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REFUSAL OF RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS ON THE GROUNDS OF VIOLATION OF DUE PROCESS UNDER THE NEW YORK CONVENTION

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INTRODUCTION

Today it is not a novelty at all that arbitration has become a preferred and widely appreciated method for the resolution of international commercial disputes. The gradual harmonization of arbitration law and practice as well as the community of highly qualified international arbitrators also contributed to the success of international arbitration[1]. However, the flexible, time- and cost-saving international arbitration might be, taking into account the human nature – which is obviously also determinant in case of legal persons – arbitral awards will never be hundred-percent complied with by the parties. The effectiveness and success of international arbitration thus – as any other decision of authorities –highly depends on the rate of enforceability of the awards rendered in such proceedings. Furthermore, if we consider other factors inherent in international arbitrations, that it is often involve parties – and arbitrators – with different legal background, it frequently applies substantive law different from that of the seat of the arbitration, it is not necessarily governed by procedural rules identical or even similar to the lex arbitri, the arbitrators do not have access to state assistance in enforcement like judges, and that parties very often seek enforcement of awards in countries different from that of the seat of arbitration (or where the award was made), the significance of a uniform or at least harmonized regulation of recognition and enforcement of arbitral awards is obvious.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards („New York Convention" or „Convention"), with its 142 signatory countries, provides for a well-established, uniform, flexible and effective system, which enable the relative easy and predictable recognition and enforcement of foreign arbitral awards. Not

[1] Robert B. VON MEHREN, *Enforcement of foreign arbitral awards in the United State*, Int. A.L.R. 1998, I(6), at 198

surprising therefore, that the Convention is regarded "as the most important Convention in the field of arbitration and as the cornerstone of current international commercial arbitration"[2].

In order to support enforcement, the list of the grounds for refusal of recognition and enforcement in the Convention is exclusive and subject to the discretionary power of the national courts. Within this the respect of the fundamental principle of DUE PROCESS is also safeguarded (Article V(1)(b)). Like the meaning of general principles usually, the notion of due process is rather flexible – in the text of the Convention as well –, thus it requires common standards and understanding to ensure the uniform and predictable application of the Convention.

The present case law pertaining to the due process defenses shows that national courts apply a narrow interpretation and are not likely to refuse enforcement except for serious irregularities or material violation of parties' rights arising out of the due process principle, in line with the purposes of the Convention. However, it is also general, that the starting point and basis for courts' review are the domestic principles and notions of due process of the national legislations, and not the governing procedural law of the arbitration.

This thesis will analyze the notion of due process and the principles covered by it in international commercial arbitration, along with the relevant case law pertaining to the refusal of recognition and enforcement of arbitral awards falling into the scope of the New York Convention.

Furthermore it discusses the potential/existing problems arising out of the lack of clear notions and guidelines for the application of the due process clause of the Convention, which may affect both the parties and the arbitrators and proposes solution.

[2] Elise P. WHEELESS, *Article V (1) b of the New York Convention*, 7 Emory Int'l L. Rev. (1993), at 807

In Chapter 1 the author will set the framework of application of the New York Convention, define the awards covered by the Convention, draw a distinction between set-aside and enforcement proceeding, and describing the courts general role in enforcement, including the short description of the legislative history as well as of some further developments. In Chapter 2 the different levels of the notion of due process will be analysed, and the role of the arbitrators who play a key role in observing the due process requirements. In Chapter 3 the issues and questions relating to the standard of review will be analyzed with respect to the present situation and to the proposed changes, along with the presentation of remarkable examples of the case law pertaining to Article (V)(b)(1).

1. BACKGROUND AND FRAMEWORK OF APPLICATION OF THE NEW YORK CONVENTION

1.1. LEGISLATIVE HISTORY AND THE ROLE OF THE CONVENTION

1.1.1. Enforcement of Arbitral Awards Before the Convention

The question of recognition and enforcement of arbitral awards as well as the need for international guidelines for commercial arbitration emerged and received heightened international attention at the end of the World War I, among others as a consequence of the increased level of international commerce as well as of the development of transnational investments[34]. At that time the International Chamber of Commerce ("ICC") initiated a convention regarding the enforcement of arbitration clauses which resulted in the adoption of the Geneva Protocol on Arbitration Clauses in 1923 ("Geneva Protocol")[56]. Following the initiative, the League of Nations also elaborated the rules of enforcement of the arbitration awards emerging from clauses covered by the Geneva Protocol and adopted the Geneva Convention on the Execution of Foreign Arbitral Awards in 1927 ("Geneva Convention"[7])[8].

[3] Cindy SILVERSTEIN, *Iran Aircraft Industries v. Avco Corporation: was a violation of due process?*, 20 Brook. J. Int'l L. (1994), at 450
[4] See WHEELESS, supra note 2, at 805
[5] See SILVERSTEIN, supra note 3, at 450
[6] The Geneva Protocol did not include any provisions regarding the judicial control of arbitral agreements, however it provided for some fundamental rules that are inherent in the New York Convention as well as in arbitration proceeding itself, such as the principle of party autonomy in constituting the arbitral procedure and the obligation of the tribunals of the contracting states to refer the parties to arbitration in case of a dispute covered by the Geneva Protocol and in the presence of an arbitration agreement.
Geneva Protocol on Arbitration Clauses of 1923, Sept. 24, 1923, (March 31, 2007) <http://interarb.com/vl/g_pr1923>
[7] Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, Sept. 26, 1927, (March 31, 2007) <http://interarb.com/vl/g_co1927>
[8] See SILVERSTEIN, supra note 3, at 450

Among other provisions which – with certain grave and less important changes[9] – are incorporated in the New York Convention, the Geneva Convention already provided for regulations relating to the principle of due process and rendered that courts shall refuse the recognition and enforcement of foreign arbitral awards if they were satisfied „that the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented."[10] It is interesting to remark that this wording of due process requirement – although amended[11] – was reflected and applied as the initial concept in the first draft of the New York Convention prepared by the United Nations Economic and Social Council ("ECOSOC")[12].

The limitations of the Geneva Convention, especially the prevailing role of law of the seat of arbitration[13] that practically made it impossible to treat international arbitration award relative independently of the national law of the relevant seat of arbitration, encouraged the ICC to propose a new draft of convention on international arbitration awards in 1953 aiming

[9] If compared, the major differences between the provisions having already been existing in the Geneva Convention and their counterparts in the New York Convention encompass the followings: 1. scope of applications (the Geneva Convention required the arbitral award be made in the territory of a contracting state and between parties who were both subject to the jurisdiction of a contracting state, which is not a condition under the New York Agreement; furthermore in contrary to the New York Convention the Geneva Convention only applied to commercial matters); 2. discretionary power of the enforcing courts (the Geneva Convention leaved the enforcing courts less room for deliberation on the refusal of recognition and enforcements of awards if certain conditions were given – such as violation of public policy, of due process, ultra petita arwards –, whilst the New York Convention generally enable the courts to consider the recognition and enforcement even if a ground for refusal has been proved); 3. burden of proof (the Geneva Convention placed the burden of proof on the party seeking recognition and enforcement of an award in contrary to the New York Convention according to which the burden lies on the party opposing such recognition or enforcement); 4. relevance of the law of country where the arbitration took place (unlike the New York Convention, the Geneva Convention required that the arbitration agreement of the parties should correspond to the law of the country where the arbitration took place). Geneva Convention Article 1, 2 and New York Convention Article I, V

[10] Geneva Convention, Article 2(b), supra note 7

[11] Final version under Article V(1)(b) of the New York Convention

[12] Report of the Committee on the Enforcement of International Arbitral Awards, U.N.Doc.E/2704:E/AC.42./4/Rev.1., (March 28, 1955), at 10, (March 31, 2007) http://www.uncitral.org/pdf/english/travaux/arbitration/NY-conv/e-ac/eac424r1-N5508097.pdf

[13] Pursuant to Article 1 of the Geneva Convention it applied for arbitral awards arising out of agreements covered by the Geneva Protocol that provided in Section 2 that arbitral procedures as well as the constitution of tribunal should be governed by the law of the country where the arbitration took place. Supra note 7

to provide for international commercial arbitration, however this draft has never been adopted[14][15].

The failure of the ICC draft was followed by a new draft on the recognition and enforcement of ECOSOC on *foreign*[16] arbitral awards in 1955, which was debated, amended and finally adopted at the Conference on International Commercial Arbitration held in New York from May 20 to June 10, 1958 (New York Convention)[17].

1.1.2. Purposes and Significance of the Convention

The main purpose of the adoption of the New York Convention can be described as to "liberalize procedures for enforcing foreign arbitral awards"[18] and to "encourage recognition and enforcement of commercial arbitration agreements in international contracts and unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in signatory countries". The Convention "aims to facilitate and provide uniform standards for the enforcement of arbitral awards in national courts"[19]. The primary goal of standardization of the major aspects and requirements of enforcement of foreign arbitral awards – along with the wide acceptance of the Convention – contributed to the success of international arbitration and provided for a huge advantage of it[20]. Regarding the topic of this thesis it also has to be

[14] See SILVERSTEIN, supra note 3, at 451
[15] The notion of violation of due process as a ground for refusal of recognition and enforcement of arbitral awards appeared in this draft of the ICC as well. Supra note 12, at 10
[16] For the different approach of the ICC draft (international arbitral awards) and the ECOSOC draft (foreign arbitral awards) see footnote FN63 to SILVERSTEIN, supra note 3
[17] See SILVERSTEIN, supra note 3 at, 452
[18] Parsons & Whittemore Overseas Co. v. Société Générale de L'industrie du Papier (RAKTA), 508 F.2d 969, 973 (2d Cir. 1974), and Biotronik Mess- und Therapiegeräte GmbH & Co. V. Medford Medical Instrument Co., 415 F.Supp.133,136 (D.N.J. 1976), see SILVERSTEIN, supra note 3, at 452
[19] Susan CHOI, *Judicial enforcement of arbitration awards under the ICSID and the New York conventions,* 28. N.Y.U.J. Int'l L.&Pol. (1997), at 175
[20] Erik SCHÄFER, Herman VERBIST, Christophe IMHOOS, *ICC Arbitration in Practice,* Kluwer Law International, Staempfli Publischers Ltd. Berne, 2005, at 5

mentioned that the predictability and relative easiness of enforcing international arbitration awards in foreign countries induce parties to comply with such awards[21].

The significance and success of the New York Convention is indicated by the fact that altogether 142 countries have signed it until now[22]. Although both the Geneva Protocol and the Geneva Convention signified the beginnings of the attempts to "unify and liberalize international commercial arbitration"[23], the Convention is regarded "as the most important Convention in the field of arbitration and as the cornerstone of current international commercial arbitration"[24].

1.1.3. Subsequent Development – the UNCITRAL Model Law

Along with the success of the Convention, some remarks must be added regarding the development of harmonization and unification in the field of recognition and enforcement of international arbitral awards following the adoption of the New York Convention.

The scope of this thesis does not allow mentioning and analyzing all agreements and conventions adopted since then[25], however the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law of 1985 ("UNCITRAL Model Law" or "Model Law") as one of the most significance results will be

[21] See SCHÄFER, VERBIST, IMHOOS, supra note 20
[22] UNCITRAL Texts & Status (March 31, 2007) http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html
[23] Roger S. HAYDOCK, Jane L. VOLZ, *Foreign arbitral awards: enforcing the award against the recalcitrant loser"*, 21 Wm. Mitchell L.Rev. (1996), at 874
[24] See WHEELESS, supra note 2, at 807
[25] For the development of harmonization of the rules of international commercial arbitration and the recognition and enforcement of awards within, see Kenneth T. UNGAR, *The enforcement of arbitral awards under UNCITRAL's Model Law on International Commercial Arbitration*, 25 Colum. J. Transnat'l L. 717 (1987) and HAYDOCK, VOLZ supra note 23

presented here since it has very close links to the Convention and very similar rules with respect to the recognition and enforcement of arbitral awards[26].

