



**Legal Issues of Recognition and Enforcement of Foreign
Arbitral Awards in the Republic of Belarus.**

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ABSTRACT

In connection with permanent growth of popularity of alternative to state court procedure methods of dispute settlement and increase of number of Belarusian business entities referring to international arbitration, the author carried out research on recognition and enforcement of foreign arbitral awards in the Republic of Belarus.

The purpose of the research is to analyze and compare national legislation with international standards on recognition and enforcement of foreign arbitral awards and to find out whether rules of national legislation are in accordance with these standards.

In general, the approach towards recognition and enforcement of foreign arbitral awards in the territory of the Republic of Belarus is in line with international tendency and rules of national legislation are in accordance with standards, set in international agreements of the Republic of Belarus. However, the author found out several flaws and deficiencies in national legislation and proposed some possible solutions on them.

TABLE OF CONTENTS

ABSTRACT.....	i
TABLE OF CONTENTS	ii
INTRODUCTION.....	1
Chapter 1. Legal Regulation of Recognition and Enforcement of Foreign Arbitral Awards in the Republic of Belarus.	4
1.1 National Sources of Law Regulating Recognition and Enforcement of Foreign Arbitral Awards.	4
1.2 International Agreements as the Standard for the Recognition and Enforcement of Foreign Arbitral Awards.	7
Chapter 2. Procedure of Recognition and Enforcement of Foreign Arbitral Awards in the Republic of Belarus.	12
2.1 . General Standards and Conditions for Recognition and Enforcement of Foreign Arbitral Awards in the Republic of Belarus.....	12
2.2 Formal Requirements and Procedure of Recognition and Enforcement of Foreign Arbitral Awards in the Republic of Belarus.....	15
2.3 The Problem of Determination of the Nationality of the Award Rendered by International Commercial Arbitration Court.....	18
Chapter 3. The Grounds for Refusal to Recognize and Enforce Foreign Arbitral Awards in the Republic of Belarus.	21
3.1 Procedural Grounds under the New York Convention for Refusal to Recognize and Enforce an Award.....	22
3.1.1. <i>Incapacity of the parties and formal invalidity</i>	23
3.1.2. <i>Violation of Due process</i>	25
3.1.3. <i>Excess of Authority by the Arbitrator</i>	28
3.1.4. <i>Violation of Composition of the Arbitral Tribunal or Arbitration Proceedings</i>	29
3.1.5. <i>The Award Has Not Yet Become Binding or Has Been Set Aside or Suspended</i>	31
3.2 Substantive Grounds to Refuse Recognition and Enforcement of Foreign Arbitral Award under the New York Convention.	32
3.2.1 <i>Subject Matter of the Difference is not Capable of Settlement by Arbitration</i> .	33
3.2.2 <i>Public Policy Violation</i>	33
CONCLUSION.....	39
BIBLIOGRAPHY	43

INTRODUCTION

One of the distinctive features of modern world is economic globalization. Belarusian economy does not stand off this world process. Belarusian companies entered international market, what led to the intensification of international business circulation, entry by Belarusian businessmen into contractual relationships with foreign counterparts, which in turn led to the increase of disputes between Belarusian participants of trade circulation and their foreign partners.

The increase in a number of disputes with foreign element together with liberalization of public administration encouraged Belarusian businessmen to turn to alternative methods of dispute settlement, unfamiliar for them, but wide-spread in countries their partners came from, namely by means of international commercial arbitration.

According to various estimations in countries with developed market economy about 70% of economic disputes are settled in non-state jurisdictional bodies.¹

Though international commercial arbitration obviously has some advantages in comparison with state litigation (predictability, privacy, rapidity), efficacy of dispute settlement depends on the possibility of enforcement of the award, rendered by arbitration court.

As practice shows, arbitral awards are usually voluntarily performed by those award-debtors who worry about their commercial standing. Moreover, it is economically sound as far as otherwise they would be charged for legal costs, connected with proceedings on recognition and enforcement of arbitral award.²

¹ See, e.g., Nosyreva E.I., *Alternativnoe razreshenie grajdansko-pravovih sporov v SSHA* [Alternative Settlement of Civil Disputes in the US], 37 (1999); Tarasov V.N., *Treteyskiy process*, [Arbitration Procedure], 6 (2002).

² I.V. Pererva, *Voprosi ispolneniya resheniy mejdunarodnih arbitrajnih sudov na territorii Respubliki Belarus*, [Issues on Enforcement of International Arbitration Court Awards on the Territory of the Republic of Belarus], in *TEORETICHESKIE PROBLEMI PRAVOVOGO REGULIROVANIYA HOZ. DEYATELNOSTI V YSLOVIYAH RINOCHNIH OTNOSHENIY: TEZ. DOKL.RESP. NAUCH.-PRAKT. KONF. 300* (V.F. Chigir ed., 1998).

However, at least in half of the cases, the losing party of the arbitration not only does not execute arbitral award voluntarily, but opposes its recognition and enforcement in the state court of the country, where the recognition and enforcement of such award is sought.

Legal framework, institutional achievements, practice of cases consideration create conditions for optimistic view on dealing with international commercial arbitration in the Republic of Belarus; however there still remain problems both in legal and practical area of recognition and enforcement of foreign arbitral awards in the Republic of Belarus, as legislation is permanently changing and practice of state economic courts of the Republic of Belarus on cases on recognition and enforcement of foreign arbitral awards is rather poor.

This situation gives reasons for carrying out a research in this area of social relations, especially, taking into account, that the problem of recognition and enforcement of foreign arbitral awards in the Republic of Belarus has never been explored, though researches in this field were carried out by legal scholars of neighboring countries.³

The purpose of the research is to find out whether approach on the recognition and enforcement of foreign arbitral awards set in national legislation of the Republic of Belarus is in accordance with international tendency and international agreements of the Republic of Belarus, as well as to examine the judicial practice on Belarusian economic courts and settle theoretical and practical problems in this field.

The object of the research is legal relationships, arising out of recognition and enforcement of foreign arbitral awards in the Republic of Belarus.

The subject of the research is the concept and procedure of recognition and enforcement of foreign arbitral award, the concept of the place of arbitration, the classification of awards as

³ See, e.g., B. KARABELNIKOV, PRIZNANIE I PRIVEDENIE V ISPOLNENIE INOSTRANNIH ARBITRAZHNIH RESHENIY: NAUCHNO-PRAKTICHESKIY COMMENTARIY K NEW-YORKSKOY KONVENCI 1958 GODA [RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: SCIENTIFIC AND PRACTICAL COMMENTARY TO THE NEW YORK CONVENTION OF 1958] (2001); BARBARA WYSOCKA UZNAWANIE I WYKONYWANIE ZAGRANICZNYCH ORZECZEN ARBITRAZOWYCH W POLSCE [RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN POLAND] (1998).

domestic and foreign, conditions and grounds for refusal of recognition and enforcement of foreign arbitral awards, efficacy of the Republic of Belarus legislation rules, governing recognition and enforcement of foreign arbitral awards in the Republic of Belarus.

The thesis consists of three Chapters.

First Chapter is an introductory chapter and provides legal bases for recognition and enforcement of foreign arbitral awards in the republic of Belarus. Both, international agreements and national legislation are presented.

Second Chapter deals directly with the procedure of recognition and enforcement of foreign arbitral awards in the Republic of Belarus and explores the problem of determination of the nationality of the award, rendered by international commercial arbitration court. It is a theoretical part of the paper.

Finally, the third Chapter examines grounds for refusal to recognize and enforce foreign arbitral award in the Republic of Belarus and explores judicial practice of Belarusian courts on this matter.

Chapter 1. Legal Regulation of Recognition and Enforcement of Foreign Arbitral Awards in the Republic of Belarus.

1.1 National Sources of Law Regulating Recognition and Enforcement of Foreign Arbitral Awards.

“As a general rule, the legal effect of a court decision is limited to the territory of the State, where it was rendered”⁴. In the Republic of Belarus the decisions of foreign courts, including awards of foreign arbitration courts, acquire legal effect after the procedure of their recognition and enforcement.

Recognition and enforcement of foreign arbitral awards is accomplished in the territory of the Republic of Belarus if recognition and enforcement of such awards is provided by legislation of the Republic of Belarus or international agreement or on the basis of reciprocity⁵ and is carried out in accordance with international rules and national legislation of the Republic of Belarus.

National sources of law, governing the procedure of recognition and enforcement of foreign arbitral awards in the Republic of Belarus vary from the Constitution of the Republic of Belarus to subordinate legislation.

