisions applicable to the given proceedings do not provide for the possibility of a judicial review of the arbitration court's decision refusing the arbitrator's exclusion, state courts call upon the fact that the decisions of arbitration courts are final if the appropriate provisions do not stipulate the procedure for challenging them and refuse to hear the charge of an arbitrator's partiality, heard already by the arbitration court.³⁸ Some state courts assume that an unsuccessful institutional challenge will not be precluded in a subsequent annulment action, for the parties may not waive the right to demand that the arbitral award be set aside due to the charge of the arbitrator's impartiality or independence.³⁹

- 8.24.** Yet another view assumes that where the exclusion is ruled on by an arbitral institution, its decision is of an administrative nature and enjoys no *res judicata* effect. *Ipso facto*, in the course of the proceedings for recognition, state courts may rule whether the challenge raised against the arbitrator and rejected by the arbitral institution constitutes a ground on which to refuse the action to enforce. However, where the challenge has been rejected by a state court, the issue of the arbitrators' independence is deemed to be finally decided and can no longer be re-examined by the courts when hearing a motion for recognition of an award, unless a defect affecting the constitution of the arbitral tribunal has since come to light.⁴⁰
- 8.25.** Although there are substantial arguments in favor of each of these views, yet it would seem that the state court's refusal to exclude the

³⁶ See: e.g. GARY BORN, *supra* note 6, at 2616.

³⁷ See: e.g. judgment of OLG Munich of 20 December 2006, 34 Sch 16/06 (available at: <http://www.dis-arb.de/de/47/datenbanken/rspr/olg-muenchen-az-34-sch-16-06-datum-2006-12-20-id655>; accessed on: September 30, 2013).

³⁸ Judgment of Paris Cour d'appel of 15 May 1985, *Raffineries de pétrole d'Homs et de Baniyas v. Chambre de Commerce Internationale*, 1985 Revue de l'Arbitrage 141, regarding the procedure for the exclusion of the arbitrator based on the ICC Rules.

³⁹ Judgment of English Court of Appeal, *AT&T Corp. v. Saudi Cable Co.* [2000] 2 Lloyd's Rep. 127, 137; quoted after: GARY BORN, *supra* note 6, at 2617.

⁴⁰ FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, Alphen aan den Rijn: Kluwer Law International ¶ 1069 (E. Gaillard, J. Savage eds., 1999) and the literature and case-law quoted therein.

arbitrator should, in principle, exclude the possibility to later call upon the same circumstances in the recognition or enforcement proceedings. The dismissal of the motion for the arbitrator's exclusion should mean that the charges raised by the party against the arbitrator's impartiality and independence were analyzed by an independent state court from the viewpoint of the rules of procedure applicable in the proceedings and no violation of these rules was established. The court of the country where the recognition is sought should, however, retain the right to refuse the recognition of a foreign arbitral award in those cases where the motion for the arbitrator's exclusion was heard exclusively in the institutional challenge mode. Furthermore, such a right must also be awarded to the court of the recognizing country if this court arrives at the conclusion that, despite the previous examination of the charge of the arbitrator's partiality (be it in the institutional challenge mode or the judicial review mode), the standards of impartiality and independence of arbitrators in force in the recognizing country object to the recognition of the award issued with the participation of this arbitrator. Hence, the court of the recognizing country should retain the right to refuse the recognition of such an award if the recognition thereof would contradict that country's public policy.

III.4. Exclusion of the Arbitrator after the Rendering of the Arbitral Award

- 8.26.** The domestic provisions on arbitration proceedings stipulate the recourse to the state court for the exclusion of an arbitrator. Simultaneously, these provisions do not assume staying of further proceedings before the arbitration court. Therefore, it is worthwhile to consider the impact which the exclusion by the state court, after the award has been issued, of the arbitrator who participated in the issuance of the arbitral award, will have on the admissibility of the recognition (enforcement) of such an award.
- 8.27.** In the proceedings for the arbitrator's exclusion, the state court confirms (or negates) the existence of circumstances impacting the arbitrator's impartiality and independence. Hence, if the existence of such circumstances is established by virtue of the judgment issued by the state court, then it must be assumed that it is the basis for the setting aside or refusing the recognition (enforcement) of the arbitral award.⁴¹ There are also no grounds to assume that in the event of

