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List of Abbreviations

AAA	American Arbitration Association
AAA International Arbitration Rules	American Arbitration Association Arbitration Rules
ACICA Rules	2016 Australian Centre of International Commercial Arbitration Rules
ADR	Alternate Dispute Resolution
AIA	(Italian Arbitration Association -Associazione italiana per l'arbitrato)
ArbAct	Act (of the Czech Republic) No. 216/1994 Coll., on Arbitration and the Enforcement of Arbitral Awards, as amended.
Australian Arbitration Act	International Arbitration Act 1974, Act No. 136 of 1974 as amended in 2011
CC	Act (of the Czech Republic) No. 89/2012 Coll., the Civil Code
CC (1964)	Act (of the Czech Republic) No. 40/1964 Coll., the Civil Code, as amended
CCP	Act (of the Czech Republic) No. 99/1963 Coll., the Code of Civil Procedure, as amended
CIETAC Rules	2015 China International Economic and Trade Arbitration Commission Arbitration Rules
Commercial Code	Act (of the Czech Republic) No. 513/1991 Coll., the Commercial Code, as amended
DIS Rules	1998 German Institute of Arbitration Rules
HKIAC	Hong Kong International Arbitration

	Centre
IBA	International Bar Association
ICAC Rules	Arbitration Rules of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, adopted on 18 October 2005, as amended on 23 June 2010
ICC	International Chamber of Commerce.
ICC Rules	ICC Rules of Arbitration of the ICC International Court of Arbitration, in force as from 1 January 2012
ICT	Information and communication technologies
IP	Intellectual Property
LCIA	London Court of International Arbitration
LCIA Rules	Arbitration Rules of the London Court of International Arbitration, in force from 1 October 2014
Milan Rules	Rules of the Chamber of Arbitration of Milan
New York Convention	Convention in the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958
New Zealand Arbitration Act	Arbitration Act 1996, Public Act 1996 No 99, reprint 1 January 2011
OECD	Organisation for Economic Co-operation and Development
RAA Online Rules	Online Arbitration Rules of the Russian Arbitration Association, in force as from 1 October 2015
Rome I Regulation	Regulation (EC) No. 593/2008 of the European Parliament and of the Council of June 17, 2008, on the law applicable to contractual obligations.
SC	Supreme Court of the Czech Republic.
SCC	Stockholm Chamber of Commerce
SCC Rules	Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, in force as from 1 January 2010
SIAC	Singapore International Arbitration Centre
SIAC Rules	Arbitration Rules of the Singapore International Arbitration Centre, in force from 1 April 2013

Swiss Rules	2012 Swiss Rules of International Arbitration
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Arbitration Rules	Arbitration Rules of the United Nations Commission on International Trade Law
UNCITRAL Model law	the Model law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law on 21 June 1985, with amendments on 7 July 2006
UNCITRAL Rules	UNCITRAL Arbitration Rules, revised in 2010, adopted in 2013
WIPO	World Intellectual Property Organization

Articles

Wojciech Wandzel | Kuba Gąsiorowski

Enforcement Issues in the Conduct of Arbitration and National Laws in International Arbitration

Key words:
arbitration agreement | New York Convention | international arbitration | pro-enforcement | pro-arbitration | enforcement of arbitral awards

Abstract | *Arbitration is a process and its product is an arbitral award that can be a substitute for a state court judgment in the most important aspect - enforceability. As a result, both arbitral tribunals and counsels should undertake necessary steps to ensure the future enforceability of the award. This requires tailoring the arbitral process with enforcement issues in mind and conducting the arbitration proceedings with a flexible and knowledgeable navigation among several different legal systems that will only come into play during enforcement as provided by the New York Convention. Such pre-emptive and multi-level legal analysis should secure enforcement of the award in different jurisdictions with varying legal systems. Unfortunately, it is often replaced by 'pro-arbitration' arguments and vague references to 'international standards', without due consideration of different national laws, and in particular the public policy of prospective places of enforcement. This article discusses these deficiencies and provides a roadmap of applicable national laws that need to be kept in mind under the New York Convention in the conduct of arbitration.*

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I. Introduction

9.01. No matter how much has been said about the informality and flexibility of arbitration, the truth is that it is a legal process after all. In most cases arbitration is based on national laws and the fixed principles found in statutes and case law. There are reasons for which parties decide on very rare occasions to have their dispute decided *ex aeqo et bono*, not on the basis of some national law. This is because international commerce needs definite frameworks and solutions, grounded on properly applied rules of law. In short, it needs as much predictability as a transaction that is international in nature can have.[1] Although the commerce or transaction itself may be international it looks to national laws for stability.