Thus, the Constitution of the Republic of Belarus contains the rule that the Republic of Belarus shall recognize the supremacy of the universally acknowledged principles of international law and ensure that its laws comply with such principles⁶.

⁴ See, BOGUSLAVSKIY M.M, MEJDUNARODNOE CHASTNOE PRAVO [INTERNATIONAL PRIVATE LAW] 381 (MEJDUNARODNIE OTNOSHENIYA 2D ED. 1999) (1974)

⁵ See, Code of Economic Procedure of the Republic of Belarus [Code of Economic Procedure] on December 15, 1998, (last redaction on July 1, 2007, Nacionalniy Reestr Pravovih Aktov Respubliki Belarus' [NRPA], 2/1348, 2007), art. 245.

⁶ See, Constitution of the Republic of Belarus on March 15, 1994, (with amendments, adopted at Republic Referendum on November 24, 1996 and October 17, 2004) NRPA 05.01.1999, N 1, 1/0, art. 8.

The major national source, providing rules for recognition and enforcement of foreign arbitral award in the Republic of Belarus is the Code of Economic Procedure of the Republic of Belarus (hereinafter – Code of Economic Procedure⁷).

Article 397 of Code of Economic Procedure of the Republic of Belarus of 1964 contained only declaratory norm, providing for possibility to enforce foreign arbitral awards during the period of three years after their entry into force.

Code of Economic Procedure, adopted on November 11, 1998 and Supplement 2 to the Code regulated the procedure of recognition and enforcement of foreign arbitral award in more detail but had a number of defects.

For example, article 229(5) considered awards of foreign arbitral courts as writs of enforcement. However, foreign arbitral award can not be equal to writ of enforcement, since it is inconsistently with the sovereignty of the Republic of Belarus and in contravention with the provisions of the New York Convention.

Article 230 (3) of the Code obliged the judge of Economic court to check the legality of the foreign arbitral award, what contradicted the principle of international commercial arbitration, that arbitral award can not be reconsidered on the merits.

The new redaction of Code of Economic Procedure of the Republic of Belarus, which entered into force on March 7, 2005 changed the procedure of recognition and enforcement of foreign arbitral awards significantly and eliminated the defects of previous redaction⁸.

First of all, new Code of Economic Procedure allotted economic courts of the Republic of Belarus with jurisdiction to consider cases on recognition and enforcement of foreign

⁷ It seems that more appropriate translation would be Code of Commercial Procedure, but Code of Economic Procedure is an official English translation according to information, presented at Supreme Economic Court web-site, available at www.court.by

⁸ See I.V. Pererva, *Osobennosti ispolneniya resheniy inostrannih mejdunarodnih arbitraznih sudov na territorii respubliki Belarus*, [Characteristics of Enforcement of Foreign International Arbitration Courts Awards in the Territory of the Republic of Belarus], 5-6, Promishlenno-Torgovoe Pravo [PTP], 326, 326-327 (2004).

arbitral awards, rendered on disputes, arising out of accomplishment of entrepreneurial and other commercial (economic) activity.⁹

The main advantage of new Code became categorizing of cases on recognition and enforcement of foreign court decisions and foreign arbitral awards into two separate kinds of proceedings in the economic court of first instance¹⁰.

The new Code set a one month period for consideration of application to recognize and enforce foreign arbitral award.

For the first time the Code of Economic Procedure provided requirements to the form and contents of the court order on recognition and enforcement of foreign arbitral award.

As far as considering the cases on recognition and enforcement of foreign arbitral award Economic court deals with documents of foreign origin, the procedure of authorization of such documents is clarified in the Act of the Plenum of the Supreme Economic Court of the Republic of Belarus, dated on December 2, 2005 No. 31 “On practice of consideration of cases with the participation of foreign parties by economic courts of the Republic of Belarus”.

Aiming to provide uniformity in recognizing and enforcing of foreign and domestic arbitral awards, as well as foreign court decisions, the Plenum of the Supreme Economic Court of the Republic of Belarus summarized the judicial practice on recognition and enforcement of foreign court decisions and foreign arbitral awards, on appealing to the awards of international arbitration courts, situated on the territory of the Republic of Belarus and passed on the 29 June 2006 the Act No. 10 “On the procedure of consideration by commercial courts cases on recognition and enforcement of foreign court decisions and foreign arbitral awards, on appealing to the awards of international arbitration courts, situated on the territory of the Republic of Belarus and issue of writ of enforcement”(hereinafter – Act of the Plenum of the Supreme Economic Court No. 10).

⁹ See, Code of Economic Procedure, art. 45.

¹⁰ See, Pererva, *supra* note 7, at 329.

Rules on recognition and enforcement of international arbitral awards are contained in the 9 July 1999 Act “On international arbitration court”¹¹. The Act mainly regulates the activity of the permanent international arbitration court, created according to article 2 of the given Act – International arbitration court of the Belarusian Chamber of Commerce and Industry, and as well applies to ad hoc arbitration court, situated in the territory of the Republic of Belarus.

However, article 45 of Act “On international arbitration court” contains a provision, concerning foreign international arbitration courts and provides that in the territory of the Republic of Belarus recognition and enforcement of awards of foreign international arbitration courts, irrespective of what foreign country they were rendered in, is carried out in accordance with the procedure, established by the legislation on economic procedure of the Republic of Belarus.

A state duty is imposed on the applications to recognize and enforce foreign arbitral award, what is provided in the Act of the Republic of Belarus adopted on 10 January 1992 “On State Duty”¹².

These acts are characterized by the novelty of legal regulation of Belarusian economic courts activity on recognition and enforcement of foreign arbitral awards, reflect interest of the Republic of Belarus to improve this institute of law of economic procedure.

1.2 International Agreements as the Standard for the Recognition and Enforcement of Foreign Arbitral Awards.

Recognition and enforcement of foreign arbitral awards by Belarusian courts is based on the principle of supremacy of international law, set in the article 8 of the Constitution of the Republic of Belarus and article 25 of the Code on Economic Procedure. It means that in

¹¹ Act of the Republic of Belarus “On international arbitration court” on July 9, 1999 (NRPA, 2/219, 2000).

¹² Act of the Republic of Belarus “On State Duty” on Jan. 10, 1992 (NRPA, 2/1398, 2007), art. 2 (1.3.)

case, when international agreement provides rules for recognition and enforcement of arbitral awards other than those, set by national laws, economic court will apply rules of international agreement.

The main international agreement, regulating recognition and enforcement of foreign arbitral awards is United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (hereinafter - the New York Convention)¹³.

The New York Convention came into force almost 50 years ago and at present time 142 countries are members to it¹⁴.

The New York Convention was not the first attempt to set in international agreement rules in the area of international arbitration. Among its predecessors there can be named Protocol on Arbitration Clauses (Geneva, 1923) (hereinafter - the Geneva Protocol)¹⁵ and 1927 Geneva Convention on the Execution of Foreign Arbitral Awards (hereinafter – the Geneva Convention)¹⁶.

The Geneva Protocol was adopted in order to separate disputes settled by arbitration, the parties to which came from different countries from regular disputes, decided by state courts and ensure enforcement of arbitral awards on the territory of the state, where they were rendered.

The Geneva Convention aimed to extend the application of the Geneva Protocol and ensure execution of arbitral awards, outside the State where they were rendered. However, the Geneva Convention had several drawbacks. First of all it provided that parties to disputes, settled by arbitration court must be persons, domiciled in different States. Secondly, the Geneva Convention set principle of “double exequatur”, according to which in order to

¹³ The UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards [the New York Convention], June 10, 1958, 330 UNTS 4739, 38.

¹⁴ The New York Convention, United Nations Commission on International Trade Law, available at http://www.uncitral.org/pdf/07-87406_Ebook_ALL.pdf

¹⁵ The Geneva Protocol on Arbitration Clauses Sep. 24, 1923, 27 LNTS 157.

¹⁶ The Geneva Convention on the Execution of Foreign Awards of Sep. 26, 1927, 92 LNTS 301.

enforce foreign arbitral award abroad it was necessary to get firstly exequatur in the State court of the country, where it was rendered and only after that in the state court of the country of execution (domicile of the award-debtor or country of location of its assets). Thus, regulations of the Geneva Convention did not satisfy the requirements of international commerce, which burst out after the Second World War and to preparation of the New York Convention draft by united forces of ICC and ECOSOC and its adoption on the UN Conference in New York in 1958¹⁷.