⁴¹ See: KARL-HEINZ SCHWAB, GERHARD WALTER, *supra* note 7, at 118; TADEUSZ ERECIŃSKI, KAROL WEITZ, *supra* note 7, at 203-204; Andrzej Zieliński, *in* KODEKS

issuance of the award by the arbitration court, the proceedings for the exclusion of the arbitrator become devoid of purpose.⁴² As it seems, if it was to be so, the legislators would specify in the statute that in the event a motion for the arbitrator's exclusion is filed, the arbitration proceedings are suspended or they would decide that the questionable arbitrator may continue to participate in the proceedings, but no award may be issued with such an arbitrator's participation (cf. Article 20 Vienna Rules of 2013). Possibly, another rule would be introduced providing for the discontinuation of the proceedings on the motion for the arbitrator's exclusion if the arbitral award was issued in the course of the proceedings. However, there are no such regulations since, in principle, as already indicated, it is assumed that arbitration proceedings may be pending in parallel to the proceedings for the arbitrator's exclusion. Legislators take into account the possibility that the arbitration proceedings would end sooner than the proceedings for the exclusion of the arbitrator. At the same time, it is difficult to assume that the decision on the arbitrator's exclusion issued after the arbitral award has been passed remains without any impact on the admissibility of the recognition of the award issued with this arbitrator's participation. It is so due to the fact that such a decision constitutes the confirmation that the arbitrator failed to comply with the requirements of impartiality and independence expected in light of the rules of procedure applicable in the given arbitration proceedings. Hence, a party may move for the refusal of the recognition of the award, quoting Article V(1)(b) NYC.

IV. Summary

- 8.28. The possibility of the refusal to recognize an arbitral award, due to a violation of the principle of impartiality and independence of arbitrators, constitutes a substantial warranty of the observance of this principle. It is the last stage at which a party may raise the charge of the lack of arbitrators' impartiality and independence. If the charge is not allowed, the arbitral award issued by a partial arbitral tribunal acquires as consequence of its recognition a force equal to that of a state court

POSTĘPOWANIA CYWILNEGO. KOMENTARZ (CODE OF CIVIL PROCEDURE. COMMENTARY), Warszawa: C.H. Beck 1672 (A. Zieliński ed., 2013).

⁴² According to another opinion, at the moment of the issuance of the arbitral award, the proceedings for the exclusion of the arbitrator become devoid of purpose while in the recourse for the setting aside of the arbitral award the party may call upon the non-compliance of the composition of the arbitral tribunal with the law (see: BERNHARD BERGER, FRANZ KELLERHALS, INTERNATIONALE UND INTERNE SCHIEDSGERICHTSBARKEIT IN DER SCHWEIZ, Bern: Stampfli Verlag 294 (2006)).

judgment. For this reason, a too lenient approach of state courts hearing motions for the recognition or enforcement of arbitral awards may lead to the questioning of the arbitral awards as being issued in proceedings that do not guarantee a certain standard of due process. This may deprecate the role of arbitration as a manner of dispute resolution and may seriously impair parties' trust in arbitration since they will not have certainty that the potential violation of principles of impartiality and independence of arbitrators will result in the refusal of the recognition of the arbitral award. Therefore, in the recognition proceedings, charges based on the violation of the principles of arbitrators' impartiality and independence should be treated with special attention. It is necessary to permit *ex officio* actions of the state courts aimed at preventing the recognition of awards issued with the grave violation of these rules.

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Summaries

DEU [Einfluss des Verstoßes gegen die Regeln der Unabhängigkeit und Unparteilichkeit auf Vollstreckbarkeit und Wirkung eines Schiedsspruchs]

Die Unabhängigkeit und Unparteilichkeit der Schiedsrichter werden durch mehrere Regelungen der Schiedsverfahrensrecht abgesichert, wie eine dem Schiedsrichter auferlegte Pflicht, alle Umstände offen zu legen, die Zweifel an seiner Unparteilichkeit oder Unabhängigkeit wecken können oder die Möglichkeit, ein Verfahren zur Ablehnung eines Schiedsrichters einzuleiten. Ein Verfahrensfehler, der zur Verstoß gegen die Grundsätze der Unabhängigkeit und Unparteilichkeit der Schiedsrichter führt, kann einen Anerkennungsversagungsgrund im Sinne von Art. V des NYC darstellen. Je nachdem, was für ein Verfahrensmangel auftritt, kann ein anderer Anerkennungsversagungsgrund in Frage kommen. Besonders wichtig sind aber die Kompetenzen des Anerkennungsgerichts, ein Anerkennungsversagungsgrund von Amts wegen zu berücksichtigen, ohne sich auf die Initiative der Parteien verlassen zu müssen. Wenn dann die Missachtung der Grundsätze der Unabhängigkeit und Unparteilichkeit des Schiedsrichters im Laufe des Schiedsverfahrens zum Verstoß gegen die Grundsätze eines fairen Gerichtsverfahrens wird, dient die Versagung der Anerkennung eines Schiedsspruchs nicht nur dem Schutz des ordre public des Anerkennungsstaates, sondern auch dem Anstieg des Vertrauens der Parteien zu der Schiedsgerichtsbarkeit als einer alternativen und fairen Konfliktlösungsmöglichkeiten.