The aim of this Model Law was to increase the enforceability of arbitral awards and to eliminate the obstacles to their recognition and enforcement and – in order to achieve this goal – to unify the national laws[27]. With respect to the enforcement of arbitral awards the Model Law introduces a new distinction and applies the "international" and "non-international" categories instead of "foreign" and "domestic" arbitral awards in order to ensure "the uniform treatment of all awards irrespective of country of origin"[2829].

As far as the relationship of the Convention and the UNCITRAL Model Law is concerned, the Model Law expressly states that it only supplements the Convention and avoids conflicting with it as the Convention proved to be successful[30]. Furthermore, the grounds for refusal of recognition and enforcement listed in the Model Law are identical to those in Article V of the Convention[31]. States which adopted both the Convention and the Model Law tend to give preference to the Convention with respect to the recognition and enforcement provisions[32]. However, the similarity of the wording of the grounds for refusal of enforcement of awards, as well as the scope of application of the Convention and the Model

[26] Apart from the results achieved in the field of enforcement of international awards it has to be mentioned that UNCITRAL adopted a set of rules covering all aspects of the arbitration process on April 28, 1976 (UNCITRAL Arbitration Rules) which „provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations." March 31, 2007 http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html

[27] See UNGAR, supra note 25, at 718

[28] "This new line is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the place of arbitration in international cases. The place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration takes place. Consequently, the recognition and enforcement of "international" awards, whether "foreign" or "domestic", should be governed by the same provisions."
Explanatory note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration, at 46, March 31, 2007, http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf

[29] See UNCITRAL explanatory note, supra note 28, at Section 8(a)

[30] See UNCITRAL explanatory note, supra note 28, at Section 47

[31] See UNCITRAL explanatory note, supra note 28, at Section 50

[32] Peter, BINDER, *International commercial arbitration and conciliation in UNCITRAL model law jurisdictions*, London : Sweet & Maxwell (2005), at 282, 283

Law – although it is broader in the latter case –, further the close link between the two treaties indicated above[33], makes it possible and reasonable to refer to the court practice pertaining to Article 36 of the UNCITRAL Mode Law by analyzing the text and application of the New York Convention – as suggested by Viscasillas[34]. As the Ontario Superior Court of Justice stated the counterpart of this idea in its decision in Re Corporación Transnacional de Inversiones, SA de CV v. STET International SpA: "[t]he grounds for challenging an award under the Model Law are derived from Article V of the NYC. Accordingly, authorities relating to Article V of NYC are applicable to the corresponding provisions in Articles 34 and 36 of the Model Law."[35]

1.2. SCOPE OF APPLICATION

1.2.1. Awards Covered by the Convention

Without discussing in details the characteristics of the range of awards covered by the Convention – as this does not form close part of the topic of this thesis – the basic concepts and notions regarding the scope of the New York Convention shall be presented to establish and explain the broad framework of the present thesis.

The New York Convention applies to arbitral awards "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to

[33] See UNCITRAL explanatory note, supra note 28, at Section 50

[34] Pilar Perales VISCASILLAS, *Case law on the recognition and enforcement of arbitral awards under the UNCITRAL Model Law on International Commercial Arbitration,* Int.A.L.R. 2005, 8(5) at 191
Viscasillas also suggests that the case law pertaining to Article 34 of the UNCITRAL Model Law may be taken into account, as the grounds of setting aside in Article 34 are very similar and partly identical with those of refusal of enforcement in Article 36 of the Model Law. Id. at 191

[35] See VISCASILLAS, supra note 34, at 191, 192

arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought"[36].

The Convention does not define the notion of domestic or foreign award. The accessible court decisions show that there is no uniform court interpretation in the contracting states regarding the question which awards qualify as "non-domestic"[37]. According to the usual interpretation domestic awards encompass on the one hand awards that were granted in the country (of enforcement) in the territory of which the arbitration took place. However, there are countries where awards that were rendered within their territory are not regarded as domestic awards, if they contain certain foreign elements (and as a consequence they are covered by the Convention)[383940]. Another existing interpretation does treat awards granted in the territory of another country domestic if the respective arbitration was governed by the lex arbitri of that country (and therefore regards such awards as falling outside of the scope of the Convention)[414243].

[36] New York Convention, Article I

[37] For further discussion of the different approaches applied by national courts as well as the question of anational awards see CHOI, supra note 19

[38] Tibor Várady, John J. Barceló III, Arthur T. von Mehren, *International Commercial Arbitration, A Transnational Perspective*, American Casebook Series, Thomson West, (3rd. ed. 2006), at 669

[39] Regarding this approach present for example in the U.S., the United States Court of Appeal for the Second Circuit declared: „We adopt the view that awards „not considered as domestic" denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principle place of business outside the enforcing jurisdiction. We prefer this broader construction because it is more in line with the intended purpose of the treaty, which was entered into to encourage the recognition and enforcement of international arbitration awards." Sigval Bergesen v. Joseph Muller Corporation, United States Court of Appeal, Second Circuit (1983), see VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 798

[40] For the U.S. approach regarding foreign awards see also the analysis of the case Lander Co., Inc. V. MMP Investment, Inc. before the United States Court of Appeals for the Seventh Circuit in which the court also understood a broad jurisdictional scope of the Convention. In Jennifer Dawn NICHOLSON, *Lander Co., Inc. V. MMP Investment, Inc.*, 13 Ohio St. J. on Disp. Resol. 287 (1997)

[41] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 669

[42] Germany is one of the countries which primarily does not rely on the territorial concept, rather on the procedural theory. „The qualification of an arbitral award as foreign or as domestic does not depend upon the question of whether it has been rendered in the territory of West German or abroad (as most other laws provide). Rather, the designation depends upon whether the procedure leading to the arbitral award was by way of West German arbitration rules (then the award is considered domestic); or, whether it was subject to the arbitration rules of a foreign state (then the award is considered foreign)." In Otto SANDROCK, Matthias K. HENTZEN, *Enforcing foreign arbitral awards in the Federal Republic of Germany: the example of a united states award*, 2 Transnat'l Law (1989), at 53

The wording of the Convention allows the different interpretations mentioned above and represents a compromise of the drafting common law and civil law countries[44]. The United States Court of Appeals for the Second Circuit discussed the matter of foreign and domestic awards in one of its judgments[45], and after examining the legislative history of the Convention and the draft recommends of the working parties relating to this issue it stated that "[…] except as provided in paragraph 3 [of the New York Convention], the first paragraph of Article I means that the Convention applies to all arbitral awards rendered in a country other than the state of enforcement, whether or not such awards may be regarded as domestic in that state; "it also applies to all awards not considered as domestic in the state of enforcement, whether or not any of such awards may have been rendered in the territory of that state.""[46].

Article V(1)(e) of the New York Convention indicates further that the Convention applies to binding awards[4748] The Convention does not prescribe however that the award should be final in order to fall under the application of the Convention[49]. It is quite clear however, that the awards should be based on a proceeding that has been already completed so as the Convention apply for it. The interpretation of finality of awards usually appeared before

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[43] For the question of denationalized awards see the case Société Européenne d'Etudes et d'Entreprises v. Yugoslavia, in CHOI supra note 19, at 191

[44] „The common law nations had sought a strict territorial approach, such as adopted in the first clause. The civil law nations, however, argued that factors other than the actual location of the arbitration, such as the law to be applied, should be taken into account in determining the situs of an award. As a result the Convention applies to a broader range of arbitral awards that would have been the case if either of the two approaches alone had been adopted." See VON MEHREN, supra note 1, at 199

[45] Sigval Bergesen v. Joseph Muller Corporation, United States Court of Appeal, Second Circuit (1983), in VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 798 and CHOI supra note 19, at 190

[46] For the question of the criteria of a decision qualifying as foreign arbitral award see further cases: Cosid, Inc. (U.S.) v. Steel Authority of India, Ltd., India High Court of Delhi (1985), Fratelli Damiano v. August Topfer & Co., Italy, Corte die Cassazione (1991), Seetransport Wiking Trader Schiffahrtgesellschaft GmbH & Co. V. Navimpex Centrala Navala, United States Court of Appeals, Second Circuit (1994) in VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 671, 674, 677

[47] Article V(1)(e) of the New York Convention: "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: […] the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made […]."

[48] Regarding the notion of binding awards see also the decision of the German Supreme Court, Decision of 8 October 1981, Bundesgerichtshof in VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 805

[49] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 808

the national courts with respect to setting-aside procedures and for the purposes of them, rather than in enforcement procedures, however it applies for both type of proceedings. The court practice show that partial awards – which provide for a final, although not exhaustive decision – are normally treated as captured by the Convention, on the other hand interim awards – settling preliminary questions – are usually not regarded as final awards, likewise, arbitration awards issued by the first instance tribunal in arbitration systems which provide for an appellate level cannot be regarded as being covered by the Convention[50].

Furthermore the scope of the Convention may be limited by the two optional reservations available for the contracting parties with respect of reciprocity and commercial matters[51].

Regarding the application of the New York Convention the "more favorable rights" clause of Article VII (1) of the Convention also has to be mentioned[52]. According to this provision, even if the Convention would be applicable for an award, parties to seek enforcement may rely on the domestic enforcement regulation of the country in which the enforcement is sought.

1.2.2. International Commercial Arbitration

In addition to the limitations provided by the Convention, the topic of this thesis as well as the area of examination will be confined to the field of international commercial arbitration. This notion refers to arbitration in sense of a "process whereby a third party determines a dispute between two or more parties in exercise of a jurisdictional mandate

[50] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 708, 709

[51] Article I(3) of the New York Convention: „When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration."

[52] Klaus Peter BERGER, *International Economic Arbitration,* Kluwer Law and Taxation Publishers, 1993, at 737

entrusted to him by the parties."[53] The "international" component of this notion – although not necessarily self-explaining – will be understood according to the Model Law notion as discussed above[54]. The commercial character shall be understood broadly as referred to by Petrochilos[55]. The importance and distinctive features of international commercial arbitration can be formulated as follows: "international arbitration provides a neutral forum where parties are less vulnerable to local prejudices and procedures that may hinder settlement."[56].

1.3. RECOGNITION AND ENFORCEMENT OF AWARDS

1.3.1. Pro-enforcement Principle

In many cases parties accept and comply with the award rendered by the arbitrator(s). Apparently, the question of recognition and enforcement arises if this is not the case and the winning party needs effective assistance to exercise its rights as well as to enforce its claims arising out of the award. As arbitrators – by the nature of the arbitration – do not have authority with respect to enforcement as well as available state assistance like judges, parties might need court help to enforce the arbitration awards. As von Mehren phrases „[t]he arbitrator has completed his mission and becomes functus officio on the issuance of his award. The enforcement of the award rests in the hands of the successful party."[57]. It is quite obvious that without bilateral or multilateral agreements and unified regulations the procedure of enforcement is much more burdensome and unpredictable for a party if the enforcement is sought in a foreign country (this also indicates the importance of the New York Convention).

[53] Georgios PETROCHILOS, *Procedural law in international arbitration*, Oxford Private International Law Series, Oxford University Press, 2004, at 3
[54] See supra note 26
[55] „The term „commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not." See PETROCHILOS, supra note 53, at 5
[56] See WHEELESS, supra note 2, at 805
[57] See VON MEHREN, supra note 1, at 198

One of the generally acknowledged characteristics of the New York Convention is its pro-enforcement approach. This philosophy is supported with numerous provisions of the Convention, such as placing the burden of proof on the party challenging enforcement, specifying an exclusive list of grounds for refusal of enforcement, in addition providing the courts with a power to deny refusal even if any of the enumerated grounds exists[58], as well as the fact that basically the Convention does not allow revision of the substance of the award[59].