The New York Convention made a radical step forward in comparisons with the Geneva Protocol and the Geneva Convention. First of all, it gave up the archaic principle of “double exequatur”, which significantly complicated the procedure of execution of arbitral award. Moreover, it formulated an exhaustive list of grounds which allow courts in the country of enforcement to refuse the recognition and enforcement of foreign arbitral award. Finally, it joined in a single document rules on form of the arbitral agreement and rules on enforcement of foreign arbitral awards.

Several international agreements were adopted in development of the New York Convention. Above all it is European Convention on International Commercial Arbitration of 1961 (done at Geneva, April 21) (hereinafter – the European Convention)¹⁸ and UNCITRAL Model Law on International Commercial Arbitration of 1985 (A Proposal for National Legislation) (hereinafter-UNCITRAL Model Law)¹⁹. These acts expanded the application of the institution of international commercial arbitration, regulated the procedure of enforcement of international arbitration awards in the country, where they were rendered, and went even

¹⁷ See, A. Borodak, *Konvencija OON po priznanju i ispolnenju inostrannih arbitraznih reshsniy 1958 goda: problema tolkovaniya i primeneniya* [UN Convention on Recognition and Enforcement of Foreign Arbitral Awards on 1958: the Problem of Interpretation and Application], 3, *Nedvijimost' i investicii: pravovoe regulirovanie*, 104, 105-106 (2005).

¹⁸ European Convention on International Commercial Arbitration, April 21, 1961, 484 UNTS 364.

¹⁹ UNCITRAL Model Law on International Commercial Arbitration of 1985 (A Proposal for National Legislation, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html

further in restriction of state courts to interfere in dispute, already settled or supposed to be settled by international commercial arbitration.

Such features of Convention as limitation of state courts interference in the dispute, submitted to arbitration by arbitration agreement, fixing of exhaustive list of documents, necessary for recognition and enforcement of foreign arbitral awards and exclusive list of grounds for refusal to recognize and enforce foreign arbitral award, denial of the principle of “double *exequatur*” obtained broad recognition and embodiment in various national legal acts of different countries, the Republic of Belarus among them. These principles were not just adopted, but are being developed, which causes the necessity to study the interrelation of norms of Convention and norms of national legislation. Moreover, devices provided by the Convention for recognition and enforcement of foreign arbitral awards became the basis for the development of national legislation, regulating recognition and enforcement of domestic arbitration awards²⁰.

In view of large quantity of countries-members to the New York Convention, it seems impossible to amend text of the Convention, as it would lead to parallel operation of several versions of the Convention and originating of different categories of member countries.

Continuous development of national legislation on commercial arbitration, based on principles and devices of the New York Convention, transformation of meaning of concepts, contained in the Convention, require permanent study and generalizing of practice on its interpretation and application.

For above stated reasons a great importance is attached nowadays to uniformity of the interpretation of concepts, used in the New York Convention, uniformity of application of

²⁰ See e.g., B. Karabelnikov, *New-Yorkskaya Konvenciya 1958 goda o priznanii i privedenii v ispolnenie inostrannih arbitrajnih resheniy (Problemi teorii i praktiki primeneniya)* [New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (problems of theory and application)], (unpublished candidate of legal science dissertation, (Moscow, 2001) (on file with author).

national legislation, adopted in development of the Convention and, and practice of its application by state courts of different countries.

Chapter 2. Procedure of Recognition and Enforcement of Foreign Arbitral Awards in the Republic of Belarus.

2.1 . General Standards and Conditions for Recognition and Enforcement of Foreign Arbitral Awards in the Republic of Belarus.

Awards of international arbitration courts, regardless of what country they were rendered in, are recognized and enforced on the territory of the Republic of Belarus in accordance with the economic procedural legislation of the Republic of Belarus and its international agreements²¹.

As far as it is directly provided by the Code of Economic Procedure, that in case rules, set by international agreement of the Republic of Belarus are different from rules, contained in national legislation, the rules of international agreement shall apply, the first source of law, regulating recognition and enforcement of foreign arbitral awards to be addressed is the New York Convention.

In the territory of the New York Convention member country it may be sought recognition and enforcement of foreign arbitral award rendered either in the territory of the country member to the New York Convention or not.

Foreign arbitral awards rendered in the territory of the countries members to the New York Convention are recognized and enforced by economic courts of the Republic of Belarus according to the Convention.

If the award comes from the arbitration court of the country, which is not a party to the New York Convention, its recognition and enforcement is accomplished on the basis of principle of reciprocity²².

²¹ See, Act “On international commercial arbitration”, Supra, note 10, art, 45.

²² Code of Economic Procedure art. 245.

However, in the Republic of Belarus this principle has never been applied in practice, as a result of the absence of that sort of applications²³.

Regarding the procedure of recognition and enforcement of foreign arbitral awards the New York Convention refers to the rules of national legislation of the state where the recognition and enforcement of the award is sought.

“Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards”²⁴.

Article 45 of the Code of Economic Procedure of the Republic of Belarus allots economic courts with jurisdiction to consider cases on the recognition and enforcement of foreign arbitral awards on disputes, arising out of accomplishment of entrepreneurial and other commercial (economic) activity.

Conditions and procedure of the recognition and enforcement of foreign arbitral awards in the Republic of Belarus are stated in Chapter 28 of the Code of Economic Procedure of the Republic of Belarus.

Article 245 of the Code of Economic Procedure sets that cases on recognition and enforcement of foreign arbitral awards are considered by commercial court on application of a prevailing party to arbitration, seeking recognition and enforcement of foreign arbitral award.

According to paragraph 2 of article 250 of the Code of Economic Procedure foreign arbitral award can be presented for recognition and enforcement during 3 years period after it

²³ See, A. Garnovsky, *Priznanie i privedenie v ispolnenie inostrannih arbitrazhnyh resheniy na terrioirii Respubliki Belarus'* [Recognition and enforcement of foreign arbitral awards in the territory of the Republic of Belarus] 24, *Vestnik Vishego Hozyastvnnogo Suda Respubliki Belarus'*, 65, 66 (2005) [hereinafter – VVHS RB].

²⁴ The New York Convention, *Supra* note 11, art. III.

entered into force. If the term is missed it can be renewed by court at the application of award-creditor under certain rules, set by the Code of Economic Procedure.

However, paragraph 9 of the Act of the Plenum of the Supreme Economic Court No. 10 provides that when recognizing and enforcing foreign arbitral award under the rules of the New York Convention it is necessary to take into account, that the Convention does not provide lapse of statute of limitation as a ground to refuse recognition and enforcement of foreign arbitral award.

The problem which can arise in connection with these provisions of national law is that though lapse of statute of limitation is not a ground to refuse recognition and enforcement of foreign arbitral award, the provision of article 250 of Code of Economic Procedure can hinder in initial consideration of the application by the court.

When application to recognize and enforce foreign arbitral award is brought before the court, the latest decides on both recognition and enforcement simultaneously and renders the order either to recognize and enforce the award, or to decline recognition and enforcement, though directly enforcement is carried out later on bases of enforcement writ.

M. Goronkov, however, supposes that it is it might be useful to consider the issue of recognition of the award separately from issue of enforcement. He argues that recognition of an award is usually only tied to observance of some legal conditions, and does not directly affect debtor's assets. It is enforcement that affects. That is why when enforcing an award in one country it is necessarily to take into consideration the results of previous enforcement of the award in different countries. In this sense, full recognition of the award in different countries is conflict-free, while enforcement of the same award in full violates debtor's rights.

However, neither national legislation, nor New York Convention provides as a ground for refusal of recognition and enforcement of the award it's partial or full enforcement in other

country. This reflects the independent existence of recognition and enforcement of foreign arbitral award.

If court does not find grounds to refuse recognition and enforcement it can not recognize only part of the award. That is why Goronkov offers to apply separately for recognition of the award, and after court recognizes it entirely, to apply for its enforcement.

Then it is possible to resist enforcement in full by means of presenting evidence of partial enforcement of the award abroad, but order on its recognition will not suffer, since subject of recognition is not execution of the award, but its transforming effect (closure of a dispute between parties).

This approach, according to Goronkov, facilitates establishment of world law order, since all lawful awards are recognized and judge, considering issue in recognition and enforcement of the award is not involved in reviewing merits of the case²⁵.

2.2 Formal Requirements and Procedure of Recognition and Enforcement of Foreign Arbitral Awards in the Republic of Belarus.