CZE [*Vliv porušení pravidel o nezávislosti a nestrannosti na vykonatelnost a účinky rozhodčího nálezu*]

Dodržování pravidel o nezávislosti a nestrannosti rozhodců je garantováno různými mechanismy. Tyto zahrnují povinnost rozhodců informovat o jakýchkoliv okolnostech, které by mohly způsobit pochybnosti o jejich nestrannosti a nezávislosti, nebo které by mohly založit právo stran odmítnout rozhodce. Procesní pochybení vedoucí k porušení zásady nezávislosti a nestrannosti rozhodce může zakládat důvody pro odmítnutí uznání a výkonu rozhodčího nálezu uvedené v článku V Newyorské úmluvy (NYC). V závislosti na druhu procesního pochybení přicházejí v úvahu různé důvody pro odmítnutí uznání a výkonu. Je však zásadní, zda jsou soudy oprávněny odmítnout uznání a výkon rozhodčího nálezu ex officio bez ohledu na aktivní přístup stran k řízení. Zakládá-li porušení pravidel o nezávislosti a nestrannosti rozhodců v průběhu rozhodčího řízení porušení zásady spravedlivého procesu, pak právo odmítnout uznání rozhodčího nálezu podporuje nejen ochrana veřejného pořádku státu, v němž je uznání požadováno, nýbrž toto právo přispívá rovněž ve zvýšení důvěry stran v rozhodčí řízení jako alternativnímu a spravedlivému způsobu řešení sporů.

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POL [*Wpływ naruszenia reguł niezależności i bezstronności na wykonalność i skuteczność wyroku sądu arbitrażowego*]

W artykule poruszono problem konsekwencji naruszenia w postępowaniu arbitrażowym zasad gwarantujących rozpoznanie sprawy przez bezstronnych i niezależnych arbitrów dla późniejszego postępowania w przedmiocie uznania (stwierdzenia wykonalności) wyroku arbitrażowego. Autorki analizują wybrane postaci naruszenia tych zasad i oceniają je z punktu widzenia podstaw odmowy uznania wyroku wymienionych w art. V ust. 1 i 2 NYC.

FRA [*L'impact de la violation des principes d'indépendance et d'impartialité sur l'exécution et l'efficacité d'une sentence d'un tribunal arbitral*]

Dans l'article, on a abordé le problème des conséquences de la violation dans l'arbitrage des principes garantissant qu'un différend sera résolu par des arbitres impartiaux et indépendants pour les besoins d'une procédure ultérieure de la reconnaissance (de la constatation de la force exécutoire) d'une sentence arbitrale. Les auteurs analysent des types choisis de la violation de ces principes et les évaluent de point de vue des

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motifs de refus de la reconnaissance d'une sentence arbitrale mentionnées dans l'art. V al. 1 et 2 de la NYC.

RUS [**Влияние нарушений правил беспристрастности и независимости на приведение в исполнение и эффективность решений арбитражных судов**]

В настоящем документе рассматривается вопрос о последствиях нарушения в арбитражном процессе принципов, гарантирующих рассмотрение дела беспристрастными и независимыми судьями в целях последующего разбирательства о признании (приведении в исполнение) арбитражного решения. Авторы анализируют выбранные примеры нарушения этих принципов и оценивают их с точки зрения оснований для отказа от признания решения, приведенных в статье V, пунктах 1 и 2 NYC.

ESP [**El impacto de la violación de las normas de la independencia e imparcialidad sobre la ejecutividad y la eficacia de la sentencia arbitral**]

En este artículo se aborda el tema de las consecuencias de la violación de las normas del procedimiento de arbitraje que garantizan el reconocimiento del caso por los árbitros imparciales e independientes para el procedimiento ulterior de reconocimiento (de declaración de ejecutividad) de la sentencia arbitral. Las autoras analizan seleccionadas formas de la violación de estas normas y las evalúan desde el punto de vista de los motivos de denegación del reconocimiento de la sentencia nombrados en el artículo V párrafos 1 y 2 de NYC.

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