The pro-enforcement principle is also followed by the national courts while exercising their discretionary power of granting recognition and enforcing of foreign arbitral awards[60]. The pro-enforcement approach of the national courts may be shown by a remarkable decision of the Supreme Court of the United States [61], where the court stated "that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of agreements".[62]

1.3.2. Set Aside and Enforcement

"Arbitral awards have effects from the moment they are rendered."[63] This immediate effect may be vitiated however if the award is challenged either in a setting aside procedure or if the claim for enforcement is opposed by the other party.

The two fields where judicial control of arbitral awards is usually present are therefore the followings: 1. claims for setting aside awards in the country in which the award was made or in which the award is regarded as a domestic award; 2. if the recognition and enforcement

[58] See WHEELESS, supra note 2, at 816
[59] See SCHÄFER, VERBIST, IMHOOS, supra note 20
[60] The court's discretionary power is discussed in Section 3.2.2. below
[61] Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 (1974) in Pelagia IVANOVA, *Forum non conveniens and personal jurisdiction: procedural limitations on the enforcement of foreign arbitral awards under the New York Convention*, 83 B.U.L. Rev. (2003), at 905
[62] Id. note 61
[63] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 668

of an award is sought and opposed by the other party in a country other then the country where the award was rendered or where the award is considered to be non-domestic[64]. The New York Convention only regulates the latter case of enforcement and recognition – and the grounds for refusal of it–, the grounds for setting aside are not mentioned in the New York Convention, they are regulated by the national laws. Despite of this fact, the basis of setting-aside claims of the national jurisdictions are very similar.[65] Furthermore the UNCITRAL Model Law contains wordings for the grounds of setting aside (and refusal of enforcement) that are almost identical and very similar to that of the New York Convention. In additional to this similarity it has to be emphasized that the main difference between a set-aside and an enforcement procedure as foreseen by the Convention – beyond the category of domestic and foreign awards covered by them – is that the refusal of enforcement under the New York Convention can only be based on one of the grounds listed in the Convention, whilst claims for setting-aside might be based on express or implied defenses depending on the rules of the national law concerned.[66]

In this thesis – as it can be concluded from the title – I will not examine the grounds for setting aside, only discuss its links and some common feature with the procedure of foreign award enforcement as well as with the grounds for refusal of enforcement – on the grounds of the relevant case law.

[64] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 706
[65] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 706
[66] The United States Court of Appeals for the Second Circuit set forth in its decision in Alghanim & Sons, W.L.L. v. Toys „"R" US Inc. (126 F.3d 19) that „[t]he Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds of relief. See Convention Article V(1)(e). However, the Convention is equally clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention." See VON MEHREN, supra note 1, at 204

1.3.3. Courts in Enforcement

The courts may have different roles and provide different types of assistance in the arbitration depending on the national laws. The fields of court assistance and intervention include the followings:

- the New York Convention as well as the UNCITRAL Model Law[67] requires the courts to refer parties to arbitration in case of a valid arbitration agreement is present;

- courts may proceed in independent and embedded suits[68];

- in some jurisdiction they may scrutinize the arbitrators decision denying jurisdiction[69];

- they may decide on the interim measures brought by the parties to the arbitration for provisional relief before or during the arbitration proceeding[7071];

- courts may provide for assistance in the construction of the arbitration tribunal, as well as the appointment of arbitrators[72];

- parties may challenge arbitrators before national courts[73];

- courts may assist in taking evidence[74];

- and finally courts may review arbitral awards in the course of setting-aside or enforcement procedures.

[67] See Article II(3) of the New York Convention and Article 8(1) of the UNCITRAL Model Law
[68] For the meaning of such suits see VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 86
[69] VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 92
[70] See BERGER, supra note 52, at 331
[71] However the UNCITRAL Model Law does not support the idea of seeking interim measured, see Article 9 of the Model Law
[72] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 370
[73] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 419
[74] Matti S. KURKELA, *Due Process in International Commercial Arbitration*, Oceana Publications, Inc., 1 (2005), at 130, 131

As Binder remarks,"[w]ithout doubt, the success of international commercial arbitration would not have been possible without the mechanism of judicial control as a safety-net in the background."[75] It is clearly true that court assistance is needed, especially because of the lack of judicial power of arbitrators, and because it can guarantee the observance of imperative principles. However, court intervention shall be limited to the necessary minimum in order to safeguard the autonomy of the arbitration. In this sense the UNCITRAL Model Law propose to set the "maximum extent of judicial intervention"[76] in Article 5 as follows: "[i]n matters governed by this Law, no court shall intervene except where so provided in this Law.".[77]

The possible judicial review of arbitral awards may affect the whole arbitral process. As there is the danger that an award may be set aside or its enforcement be denied upon procedural grounds and grounds arising from non-observance of the procedural law of the seat of arbitration, even in case of international arbitration, where – with certain limitations – it is possible to choose procedural rules different from that of the seat of arbitration or different from any kind of national law, it is advisable for the arbitrators to look upon the procedural law of the seat to avoid non desired consequences[78]. Regarding the relationship of mandatory national rules and parties agreement see also Section 3.1.2.2. below.

[75] See BINDER, supra note 32, at 50
[76] See BINDER, supra note 32, at 50
[77] See Article 5 of the UNCITRAL Model Law - Extent of court intervention
[78] See PETROCHILOS, supra note 53, at 207. „The latitude enjoyed by the arbitrators in respect of [arbitral] procedure clearly does not dispense them from the obligation to respect imperative principles of the law of the seat, on whose observance depends the validity of their award. The arbitrator must therefore have regard to the [relevant] provisions of the law of the seat of the arbitration, not because these would regulate the arbitral procedure but because their non-observance might lead to the setting-aside of the award."

2. DUE PROCESS

2.1. THE NOTION OF DUE PROCESS

2.1.1. Principles and Issues Covered

Due process can be used in different meanings and contexts. One of its levels of understanding refers to a procedure which complies with certain set of national procedural laws. A broader interpretation covers not only the national procedural statutes, but includes the soft and adjustable procedural rules implicit in a certain jurisdiction[79]. Furthermore due process may refer to those procedural principles which are universally recognized and usually envisaged in the national legislations, the violation of which normally results in the unenforceability of the decision concerned.[80]

In the area of international commercial arbitration where trade usages and lex mercatoria play an important role, the question naturally arises, whether there are international procedural rules similar to the character of the lex mercatoria.[81] Authors usually recognize the existence of certain procedural public policy with the proximate meaning referred to as universally accepted principles in the followings, below.[82][83]

Regardless of its sources due process in international commercial arbitration covers principally – as set out by Kaufmann-Kohler quoted by Kurkela – the followings: "[…] natural justice, procedural fairness, the right or opportunity to be heard, the so-called principle de la contradiction and equal treatment"[84], or as formulated in the UNCITRAL Model Law which was apostrophized by the UNCITRAL Secretariat as the "Magna Carta of Arbitral

[79] See KURKELA, supra note 74, at 1
[80] See KURKELA, supra note 74, at 1
[81] See KURKELA, supra note 74, at 2
[82] See KURKELA, supra note 74, at 4
[83] For the notion of international public policy, procedural public policy and their relation to the due process requirement of the New York Convention see Section 2.1.3. below.
[84] See KURKELA, supra note 74, at 1

Procedure"[85]: "[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."[86] With respective to the afore-mentioned principles there is no doubt that they form elements of due process.[87] The importance of such principles is based on the premise "that a fair trial in […] procedural sense will presumably lead to a just decision on the merits."[88]

To the content of party equality the remark has to be added, that as a consequence of the principally different role of the parties to the arbitration, the equality principle does not mean that the rights and obligations of the parties should be identical or similar[89]. To achieve substantive equality sometimes it is necessary to treat the parties unequal to a certain degree[90]. As Binder formulates, it means "that no party shall be given an advantage over the other."[91]

Regarding the component of the principle of fair hearing Kurkela lists various elements on a non-exclusive basis, however some of the suggested elements may be waivable by the parties therefore do not belong to the core meaning of fair hearing limiting the principle of party autonomy[92]. I share the view of Petrochilos who states that "fair hearing"

[85] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 560
[86] Article 18 of the UNCITRAL Model Law – Equal treatment of parties
[87] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 472, PETROCHILOS, supra note 53, at 144, BINDER, supra note 32, at 181, SCHÄFER, VERBIST, IMHOOS, supra note 20, at 78 and VON MEHREN, supra note 1, at 200
[88] See PETROCHILOS, supra note 53, at 130
[89] See KURKELA, supra note 74, at 187
[90] Petrochilos quotes the comment of the Norvegian government to the draft text of the UNCITRAL Model Law as follows. „absolute equality seems insufficient to prevent real inequality between the parties" […] „it is not sufficient that the same formal rules be applied to both parties." See PETROCHILOS, supra note 53, at 145
[91] BINDER, supra note 32, at 183
[92] See KURKELA, supra note 74, at 182-184:
"1) the right to all information in submissions; proper notice of the initiation of the proceedings must be given. Proper notice implies reasonable time to prepare the case and full disclosure of the parties and the claims made and reference to the rules applicable, if any;
2) full and simultaneous access with other parties and the panel to all communications, pleadings, arguments and testimony;
3) the right to presence in all physical hearings and the right to presence in hearings via internet or by means of tele or video conferencing;
4) full access to all written documents, evidence, reports submitted in the proceedings by the parties, witnesses, experts or other third parties without undue delay;
5) the right to submit claims and argue in support of them; to raise material and procedural defenses and objections and to bring new claims and raise new defenses;
6) the right to submit relevant documentary evidence in defense or in support of claims;

and the right to be heard should be safeguarded at all stages of the arbitration proceedings and should mean that both parties are given the effective and reasonable opportunity to be heard on all arguments and comments and on all essential elements of the intended reasoning of the tribunal, further that neither party should be put in a privileged provision during the arbitration.[93] Schäfer, Verbist and Imhoos add a crucial comment to the predominance of this principle, namely that it is limited by the agreed time-schedule and may not be misused by dilatory tactics of parties.[94][95]

In the literature we can find broader interpretations of the due process principle as well. Curtin uses this notion to cover procedural and substantive due process requirements and deals with the excess of arbitrators powers (when the award settled question outside the scope of the arbitration agreement) and with fraud.[96] Schäfer, Verbist and Imhoos include impartiality of arbitrators as a necessary requirement of due process[97]. Petrochilos consider independence and impartiality of arbitrators as elements of due process in a broad sense[98]. Furthermore he enumerates some basic due process principles prevailing in public international law[99]. Probably the widest interpretation is present in Kurkela's comprehensive work[100]. Kurkela examines the due process principle covering (i) the public policy defense of the New York Convention (more precisely the respect of public policy), (ii) the classical

7) the right to cross-examine witnesses and experts and other parties heard in the proceedings and reasonable time to prepare for this;
8) the right to comment on any and all statements made, comments given, communications and a reasonable time to elaborate on an answer to any of them;
9) the right to bring further evidence and testimony as may be necessary to fully elucidate and defend one's position should new facts emerge or new claims be made;
10) adequate notice of closing of the proceedings must be given in advance in order to allow the parties to fully develop their pleadings and exhaust their testimony."

[93] See PETROCHILOS, supra note 53, at 145
[94] See SCHÄFER, VERBIST, IMHOOS, supra note 20, at 78
[95] See also BINDER, supra note 32 , at 183
[96] Kenneth M. CURTIN, *An examination of contractual expansion and limitation of judicial review of arbitral awards*, 15 Ohio St. J. on Disp. Resol. (2000), at 342
[97] See SCHÄFER, VERBIST, IMHOOS, supra note 20, at 78
[98] See PETROCHILOS, supra note 53, at 130
[99] See PETROCHILOS, supra note 53, at 218-223
[100] See KURKELA, supra note 74, at 7-34

principle of the right to present one's case, (iii) the questions relating to the arbitration agreement (in the sense that due process is not observed if the award is not based on the agreement of the parties, as well as if arbitrators exceed their power), (iv) the issue of incapacity and invalidity, (v) the finality of awards and (vi) the question of arbitrability. (The last three issues Kurkela designates as conditions – (iv) and (vi) precedent, (v) subsequent – to the existence of due process.). Furthermore, when analyzing the violation of the due process principle, Kurkela also deals with the following questions pertaining to this notion[101]: (i) general obligation of the parties to act in good faith, (ii) non-respect of duties by the arbitrators, (iii) manifest disregard of the arbitration agreement and the substantive law, (iv) disregard of facts, (v) generic prayer for relief filed by the parties and its relation to ultra petita problems.