To start the procedure of recognition and enforcement of foreign arbitral award the party, claiming the recognition and enforcement should bring the application to the Commercial Court of the Republic of Belarus²⁶.

Application to recognize and enforce foreign arbitral award is brought to the economic court of the Republic of Belarus where the debtor is domiciled or if its domicile is unknown where its assets are situated²⁷.

²⁵ See, M. Goronkov, *Nekotore posledstviya priznaniya i otказа v priznanii I privedenii v ispolnenie resheniya inostrannogo suda ili inostrannogo arbitrajnogo resheniya* [Some consequences of recognition and refusal to recognize and enforce foreign court decision and foreign arbitral award] 7, VVHS RB, 40, 40-43 (2005).

²⁶ Code of Economic Procedure art. 245.

²⁷ Code of Economic Procedure art. 246.

The application must be in written form and signed by the plaintiff or his representative²⁸.

According to paragraph 3 of article 246 of the Code of economic procedure the application must indicate:

- name of the Court where the application is submitted;
- name, location and composition of foreign arbitration court, which rendered the award;
- name and residence of the plaintiff (award-creditor);
- name and residence of the respondent (award-debtor);
- information about the arbitral award, the recognition and enforcement of which is sought;
- claim to recognize and enforce the foreign arbitral award;
- a list of enclosed documents.

Party applying for recognition and enforcement of foreign arbitral award shall supply together with an application:

- the duly authenticated original award or a duly certified copy thereof;
- the original arbitration agreement or a duly certified copy thereof²⁹;
- a duly authenticated translation of these documents into one of official languages of the Republic of Belarus (Russian or Belarusian);
- a document, verifying payment of state due.

The amount of state due is defined by paragraph 12 of supplement 2 to the 14 September 2006 President of the Republic of Belarus Decree №574 “On some issues on levy of state due”.

²⁸ *Id.* 246

²⁹ New York Convention provides the same, *See Supra*, note 11, art. IV.

Commercial court returns the application to recognize and enforce a foreign arbitral award without consideration if the above mentioned requirements are not satisfied³⁰.

According to the report of the chairman of the Supreme Economic Court of the Republic of Belarus in practice the primary reason for the return of application to recognize and enforce foreign arbitral award is absence of the document, confirming the payment of state due. Among other reasons there are non-observance of requirements to the form of the application and failure to send copy of the application to the debtor³¹.

Return of application does not deprive the applicant party of the right to bring again the application to the court, after the elimination of all defects, which caused the return.

The application to recognize and enforce foreign arbitral award is considered by a single judge within one month period³².

Commercial Court notifies parties about the date and place of proceedings; however failure of a party, properly notified, to appear does not prevent the proceeding.

According to article 247 of the Code of Economic Procedure while considering the case the court ascertains presence or absence of grounds for recognition and enforcement of foreign arbitral awards, set in article 248 of the Code of Economic Procedure, by way of examination of evidence, substantiating alleged claims and objections, produced before the court.

After considering an application the court renders the order, granting or denying recognition and enforcement of foreign arbitral award, which enters into force immediately, but can be appealed in the Court of Appeal or in Reviewing Authority³³.

³⁰ Code of Economic Procedure art. 246.

³¹ See, V. Kamenkov, *Opit hozyaystvennih sudov Respubliki Belarus' po priznaniu i privedeniu v ispolnenie resheniy inostrannih sudov i inostrannih arbitrazhnykh resheniy* [Experience of the Court of the Republic of Belarus in Recognition and Enforcement of Decisions of Foreign Courts and Foreign Arbitral Awards] 21, VVHS RB, 10, 12 (2006).

³² Code of Economic Procedure art. 247.

³³ *Id.*, art. 249.

The above described procedure is actually the procedure of recognition of foreign arbitral award. If Economic Court ordered the recognition and enforcement the next stage is enforcement of foreign arbitral award itself.

Enforcement of foreign arbitral award is carried out by court officers on basis of the writ of the court, which rendered the ruling to recognize and enforce foreign arbitral award. The writ is issued immediately after the rendering of the order to recognize and enforce foreign arbitral award and can be submitted for execution under the rules of the Code of Economic Procedure³⁴.

In case when debtor appeals to the Court of Appeal, the latest can suspend the enforcement³⁵.

2.3 The Problem of Determination of the Nationality of the Award Rendered by International Commercial Arbitration Court.

Most of provisions of international agreements and national laws apply only to “foreign” arbitral awards which are different from “domestic” arbitral awards, what leads to the differences in the procedure of their recognition and enforcement and challenging.

The New York Convention applies to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought³⁶.

According to the opinion of many foreign legal scholars in international commercial arbitration the New York Convention applies to every case of rendering of the award in the

³⁴ *Id.*, art. 250.

³⁵ *Id.*, art. 292.

³⁶ *See*, The New York Convention, *Supra* note 12, art. I(1).

territory of foreign state, and can as well entail cases, when award is rendered on the territory of the state of enforcement.³⁷

“The question what constitutes a non-domestic award within the meaning of the New York Convention is one of the most complicated issues posed by this treaty”³⁸.

Though international commercial arbitration is less connected to national legal order, than national courts, it still has some connections to it. First of all it’s a law, chosen by parties and secondly – procedural law, determined by the place of arbitration. These interconnections are fixed in the New York Convention. Thus, form of arbitration agreement and procedural rules are determined by parties, and in the absence of parties’ agreement the rule of place of arbitration is applied in both cases³⁹.

The place where the award was rendered is important for determination on the validity of arbitration agreement and entry of arbitral award in force for recognition and enforcement purposes⁴⁰.

To determine the area of application of the New York Convention it is necessary to ascertain what arbitral awards, besides those, rendered in the State other than the Republic of Belarus, are not considered domestic in the Republic of Belarus.

“Articles 44 and 45 of Act of the Republic of Belarus “On international arbitration court” make it possible to define foreign arbitral awards as awards, rendered by foreign international arbitration courts in foreign country and to define “domestic” arbitral awards as awards of permanent international arbitration court, incorporated in the Republic of Belarus or ad hoc arbitration court, situated in the territory of the Republic of Belarus”⁴¹.

³⁷ See e.g., ALBERT JAN VAN DEN BERG, *Non-Domestic Arbitral Awards under the 1958 New York Convention*, in *ARBITRATION INTERNATIONAL*, 215 Vol. 3 (1986).

³⁸ *Id.*, at 191.

³⁹ The New York Convention, *Supra* note 12, art. V (1) (a), V (1) (d).

⁴⁰ *Id.*, art. V (1) (a), V (1) (e).

⁴¹ A. Danilevich, *Vnutrennie i inostrannye arbitrazhnye resheniya [Domestic and Foreign Arbitral Awards]* 24, *VVHS RB*, 51, 52-53 (2006).

It evident from articles 44⁴² and 45⁴³ of Act “On international arbitration court” that legislator used three criteria to define the “nationality” of arbitral award:

- 1) place of incorporation of permanent international arbitration court;
- 2) location of ad hoc international arbitration court;
- 3) place, where the award was rendered.

As it was mentioned above, the classification of awards into “foreign” and “domestic” has a practical significance, because different rules are applied for recognition and enforcement of foreign arbitral award and challenge and enforcement of domestic arbitral award.

That is why the new redaction of the Code of Economic Procedure of the Republic of Belarus contains two special chapters on the issue: chapter 28 - “Proceedings on cases on recognition and enforcement of decisions of foreign courts and foreign arbitral awards” and chapter 29 “Proceedings on cases on challenge of awards of international arbitration courts, situated on the territory of the Republic of Belarus and on issue of writ of execution”. However, the Code of Economic Procedure does contain neither the definition of “foreign arbitral award” nor the definition of “domestic arbitral award”.

⁴² Awards of permanent international arbitration courts ...(incorporated in the territory of the Republic of Belarus)...as well awards of ad hoc arbitration courts, situated in the territory of the Republic of Belarus, are enforced according to legislation on economic procedure of the Republic of Belarus.

⁴³ Awards of foreign international arbitration courts, irrespective of what country they were rendered are recognized and enforced according to legislation on economic procedure of the Republic of Belarus and its international agreements.

Chapter 3. The Grounds for Refusal to Recognize and Enforce Foreign Arbitral Awards in the Republic of Belarus.

Grounds to refuse recognition and enforcement of foreign arbitral awards are contained in both national legislation of the Republic of Belarus and its international agreements.

Article 248 of the Code of Economic Procedure sets grounds for refusal of recognition and enforcement of both decisions of foreign state courts and awards of foreign arbitration courts.

