



APPLICABLE PROCEDURAL LAW IN INTERNATIONAL COMMERCIAL ARBITRATION

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Submitted to
**Central European University
Department of Legal Studies**

In partial fulfillment of the requirements for the degree of IBL LL.M.

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Course: **International Commercial Arbitration**

*Budapest, Hungary
2010*

ABSTRACT

Present thesis focuses on the topic of the choice of procedural law applicable to the conduct of arbitral proceedings. The aim of the research is to provide a comprehensive analysis of modern approaches to this issue and summarize relevant provisions of law and court practice of Ukraine.

Although delocalization of arbitral proceedings from the system of state law is a widely accepted option in modern arbitration, seat of the arbitral proceedings, which determines law applicable to the proceedings remains of importance. It is implied that by the choice of the seat parties had availed themselves to its procedural law.

The analysis of relevant provisions of Ukrainian laws demonstrates that the country supports the presumption in favor of the seat. The adoption of a special statute on regulation of international commercial arbitration did not solve all of the problems in the field. The enactment of the new Code of Civil Procedure contributed to these problems. In order to solve these problems reform of domestic laws on international arbitration and recognition and enforcement of foreign arbitral awards is necessary.

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INTRODUCTION

“Arbitration has become the preferred method for the resolution of international commercial disputes”¹ and a good alternative to court proceedings. “Modern technology, air travel, instant communication and globalization generally have changed the whole face of international business.”² In order to stay competitive as a dispute resolution method arbitration practice has to stay in line with modern business realities. As a result the principle of party autonomy is much more appraised today as it was fifty years ago.

Based on a principle of their autonomy parties have a wide discretion in shaping proceedings before arbitral tribunal and choosing rules of law that are applicable to the proceedings. If parties submitted their dispute to ad hoc arbitration they are virtually not restricted by any means in their freedom, in case of institutional arbitration they will have to comply with institutional rules, if they make their dispute subject to a system of State law their freedom may be even more restricted by mandatory norms of that system. Nevertheless two basic maxims of modern international arbitration must be respected in every proceedings: autonomy of the parties and the arbitrators in structuring the procedure combined with insurance of a certain minimal level of procedural guarantees; distribution of competences between the tribunal and state courts of the seat and place of recognition and enforcement in order to ensure effective assistance to arbitration from state judicial authorities.³

Today parties are provided with an option to detach arbitral proceedings from the law of any State. On the other hand award by itself has a little value unless it is

¹ Georgios Petrochilos, *Procedural Law in International Arbitration* (Oxford university Press, 2004), 1 [hereinafter Petrochilos]

² Julian D.M. Lew, “Achieving the Dream: Autonomous Arbitration, Arbitration International”, *Kluwer Law International* 22, no. 2 (2006): 184 [hereinafter Lew]

³ Klaus Peter Berger, *International Commercial Arbitration* (Kluwer Law and Taxation Publishers, 1993), 17 [hereinafter Klaus Peter Berger]

granted enforcement by a certain judicial system under its laws. This paper will evaluate two cornerstone approaches to the question of applicable procedural law in relation to the party autonomy principle and examine current situation regarding issue of applicable procedural law in Ukraine. While, as a result of competition for arbitral proceedings, leading world jurisdictions changed their domestic laws in order to reflect modern international trends, other countries, including Ukraine, are reluctant to review both theory and practice of arbitral proceedings. Ukraine took a path of mere copying provisions of international conventions on arbitration without changing the system of their domestic laws and, most important without changing the way of thinking of local judges.

Procedural law as part of arbitration represents an interesting area of inquiry. When it comes to such a complex issue as regulation of arbitral proceedings there are still problems that must be addressed on both theoretical and practical level. There is no uniformity between leading scholars as to the level and extent of party autonomy, intervention by the courts and consequences of parties' choice of procedural law. Extensive research had been conducted regarding the issue of procedural law applicable to proceedings in international arbitration by well known scholars in the area of international commercial arbitration such as T. Varady, A. Redfern and M. Hunter, Klaus P. Berger, G. Petrochilos, R. Goode. As to Ukraine, there are only two authors that conducted research on international commercial arbitration: G.A. Tsirat and I.G. Pobirchenko. In their textbooks on international commercial arbitration, the issue of applicable procedural laws was given very little attention. Up to this time there is no comprehensive work which would summarize current court practice on this issue.

First chapter of the paper focuses on the definition and scope of procedural law in international arbitration, and theoretical approaches towards this issue by leading scholars and arbitrators. Second chapter is devoted to practical examples of parties' choice of procedural laws and the consequences of that choice as to validity of the award and its recognition and enforcement as well as mandatory limitations of a parties' autonomy in shaping the proceedings. Third chapter evaluates current situation in Ukraine concerning the issue of procedural law, dogmatic approaches by the legislator and State courts practice.