9.02. However, in many instances arbitrators and counsels lose sight of the legal side of arbitral process and supplement it with no more than a general 'pro-arbitration' attitude and vague references to 'international standards' or 'businesswise solutions'. Then, at the stage of enforcement state courts step in and suddenly it turns out that deficiencies in careful step-by-step legal analysis threaten the execution of the arbitral award.

9.03. The purpose of this article is to provide a roadmap for counsels and arbitrators on what enforcement-related matters they should take into account in conducting the arbitral process, and why they should do so. The first part of this article will briefly examine why it is of particular importance today, when arbitration is facing increased criticism, to keep enforcement issues in mind during the arbitration itself. Secondly, the article will show that sometimes too much reliance on a 'pro-arbitration' approach might endanger the enforceability of the award. Third, this article will investigate the need to carefully analyze the laws of several jurisdictions, from the outset of the arbitral process until making of an award, from the perspective on enforcement.

II. Why Enforcement Issues Matter in the Conduct of Arbitration

9.04. According to a recent survey of Polish arbitration participants, only 15% of the respondents indicated that in all their cases the losing party voluntarily executed the arbitration award. In

[1] See Tomasz Stawecki, *Arbitraż w* świetle *badań empirycznych* (Arbitration in Light of Empirical Data), in Prawo Międzynarodowe i arbitraż. Księga jubileuszowa dedykowana doktorowi maciejowi tomaszewskiemu (International law and arbitration. Jubilee book dedicated to doctor maciej tomaszewski), Warsaw: Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej 328-329 (Jerzy Poczobut, Andrzej W. Wiśniewski eds., 2016).

turn, 18% of them answered that this happened in a minority of cases and 22% stated that this was the case in more or less half of the disputes.[2] These numbers show that in a majority of instances a winning party will have to initiate enforcement proceedings before state courts to execute the arbitral award. That is despite the fact that under the arbitration rules of some of the permanent arbitral institutions, including those located in Central Europe, parties are required to undertake to voluntarily carry out the arbitral award.[3]

9.05. Importantly, it has to be remembered that it is not only the parties that undertake enforcement related obligations in arbitration. Arbitration is a business and its product is an enforceable award. From the perspective of the parties there is no point in having arbitration proceedings if an award is rendered that cannot be executed. Several rules of arbitral institutions expressly indicate that the tribunals are obligated to conduct the proceedings in such a manner as to issue an effective and enforceable award. The ICC rules even provide for a 'General Rule' in their article 41 that 'in all matters […] the Court and the arbitral tribunal shall […] make every effort to make sure that the award is enforceable at law'. A similar principle is contained in the opening provisions of the rules of the Court of Arbitration at the Polish Chamber of Commerce.[4]

9.06. These facts show how important it is that counsels and arbitrators constantly keep enforcement issues in mind when conducting the arbitration proceedings. If at some point they disregard any matter that may influence the enforceability of their award, all time and resources spent on arbitration might be lost. Even when an arbitral award survives a challenge before a state court or its enforceability is upheld, it does not change a fact that time spent on hearings before state courts could have been avoided. It is true that there is a trend among laws of many jurisdictions to simplify post-arbitral proceedings. For example, this has been the case with Poland, where the recent amendment to the rules

[2] See Polish Arbitration Survey, available in English at: http://badaniearbitrazu.pl/wp-content/uploads/2016/06/polish-arbitration-survey-2016-eng.pdf (accessed on October 13, 2016).

[3] For examples in Central Europe see rules of the Polish Lewiatan Court of Arbitration, section §41: 'The award shall be final and binding on the parties to the arbitration. The parties undertake to carry out the award without undue delay. The above shall be without prejudice to the provisions on the action to set aside an award.'; rules of the Arbitration Court at the Economic Chamber and Agricultural Chamber of the Czech Republic, article 43 section 1: 'The Parties are obliged to perform all the duties imposed by the arbitral award within the periods of time stipulated therein.'; rules of the Vienna International Arbitration Center, article 36 section 7: 'By agreeing to the Vienna Rules, the parties undertake to comply with the terms of the award.'

[4] See Section 5 of the rules of the Court of Arbitration of the Polish Chamber of Commerce: 'The Court of Arbitration and the Arbitral Tribunal shall perform actions connected with the arbitration proceeding with due diligence, seeking in particular to assure that the ruling issued is effective and enforceable (Emphasis is the Authors).

of civil procedure have led to shortening of examination of the cases for enforcement of foreign arbitral awards. However, it is understandable that an award issued in proceedings which were conducted by arbitrators who were aware of enforcement issues has a better chance of avoiding a challenge or refusal of enforcement. At the very least, the proceedings in that matter before a state court will last a shorter amount of time.