However, seven out of eight grounds, provided in the first part of the article 248 of the Code of Economic Procedure are not applied to the recognition and enforcement of foreign arbitral award, but only to the decisions of foreign state courts.

At the same time, second part of article 248 of the Code on Economic Procedure provides, that Economic court refuses to recognize and enforce foreign arbitral award fully or in part on the ground, provided in paragraph 8 of the first part of the article⁴⁴, unless international agreement of the Republic of Belarus does not provide otherwise.

If we connect the two parts of the article together we will get the following wording: Economic court refuses to recognize and enforce foreign arbitral award fully or in part if the enforcement of the decision would be contrary to the public policy of the Republic of Belarus, unless international agreement of the Republic of Belarus provides otherwise.

Thus, literal meaning of this provision gives impression that international agreement may provide for recognition and enforcement of foreign arbitral award, in spite of the fact, that its recognition and enforcement would be contrary to the public policy of the country.

However, the provision is construed in Belarusian juridical literature in a way that the real intention of law maker, was to entitle the court with a right to refuse the recognition and

⁴⁴If enforcement of the decision would be contrary to the public policy of the Republic of Belarus.

enforcement of foreign arbitral award on a number of the grounds, provided in international agreement of the Republic of Belarus⁴⁵.

The New York Convention as the main international agreement, regulating recognition and enforcement of foreign arbitral awards provides in article V an exclusive list of grounds for refusal of recognition and enforcement of foreign arbitral awards. “In addition, the grounds for refusal are to be interpreted restrictively in accordance with the purpose of the NYC”.⁴⁶

However, as far as article 245 of the Code of Economic Procedure provides, that in the Republic of Belarus recognition and enforcement of foreign arbitral awards can be carried out on the basis of reciprocity, it can be made a conclusion, that in such case, the sole ground to refuse recognition and enforcement would be the contradiction of the consequences of the award to the public policy of the Republic of Belarus.

3.1 Procedural Grounds under the New York Convention for Refusal to Recognize and Enforce an Award.

Part 1 of the article V lists five grounds when recognition and enforcement of the award may be refused by the competent authority where the recognition and enforcement is sought at the request of the party against whom it is invoked if that party proves one of these grounds.

Thus analyzing the first part of the article V of the New York Convention we come to conclusion, that:

1) Only the unsuccessful party in the arbitration (award-debtor) but not the court itself can invoke one of these five grounds to resist the recognition and enforcement of the award, and

2) Burden of prove lies on the party, opposing the recognition, and

⁴⁵ See e.g., Garnovsky, *supra* note 22, at 67.

⁴⁶ See JAN ALBERT VAN DEN BERG, *supra* note 36, at. 297.

3) There is an acknowledged opinion⁴⁷, that even if the two first conditions are satisfied it is not an obligation, but a right of the competent authority to refuse the recognition and enforcement of arbitral award. This opinion is based on the wording of the first sentence of article V of Convention “the recognition and enforcement of the award “may be refused” (but not “must be refused”) by the competent authority.

3.1.1. Incapacity of the parties and formal invalidity

The first ground that the party opposing enforcement may invoke is the material or formal invalidity of the arbitration agreement⁴⁸.

This ground is provided in article V (1) (a) of the New York Convention and is referred to the invalidity of the arbitration agreement as a result of parties incapacity or of other reasons. Thus, invalidity of arbitration agreement causes the loss of legal basis of arbitration proceeding and in particular lack of a basis for enforcement of foreign arbitral award.

The New York Convention does not indicate under the law of what country the incapacity of parties should be determined. That is why it is necessary to find a conflict rule in national legislation of the Republic of Belarus, which will determine the law to be applied in ascertaining the incapacity of the party to arbitration agreement. In Belarusian legislation these choice-of-law rules are contained in the article 1104 of the Civil Code of the Republic of Belarus⁴⁹.

⁴⁷ See e.g., B. Karabelnikov, *supra* note 18, at 149.

⁴⁸ See, Recognition and Enforcement of Arbitral Awards: The New York Convention (UN conference on trade and development) (2003), available at http://www.unctad.org/en/docs/edmmisc232add37_en.pdf.

⁴⁹ Civil Code of the Republic of Belarus [Civil Code] (Dec. 07, 1998, NRPA № 305, 2/1398 (2007)).

Economic courts should take into account that according to international agreements of the Republic of Belarus legal status of foreign participants of economic proceedings is determined according to their “lex personalis”.⁵⁰

Conditions of formal invalidity of arbitration agreement, provided by article V(1) (a) of the New York Convention are subject to principle of autonomy of the parties and can be established according to the law of the country parties submitted the arbitration agreement or arbitration clause to. If it is impossible to ascertain such law, the law of the country where the award was rendered shall be applied.

Often party, resisting recognition and enforcement of the award alleges invalidity of arbitration clause and lack of the competence of the arbitration court to consider the case.

However, when the award-debtor invokes ground, contained in article V(1)(a) of the New York Convention and bases its defense on the fact, that the name of the court, provided in arbitration agreement differs from the name of the court, where the award was rendered (usually misspelling), and alleges on this fact, that there was no arbitration agreement between parties, the enforcing authority usually recognizes and enforces such award, when it finds out that the real intention of the parties was to submit the dispute to arbitration in that very court, where the award was rendered.

Supreme Economic Court of the Republic of Belarus considered application of “T” LLC to recognize and enforce the award of the International Commercial Arbitration Court at the RF Chamber of Commerce and Industry (hereinafter - ICAC) against CJSC “S”.

There was an agreement between parties, which provided that “any dispute, controversy or claim which may arise out of or in connection with the present contract (agreement) or the execution, breach, termination or invalidity thereof, shall be settled by the Commercial

⁵⁰ Article 31(2) of the Act of Supreme Economic Court of the Republic of Belarus No. 31, Dec.2, 2005 “On practice of consideration cases with participation of foreign parties by economic courts of the Republic of Belarus” (NRPA 4/17, 2007).

Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation in accordance with its Rules”.

CJSC “S” opposed recognition and enforcement of the award on the ground that arbitration agreement is invalid (article V (a) of the New York Convention) because in the arbitration clause in the name of the court word “International” was omitted and therefore parties did not intend to submit dispute to arbitration and ICAC had no competence to settle the dispute.

The Court held that there is no ground to refuse recognition and enforcement of the award, because at the time of case consideration in ICAC parties did not contest that concluding arbitration agreement they meant International Commercial Arbitration Court at the RF Chamber of Commerce and Industry⁵¹.

3.1.2. Violation of Due process

The ground set in article V(1)(b) of the New York Convention provides that the party against whom the award is invoked must be given a proper notice of the appointment of the arbitrator or of the arbitration proceedings and must be able to present his case. This provision concerns the fundamental principle of procedural law to enable both parties to present their case.

The notion of “*proper notice*” implies that the notice of the appointment of the arbitrator and of the arbitral proceedings must be adequate and appropriate. “This does not mean that it must be in a particular form,⁵² nor does it designate the time limit in which the respondent should name the arbitrator(s).”⁵³

⁵¹ Postanivlene Vishego Khozyaystvennogo Sude Respubliki Belarus No. 5-6 Ип/2004/106K [The Supreme Economic Court of the Republic of Belarus decision No. 5-6 Ип/2004/106K].

⁵² See Tribunal Superior de Justicia, Eighteenth Civil Court of First Instance for the Federal District of Mexico, 24 February 1977, Presse Office S.A. v. Centro Editorial Hoi S.A., YCA, Vol. 4 (1979), at 301-302; Tribunal

“The wording “*unable to present his case*” implies a concept restricted to serious violations of the arbitral procedural rules. It includes the arbitrators’ duty to inform the other party of whatever arguments and evidence had been submitted by the opposing party, thus giving the former a chance to reply”.⁵⁴ Furthermore, a party which purposely does not participate in the proceedings before the arbitrators and remains inactive may not rely on Article V(1)(b). This also includes awards rendered in default⁵⁵.

These conditions are considered according to rules, provided by the law of the country of arbitration, and the party, resisting enforcement should prove them.

However, there is an opinion in legal doctrine⁵⁶, that as soon as party alleges that it was not given a proper notice of the appointment of arbitrator or arbitration proceedings the burden of prove passes on the other party and now it is a party seeking enforcement, who has to produce evidence, that the other party was properly notified. This approach seems logical to me and Belarusian courts usually require such evidence from the party, asking for recognition and enforcement of the award.