Although not closely connected, the question of confidentiality may also be added as an element of a due process, in the sense of being a duty of the arbitrators[102]. It is accepted that arbitrators are bound by the principle of confidentiality even in the lack of express agreement of the parties[103]. However, it cannot be regarded as an implied term of the arbitration agreement which would bind the parties without express covenants[104].

The due process principle is present in national legislations as well as other treaties and model laws in various forms. To show some remarkable examples, I cite the followings[105]:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing with a

[101] See KURKELA, supra note 74, at 81-91
[102] See KURKELA, supra note 74, at 188
[103] See KURKELA, supra note 74, at 188
[104] See the case Esso Australia Resources Ltd. & ors v. the Honorable Sidney James Plowman & ors in VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 544
[105] See also Article 18 of the Model Law

> reasonable time by an independent and impartial tribunal established by law."[106]
>
> "In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case."[107]
>
> "In all cases, the Tribunal shall ensure that the parties are treated with equality and that each party is given a fair opportunity to present its case."[108]

The presentation of the different interpretation and application of the due process principle in the literature and legislation served the purposes of stating that this fundamental rule represents such an essential element of arbitration which should cover every aspect of the arbitral procedure, regardless of the scope of examination. Regarding the New York Convention, the due process principle in its broader meaning – as analyzed by Kurkela above[109] - could be applicable. Nevertheless, as this thesis is focusing on Article V(1)(b), the so-called due process clause of the Convention, I will apply a narrower meaning, closer to that of Kaufmann-Kohler, indicated above[110].

2.1.2. The Notion in the Convention

Article V(1)(b) of the New York Convention provides the followings: "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: […] [t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case […].[111]

[106] Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, Nov. 4, 1950)
[107] Article 15(2) of the Rules of Arbitration of the International Chamber of Commerce of 1998 ("ICC Arbitration Rules")
[108] Article 38(b) of the World Intellectual Property Organization (WIPO) Arbitration Rules
[109] See KURKELA, supra note 74, at 7-34
[110] See KURKELA, supra note 74, at 1
[111] In the first draft of the Convention which was based on the correspondent provisions of the Geneva Convention and the previous ICC draft - see supra note 15 - the ECOSOC suggested the "adequate" notice should be given and "in due form". From the working parties Austria commented that the wording is not clear,

As the framing is quite broad and flexible, it needs further interpretation. The "due process" notion applied here refers basically to three circumstances: (i) proper notice of the appointment of the arbitrator, (ii) proper notice of the arbitration procedure, (iii) ability of present one's case in other ways. The first two criteria are connected by the condition of "proper notice" which must be assessed under consideration of the arbitration agreement and the other applicable procedural rules[112][113] as well as upon the facts. According to the text all three requirements form part and aim to achieve the fundamental principle of presenting one's case (audi alteram partem) as referred to it above.[114][115] Within that, the world "unable" refers to objective criteria, it does not refer to the subjective ability of a party[116]. As far as the legal proficiency is concerned, the own competence or professional skills of a party or the lack thereof may not be invoked under this section of the Convention[117]. However if the party was denied to apply a legal advisor according to his choice it might be constitute a violation of due process[118].

2.1.3. Public Policy Defense

As the due process principle covers some fundamental elements of national legal systems, the question emerges whether due process forms part of the public policy. Before discussing this matter the notion of public policy must be clarified. (The detailed presentation of the notion of public policy as well as its role and application under the New York

furthermore Germany remarked that the "due form" criteria is obscure and is not appropriate for practical purposes. See supra note 12, at 20

[112] See KURKELA, supra note 74, at 18

[113] Silverstein refers that the court practice might understand under the adjective „proper" also the question of legal capacity of a party. See SILVERSTEIN, supra note 3, at 458

[114] See Section 2.1.1. supra

[115] Wheeless remarks, that the last phrase („otherwise unable to present his case") was included in the text as the drafter were afraid that if omitted, parties could not be protected against serious irregularities, which shows the high importance of this phrase. See WHEELESS, supra note 1, at 811

[116] See KURKELA, supra note 74, at 17

[117] See KURKELA, supra note 74, at 17

[118] See the case Government of Malaysia v. Zublin-Muhibbah Joint Venture before the High Court of Kuala Lumpur (1989) in Várady, Barceló, von Mehren, supra note 38, at 540

Convention would go beyond the dimensions of this thesis, therefore I will focus only on those basic perceptions which are closely related to the due process principle).

Public policy can be applied in two basic contexts: on national (domestic) and international level[119]. The concept of international public policy could be described by quoting the definition of the International Law Association ("ILA") Recommendations: "the body of principles and rules recognized by a State, which, by their nature, may bar the recognition and enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition and enforcement of said award would entail their violation on account of either of the procedure pursuant to which it was rendered (procedural international public policy) or of its contents (substantive international public policy)."[120]. Regarding the rules falling under the notion of international public policy the ILA Recommendations define three groups: (i) fundamental principles of justice and morality, (ii) public policy rules, meaning the rules protecting the fundamental political, economical and social interest of a state, (iii) duty of a state to observe and comply with its obligations towards other states or international organizations[121].

It must be remarked that the case law pertaining to Article V(2)(b) of the New York Convention clearly indicate that in international arbitration public policy should be interpreted as international public policy[122][123], furthermore that this provision of the Convention should.

[119] The International Law Association ("ILA") suggests further the use of the term „transnational public policy" in its resolution on Public Policy as a Bar to Enforcement of International Arbitral Awards adopted in 2002 ("ILA Recommendations") referring to such international public policies about which consensus within the international community (e.g. international conventions) exists. See KURKELA, supra note 74, at 12

[120] See KURKELA, supra note 74, at 12

[121] See KURKELA, supra note 74, at 13

[122] See PETROCHILOS, supra note 53, at 99

[123] For contrary decisions see for instance the judgment of the Court of Final Appeal in Hebei Import and Export Corporation v. Polytek Engineering Co. Ltd., which interestingly stated that public policy "is those elements of a state's own public policy which are so fundamental to its notions of justice that its courts feel obliges to apply the same not only to purely internal matters but even to matters with a foreign element by which other states are affected." In Theresa CHENG, *Experience in enforcing arbitral awards in Asia – a Hong Kong perspective,* Int. A. L. R. 2000, 3(6), at 187

be interpreted very narrowly[124][125]. As Kurkela quotes Holtzmann: "[U.S.] courts recognize that, […], the international public policy of the United States favors the enforcement of international arbitration as an essential element in promoting foreign trade and world peace. This international policy has been given precedence over national public policies expressed in domestic laws."[126]

It is undisputed that national public policy contains substantive and procedural issues as well[127]. From the ILA Recommendations cited above and according to the prevailing international view [128] it can be seen that this distinction of the elements may also be made on international level. From the decision of the Oberlandsgericht Köln in the case "Danish buyer v. German seller", in which the court stated that "[a]s the right of the parties to challenge has a fundamental meaning for a fair arbitral procedure, the exclusion of this right constitutes a violation of the German public order"[129], it can be concluded, that the German court was also on the opinion that public policy can have procedural elements as well. Although, as a Moscow City Court decision shows, not all courts think that procedural questions form a part of public policy at all[130].

As far the relationship of due process and (procedural) public policy is concerned, Kurkela goes quite far, he regards due process the correspondent term of procedural public

[124] „The Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum Stat's most basic notions of morality and justice." In Parsons & Whittemore v. RAKTA as quoted by Viscasillas, in VISCASILLAS, supra note 34, at 198

[125] For the narrow interpretation of the public policy defense see also the court practice of Germany („[f]rom the viewpoint of German procedural public policy, the recognition of a foreign arbitral award can […] only be denied if the arbitral procedure suffers from a grave defect that touches the foundation of the State and economic functions […]˝") and France ("[t]he public policy governing the enforcement of foreign arbitral awards is not domestic public policy, but the of international law where the decision is invoked") analyzed in details together with the U.S. case law in CHOI, supra note 19

[126] See KURKELA, supra note 74, at 11

[127] See KURKELA, supra note 74, at 11

[128] See PETROCHILOS, supra note 53, at 97 and BERGER, supra note 52, at 676

[129] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 835

[130] „The Moscow City Court decision stated that procedural infringements in the arbitral proceedings have no relevance to the notion of public policy." In VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 756

policy and argues that the procedure can be seen as an instrument to ensure that the disputed facts and issues are revealed (as a goal representing public policy). Therefore due process constitutes the part of public policy[131]. In contrary to that, Viscasillas cite a case settled by the Supreme Court of Hong Kong in Paklito Investment Ltd. V. Klockner East Asia Ltd[132]. Here the court stated that due process was violated because the right of a party to opportunity to present his case was not observed, however the court did not regarded this right to be part of public policy[133][134][135]. The case law of Germany shows a similar approach and as Sandrock and Hentzen remark: "there may be violations of due process which leave public policy unaffected."[136]

Concerning the relationship of due process and public policy, I share the view of Petrochilos in that the requirement of independency and impartiality of arbitrators as well as the principle of party equality – as discussed above[137] – do form part of the international public policy[138], but not all due process criteria constitute (international) public policy. They are not related as part and whole, rather they have a common set of elements, in the sense that some elements of due process are parts of the public policy as well. Under the New York Convention if there is a violation of due process (in its wider meaning), there are different grounds listed in Article V which can be invoked as defense or applied by the courts ex officio. Therefore, from the practical point of view and in consideration the similar outcome,

[131] See KURKELA, supra note 74, at 12
[132] See VISCASILLAS, supra note 34, at 198
[133] See VISCASILLAS, supra note 34, at 198
[134] For the court practice in Hong Kong pertaining to the relationship of due process and public procedure see also the judgment in Werner A. Bock KG v. The N's Ltd. in which the Court of Appeal stated in connection with an award rendered in Germany that the difference between the approaches of Hong Kong and Germany regarding the burden of proof does not lead to the violation of public policy of Hong Kong, as the relevant regulations of Germany cannot be regarded as "uncivilized". In CHENG, supra note 123, at 189
[135] For court decisions defining the notion of procedural public policy see VISCASILLAS, supra note 34, at 199
[136] See SANDROCK, HENTZEN, supra note 42, at 66. The authors refer to a decision of the Court of Appeals of Hamburg, where the court founded that an unreasoned award may violate due process principle (in its broader sense), but as the award was rendered in England where reasoning is not a mandatory requirement, it did not violate West Germany's public policy.
[137] See Section 2.1.1 supra
[138] See PETROCHILOS, supra note 53, at 97

it is more important for the parties to refer to the possible grounds and to provide the necessary evidence according to Article (V)(1) in order to bar enforcing of an award in violation of due process, whilst it is left to the court to assert whether the awards was contrary to the public policy (as well).

2.2. ROLE AND TASKS OF THE ARBITRATORS

While examining the due process requirements– without detailed analysis as it goes beyond the scope of this thesis – reference must be taken to the role and tasks of the arbitrators since the conduct of the arbitration proceeding and the observance of the due process requirements lie essentially in their hands.