9.07. This article is not, however, a voice in defence of the so called 'due process paranoia', as it has been called by respondents of the 2015 Queen Mary Arbitration Survey.[5] This refers to behaviour on the part of arbitral tribunal involving constant extension of deadlines, admittance of belated evidence, etc. just in order to avoid a charge of violating a party's right to be heard or due process. Rather, what is discussed in this article is the lack of sufficient attention to the use of the overlapping systems of legal rules that comes into play in many arbitration proceedings. It requires a significant degree of legal skills, knowledge of comparative law and self-confidence to make an award that will be in conformity with several legal systems that might be applicable to different aspects of the arbitral process in international trade relations, so as to secure its enforceability to the greatest possible extent.

9.08. When it comes to analyzing any legal aspects that may influence the enforceability of the award, particular care for details in the conduct of arbitration is nowadays of special importance. Arbitration is facing waves of criticism due to increases in costs and the lengthiness of the proceedings. Sometimes even a finding by the tribunal that it has jurisdiction in cases when this is highly doubtful might not serve the parties interest. In such situations, any award issued by the tribunal faces a high risk of being unenforceable, which leaves the parties spending resources on arbitration proceedings that might lead nowhere. In some legal systems the arbitral tribunal is not required to issue a separate preliminary decision on its jurisdiction and may decide this matter in its final award.[6] Thus there is no earlier possibility to 'check' the jurisdiction by the state court. Even

[5] http://www.arbitration.qmul.ac.uk/docs/164761.pdf (accessed on 22 November 2016).

[6] See Article 16 Section 3 of the UNCITRAL Model Law, which states that the arbitral tribunal *may* (thus it lies in its discretion) issue a separate preliminary decision on its jurisdiction. A similar approach can be found in Article 1180 Section 3 of the Polish Code of Civil Procedure. Legal doctrine has confirmed that the arbitral tribunal can postpone its decision on jurisdiction until the issuance of the final award: 'If the arbitral tribunal deems itself to have jurisdiction on the case, it rules on the charge of lack of jurisdiction […] in a separate decision, treating the charge as a preliminary question, or rules on it in the final award.' (See Tadeusz Ereciński, Kodeks postępowania cywilnego. Komentarz. Tom V. Międzynarodowe postępowanie cywilne. Sąd polubowny (arbitrażowy) (Code of civil procedure. Volume V. International Civil Proceedings. Arbitration), Warsaw: LexisNexis 410 (Tadeusz Ereciński ed., 2012).

when that happens, the award might still be left unenforceable, because the preliminary issue of jurisdiction and the issue of enforceability of the final award are decided by different state courts. In first instance, the issue is usually decided by the courts of place of arbitration, while in the second situation it is decided by the courts of place of enforcement. It may happen that a dispute covered by an arbitration agreement that is *prima facie* valid in the country where proceedings are conducted violates public policy or concerns a dispute that is not arbitrable under the law of the place of enforcement.

III. Too Much of a Good Thing – A 'Pro-Arbitration' Approach is Not Always the Answer

9.09. Generally speaking, arbitration might be considered a 'super contract,'[7] i.e. an agreement that is treated more favorably than any other by the state courts. Courts have upheld arbitration agreements (and arbitral awards as they are a direct result of agreements to arbitrate) in instances in which normally they would strike down different agreements for lack of compliance with certain rules of law. A pro-arbitral approach (sometimes called *in favorem validitatis*) means that the 'liberal way of construing arbitration agreements has to be pursued even in those cases where in general contract law the ambiguity could not be resolved through the application of traditional means of interpretation.'[8]

9.10. In terms of enforcement of international arbitral awards, such approach may be based on the 'pro-enforcement' policy adopted in the most widely used international treaty on arbitration, namely the Convention on Recognition and Enforcement of Foreign Arbitral Awards. This is the so called 'New York Convention', ratified in New York on the 10th of June 1958. The pro-arbitration and pro-enforcement posture means that as many arbitral awards should be upheld as possible, save for situations prescribed in the New York Convention. Such a

[7] Arbitration agreements are referred to as 'super contracts' in American legal literature, see: Thomas E. Carbonneau, Toward a New Federal Law on Arbitration, New York: Oxford University Press 48 (2014). In American scholarship this notion is used as a pejorative as arbitration agreements seem to contradict many traditional notions of common law principles of contract law, i.e., a lack of specific performance as a principle remedy.