The Arbitration Institute of the Stockholm Chamber of Commerce rendered an award in favor of the German company “A” (hereinafter- “A”), entitling it to collect from Belarusian State Agricultural Enterprise “B” (hereinafter – “B”) 73726, 4 Euro (payment for merchandise, interest on debt and arbitration costs).

“A” brought an action in the Economic Court of Brest Region to recognize and enforce the award. “B” resisted the recognition on the ground of V (1) (b) of the New York

Superior de Justicia, Court of Appeals (Fifth Chamber) for the Federal District of Mexico, 1 August 1977, *Malden Mills Inc. v. Hilaturas Lourdes S.A.*, YCA, Vol. 4 (1979), at. 302-304; Landgericht of Zweibrücken, 11 January 1978, YCA, Vol. 4 (1979), at 262-264, quoted in *Supra* note 47.

⁵³ Corte di Appello di Napoli, 20 February 1975, *Carters (Merchants) Ltd. v. Francesco Ferraro*, YCA, Vol. 4 (1979), at 275-279, quoted in *Supra* note 47.

⁵⁴ *Oberlandesgericht of Hamburg*, 3 April 1975, YCA, Vol. 2 (1977), at. 241.

⁵⁵ GAILLARD EMMANUEL & SAVAGE JOHN, *GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION*, 301-302, (E. Gaillard & John Savage eds., 1999)

⁵⁶ See e.g., I. Pererva, *supra* note 7, at. 328.

Convention, alleging that it had not been given a proper notice on time and place of arbitration. Besides, “B” contested the amount of the debt to be collected.

However, “B” could not produce any evidence before the court to prove its allegation of the absence of notice on time and place of arbitration, when “A” on the contrary proved, that “B” had been put on notice of the time and place of the arbitration. “A” presented an air waybill of global mail and messenger service with a note of serving, sent by Arbitration Institute of the Stockholm Chamber of Commerce.

Considering second argument, concerning the amount of debt to be paid, the court held that according to article 247 of the Code on Economic Procedure of the Republic of Belarus, when considering application to recognize and enforce a foreign arbitral award it has no right to review merits of the case.

Thus, Economic Court of Brest Region, ruled to recognize and enforce the award of Arbitration Institute of the Stockholm Chamber of Commerce⁵⁷.

In another case, Economic Court of Vitebsk Region considered the application of Joint-Stock Company “Elpis” (Latvia) to recognize and enforce the award of arbitration court “Baltic scirejtiesa” against Belarusian enterprise “Kontaleks” to pay “Elpis” JSC penalty interest and arbitration costs to the amount of 155 784, 99 \$. The Court ascertained that “Kontaleks” was not given proper notice of the day, place and time of the proceeding and refused the recognition and enforcement of the award on the ground of paragraph 3 of article 248 of the Code of Economic Procedure⁵⁸.

However, “Baltic scirejtiesa” is a Latvian International Arbitration Court and the Economic Court of Vitebsk Region made a mistake in applying paragraph 3 of article 248, which applies only to the recognition and enforcement of the decisions of foreign state courts.

⁵⁷ Opredelenie Economicheskogo sude Brestskoy oblasti ot 14.12.2005 N 3-3Иx/05 [Ruling of the Economic Court of the Brest region on 14.12.2005 N 3-3Иx/05].

⁵⁸ Opredelenie Economicheskogo sude Vitebskoy oblasti ot 24.22.2005 N 3-2B/05 [Ruling of the Economic Court of the Brest region on 24.22.2005 N 3-2B/05].

The recognition and enforcement of awards of Latvian International Arbitration Courts should be governed by the rules of the New York Convention, and in this very case refused under article V (1) (b) of the Convention, if “Kontaleks” invoked this ground to oppose recognition and enforcement and proved, that it had not been given proper notice of the arbitration proceedings and had been unable to present its case.

3.1.3. *Excess of Authority by the Arbitrator*

The ground to refuse recognition and enforcement of foreign arbitral award, set in article V(1)(c) of the New York Convention provides for impossibility to enforce arbitral award, which deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

“This expression covers situations where an arbitrator has decided matters covered neither by the arbitration agreement nor by the terms of reference”.⁵⁹ In other words, the arbitrator has decided claims not considered by the parties or outside the arbitration agreement. For example, when an arbitrator decided the dispute *ex aequo et bono* without proper authorization”.⁶⁰

This ground contains two kinds of conditions: arbitral award is rendered with the absolute exceeding of authority, provided by arbitration agreement or only in part.

In the first case the court refuses the recognition of the award as a whole. In the second case if the decisions on matters submitted to arbitration can be separated from those not so

⁵⁹ Terms of reference are usually drawn up jointly by the arbitrators and parties at the beginning of the arbitral proceedings to define the disputed matters GERHARD, WAGNER, “*D. Germany*” in: WEIGAND, PRACTITIONER’S HANDBOOK ON INTERNATIONAL ARBITRATION, 32 (Frank-Bernd eds., 2002).

⁶⁰ Patocchi & Jermini, “*Commentary on Articles 192 and 194*” in International Arbitration in Switzerland, Introduction and Commentary on Articles 176-194 of the Swiss Private International Law Statute, 660-661 Helbing & Lichtenhahn/Kluwer Law International (2000), quoted in *supra* note 47.

submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

3.1.4. Violation of Composition of the Arbitral Tribunal or Arbitration Proceedings

The ground, provided in article V(1)(d) of the New York Convention contains next conditions:

- 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.

An agreement by the parties regarding the composition of the arbitral tribunal or the arbitral proceedings supersedes the national rules of the country where the arbitration took place, except for the fundamental requirements of due process. “Generally, the law of the country where the arbitration took place comes into play in the absence of an agreement”⁶¹.

Thus, the priority is given to principle of autonomy of the parties and parties can freely decide the law of which country would govern their relations, regarding designation of composition of the court and arbitration procedure.

Only in the case of absence of direct instruction and impossibility to ascertain from the parties’ intention the law which parties chose to govern the composition of the court and arbitral procedure, Economic Court would apply the law of the country, where arbitration took place.⁶²

The Arbitration Institute of the Stockholm Chamber of Commerce rendered an award in favor of the German company “A” (hereinafter- “A”), entitling it to levy from Belarusian

⁶¹ See GAILLARD EMMANUEL & SAVAGE JOHN *supra* note 54, at 304.

⁶² See I. Pererva, *Supra* note 7, at 252.

State Agricultural Enterprise “B” (hereinafter – “B”) 73726,4 Euro (payment for merchandise, interest on debt and arbitration costs).

Economic Court of Brest Region granted leave to recognize and enforce the award of Arbitration Institute of the Stockholm Chamber of Commerce.

In appeal “B” asks to reverse the order of the Economic Court of Brest Region and deny recognition, alleging that “Arbitration Institute of the Stockholm Chamber of Commerce” had no jurisdiction to settle the dispute, since arbitration clause in the paragraph 15 of the agreement provided that...” any dispute shall be settled by international Arbitration Court in Stockholm, Sweden and according to the rules of the court”.

The Court of Appeal ascertained, that by the agreement parties determined that a competent authority to settle the dispute would be a non-state court – international Arbitration Court, and that this is an institutional court (not ad hoc, because parties named it Arbitration Court (starting with capital letters “A” and “C”), situated in Stockholm, Sweden.

The appellant did not produce any evidence that in Stockholm, Sweden there is any institutional international arbitration court, other than the court, which settled dispute between parties.

On the contrary, enclosed to the appeal inquiry answer of the chief legal expert of Belarusian Chamber of Trade and Commerce says that only one arbitration court with the name “Arbitration Institute of the Stockholm Chamber of Commerce operates in Sweden, Stockholm”.

Moreover, in the decision of the Economic court of Brest region it is provided, that according to article V(1) of the New York Convention the duty to produce evidence on the absence of grounds to recognize and enforce to foreign arbitral award, including the absence of arbitration court jurisdiction to settle the dispute rests on the party, against whom the claim to enforce the award is invoked. Moreover, this evidence shall be presented directly to the

court, considering application on recognition and enforcement of foreign arbitral award. In the court of first instance “B” did not challenge the jurisdiction of foreign arbitration court and in this connection arguments of “B” are unfounded. The Court of Appeal affirmed the order of Economic Court of Brest Region⁶³.

3.1.5. The Award Has Not Yet Become Binding or Has Been Set Aside or Suspended

The last ground of the first part of article V (e) provides that recognition and enforcement can be refused if the award has not yet become binding on the parties.