Whether the arbitrators play a dominantly active or passive role depends on the stipulations of the parties as well as the different legal backgrounds of the arbitrators[139]. The type of their activities can also vary from guidance of the parties (in form of consultations, hearings) to direct interventions (such as questions, orders, appointment of experts by themselves, etc.)[140]. In general – as a characteristic of the arbitration – arbitrators have a wide discretionary power with respect to the identification of the applicable procedural rule (in the absent of parties agreement)[141], to the way of conduct of the proceeding, to the deliberations of the weight of the evidences, to the conclusion drawn form the evidences, eventual to the establishment of the interpretation of the applicable substantive rules[142] and to the legal

[139] See KURKELA, supra note 74, at 43
[140] See KURKELA, supra note 74, at 44-45
[141] Kurkela quotes Bernardini in this respect who states: "All institutional rules of arbitration recognize the arbitrator's power, in the parties' silence, to regulate the proceeding in the most appropriate manner, as confirmed by a similar provision set by the rules of procedure prevailing at the arbitral seat. Such power is very large, the only practical limitation imposed by such rules and by applicable international conventions being the respect of due process". See KURKELA, supra note 74, at 152
This is widely provided by national laws and various institutional rules, e.g. in Article 19 of the UNCITRAL Model Law which is analyzed by Howard M. Holtzmann & Joseph E. Neuhaus in VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 462-463
[142] See KURKELA, supra note 74, at 56

conclusion and motivations of the award[143]. The discretionary power of the arbitrators should be remain within the frame of the parties' agreement – as the primary source and basis of the arbitration – however as Kurkela suggests the boundaries of the arbitrators' power cannot be defined only by the express agreement of the parties, and they should be entitled to "take any such procedural actions or measures which serve the interests of the parties and are necessary to carry out the task of the panel […]"[144][145].

As far as the duties and tasks of the arbitrators are concerned – beyond that it depends on the parties' agreement –, first of all it includes the general goal of the arbitration proceeding: the establishing of the truth[146]. Arbitrators are further responsible for the fair conduct of the proceedings[147]. The issue of establishing of the facts also form part of the arbitrators tasks, but it is only secondary in comparison to the same duty of the parties[148]. Within their duty to establish the facts, Kurkela argues that they should define and communicate to the parties at least what facts the arbitrators regard to be relevant, and how they think the relevant facts will be established[149]. Therefore, I share the view of Kurkela that it is advisable to hold consultation with the parties on the status of evidence and of the further need of fact-finding[150].

The question whether the arbitrators should carry out own fact-finding also arises and I believe that it can be decided on the special circumstances given in each cases and under observance of the criteria of time-effectiveness. So generally arbitrators should be allowed to

[143] See KURKELA, supra note 74, at 85
[144] See KURKELA, supra note 74, at 119
[145] For the arbitrators' autonomy see also Article 8(1) of the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration: "The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any questions to, answer by or appearance of witness […], if it considers such question, answer or appearance to be irrelevant, immaterial, burdensome, duplicative or covered by reason for objection […]." In KURKELA, supra note 74, at 124
[146] See KURKELA, supra note 74, at 125
[147] As formulated in Article 15(2) of the ICC Rules of Arbitration: „In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case."
[148] See KURKELA, supra note 74, at 126
[149] See KURKELA, supra note 74, at 176
[150] See KURKELA, supra note 74, at 176

sua sponte fact finding if they find necessary but they should not be obliged or be responsible for that, and the dilatory tactics of the parties should be avoided by providing reasonable time for presenting the evidences and warning the parties of the consequences of non-delivery of sufficient evidences. Schäfer, Verbist, Imhoos state that arbitral tribunal may take into account facts of which they themselves are aware and require to the disclosure of crucial evidences, but "international arbitrators generally show restraint in this regard"[151].

The issue of burden of education can also be raised as a possible task of the arbitrators. However, arbitration is different form the ordinary judiciary proceeding also in that sense that the burden of education does not form a general and mandatory task of the arbitrators.

3. REFUSAL OF RECOGNITION AND ENFORCEMENT

3.1. STANDARD OF REVIEW

3.1.1. Which Standards to Apply?

3.1.1.1. Applicable Procedural Rules

As recognition and enforcement procedures are conducted before national courts in order to enjoy the relief provided in the award in a territory different from that where the awards was rendered, the questions 'which standards national courts should apply by considering the due process principle', 'what elements of the applied standards should be taken into account', as well as 'in what way such standards should be applied', also arise.

The problem of the applicable standards is closely connected with the issue of the applicable procedural law. The detailed analysis of this question would make it impossible to hold this thesis in manageable boundaries[152], however, as the rules of the applicable

[151] See SCHÄFER, VERBIST, IMHOOS, supra note 20, at 8
[152] For further discussion see PETROCHILOS, supra note 53

procedural law constitute one set of rules of the standards to be applied, I refer to Kurkela who list the possible elements of the applicable procedural rules as follows: (i) (original and subsequent) provisions of the arbitration agreement, (ii) rules (of national law or of an institution) referred to in the arbitration agreement, (iii) laws and principles pertaining to arbitration of the seat of arbitration (lex arbitri), (iv) international arbitration practices[153], (v) procedural orders of the arbitrators, (vi) (national or international) public policy.[154]

Taking into account the party autonomy principle prevailing in arbitration with respect to the arbitration procedure and the governing procedural rules as well[155], I believe that the eventual parts of the applicable procedural law - among other aspects – should definitely be observed by evaluating the due process criteria. It is quite clear from the nature of the arbitration that parties' agreement must principally be observed, therefore the provisions expressly included in the arbitration agreement and those referred to in the agreement should constitute the basis of standard of review. It is also a quite common idea that national procedural law of the seat of arbitration, closer its mandatory rules should also be respected[156]. Regarding the lex arbitri, it has to be mentioned however, that it cannot cover all national dispositive procedural laws, those for example, which are specific to the court procedures cannot be applied for (international) arbitration.[157] As Petrochilos formulates: "[a] choice of seat is not a wholesale choice of national law. In choosing the seat of arbitration, the parties place confidence in that legal system to provide them a disinterested service and not to impose upon them any legal conceptions that are particular to it."[158]

[153] The content of this element is not stated and discussed, therefore I do not apply by analyzing the applicable standard.
[154] See KURKELA, supra note 74, at 46-47
[155] See Section 3.1.2.2. below
[156] For detailed discussion see Section 3.1.2.2. below
[157] See KURKELA, supra note 74, at 19
[158] See PETROCHILOS, supra note 53, at 65

I discussed already the content and role of international public policy[159], and I was in the opinion that it contains some rules also covered by the broad sense of due process. These common, fundamental principles must be applied for the purposes of the due-process clause of the New York Convention, as well as by the assessment of the public policy defend. (Although it goes beyond the scope of this thesis, in this context the issue of the so-called denationalized award must also be mentioned, which are awards fully detached form the seat of arbitration and which invoke the general principle of international arbitration.[160])

The list of elements suggested by Kurkela does not mention expressly the question of human rights and the relevant conventions, but the case law show that as due process constitutes an important element of these, they may also be relied on and consequently form part of the applicable standard[161]. As for instance Petrochilos argues "the guarantee in Article 6(1) [of the European Convention for the Protection of Human Rights[162]] must be given effect to by an arbitral tribunal[…]"[163]. The applicability of human rights convention – namely that of Article 6(1) of the European Convention on Human Rights and Fundamental Freedom – as due process defense was checked by the European Court of Human Rights in Stran Greek Refineries & Stratis Andreadis v. Greece, where the court stated – after almost 16 years legal dispute – that the Greek Government violated the right of the defendant to a fair hearing through a legislative action which was adopted while the proceedings, in which the state was involved as party, was pending, and which action in reality aimed to influence the judicial decision of the dispute.[164]

3.1.1.2. Forum State's Standards

[159] See Section 2.1.3. supra
[160] For further discussion see BERGER, supra note 52, at 482-484
[161] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 712-713
[162] See supra note 106
[163] See PETROCHILOS, supra note 53, at 156; for details: id. at 151-158
[164] For the facts of this case – which is one of the most outrageous and cynical cases of state intervention and which I found the most interesting while preparing this thesis – see VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 780-791

Contrary to the above interpretation, the case law pertaining to the applicable standards shows that national courts primarily apply their own national standard of due process, and do not or only secondary observe the applicable procedural law governing the award before them.

Inoue analysis the standard applied by the U.S. courts and while citing the case Parsons & Whitmore Overseas Co., Inc. v. Société Générale de L'industrie du Papier (RAKTA) states that "[the] so-called due process defense has been interpreted to "essentially sanction the application of the forum state's standards of due process."[165], that is U.S. courts usually apply the American standard. Regarding the content of such standard however the court practices as well as the views of their commentators are different. Inoue demonstrates – and further criticize[166] – by a number of cases[167] that although the arbitration procedures constituting the basis of the awards before the courts were governed by (national and institutional) procedural rules other than U.S. laws, courts did not review the governing procedural laws but simply applied the U.S. provisions and principles[168].

Wheeless on the other hand relies on Article VII(1) of the Convention – and § 208 of the United States Federal Arbitration Act – and states that courts can and should apply domestic due process principles, they can and should back on cases concerning domestic awards, not even requiring that courts should apply a higher level of due-process-standard in case of foreign awards – but only referring to the pro-enforcement approach and narrow interpretation of the Article V defenses[169]. Wheeless proposes that the boundary which

[165] Osamu INOUE, *The due process defense to recognition and enforcement of foreign arbitral awards in United States Federal Courts: a proposal for a standard,* 11 Am Rev. Int'l Arb. (2000) at 247
[166] See Section 3.1.3.4 below
[167] See INOUE, supra note 165, at 255, 256
[168] Despite of this fact, Inoue also concluded from the analyzed case law that besides of the application of the U.S. standards the courts generally respect parties' agreement to arbitrate and the discretion of the arbitrators in the procedure in line with the universal pro-enforcement approach present with respect to international commercial arbitration. See INOUE, supra note 165, at 257
[169] See WHEELESS, supra note 2, at 812, 813

divides the criteria and conditions upon which the enforcement should be refused from those upon which enforcement can be granted should be defined by the court practice pertaining to the foreign and domestic awards.

German courts seem to apply a similar standard. Sandrock and Hentzen mention that West German courts normally apply municipal law as standard for review, therefore they examine whether the rules of the German municipal law were violated[170].

The case law is thus more or less uniform in the respect that courts principally rely on their domestic notions and principles when examining foreign (!) awards and their compliance with the due process requirements. This approach is apparently different form that applied for public policy defenses[171], however similar – and really uniform – in the sense that they require a narrow interpretation of the due process excuses[172].

3.1.2. Party Autonomy and its Limits

3.1.2.1. Party Autonomy and Minimum Procedural Guarantees

Before going forward with the analysis of the applicable standards and the method how such standard are and should be applied, for the clear understanding some words shall be devoted to party autonomy, one of the basic principles of arbitration[173] and its boundaries,. This idea is present in many aspects of the arbitration process, among these in the area of the governing procedural law as well. As suggested by Petrochilos "[…] courts should leave the parties free to fashion the arbitral procedure as they see fit, subject to certain imperative limits of due process[…]"[174]. Holtzmann & Neuhaus remark further, that "[t]he autonomy principle is critical to an effective system of commercial arbitration for international cases because in

[170] See SANDROCK, HENTZEN, supra note 42, at 58
[171] See Section 2.1.3. supra
[172] See Section 3.1.3.3. below
[173] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 452
[174] See PETROCHILOS, supra note 53, at 42

such cases there is a special need to be free of unfamiliar local standards."[175] The authors also mention that this principle expresses the idea that arbitration relies on the ability of the parties and the arbitrators to be able to fairly conduct the procedure and to reach a just solution.[176]

To show the slightly different appearances of this general principle with respect to the governing procedural law I present the following examples. Article 15 of the ICC Arbitration Rules provides: "[t]he proceeding before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, *by any rules which the parties* or, failing them, the Arbitral Tribunal *may settle on*, whether or not reference is thereby made to the rules of procedure of a national law to be applied in the arbitration."[177] Article 14 of the London Court of International Arbitration (LCIA) Rules renders: "[t]he parties may agree on the conduct of their arbitral proceedings and they are encouraged to do so […]"[178]. UNCITRAL Model Law defines: "[s]ubject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."[179][180]

The examples indicate that the principle of party autonomy with respect to the procedural law which governs the arbitration are usually expressly present in the institutional rules; besides, as a general principle it shall prevail in ad hoc arbitrations as well.