[8] Commentary to Trans-Lex Principle, available at: http://www.trans-lex.org/968902 (accessed on 19 October 2016).

posture has been interpreted to follow from the drafting history of the Convention.[9]

9.11. It is beyond the scope of this article to analyze the complicated matter of what the limits of the pro-arbitration and pro-enforcement approaches should be, although this is an issue definitely worthy of examination. Still it has to be remembered that the 'pro-arbitration' approach should never be treated lightly as a gap filler by both counsels and arbitrators. *In favorem validitatis* can be used when there are doubts as to the existence of the arbitration agreement or the validity of an arbitral award due to a balance of comparatively convincing arguments on both sides. However, it cannot be invoked in situations when it is rather clear that the arbitration agreement or the award do not conform with the applicable domestic law or the New York Convention such as when the arbitration agreement does not satisfy the form requirements set out in Article II.2 of the New York Convention. In such instances, a 'pro-arbitration' argument cannot be used to press for a *contra legem* interpretation of the Convention, i.e. allowing expanding the Convention to include new forms of agreements to arbitrate that are not contained therein, even within the liberal interpretation of its provisions. What can be sometimes seen in both arbitration and post-arbitration proceedings is the invoking of a 'pro-arbitration' policy as a substitute for a full legal justification of the validity of an arbitration agreement or the validity of the arbitral award.

9.12. Yet relying on such 'pro-arbitration' and 'pro-enforcement' arguments on behalf of state courts in proceedings for enforcement should not be taken for granted. That is because in contrast to an arbitral tribunal which works under more informal principles, the state court is usually expected to provide a complete legal substantiation of its decision. A state court, when making its decision, will still have to identify in detail how exactly an arbitration agreement was concluded and how this satisfies (or not) legal preconditions from Article II of the New York Convention. When a judge is unable to identify relevant pieces of legal argumentation, then they might decline to enforce the award.

9.13. Moreover, 'pro-arbitration' policy can be understood differently in several countries, often against the background of constitutional principles, including the parties' right to access to

[9] New York Convention. Convention on the recognition and enforcement of foreign arbitral awards of 10 june 1958. Commentary, C.H. Beck, Hart Publishing, Nomos 21 (Rudolf Wolff ed., 2012).

courts, or against the general policy of court system not limited to arbitration.

9.14. For example, in one case the Polish Supreme Court stated that due to the fact that the agreement to arbitrate excludes examination of the case by state court, it is an advisable interpretation which, in case of doubts, would opt against limitation of state court power resolution of the dispute and in favor of the Polish constitutional right for parties to be heard by state courts.[10] This decision was reached precisely because of the emphasis that is put in the Polish legal system on the right to access the courts. This might be surprising to foreign parties as generally Polish courts have a liberal approach to arbitration and arbitration is widely used in Poland. This is true to such a degree that the Court of Arbitration at the Polish Chamber of Commerce has examined more cases in some years than the renowned ICC Court of Arbitration in Paris.[11]

9.15. Another interesting example can be traced to the general attitude of the Czech Republic's Supreme Court which has been reported to have a tendency to favor a weaker party in arbitral disputes. However, this has not impeded the development of arbitration in the Czech Republic in any way, where this method of dispute resolutions seems extremely popular. In that country cases resolved in arbitration by a single permanent court of arbitration reached the astounding number of three thousand disputes.[12]

9.16. An interesting perspective can be gleaned by looking at the other side of the Atlantic. Despite the general pro-enforceability policy of US courts when it comes to foreign arbitral awards governed by the New York Convention, it does happen that they treat obstacles to enforcement contained therein as non-exhaustive. There is a risk for refusal of enforcement when the US court finds that the arbitral tribunal manifestly disregarded the law – a situation not listed in the New York Convention. Furthermore, US courts may deny enforcement of an arbitral award on basis of the *forum non convenience* doctrine (i.e. situations when arbitration will be a clearly 'inconvenient' forum for examination of the dispute).[13]

9.17. All in all, the above examples lead to a conclusion that even in the most friendly arbitral jurisdictions a simple reliance on a general

[10] Judgment of the Polish Supreme Court of 7th November 2013, file reference no V CSK 545/12, Wolters Kluwer LEX no 1422127.

[11] Piotr Nowaczyk, *Perspectives for development of arbitration in Poland*, (1) ADR Quarterly 145-146 (2009) (P. Nowaczyk, *Perspektywy rozwoju sądownictwa polubownego w Polsce*, Kwartalnik ADR).

[12] Martin Hrodek, Kristina Bartoskova, Czech Republic, in The Baker & McKenzie International Arbitration Yearbook 2014-2015, New York: Juris 109 (2015).

[13] New York Convention. Convention on the recognition and enforcement of foreign

'pro-arbitration' and 'pro-enforcement' approach is not enough. It cannot supplement the need for knowing the particularities of the various legal systems that are usually involved in the conduct of the arbitral process.

IV. Knowing Jurisdictions that will be Relevant for Enforcement of the Award

9.18. As stated by Alan Redfern and Martin Hunter in their leading commentary on international commercial arbitration: 'There is a deceptive simplicity about the way in which arbitral proceedings are conducted.'[14] They follow this statement with a description of how, despite a lack of all of the decorum associated with state courts, international arbitration is a complex process. That is because arbitration does not operate in a legal vacuum, and different legal systems, which may be relevant in the context of recognition or enforcement of awards issued by arbitrators, must be taken into account.