In foreign literature it is mentioned that the concept of final “binding award” in the sense of article V(1)(e) was an issue of discussion and prevailed the opinion, according to which the award is binding on the parties when it can not be challenged on its merits by means of appeal or cassation.⁶⁴

It is important to note that application to set the award aside was not mentioned as a means of challenge.⁶⁵

The drafters of the Convention chose the word “binding” in order to abolish the requirement of the double-exequatur which was the result of word “final” in the Geneva Convention of 1927⁶⁶.

In Russian text of the New York Convention ground V(1)(e) provides for refusal to recognize and enforce foreign arbitral award if the award has not become “final” yet (not “binding” as in English authenticated text). However, according to article 33 of the Vienna Convention on the Law of Treaties the terms of the treaty are presumed to have the same

⁶³ Postanivlene Vishego Ekonomicheskogo suda Respubliki Belarus ot 30.01.2006 N 3-3ИХx/2005/4K [The Supreme Economic Court of the Republic of Belarus decision on 30.01.2006 N 3-3ИХx/2005/4K]

⁶⁴ See Barbara Wysocka, *supra* note 3, at 183.

⁶⁵ Pererva I.V. *Okonchatelnost' resheniya Belorusskogo mejdunarodnogo arbitrajnogo suda i inie ego svoistva*, [The finality of the decision of Belorussian international arbitration court and its other features] 3 PTP, 129 (2006).

⁶⁶ South Pacific Properties (Middle East) Ltd. V. Arab Republic of Egypt, CASE[1984], ILM 1040 (1985).

meaning in each authentic text. That is why term “final” in Russian version should be understood as “binding” in English version.⁶⁷

Article V (1) (e) of the New York Convention allows to refuse recognition and enforcement if the award 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.

According to Article VI of the New York Convention if an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award.

The European convention of 1961 to which the Republic of Belarus is a party limits the application of Article V(1)(e) of the New York Convention solely to the cases of setting aside of the award, set out in paragraph 1 of Article IX of the European convention of 1961⁶⁸.

3.2 Substantive Grounds to Refuse Recognition and Enforcement of Foreign Arbitral Award under the New York Convention.

Article V(2) of the New York Convention provides two policy-oriented grounds to deny enforcement under the Convention. Grounds, provided in this category serve the vital interests of the forum country.⁶⁹ In contrast to grounds of the first category grounds provided in V(2) may be invoked by the court *ex officio*.

⁶⁷ See, Pererva, *supra* note 64, at 130.

⁶⁸ “(1) The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made and for one of the following reasons...”, See *supra* note 17, art. IX.

⁶⁹ INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION (J. PAULSSON et al. eds, 3rd ed. 1998).

3.2.1 *Subject Matter of the Difference is not Capable of Settlement by Arbitration*

According to article V (2) (a) recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the subject matter of the difference is not capable of settlement by arbitration under the law of that country.

The concept of arbitrability is concerned in this ground. For their part, national legal systems have reserved a number of issues for adjudication by the judiciary, thus making them non-arbitrable. Classic examples include antitrust, the validity of intellectual rights (patents, trademarks, etc.), family law and the protection of weaker parties, all of which differ from country to country.⁷⁰

In the republic of Belarus, the list of issues which are subject to exclusive competence of Economic Courts of the Republic of Belarus is provided in article 236 of Code of Economic Procedure of the Republic of Belarus, and contain cases on disputes on real property, situated in the territory of the Republic of Belarus, on bankruptcy of legal entities and sole proprietors, domiciled or resided in the Republic of Belarus, on disputes arising out of incorporation, registration and liquidation on the territory of the Republic of Belarus of legal entities and sole proprietors, etc.

3.2.2 *Public Policy Violation*

Violation of public policy of the country, where recognition and enforcement of foreign arbitral award is sought is a ground to refuse recognition and enforcement of foreign arbitral award.

⁷⁰ BORN G.B., INTERNATIONAL COMMERCIAL ARBITRATION, COMMENTARY AND MATERIALS, 258-264, Kluwer Law International/Transnational Publishers (2001).

This principle is enshrined in paragraph 2 article V of the New York Convention⁷¹ and article 36 of the UNCITRAL Model Law. As mentioned above, public policy exception is the only ground to refuse recognition and enforcement of foreign arbitral award, directly provided in the Code of Economic Procedure of the Republic of Belarus.

“The public policy exception to recognition and enforcement of foreign arbitral award is recognition of the State courts right to exercise ultimate control over the arbitral process”.⁷²

It is necessary to draw attention that the Convention uses “may be refused”, but not “must be refused” language, since the main presumption of the New York Convention is that arbitral awards are always subject to recognition and enforcement. However, the Code of Economic Procedure of the Republic of Belarus uses the word “refuses” in article 246 of the Code of Economic Procedure.

This tendency of new Code of Economic Procedure of the Republic of Belarus seems justified, as to my point of view, it is not lawful to use “may” possibility and recognize and enforce foreign arbitral award even if a court finds a ground to refuse recognition and enforcement.

Examining the accordance of foreign arbitral award to the public policy of the country, the court must analyze only consequences of recognition and enforcement of foreign arbitral award, but not look for deficiencies of the award itself. An arbitral award can not itself be contrary to the public policy of the country, only the consequences of its recognition and enforcement.⁷³

⁷¹ Article V(2)(b) of New York Convention provides, that recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country.

⁷² Audley Sheppard, *Public Policy and the Enforcement of Arbitral awards: Should there be a Global Standard?*, 2, Oil, Gas and Energy Law. Vol. I, (2003).

⁷³ A. Korochkin, *Primenenie ogovorki o publichnom poryadke pri rassmotrenii del o priznanii i privedenii v ispolnenie resheniy inostrannih sudov i inostranich arbitrazhnykh resheniy* [Application of public policy exception in cases on recognition and enforcement of foreign arbitral awards] 5 VVHS RB, 47, 48 (2006).

“Public policy is often regarded as a vague concept which is impossible to define, which varies from State to State”⁷⁴.

“In using the term "public policy", I mean those moral, social or economic considerations which are applied by courts as grounds for refusing enforcement of an arbitral award (either domestic or foreign).”⁷⁵

The English House of Lords in 1853 described public policy as "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against public good"⁷⁶.

In the Republic of Belarus the concept of public policy is provided in the article 1099 of the Civil Code of the Republic of Belarus: “Foreign law is not applied when its application is contrary to the fundamental principles of law (public policy) of the Republic of Belarus and in other cases, expressly provided by the law of the Republic of Belarus. In these cases the law of the Republic of Belarus is applied”.

A. Korochkin suggests the following classification of fundamental principles of Belarusian law:

a) Constitutional rules, in particular those, set in section II of the Constitution of the Republic of Belarus: “The Individual, Society and the State”.

b) fundamental principles of different fields of law:

- principle of supremacy of law;
- principle of social directivity of regulation of economic activity;
- principle of priority of public interests;
- principle of equality of participants of economic relations;
- principle of security of property;
- principle of contract freedom;

⁷⁴ See *supra* note 71, at 52.

⁷⁵ *Id.*

⁷⁶ *Egerton -v- Brownlow* (1853) 4 HLC 1.

- principle of free realization of civil rights, guaranteeing of restoration of infringed rights and their legal defense⁷⁷.

Uncertainty of the public policy concept encourages the unsuccessful party in the arbitration to resist enforcement of the foreign arbitral award on the grounds of public policy.

Recommendations of International Commercial Arbitration Committee of the International Law Association were adopted at the ILA's 70th Conference in New Delhi, in April 2002. The purpose of these Recommendations was to achieve greater consistency and predictability of public policy exception and to eliminate the extent of challenging of foreign arbitral award on this ground.⁷⁸

ILA adopted 16 recommendations for State courts to follow, when applying public policy exception. Among them there is a recommendation to consider a party to have waived its right to raise fundamental principles as a ground for refusing enforcement, if that party could have raised relied on any such principle before the tribunal but failed to do so (a public policy rule of the enforcement State cannot, however, be waived - intentionally or not) or that any part of the award that offends public policy should be severed (if possible) and that part that does not should be recognized or enforced⁷⁹.

In judicial practice of economic courts of the Republic of Belarus the challenge of the award on the ground of public policy is rather frequently invoked, but usually party, resisting the recognition and enforcement of foreign arbitral award hardly understands substance and extent to which public policy exception can be applied.