[175] Howard M. Holtzmann & Joseph E. Neuhaus, *A guide to the UNCITRAL Model Law on International Commercial Arbitration: legislative history and commentary*, in VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 460
[176] Id. note 175
[177] ICC Arbitration Rules, Article 15(1), Rules Governing the Proceedings
[178] London Court of International Arbitration (LCIA) Rules, Article 14.1, Conduct of the Proceedings
[179] UNCITRAL Model Law, Article 19(1), Determination of rules of procedure
[180] This principle is expressed in a remarkable and comprehensive way by the Institut de Droit International which elaborated the principle of party autonomy in its Resolution on Arbitration between States, State Enterprises, or State Entities, and Foreign Enterprises the followings: "Article 6, The Parties have full autonomy […] to determine the procedural and substantive rules and principles that are to apply in the arbitration. In particular, (1) a different source may be chosen for the rules and principles applicable to each issue that arises and (2) these rules and principles may be derived from different national legal systems as well as from non-national sources such as principles of international law, general principles of law, and the usages of international commerce." See PETROCHILOS, supra note 53, at 43

However, the party autonomy principle in general as well as in the closer field of procedural law does have limitations. Beyond such barriers that mandatory national rules of arbitration may impose[181][182], and which institutional rules may foresee[183], there are some basic rules of due process inherent in arbitration which are universally regarded as limitations. These – already mentioned[184] – imperative rules involve the imperative of equal treatment of parties and of giving equal opportunity to present their case, and – as many authors suggest[185] – the independence and impartiality of arbitrators. These due process requirements should not be submitted to party autonomy[186]. These principles guarantee a balance that is characteristic to international commercial arbitration, namely – as formulated by Berger – "maximum autonomy for the parties and the tribunal in structuring the proceedings and choosing the law as well as maximum independence from the law of the seat combined with the insurance of certain minimum "procedural guarantees""[187].

3.1.2.2. National Mandatory Rules

The question is that beyond the minimum procedural guarantees what further limitation to parties' autonomy national laws should and practically do apply. Berger reflects to the complexity of the problem and its affect on the "efficiency and effectiveness" of international commercial arbitration, however does not provide a definite answer.[188]

If we look upon the national regulations regarding the mandatory provisions of the procedural law of the seat of arbitration rather similar approaches seem to be applied. During

[181] As suggested in Article 19(1) of the UNCITRAL Model Law („Subject to the provisions of this Law […]")
[182] For the provisions usually applied by the national laws as mandatory rules with respect to the arbitration procedure see PETROCHILOS, supra note 53, at 83
[183] For instance the first provision of Article 15(1) of the ICC Arbitration Rules
[184] See Section 2.1.1. supra
[185] See PETROCHILOS, supra note 53, at 82, VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 416, KURKELA, supra note 74, at 102
[186] „The autonomy conferred to the parties does not empower them to contract out of due process." See SANDROCK, HENTZEN, supra note 42, at 58
[187] See BERGER, supra note 52, at 17
[188] See BERGER, supra note 52, at 17

the drafting of the UNCITRAL Model Law it was proposed for instance by the Secretary-General that the enforcement of an award should not be refused – and correspondently the claim for setting aside should not be granted – on the grounds that the arbitrators followed the agreement of the parties in the course of which they did not comply with the mandatory rules of the applicable national laws, however this proposal was rejected and was not incorporated in the Model Law[189]. The present wording of the Model Law[190] limits the party autonomy by requiring compliance with the mandatory provisions of the applicable national law (and implying absolutely binding rules for the tribunal[191]). This concept is applied by a numerous national laws[192]. The New York Convention contemplates a similar but not such clear approach in Article V (1) (d)[193].

Upon the examination of Petrochilos[194] it can be stated that national laws usually apply mandatory procedural requirements which go beyond the minimum guarantees and expect them to be followed even to the detriment to the parties right to free agreement. As far as the desired situation is concerned, I share the idea suggested by the U.N. Secretary-General as summarized above[195] that in international commercial arbitration party agreement on procedural matters in general should not be submitted to mandatory provisions of certain national laws, the principle of party autonomy should be maintained and stricter safeguarded, and therefore awards should not be set aside, respectively their enforcement should not be denied on the grounds that the arbitrators complied with the parties' agreement as opposed to national regulations. As Petrochilos suggest, "[f]aced with an express agreement of the

[189] See PETROCHILOS, supra note 53, at 81
[190] See supra note 167
[191] Article 24 (2) – (3) of the Model Law
[192] See PETROCHILOS, supra note 53, at 82
[193] Article V(1)(d) of the New York Convention: „Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: […]The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, *failing such agreement*, was not in accordance with the law of the country where the arbitration took place […]"
[194] See PETROCHILOS, supra note 53, at 83
[195] See supra note 189

parties, the tribunal has a duty to comply with it, or resign. The parties' procedural agreements should be respected, even if they would lead to an unenforceable award."[196] Although in my opinion, arbitrators should at least warn the parties if their agreement on procedural matters may result in refusal of enforcement or setting aside[197].

National laws could protect their basic procedural principles even without imposing mandatory procedural laws on arbitration through the minimum procedural guarantees of due process as mentioned above[198] and provided that it corresponds with the international public policy, by the means of the public policy defense that is generally applicable in setting aside procedures and is included in the New York Convention as well[199]. This would be in line with the essential principles and characteristics of international commercial arbitration, such as the pro-enforcement approach as well as the independency of national laws and respect of the party autonomy and therefore provide for the effectiveness of this type of dispute resolution.

3.1.3. Courts Scrutiny – How to Apply the Standards?

3.1.3.1. Review of Procedure

Generally it is clear in the light of the nature of arbitration as well as its basic principle of party autonomy that court scrutiny shall be limited. In the landmark decision of the United States District Court for the Southern District of New York, in Spector v. Torenberg, the court observed, that the "limited judicial review reflects the desire to "avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation."(…) As the Court of Appeals for the Second Circuit has observed, "[a]rbitration

[196] See PETROCHILOS, supra note 53, at 96
[197] Regarding the role and tasks of arbitrators as well as the burden of education see Section 2.2. below.
[198] See Section 2.1.1. supra
[199] See Article V(2)(b) and section 2.1.3 supra

cannot achieve the savings in time and money for which it is justly renowned if it becomes merely the first step in lengthy litigation""[200][201].

Furthermore, the United States District Court for the Southern District of New York stated in another decision "[t]hat this was the animating principle of the [New York] Convention, that the Courts should review arbitrations for procedural regularity but resist inquiry into the substantive merits of awards, is clear from the notes on this subject by the Secretary-General of the United Nations."[202]

Procedural questions are typically those issues which are left to be governed by the principle of party autonomy and do not fall under judicial review – until the final award is rendered[203]. Even in proceedings for setting aside or enforcement the courts may usually deal with a limited – and listed – number of issues[204], which can be seen in the New York Convention as well.

3.1.3.2. Sua Sponte Fact Finding

Beyond this limitation the scope of judicial scrutiny is barred regarding the findings of the arbitrators as well. Courts may reinvestigate some facts and reconsider the weight of some

[200] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 745
[201] See also the decision in Fertilizer Corp. Of India v. IDI Management, Inc. Rendered by the United States District Court, Southern District of Ohio, 517 F.Supp. 948. (1981), in which the court referred to a decision of the Supreme Court that stated that "if the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set aside from error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of judges [arbitrators] chosen by the parties, and would make an award the commencement, not the end, of litigation." See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 894
[202] International Standard Electric Corp. V. Bridas Sociedad Anonima Petrolera, United States District Court, Southern District of New York, 1990 in VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 713, 717
[203] In a case before the Supreme Court of Austria the court held that court scrutiny does not the course of arbitration proceedings, such proceedings are governed by the principle of party autonomy, therefore court interference with the arbitration procedure is not allowed, only after the award was rendered. See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 452
[204] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 709

evidences during a setting-aside or enforcement procedure and may come to result and/or conclusion different from that of the arbitrators, however, there are some limitations in this respect as well. "[W]hether a court is free to substitute its own view of the facts – and of the law – for those of the arbitrators"[205] is one of the key questions of the judicial review.

National courts apply different level of scrutiny. The Swiss Supreme Court applied a very limited standard of review in a decision and stated that "[a] determination as to what one party's act or omission communicated to the other party requires an appreciation of the factual context. The ICC Tribunal heard testimony (and had the benefit of a complete record) regarding the context. The Swiss Supreme Court did not, yet nevertheless arrogated to itself the power to disagree with the arbitrators and to set aside the arbitral award on the basis of its disagreement."[206] The Paris Court of Appeals in its decision in Arab Republic of Egypt v. Southern Pacific Properties, Ltd & Southern Pacific Properties, Ltd.[207] adopted a much broader standard of review and practically evaluated the facts de novo.

Taking into account the general characteristics of international commercial arbitration as the flexibility of procedure and the relative easy and unified enforcement provided for it, which contribute to its popularity and effectiveness, I think that the court scrutiny should not go beyond the review of the procedure and the observance of the minimum procedural guarantees and should not include new fact findings. I share the view of the Swiss Supreme Court that "with respect to facts review is only possible within the limits of substantiated objections which claim that factual findings result from non-observance of procedural guarantees set by law […], or that they are incompatible with procedural ordre public."[208]

[205] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 709
[206] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 767
[207] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 761
[208] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 760

3.1.3.3. Narrow Interpretation

The case law with respect to the methods and rules of the application of the standards of review shows a rather similarity. The Supreme-Court of the U.S. expressed in its judgment in Scherk v. Alberto-Culver Co. its view – although concerning an arbitration agreement and not an award – that while examining the due process defense, parties agreement must be respected and narrow interpretation should be applied, and the court stated that "[t]he invalidation of such an [arbitration] agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a parochial concept that all disputes must be resolved under our laws and in our courts […]. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."[209] German case law also shows the narrow interpretation of the due process exceptions and the refusal of enforcement only in case of "serious abnormalities"[210].

Apart from the practice of narrow interpretation, courts rely on domestic rules as we seen above[211]. (Regarding the hierarchy of the possible elements of the applicable standards Viscasillas interestingly argues on the basis of the Paklito case, that the law of the enforcing state seems to be considered last which was foregone by the procedural law chosen by the parties in [212]. This view is clearly different form the prevailing court interpretation). While the narrow interpretation of the due process defense and the unwillingness of its application by the national courts correspond to the nature of awards rendered in international commercial awards, to the requirements of the parties involved and to the party autonomy principle, the court's dominant method of review and its basis are not in line with them.

[209] See footnote FN40 to IVANOVA, supra 61
[210] For cases before German courts see CHOI, supra not 19 and SANDROCK, HENTZEN supra note 42
[211] See Section 3.1.1.2 supra
[212] See VISCASILLAS, supra note 34, at 198

3.1.3.4 Two-Step Review

After examining the existing practice, we should turn to the discussion of other possible methods, more suitable for the purposes of the Convention.