9.19. One law may be applicable to the form of the arbitration agreement, another to its substantive validity, yet another to the conduct of arbitration and a different one to the decision on the merits. In light of the above, it may be concluded that arbitration constitutes a 'comparative law' in action.[15] During arbitration proceedings, the arbitrators and counsels need to be aware of that fact.

9.20. Just to illustrate this by an example: an arbitral award issued in accordance with the law chosen by the parties may be somehow contrary to the law of the respondent's country. In the case of conflict with the fundamental principles of that law, this may lead to refusal of recognition and enforcement of the award. This is especially important, since usually most of the assets of the defendant are located in their country of residence, or country of incorporation. So in case of refusal to recognize or enforce an arbitration award, the said award would lose its

arbitral awards of 10 june 1958. Commentary, *supra* note 8, at 246-247.

[14] Redfern and Hunter on international arbitration, Oxford University Press 1.04 (Nigel Blackaby, Constantine Partasides, eds. 2009).

[15] 'Even a comparatively simple international arbitration may require reference to at least four different national systems or rules of law, which in turn may be derived from an international treaty or convention—or indeed, from the UNCITRAL Model Law on international arbitration, which is referred to later in this chapter. First, there is the law that governs the international recognition and enforcement of the agreement to arbitrate. Then there is the law—the so-called 'lex arbitri'—that governs, or regulates, the actual arbitration proceedings themselves. Next—and generally most importantly—there is the law or the set of rules that the arbitral tribunal is required to apply to the substantive matters in dispute. Finally, there is the law that governs the international recognition and enforcement of the award of the arbitral tribunal' *Ibid*., 1.05.

practical importance for the claimant, whose claim was upheld by the arbitral tribunal.

9.21. The starting point for providing enforceability for an award should be the previously mentioned New York Convention. Its exceptional significance for the issue in question stems from the fact that the Convention was ratified by 156 countries.[16] Hence, the Convention applies to the recognition and enforcement of the majority of foreign arbitral awards.

IV.1. The Applicable Law Chosen by the Parties

9.22. From the point of view of enforceability, the principal issue is the law chosen by the parties to an arbitration agreement. According to Article V.1.a. of the New York Convention, the court of the state in which the decision is to be enforced is obliged to refuse to recognize or enforce the award in the event of the invalidity of the arbitration agreement according to the law to which the parties have subjected the arbitration agreement. This implies the need for the arbitrators to analyze the validity of an arbitration agreement under the law chosen by the parties. This is not about the very knowledge of the law chosen by the parties to their main commercial contract itself. Rather, it is about knowledge and examination by the arbitrators of the validity of the arbitration agreement in order to ensure the effectiveness of the future arbitral award resulting from the arbitration.

9.23. The analyzed issue is of particular importance in cases in which the parties subject their main contract to one law, and the autonomous[17] arbitration agreement to a different law. In such cases, the parties usually choose arbitrators with legal knowledge in the field of law applicable to the main contract. Less emphasis is put on their knowledge of the law chosen for the arbitration agreement. A similar situation occurs when the parties have not chosen the law for the arbitration agreement. Under Article V.1.a. of the New York Convention, in that situation, the invalidity of the arbitration agreement is evaluated according to the laws of the country in which the award was made, and this law may be different than the law applicable to

[16] http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (accessed on 19 October 2016).

[17] Dariusz Mazur, *Applicable law in international commercial arbitration*, 1 Private law Quarterly 115.120 (2003) (Dariusz Mazur, *Prawo właściwe w międzynarodowym arbitrażu handlowym*, Kwartalnik prawa prywatnego): 'One consequence of the adoption of the principle of autonomy of the arbitration clause is that the basic agreement and the arbitration clause may be subject to two different laws. Even if the parties agree that the agreement in question shall be drawn up under a specific legal system, the principle of autonomy ensures that the arbitral tribunal needs not necessarily apply this law to the arbitration agreement.'

the main contract which is the subject of dispute between the parties.

9.24. Should the arbitration agreement be void, pursuant to the applicable law according to the New York Convention, one may seek to maintain the validity of the arbitration agreement and, consequently, to 'save' its enforceability through the application of provisions of any bilateral agreements or domestic laws referred to in Article VII.1. of the New York Convention. The aforementioned provision of the New York Convention can lead to the application of bilateral agreements or national laws, during the proceedings concerning the recognition or execution of the award. Such agreements may provide different solutions with respect to the recognition and enforcement of foreign arbitral awards. This is actually indicated in a recommendation of the UN Commission on International Trade Law (UNCITRAL) of 7 July 2006.[18]

9.25. Moreover, parties may choose yet another law which will govern the proceedings and conduct of arbitration, along with the composition of the arbitral tribunal.[19] According to Article V.1.d. of the New York Convention, the court where a request to recognize or enforce an arbitration award is filed will dismiss such a request, when the arbitral tribunal and procedures were not in accordance with the parties' agreement. Determining whether the panel and procedures were in accordance with the parties' agreement or not, will sometimes have to be evaluated on the basis of the law chosen by the parties to the arbitral procedure itself.[20]

IV.2. The Law of the Seat of Arbitration

9.26. In cases where the parties have not chosen the law applicable to their contractual relations, the arbitration agreement has to be valid under the law where the arbitration is taking place, which follows from Article V.1.a. of the New York Convention.