Economic court of the Republic of Belarus ruled to recognize and enforce the award of the International Commercial Arbitration Court at the RF Chamber of Commerce and Industry (hereinafter - ICAC). At the appeal respondent asked to reverse the court decision on the

⁷⁷ See A. Korochkin *supra* note 72, at. 41.

⁷⁸ International Law Association Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards, available at <http://www.ila-hg.org/>.

⁷⁹ Ibid.

ground of public policy, referring to paragraph 5 of the Act of the Plenum of Supreme Economic Court of the Republic of Belarus, dated 20 July 1999 No. 9 “On jurisdiction of cases after the assignment or novation of debt” (hereinafter – Act No. 9) which provides, that “existing legislation does not give parties, located or resided only in the Republic of Belarus, a right to conclude arbitral agreement (arbitration clause) to choose for dispute settlement foreign, in particular foreign international arbitration court, and if such clause is present in the agreement it is void by virtue of distribution of the jurisdiction of economic courts on the whole territory of the Republic of Belarus”.

However, from the case papers it was discovered that the contract was concluded not only between two parties, situated in the territory of the Republic of Belarus, but as well a third party, situated in the territory of the Russian Federation. In such case a dispute was subject to ICAC consideration.

The Court of Appeal ruled that the ICAC award was rendered with respect to both parties situated on the territory of the Republic of Belarus and a party, situated in the territory of Russian Federation and as a result of it the respondent’s reference to the paragraph 6 of the Act No. 9⁸⁰ is unfounded.

Therefore, recognition and enforcement of the ICAC award is not contrary to the public policy of the Republic of Belarus⁸¹.

In another case Economic Court refused recognition and enforcement of ICAC award, ordering Belarusian State Enterprise “B” to pay US company “T” US \$1,7 billion, because at the time of bringing the application to enforce the award and to collect the debt, there was commenced a bankruptcy proceeding against the debtor. The Court noted that recognition and enforcement of the award in this case would infringe interests of the State and interests of

⁸⁰ according to it in cases of decisions of foreign court and other bodies on disputes, parties to which are located or resided in the Republic of Belarus, the recognition and enforcement of such decisions must be denied, because such disputes in virtue of law are subject to consideration of economic courts of the Republic of Belarus.

⁸¹ Postanivlene Vishego Xozyaystvennogo Suda Respubliki Belarus No. 5-6 Ип/2004/106K [The Supreme Economic Court of the Republic of Belarus decision No. 5-6 Ип/2004/106K].

debtor's creditors and thus would be contrary to the public policy of the Republic of Belarus⁸².

It is important to examine the Relationship between paragraphs 1(b) and (2(b) of Article V of the New York Convention. While paragraph 1(b) deals with due process, paragraph 2(b) of Article V stipulates the ground for refusal of enforcement if the arbitral award is contrary to the public policy of the country where enforcement is sought. It is commonly recognized that due process constitutes part of public policy. In this context the question arises whether the specific provision of Article V(1)(b) excludes the due process grounds from the general provision of Article V(2)(b).⁸³ The importance of this question is obvious in light of the fact that the former ground may be considered by the court only if raised by the parties themselves, whereas the court takes account of the latter *ex officio*. Given the essential position of the due process requirement, it may be concluded that the special provision of Article V(1)(b) was inserted as a manifestation of its importance. Therefore, Article V(2)(b) should be interpreted as including the specific ground referred to in Article V(1)(b).⁸⁴

⁸² *Resheniya inostrannih i arbitrazhnikh (treteyskih) sudov, priznanie i privedenie v ispolnenie*, 22 VVHS RB 94, 97 (2005).

⁸³ This has also been noted as a problem by other legal scholars See e.g., ALBERT JAN VAN DEN BERG, *Non-Domestic Arbitral Awards under the 1958 New York Convention*, in *ARBITRATION INTERNATIONAL*, 299 Vol. 3 (1986)

⁸⁴ *Ibid.*, at 300.

CONCLUSION

According to the purpose of the paper, the author carried out the research on the recognition and enforcement of foreign arbitral awards in the Republic of Belarus and compared national legislation, regulating recognition and enforcement of foreign arbitral awards in the Republic of Belarus with standards, set in international treaties. However, absence of previous researches on the topic in the Republic of Belarus and poor judicial practice of Belarusian courts in this field did not give the author opportunity to provide deep critical analyses on the issue.

In general, the approach towards recognition and enforcement of foreign arbitral awards in the territory of the Republic of Belarus is in line with international tendency and international agreements of the Republic of Belarus. However, the author found out several flaws and deficiencies in national legislation and proposed some solutions on them. It should be noted, that due to the fact, that Belarusian courts consider cases on recognition and enforcement of foreign arbitral awards for just about 5 years, judicial practice on recognition and enforcement of foreign arbitral awards is not just poor, but often erroneous and contradictory.

1. According to paragraph 2 of article 250 of the Code of Economic Procedure foreign arbitral award can be presented for recognition and enforcement during 3 years period after it entered into force.

Paragraph 9 of the Act of the Plenum of the Supreme Economic Court No. 10 provides that when recognizing and enforcing of foreign arbitral award under the rules of the New York Convention it is necessary to take into account, that the Convention does not provide lapse of statute of limitation as a ground to refuse recognition and enforcement of foreign arbitral award.

There is an obvious collision of rules, which can result in different outcomes, as some courts would enforce awards, and others would not even start proceeding, but return applications without consideration.

Taking into account the pro-enforcement spirit of the New York Convention it might seem reasonable to refuse the time-limit rules with respect to foreign arbitral awards; however, time-limits for the commencement of proceedings for the recognition and enforcement of foreign arbitral award are laid in national legislation of almost countries members to the New York Convention.

Bur anyway, Belarusian law-maker should adopt a clear rule on this matter, so that provide uniformity in recognition and enforcement of foreign arbitral awards by different courts.

2. For purposes of recognition and enforcement of arbitral awards it is necessarily to distinguish domestic arbitral awards from foreign arbitral awards, since rules of different act are applied to their enforcement and challenge.

The New York Convention provides national lawmakers with discretion to decide what arbitral award are domestic and what arbitral awards are foreign.

However, the Code of Economic Procedure of the Republic of Belarus does contain neither the definition of “foreign arbitral award” nor the definition of “domestic arbitral award”. Though, some criteria to determine the nationality of the award can be drawn from the Act “On International Arbitration Court”, they are not sufficient to answer such unclear questions as whether the award of foreign international court, rendered in the territory of the Republic of Belarus and vice versa is considered foreign or domestic.

That is why, the author considers it important to define expressly in the Code of Economic Procedure what is to be considered domestic and what is to be considered foreign arbitral award under the law of the Republic of Belarus.

3. The language of article 248 of the Code of Economic Procedure of the Republic of Belarus is rather ambiguous and the literal meaning of the article provides only one ground for refusal to recognize and enforce of foreign arbitral award – contradiction of the consequences of enforcement of arbitral award to public policy of the Republic of Belarus.

According to the interpretation of the above mentioned article by various Belarusian scholars, the provision shall be understood as referring to other grounds for refusal to recognize and enforce foreign arbitral award, provided in international agreements of the Republic of Belarus in this field-namely the New York Convention. However, if the award is sought to be enforced on the principle of reciprocity there is no other source, providing grounds for refusal, as a result of which award-debtors are deprived of the proper defense of their interests.

In connection with this, the author finds it worthwhile to amend the article and to bring it into line (set same grounds) with the article V of the New York, providing that it shall be as well applied to recognition and enforcement of foreign arbitral awards on the basis of reciprocity.

4. Public policy exception is the most frequently invoked ground to refuse recognition and enforcement of foreign arbitral award. However, the concept of public policy is rather vague, what often leads to erroneous decisions. In this view it looks reasonable that the Plenum of the Supreme Economic Court of the Republic of Belarus should generalize judicial practice on the issue and, taking into consideration “International Law Association Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards” adopt corresponding Act, interpreting and explaining the issue.

5. The author finds the provision of paragraph 5 of the Act of the Plenum of Supreme Economic Court of the Republic of Belarus No. 9 “On jurisdiction of cases after the assignment or novation of debt” prohibiting parties, located or resided (all of them) in the

territory of the Republic of Belarus, to conclude arbitral agreement (arbitration clause) to choose for dispute settlement foreign international arbitration court, and providing that if such clause is present in the agreement it is void by virtue of distribution of the jurisdiction of economic courts on the whole territory of the Republic of Belarus as limitation of economic and contractual freedom of legal entities. That is why the author considers it necessary to repeal the provision and to allow these parties to choose international arbitration court for settlement of disputes between them.

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