Inoue discusses in its article the standard of review applied by the U.S. courts pertaining to the due process defense. I share the view proposed by Inoue for defining the applicable standard as well as for the method of application and find his work a very logical and well-built analysis appropriate for general interpretation and application, therefore I present a summary of his ideas as follows[213]. As opposed to the practice of the U.S. courts Inoue suggests that beyond the U.S. standards, factors, such as the inherent risk of arbitration[214], parties' choice and the policy purposes of the New York Convention should be taken into account when defining the applicable standards and the way of application. In this sense he proposes that within American due process criteria only the minimum and essential requirements of fairness should be applied as standard for the foreign awards, not those parts relating to American domestic procedures[215]. To define the content of the minimum requirements he considers the special characteristics of foreign arbitration and concludes the followings:

- "the risks inherent in foreign arbitration should not be the basis for the due process defense"[216];

[213] See Inoue, supra note 165, at 259-275
[214] See note 216 below
[215] Domestic standards and provisions of arbitration may only be applied if they are not in conflict with the provisions of the New York Convention. See INOUE, supra note 165, at 272
[216] Inoue cites several judgments which help to understand the so-called inherent risks and the limitations which such risks place upon the interpretation and applications of the due process defense: "[p]arties that have chosen to remedy their disputes through arbitration rather than litigation should not expect the same procedures they would find in the judicial arena."; further: "A party's choice to accept arbitration entails a trade-off. A party can gain a quicker, less structured way of resolving disputes; and it may also gain the benefit of submitting its quarrels to a specialized arbiter …. Parties lose something, too; the right to seek redress from courts for all but the most exceptional errors at arbitration." In INOUE, supra note 165, at 261
For the types of risks of the arbitration see INOUE, supra note 165, at 262-266

- the governing law of the arbitration is usually different from the U.S. law and it is necessary first to specify the scope of the governing foreign law;

- as a consequence of the prevailing pro-enforcement approach due process defense should be interpreted narrowly and can be applied for the "most exceptional errors in arbitration" upon fulfilling the parties obligation to prove the underlying facts.

Taking into account of the above factors Inoue suggest a "Two-Step-Application-Approach" according to which

- first the governing foreign law and their application to the facts should be reviewed by the courts in observance of the afore-mentioned limitations and specificities of foreign awards, and

- then the American standard of review – in its narrow meaning as described above – should be applied.

This method will be further refined by the discretionary power of the courts provided by Article V of the Convention (recognition and enforcement "may" be refused)[217].

To summarize the ideas and actual case law below, I believe that standards such as suggested by Wheeless[218] do not give clear guidance as to the meaning, content and way of application of due-process standards. The solutions followed by the German and U.S. courts as described above provide for a narrow standard of review that can be assented in the light of the primary purposes of the New York Convention. In international commercial arbitration the application of an international standard is necessary also because parties usually come

[217] For detailed analysis see INOUE, supra note 165, at 273-275
[218] See WHEELESS, supra note 2

form different legal background, they may depart form the application of national laws, they may submit the procedure to set of rules not familiar in the territory of enforcement, which can cause a lot of difficulties and which does not support the application of substantially "domestic" due process standards at all. Therefore, whilst the narrow interpretation practice of courts should be maintained as it guarantees a high standard, the review should not be based primarily on domestic principles.

Regarding the basis, scope and method scrutiny, I find the solution and aspects offered by Inoue the most appropriate as it observes the principle of parties' autonomy, the applicable procedural law, and the special features of foreign arbitration at the same time.

3.2. ARTICLE V(1)(B) OF THE CONVENTION

Pursuant to Article V(1)(b) of the New York Convention "[r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that […] [t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."

I have already discussed the elements of due process included in this provision, as well as the question of the applicable standard to estimate the due process defense invoked by a party. There are two further ideas covered by this provision which must be explained.

3.2.1. Burden of Proof

The text of the Convention is clear regarding the placement of burden of proof: it lies on the party opposing to recognition and enforcement of the award. This concept mirrors the

pro-enforcement spirit of the Convention, together with the fact that the enforcement my only be refused on one of the grounds of the exhaustive list of Article V.[219]

The discovery of the relevant facts forms firstly the task of the parties and secondarily that of the arbitrators[220]. In order to decide on the question of enforcement, the facts must be supported with sufficient evidence[221]. In order to establish all relevant facts, arbitrators may also order the production of evidences or appoint an expert, but in order to ensure the due process requirements it should be done after due consultation with the parties[222]. An award rendered in disregard by the facts may violate due process[223]

3.2.2. Court's Discretion

The Convention provide for a great flexibility and broad discretionary power for the courts scrutinizing the award by using the word "may" in Article V(1) and V(2) with respect to the decision on the refusal of recognition and enforcement. It enables national courts to grant enforcement even if a ground for refusal exists if they regard it reasonable and just, which again reflects to the pro-enforcement attitude of the Convention.

The court's discretionary power granted by Article V of the Convention allows the courts to apply a higher level of standards and to express the pro-enforcement spirit in their decision. As the decision in China Nanhai Oil Joint Service Corporation, Shenzen Branch v. Gee Tai Holdings shows, the Supreme Court of Hong Kong exercised its discretionary rights

[219] In case the party on whom the burden of proof lies is not able to bring an evidence due to objective reasons such as he is not in possession of it, however it is accessible to the other party or a third party, depending on the applicable procedural law of the arbitration - and within that of the seat of arbitration – the arbitrators may order the other party to deliver such evidence or court assistance may be available. See further KURKELA, supra note 74, at 41-42
[220] See Section 2.2. above
[221] See KURKELA, supra note 74, at 38
[222] See KURKELA, supra note 74, at 133
[223] See KURKELA, supra note 74, at 89

when it did not find any *material* violation of one party's rights[224]. According to the court's view the fact that the arbitration took place in Bejing instead of Shenzen, which was stipulated as the place of arbitration in the parties' agreement, did not amount to a material violation as "the defendants got what they agreed in their contract in the sense that they got an arbitration conducted by 3 Chinese arbitrators under the CIETAC Rules"[225].

The court's discretion is illustrated in another case before the Court of Appeal of Hamburg, in which the court examined whether the result of the arbitration would have been different, if the present violation of due process had not happened. Since the court found that the award is not affected by the violation, it did not refuse enforcement.[226]

By analyzing the discretionary power Viscasillas mentions further cases based upon Article 36 of the UNCITRAL Model Law and Article V(1)(b) which support the view that refusal of recognition and enforcement "may" and not "shall" be granted even in case of violation of due process[227].

3.3. CASE LAW PERTAINING TO THE ELEMENTS OF DUE PROCESS

Going into the examination of the case law pertaining to the most important elements of due process under the Convention, I generally refer to the statements, criteria and explications presented before in this thesis. Among these frameworks now I deal with the fundamental elements of the arbitration proceedings and highlight some remarkable cases

[224] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 842-845
[225] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 844
[226] See SILVERSTEIN, supra note 3, at 11
[227] See VISCASILLAS, supra note 165, at 195, 196

relating to due process required in the spirit of the Convention, in order to see the appearance of the principles before courts, to illustrate the function of the Convention in practice.

3.3.1. Timing

The time-schedule of the arbitration is crucial in order to maintain the time- and cost-effective characteristics of (international) arbitration. However, not only the relative speed, but the requirement of giving parties the right to reasonable opportunity to present their case must also be observed by setting the time limits, in order not to violate the due process principle[228]. An agreed time-schedule or – in the absence of it – a sufficient advance notice of deadlines and the legal consequences of their omission can ensure that arbitrators hinder parties' eventual dilatory tactics without violating the due process principle[229]. The timing is important also in the sense that the fundamental principle of party equality calls for that – unless specific circumstances require otherwise – the same amount of time should be given to the parties at the hearings, for preparing their comments and bringing their evidence.[230].

Whether the notice period provided by the arbitrators was sufficient was examined in a case before the Supreme Court of Italy in Abati Legnami v. Fritz Häupl, where the Supreme Court accepted the position taken by the Court of Appeal of Milan that a notice period of 28 days was sufficient and reasonable even in the circumstances that this period covered the Ferragosto-period in Italy[231] and this in itself does not mean the violation of due process.

[228] As Berger formulates it: „[t]he arbitrator thus finds himself trapped between two conflicting goals: the speedy disposition of the case through exhaustion of all procedural means that the applicable arbitration law and rules have to offer and the preservation of the procedural guarantees of the international arbitral process through careful balancing of the parties rights for arbitral due process" in BERGER, supra note 52, at 667

[229] See KURKELA, supra note 74, at 39

[230] See SCHÄFER, VERBIST, IMHOOS, supra note 20, at 78

[231] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 467. However the Supreme Court remanded the case with reference to the usual 90-days legal notice period of the Italian courts, which raises the issue of the applicable procedural law and the applicability of the procedural rules of the seat of enforcement.

Silverstein also mention a case before the Court of Appeals of Hamburg where the court did not find any violation of due process, when the respondent argued that certain documents of the other party he only received at the night before the oral hearing and therefore he was not able to present his case. The court did not accept this argument and was in the opinion that the respondent in reality had the opportunity to read such document.[232]

3.3.2. Notice

It is clear form the text of the Convention that parties must get proper notice of the appointment of the arbitrators and of the arbitration procedure as well. Whether a notice was "proper" must be decided in the special circumstances of each cases [233].

The Highest Regional Court of Bavaria refused the enforcement of an award, as it found that the defendant did not receive any notice of the arbitration[234]. This decision was interesting in the light that the applicable law held the *dispatch* of a notice satisfactory for evidencing purposes.

The Court of Appeals of Köln dealt with a case, in which the arbitration tribunal only allowed the disclosure of the name of the president of the tribunal due to the small numbers of the eligible arbitrators and in order to avoid undue influence on those arbitrators. Upon the defendant allegations not having been informed about the name of the arbitrators the court found that the proper notice requirement was violated holding the right to challenge arbitrators and to exclude them from posterior procedures is stronger than the reasons underlying the tribunal's rules[235].

[232] See SILVERSTEIN, supra note 3, at 461
[233] See Section 2.1.2 supra
[234] See VISCASILLAS, supra 165, at 197
[235] See SANDROCK, HENTZEN, supra note 42, at 59

3.3.3. Communication with the parties

The prevailing principle of party equality and that of the right to present one's case include the imperative of avoidance and disclosure of any kind of unilateral communications to the other party[236].

The question of unilateral communication was assessed by the Court of Appeal of Hamburg in Firm P (U.S.A.) v. Firm F (F.R.G.), where the court clearly stated that the single arbitrator's conduct of not forwarding the letter of one party to the other violated the party's right to opportunity to obtain knowledge of the other party's evidence.[237]

In a case before the Court of Appeal of Paris, in which one party submitted his pleadings in Spanish to the Spanish arbitrators, although the language of the arbitration was English, the court – rather disputably – did not find that this was an ex parte communication, because the content of the Spanish pleadings corresponded to its English version[238].

3.3.4. Hearings

Depending on the agreement of the parties, arbitrators may proceed with and without hearings. As Berger suggests, even if the parties agreed on a "documents-only" arbitration, arbitrators may schedule hearings in the given circumstances, for example if the complexity of the case was not foreseeable by the parties at the time of the conclusion of the agreement[239]. On the contrary, the request of a party to hold a hearing may be refused by the arbitrators if it was made to delay the closing of the procedure[240]. Although the opportunity of a party to appear in the hearing may be fundamental with respect to its right to present his

[236] See KURKELA, supra note 74, at 165
[237] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 467 In this case the Court of Appeal of Hamburg found the violation so serious that it amounted to the violation of the public policy of Germany.
[238] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 535
[239] See BERGER, supra note 52, at 421
[240] See BERGER, supra note 52, at 421

case, the non-appearance due to the deliberate decision of a party does not amount to the violation of due process.

The estimation of non-appearance is illustrated by the following cases before U.S. courts. In Biotronik Mess- und Therapiegeräte GmbH & Co. V. Medford Medical Instruments Co. the court granted enforcement of the award, because – although Medford was not present at the hearing as Medford thought that the claim against him was immature – Medford was not prevented from presenting his case, he only refused to appear. In Geotech Lizenz AG v. Evergreen System the enforcement again was not refused, as Evergreen was not deprived of his right to present his case, he deliberately chose not to appear before the tribunal based on the fact that he initiated a court proceeding which was pending.[241]

3.3.5. Comments of the parties

The principles of party equality and of the right to present one's case require that both parties have the real opportunity to comment on any observations, comments, evidence and suggestion of the other party or of the arbitrators.

In Paklito Investment Ltd. v. Klöckner East Asia Ltd. the High Court of Hong Kong stated that the defendant was prevented from presenting his case and deprived of the opportunity of being heard, consequently there was a clear violation of due process, since the defendant could not comment on the expert's report appointed by the tribunal - which appointment was opposed by the defendant earlier -, nor was his request for an oral hearing granted[242].