9.27. The law of the seat of arbitration has to be taken into account in one more respect. When it comes to the conduct of the arbitration proceedings *per se,* in the absence of the parties'

[18] 'The United Nations Commission on International Trade Law (…) 2. Recommends also that Article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.'

[19] General choice of law clauses, also need to be carefully analyzed because even without an explicit indication that such general clause refers also to other issues, like to arbitration proceedings, that would still be what the parties intended.

[20] New York Convention. Convention on the recognition and enforcement of foreign arbitral awards of 10 june 1958. Commentary, *supra* note 8, at 332, 344.

agreement under Article V. 1.d. of the New York Convention, the arbitral process should be in conformity with the law of the country where the arbitration took place.

IV.3. Arbitrability of the Disputes

9.28. Generally speaking, a dispute is arbitrable if it falls into a category of cases which a given national law considers to be suitable to be subjected to arbitral jurisdiction. In this regard, Article II.1. of the New York Convention uses the phrase: 'subject matter capable of settlement by arbitration'. Under Article V.2.a. of the New York Convention this will be decided against the background of the law of the country of enforcement. Therefore already at the stage of determining its jurisdiction, the arbitral tribunal will have to take into account this factor.

9.29. Traditionally, arbitrability was a mechanism of public policy. Its rationale lies in the assumption of national legislatures that some disputes need close scrutiny in a court room of the state judiciary. There is a modern trend to expand the limits of arbitrability, which should be treated as a sign of trust from the national legislatures towards arbitration activities.

9.30. For an example of how arbitrability might be defined, one can look to Article 1157 of the Polish Code of Civil Procedure. This provision provides that the parties may subject to arbitration disputes concerning matters that can be resolved by a court settlement, excluding alimentary matters. However, there is still much debate as to what this means in practice and always needs very careful consideration. In some of the European jurisdictions the disputes that are most commonly deemed not arbitrable involve labor law matters or consumer disputes.

IV.4. Public Policy Considerations

9.31. From the point of view of enforcement and recognition of the arbitral award, a very important issue is the possible conflict between the award and the public policy of the state in which the judgment is to be enforced. This is a fundamental matter in international commercial arbitration, in which different legal systems applicable in the proceedings 'clash'. Through its public policy, the state on whose territory the foreign arbitral award is to be enforced provides itself the possibility to eliminate decisions that cannot be reconciled with the fundamental principles of the legal system of the country. Thus, arbitrators should investigate whether an award will not violate public policy in the country in which the award will be enforced, and should do so early in the

course of the arbitration proceedings. Subsequently, arbitrators should take necessary steps to address these concerns.

9.32. However, it should be noted that Article V.2.b. of the New York Convention only allows (and does not require) the court of a specific state to refuse recognition and enforcement of an arbitral award, should it be contrary to the public policy of the state. This means some freedom for the court hearing the case, which may refuse the recognition or enforcement of such an award, even though it is not obliged to do so.

9.33. In this regard, it is worth noting that the solution used in Article V.2.b. of the New York Convention is different from the one provided for in the Polish Code of Civil Proceedings, which regulates the recognition and enforcement of foreign arbitral awards that are not subject to the New York Convention. Namely, Article 1215 Section 1 of the Polish CCP specifies an obligation to refuse recognition or enforcement of an arbitration award, when the recognition or enforcement of such an award would be contrary to the fundamental principles of the legal order of the Republic of Poland.[21] Thus, using the Polish example, it can be concluded that arbitration awards subject to the New York Convention are in a better position in Poland than those sitting outside the Convention's purview.

9.34. In the case law of various countries, courts have developed certain rules that should be taken into consideration in the arbitration proceedings. Public policy arguments can take very different forms in different countries. For example, in Germany, it was decided that in arbitration proceedings, the prohibition to issue awards granting compensation exceeding the requested value is a part of the German legal system (the so-called *ne ultra petita*).[22] In the same country it was assumed that non-delivery of correspondence essential for the case to one of the parties, or failure to take into consideration a document submitted by one of the parties is contrary to public policy.[23] To give another example: in the United States, in the case of *Mitsubishi Motors Corp.* v. *Soler Chrysler Plymouth Inc.* enforcement was refused, due to the alleged breach of the anti-trust law.[24] In one case in

[21] Piotr pruś, Kodeks postępowania cywilnego. Komentarz. Tom II. Art. 506-1217 Code of civil procedure. Commentary. Volume II. Articles 506-1217)., LEX Wolters Kluwer, note 5 to Article 1215 of CCP (Małgorzata Manowska ed., 2015).

[22] Decision of the Appellate Court in Frankfurt of 5 June 2014, case no. 26 Sch 1/14.

[23] Mateusz Pilch, *Public policy clause in the proceedings for recognition and enforcement of a foreign arbitral award,* 1 Private law Quarterly 157.173 (2008) (Mateusz Plich, *Prawo właściwe w międzynarodowym arbitrażu handlowym*, Kwartalnik prawa prywatnego).

[24] https://supreme.justia.com/cases/federal/us/473/614/case.html (accessed on 19 October 19 2016).

Italy, it was decided that the possibility to participate in the selection of an arbitrator is part of the *orde public.*[25]

9.35. In Poland, case law and the doctrine have developed a catalog of rules establishing public order, the violation of which constitutes a basis for the refusal to recognize or enforce an award. Among these principles are included the principle of good faith[26], the principle of parties' autonomy of will in civil law,[27] the principle of *pacta sunt servanda,*[28] the principle of freedom of economic activity[29] and the principle of the compensatory nature of damages. The latter opposes the possibility to include in an agreement clauses that specify monetary sanctions for violation of an obligation at amounts unrelated to the scope the damage. This would primarily become a means of penalty, and would lead to the unjustified enrichment of the other party.[30]

9.36. Under Polish law, there is one particular case worth noting in which the Polish courts refused to recognize the enforceability of a US court's decision.[31] In this case, the Polish courts refused to enforce a judgment issued by District Court for Cook County, Illinois, arguing that punitive damages, known under US law, cannot be reconciled with the principle of proportionality fundamental for Polish civil law. This principle makes it impossible to grant the claimant a cash benefit from the person responsible for the damage at an amount unrelated to the scope of the damage caused, as it is designed to perform merely a repressive and preventive function. The principle of proportionality requires that the compensation should correspond to the scope of the damage, and thus compensation of a repressive nature, as is the case with punitive damages, cannot be honored in the Polish legal system.

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[25] Mateusz Pilch, *supra* note 23 at 173.

[26] Rafał Kos, Maciej Durbas, *The Arbitrators' (Perceived) Power to Revise a Contract vs. the Power of the Public Policy Clause*, in Austrian Yearbook on International Arbitration 2014, Vienna 139 (Gerold Zeiler et. al eds, 2014).

[27] Judgment of the Polish Supreme Court of 13 December 2006, file reference no. II CSK 289/06, Wolters Kluwer LEX no. 488987, judgment of the Polish Supreme Court of 30 September 2010, file reference no. I CSK 342/10, Wolters Kluwer LEX no. 784176.

[28] Judgment of the Polish Supreme Court of 11 August 2005, file reference no V CK 86/05, Wolters Kluwer LEX no. 371463.

[29] Judgment of the Polish Supreme Court of 20 May 2004, file reference no. II CK 354/03, Wolters Kluwer LEX no. 134392.

[30] Decision of the Polish Supreme Court: of 11 April 2002, file reference no. III CKN 492/01, Wolters Kluwer LEX no. 407129, of 11 June 2008, file reference no. V CSK 8/08, Wolters Kluwer LEX no. 400965, of 11 October 2013, file reference no. I CSK 697/12, Wolters Kluwer LEX no. 1396299.

[31] Decision of the Polish Supreme Court of 11 October 2013, file reference no I CSK 697/12, Wolters Kluwer LEX no. I CSK 697/12.

V. Conclusions

9.37. The term 'International' arbitration or the job title of an 'International' lawyer is 'deceptive', to bring back the phrase used by Redfern and Hunter. In fact 'international' dispute resolution in arbitration does not mean resolving cases on the basis of some super-national standards. On the other hand, one cannot say that no such standards exist, as the New York Convention is one of them. At the same time however, the Convention also serves as the crossroads where *national* legal systems of different countries meet. Therefore what 'International' arbitration is really about is reconciling these different systems in order to achieve an award that will be enforceable to the greatest possible degree in relevant jurisdictions.