[241] Both cases in INOUE, supra note 165, at 249, 250
[242] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 511-519

3.3.6. Offering evidence

Generally parties' right to have the reasonable opportunity to present their case means that they should afford the opportunity to present all documentary evidences, hear experts, witnesses, and provide any other evidences which the parties find relevant to the case. However this right is not unlimited, and arbitrators – corollary to their autonomy – can refuse the evidences offered by the parties with sufficient reasoning [243], for instance if it is made for dilatory purposes[244].

In the landmark decision of the United States Court of Appeals for the Second Circuit in Parsons and Whittemore Overseas Co. v. Société Général de L'industrie du Papier (RAKTA) the court dealt with this questions[245]. The appellant alleged that he was not able to present his case, as the arbitral tribunal denied his request to postpone the hearings because his witness could not appear on the scheduled day due to his obligation to lecture at university. The court did not accept the defense as it did not find the reason of the appellant as an objective and unavoidable obstacle, further because the arbitral tribunal already disposed of an affidavit of the witness. The court also stated that "inability to produce one's witnesses before an arbitral tribunal is a risk inherent in an agreement to submit to arbitration. By agreeing to submit disputes to arbitration, a party relinquishes his courtroom rights – including that to subpoena witnesses – in favor of arbitration "with all of its well known advantages and drawbacks"[246].

The question of submittal of evidence was scrutinized in Generica Ltd. v. Pharmaceutical Basics Inc. (PBI). PBI wanted to re-open the cross-examination of a witness, which request was rejected, however PBI was given the opportunity to use the testimony of

[243] See SCHÄFER, VERBIST, IMHOOS, supra note 20, at 102
[244] See BERGER, supra note 52, at 443-444
[245] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 814-823 and SILVERSTEIN, supra note 3, at 470, 471
[246] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 819

several experts on the issue. When PBI argued that through denying the re-opening of cross-examination he could not present his case, the U.S. court held that arbitrators are not bound by rules of evidence and they are not obliged to hear all of the evidences offered by the parties, therefore the enforcement was not refused.[247]

In an interesting case before the United States Court of Appeals for the Second Circuit, in Iran Aircraft Industries v. Avco Corp. the issue of providing evidence was again examined by the U.S. Court. Here the Tribunal held a pre-hearing conference where the chairman of the Tribunal and Avco were considering how an enormous quantity of invoices as evidence should be presented by Avco, whether Avco should present an authorized summary of them. During the proceedings the Iranian party denied the sum of the claims of Avco, however Avco relying on – and probably misunderstanding – the discussion at the pre-hearing, did not submit the original invoices. The Tribunal finally did not find the summary of invoices sufficient and rejected the claim of Avco. In the enforcement procedure the U.S. courts uniquely refused the enforcement of the award stating that the words of the chairman of tribunal relating to the form of evidence were so misleading that "the Tribunal denied Avco the opportunity to present its case in a meaningful manner."[248][249]

[247] See INOUE, supra note 165, at 253

[248] See INOUE, supra note 165, at 255. Inoue strongly criticizes the award on the grounds of facts upon which the U.S: court should not come to the said conclusion, as Avco was in reality not denied the opportunity to present his case, Avco heard the allegations of the Iranian party, he had sufficient time to present the original invoices which were at his disposal, but decided deliberately not to submit them relying on the conversation at the pre-hearing, which - according to Inoue – Avco should not have to do, as the words of the chairman were clearly suggestions and no binding arbitral order.

[249] The critical view is also present in the article of SILVERSTEIN, supra note 3. See also Sean J. CLEARY, *International arbitration – foreign arbitral awards – enforcement of arbitral award refused under Article V(1)(b) of New York Convention, IRAN Aircraft Industries v. AVCO Corp., 980.F.2d 141 (2d sir. 1992),* 17 Suffolk Transnat'l L. Rev. 566 (1994). However WHEELESS regards this decision as one which encourages the integrity and effectiveness of the New York Convention and as a cornerstone decision and clear guidance regarding the content and standard level of due process defense. See WHEELESS, supra note 2. Taking into account the underlying facts of the decision and the narrow interpretation of Articla V(1)(b) of the Convention I share the view of Inoue.

3.3.7. Witnesses

The right to cross-examine witnesses belongs to the broader notion of due process[250]. It is not necessarily present in all jurisdictions, but it must be at least safeguarded that the direct examination of the witnesses be carried out by both parties.

In Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co. the proceeding U.S. court came to a narrow interpretation of the due process defence and a broad of its own power. The court did not refuse the enforcement of the award, in connection which Southwire argued that he was denied fair hearing by not being given the opportunity to fully cross-examine the other party's witness. The court held that "arbitrators are charged with the duty of determining what evidence is relevant and what is irrelevant, and that barring a clear showing of abuse of discretion, the court will not vacate an award based on improper evidence or the lack of proper evidence."[251]

3.3.8. Experts

Beyond the general right of the parties to appoint experts, the arbitrators – unless otherwise agreed – also have the power to self-appoint experts with respect to certain issues requiring special knowledge. In order to maintain the due process criteria however, the parties should be consulted in advance on the appointment of an expert by the arbitrators and they should be given the opportunity to question the expert[252].

In the Hebei Import&Export Corp. v. Polytek Engineering Co. Ltd. the expert appointed by the arbitral tribunal carried out an on-site inspection, where the representatives of one party as well as the Chief Arbitrator were present, whilst the other party was not

[250] See KURKELA, supra note 74, at 145
[251] See INOUE, supra note 165, at 252
[252] See KURKELA, supra note 74, at 148

informed of the inspection at all. The Hong Kong Court of Final Appeal did not refuse the enforcement on the grounds that although the defendant was not present, it did not deprive him of the right to present his case, as "[t]he inspection at the factory was not a "hearing", nor was it an occasion for either party to present its case"[253], furthermore he could and did submit his comment on the expert's report. It was also stated that the defendant's inactivity after obtaining knowledge of the lack of notice regarding the inspection also speaks against the presence of violation of due process.

In International Standard Electric Corp. (ISEC) v. Bridas Sociedad Anonima Petrolera, Industrial Y Commercial the question of secret experts emerged. The U.S. court applied here the narrow interpretation of due process common in the U.S., granted enforcement, and rejected ISEC's argument that the secrecy of the identity of the experts made him unable to present his case, holding that ISEC was aware of the use of secret experts and cannot envoke such defense later in the enforcement proceedings.[254]

3.3.9. Language issues

The meaning of right to present one's case also includes ensuring the use of a comprehensible language during the proceedings (and probably also before starting the procedure as well). Both the Court of Appeal of Basel-Stadt and the Court of Appeal of Cologne refused the allegation of violation of due process pertaining to the choice of language, in the first case (N.Z. v. I.) on the grounds that an invitation to the proceeding can apply the language of the seat of arbitration without infringement of parties' rights, in the latter case because the language chosen – although not that of the contract – was neutral for

[253] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 476 , for the facts of the case id. at 473-477
[254] See INOUE, supra note 165, at 252, 253

both parties and the arbitration indeed allowed the use of two languages (one of which was the defendant's language)[255].

3.3.10. Costs

Party equality requires the effective, substantial equal treatment of parties, which may actually mean unequal treatment of the parties in practice. Petrochilos analysis those situations, where one party can not afford to pay the fees of arbitration[256]. In a case referred by him re Howe v. Bank of International Settlements the proceeding tribunal made a cost order where the allocation of the costs was not equal in amount, but considered the different financial abilities of the parties[257]. Such unequal treatments with due reasoning should not be regarded as violation of due process (although not tested in enforcement procedures yet).

3.3.11. Parties' Objection

The principle of proceeding in good faith requires that parties give their objection regarding the – argued – violation of due process in reasonable time and not wait until the award is rendered. Failure to do so results in the loss of party's right to object[258]. "In other words […] party is then estopped from challenging an award on [the] basis [of any impropriety], by operation of a collateral estoppel (or issue of preclusion).[259]"

The Bridas-case before the United States Disrtict Court for the Southern District of New York shows that parties cannot remain silent on the irregularities of the proceeding and raising their

[255] See VÁRADY, BARCELÓ, VON MEHREN, supra note 38, at 530-533
[256] See PETROCHILOS, supra note 38, at 129
[257] See PETROCHILOS, supra note 38, at 129
[258] „[T]he party forfeits its right to raise an objection if it fails to allege infringement of its rights in the course of the proceedings." See SCHÄFER, VERBIST, IMHOOS, supra note 20, at 79
[259] See PETROCHILOS, supra note 38, at 117

objection only after an award unfavorable to them is rendered[260] without loosing their right to rely on the due process defense.

[260] See PETROCHILOS, supra note 38, at 118

CONCLUSION

It is clear, that the effectiveness and success of international commercial arbitration largely depends on the enforceability of the awards in the territory where the winning party might find accessible assets of the other party[261]. It requires on the one hand the avoidance of burdensome procedures and formal prescriptions, on the other hand predictable and uniform application of the existing international agreements in pro-enforcement spirit.

The New York Convention aimed to achieve these goals and provide for the necessary legal framework with sufficient flexibility, however its fate is in the hand of the national courts which – due to the limited power of the arbitrators – provide the necessary assistance in enforcement of the arbitral awards.

The inner conflict in international commercial arbitration, namely the demand for the independency of national laws and jurisdictions on the one side, and the need for the national courts support in enforcement on the other side, requires a reasonable balance in order to maintain the advantages of international arbitration. As Berger formulates: "[w]hile the international arbitration community relies on the specificity of international arbitration and demands more freedom from the constraints of domestic court control, the complicated and fragile equilibrium of arbitration and enforcement abroad requires a careful and deliberate approach in order to preserve the major benefit of international arbitral process, the quick and easy enforcement of arbitral awards abroad."[262]

National courts are vested with discretionary power regarding their decisions on the enforcement or refusal of foreign awards; in addition to that the Convention uses rather flexible notions (in line with its purposes). In order to safeguard the afore-mentioned goals and effectiveness of international commercial arbitration, it is of utmost important to achieve

[261] See INOUE, supra 165, at 284
[262] See BERGER, supra note 52

– within the possible frames of the different legal systems – a uniform court interpretation of the grounds for refusal listed in the Convention. This requires clear notions and standard for the application.

Regarding the essential principle of due process the national courts already apply a common, narrow interpretation respecting the nature of foreign awards and the demands of international arbitration and they usually refuse enforcement only in case of serious irregularities resulting in the material violation of the rights of parties relating due process. However, courts regard the due-process clause of the Convention as a defense that "essentially sanctions [] the application of the forum state's standards of due process"[263] and they normally not looking onto the applicable procedural law governing the arbitration.

This interpretation does not fully observe the parties' autonomy of forming and conducting the arbitration procedure and therefore may harm the parties' rights and interest. Furthermore it forces the arbitrators to take into account the law of the possible country of enforcement by rendering their awards in order not make the award unenforceable. While doing this, the arbitrators might get in conflict with the parties agreement. (It might also be true in case of mandatory rules of national laws of the seat of arbitration and in relation with setting aside procedures, however, this is not the topic of the present thesis).

In order to avoid such conflicts and possible harms the application of a two-step review could be advisable, which first examine the observation of the due process principle according to the applicable procedural law and afterwards it considers the application of the due process standards of the enforcement country within the boundaries of the minimum procedural guarantees. The final decision will be rendered with exercising the courts'

[263] See INUOE, supra note 165, at 247

discretionary power which allows the enforcement of an award even if a ground for refusal pursuant to Article V of the Convention exists.

This approach, suggested by Osamu Inoue complies with the pro-enforcement spirit of the Convention, respects party autonomy and ensures the due process criteria as well. Besides, the courts can safeguard the basic procedural principles and understanding of justice of the enforcement country in the second phase of the evaluation or in the given circumstances through application of the public policy defense of the Convention as well.

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