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Summaries

DEU [***Zur Frage der Vollstreckbarkeit im Schiedsverfahren und der nationalen Rechtsvorschriften in der internationalen Schiedsgerichtsbarkeit***]

Das Schiedsverfahren ist ein Prozess, aus dem am Ende ein Schiedsspruch hervorgeht. Letzterer kann an die Stelle eines Urteils der allgemeinen Gerichtsbarkeit treten, und zwar auch in dessen wichtigster Hinsicht: der Vollstreckbarkeit. Im Ergebnis sollten Schiedstribunale und Rechtsanwälte deshalb die notwendigen Schritte ergreifen, um die künftige Vollstreckbarkeit von Schiedssprüchen sicherzustellen. Dies erfordert eine Anpassung des Schiedsverfahrens unter Berücksichtigung der Frage der Vollstreckbarkeit und eine Verfahrensführung, die sich flexibel und gekonnt zwischen den verschieden gearteten Rechtssystemen bewegt, welche gemäß dem New Yorker Übereinkommen für die Vollstreckung eine Rolle spielen werden. Derartige vorbeugende juristische Analysen auf mehreren Ebenen sollten gewährleisten, dass der Schiedsspruch in verschiedenen Ländern mit verschiedenen Rechtssystemen vollstreckbar sein wird. Leider werden anstelle dessen nicht selten Argumente „zugunsten der Schiedsgerichtsbarkeit" mit unbestimmten Verweisen auf „internationale Standards" vorgebracht, ohne dass die verschiedenen Vorschriften des nationalen Rechts – v. a. zum Ordre Public-Vorbehalt – in den potenziell für die Vollstreckung in Frage kommenden Ländern beachtet würden. Der vorliegende Beitrag beschreibt diese Unterschiede und bietet eine

Handreichung zu den aktuellen inländischen Rechtsvorschriften, die im Auge behalten werden müssen, wenn ein Schiedsverfahren gemäß dem New Yorker Übereinkommen geführt wird.

CZE [***Problematika vynutitelnosti splnění rozhodčího nálezu ve světle národních předpisů v mezinárodním rozhodčím řízení***]

Rozhodčí řízení je proces, jehož konečným produktem je rozhodčí nález, který je adekvátní alternativou rozsudku vydávaných v soudním řízení, a to pokud jde o jeho nejdůležitější kvalitativní znak, to jest jeho vynutitelnost. Výsledkem toho je, že rozhodčí senáty i advokáti by měli podstoupit nutné kroky k zajištění budoucí vynutitelnosti splnění rozhodčího nálezu. To vyžaduje přizpůsobení rozhodčího řízení při zohlednění právě otázky vynutitelnosti a vedení rozhodčího řízení s flexibilní a znalou navigací mezi několika rozdílnými právními řády (systémy), které mohou být zohledňovány právě při výkonu rozhodčího nálezu, a to zejména podle Newyorské úmluvy o uznání a výkonu cizích rozhodčích nálezů (1958). Takové víceúrovňové preemptivní a právní analýzy by měly zajistit vymáhání rozhodčího nálezu v různých právních řádech, resp. v různých systémech práva. Toto je bohužel často nahrazováno bezobsažnými argumenty o podpoře rozhodčího řízení a vágními odkazy na „mezinárodní standardy" bez řádného zvážení různých národních úprav, a to zejména veřejného pořádku těch států, které případně přicházejí v úvahu jako místo výkonu rozhodčího nálezu. Tento článek tyto rozdíly popisuje a poskytuje návod co do postupů podle národních úprav, které je třeba zohlednit při vedení rozhodčího řízení z pohledu Newyorské úmluvy.

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POL [***Kwestie wykonalności w przebiegu postępowania przed sądem polubownym – prawa krajowe w arbitrażu międzynarodowym***]

Niniejszy artykuł porusza problematykę dotyczącą konieczności uwzględniania – już na etapie prowadzenia postępowania arbitrażowego – wielu różnych praw krajowych, które będą

oceniane przez sąd państwowy w momencie decydowania o wykonalności wyroku arbitrażowego.

FRA [***L'exécution des sentences arbitrales et la législation nationale dans des arbitrages internationaux***]
Le présent article met en évidence le fait qu'un grand nombre de normes législatives nationales, différant d'un pays à l'autre, doivent être considérées dès l'ouverture de la procédure d'arbitrage, et seront plus tard utilisées par la juridiction nationale au moment de la décision sur l'exécution de la sentence arbitrale.

RUS [***Проблематика принудительности в арбитражном процессе и национального законодательства в международном арбитраже***]
В этой статье говорится о необходимости учитывать - уже на стадии возбуждения арбитражного разбирательства - множества различных национальных законодательств, которые будут впоследствии использованы государственным судом в моменте решения о принуждении соблюдения арбитражного решения.

ESP [***La ejecución forzosa en el procedimiento arbitral y las legislaciones nacionales en el arbitraje internacional***]
El artículo hace hincapié en la necesidad de tener en cuenta ya desde la fase de la apertura del procedimiento arbitral la pluralidad de distintas legislaciones nacionales que posteriormente serán aplicadas por el tribunal del Estado en su decisión sobre la ejecución forzosa del laudo arbitral.

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