1. DEFINITION OF PROCEDURAL LAW APPLICABLE TO INTERNATIONAL COMMERCIAL ARBITRATION

The distinction between substance and procedure has not always been recognized in the law of arbitration. For a long time a presumption that the law governing the merits of a case shall also be applicable to the conduct of arbitral procedure was a prevailing concept. “In the early 1970s it became apparent that one should distinguish between the law applicable to the merits of the dispute and the law governing the procedure or indeed the law of the seat of arbitration.”⁴ Main arguments in favor of this were: the arbitration agreement is autonomous by its nature and separable from the contract; although the role of contract is highly respected in the arbitration one should not unduly favor the contractual over the jurisdictional element; goals of the parties as to the conduct of arbitral proceedings are often not the same as to the decision on the merits of the case.⁵

Procedural law (or “curial law” in England, or *lex arbitri*) is only one fraction of legal norms which are applicable and used during arbitration proceedings by the tribunal. Other categories of law include norms of law that “respectively determine the validity of the initial agreement to arbitrate, the individual arbitration reference and the substance or merits of the dispute.”⁶ In the award in ICC case *Mozambique Buyer v. Netherlands Seller* arbitration agreement was unclear as to the intentions of the parties and in the absence of a clear party choice arbitrators had to decide on applicable law. Arbitrators made a distinction between: “choice of substantive law,

⁴ Loukas Mistelis, “Reality test: Current State of Affairs in Theory and Practice Relating to “Lex Arbitri”, *The American Review of International Arbitration* 17, no. 2 (2006): 159 [hereinafter Mistelis]

⁵ Ibid.

⁶ Pippa Read, “Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium”, *American Review of International Arbitration* 10, (1999): 178

choice of procedural law, choice of a rule of conflict of laws, and choice of law to determine the validity and effect of the arbitration clause.”⁷

One English judge did not support this line of thinking and deemed this distinction to be artificial: “Arbitration law is all about a particular method of resolving disputes. Its substance and proceeds are closely intertwined. The Arbitration Act contains various provisions which could not readily be separated into boxes labeled substantive arbitration law or procedural law, because this would be an artificial division.”⁸ It is hard for a lawyer from Civil law jurisdiction to follow this argument. Division of the law into substantive and procedural is a well known concept on the Continent. In fact, Civil law structure is all about divisions that may appear to common law judges as artificial.

In *Union of India v McDonnell Douglas* case arbitral tribunal recognized that procedural law forms a separate part of the law that governs arbitration:

The fact that the law of India is the proper law of the arbitration agreement does not, however, necessarily entail that the law governing the arbitration proceedings themselves is also the law of India, unless there is in that agreement some effective express or implied term to that effect. In other words, it is, subject to one proviso, open to the parties to agree that their agreement to arbitrate disputes will be governed by one law, but that the procedures to be adopted in any arbitration under that agreement will be governed by another law.⁹

In my opinion *lex arbitri* covers such issues as: the constitution of arbitral tribunal and professional requirements of arbitrators, powers of arbitrators conferred on them by the parties including the power to act as *amiable compositeurs*, conduct of arbitral proceedings, formal requirements as to statements of claim and defence, presentation of evidence, conduct of hearings, form of the award, issues of finality of the award and its challenge.

⁷ Mozambique buyer v Netherlands Seller, Preliminary Award of 1987 in Case No. 5505 in Albert Jan van den Berg (ed), Yearbook Commercial Arbitration Volume XIII - 1988, Volume XIII (Kluwer Law International 1988)

⁸ Petrochilos *supra* note 1, p. 8

⁹ Union of India v McDonnell Douglas, [1993] 2 Lloyd's Rep. 48 (Q.B.1992) [hereinafter Union of India v McDonnell Douglas]

1.1 “Internal” and “external” procedural law.

After the place of procedural law within the commencement of arbitral proceedings is established it is important to highlight its internal division. Procedural law may be classified as internal and external. This division is important because the level of party autonomy is different regarding “internal” and “external” procedural law. The internal *lex arbitri* is a body of rules which relates to the internal conduct of arbitration proceedings and governs relations between parties and between parties and arbitrators. The internal *lex arbitri* governs the following issues:

...constitution of the arbitration tribunal, including appointment and challenges to the tribunal as well as standards of independence and impartiality; the conduct of the arbitration proceedings; the allocation of roles between parties and arbitrators as well as their respective procedural rights, powers and obligations; formalities, timing and method of presentation of the case, including place of hearings, service of process, rebuttal rights of each party, the close of hearings; admission and probative value of evidence; and the form the final award must take; the power of the arbitration tribunal to grant any interim measures, the method to apply in determining the law applicable to the merits of the case and whether the arbitrators are expected or allowed to decide *ex aequo et bona* or as *amiables compositeurs*.¹⁰

The external *lex arbitri* is a body of law which regulates the relationship between arbitral tribunal and state courts in cases of recognition and enforcement of the award or other procedural issues such as interim measures or challenge of arbitrators. After receiving a winning arbitral award the party to arbitration will most likely want to enforce it somewhere. The only way of doing it is to receive an order from the court confirming the validity of the award. In this case party will have to resort to external *lex arbitri* to determine procedure of such action. Naturally, the party autonomy is more limited for this type of *lex arbitri* and the role of national and international procedural rules is much more emphasized. Party cannot simply force

¹⁰ Mistelis *supra* note 3, p. 165

the court to hear its case court needs to assume jurisdiction over particular matter in arbitration proceedings.

As regards to internal *lex arbitri* party's autonomy to select procedural laws that will suite their interests is not disputed. In case of ad hoc arbitration parties even have an option of drafting their own procedural rules or resort to supranational legislation. But "even where the parties' agreement can be interpreted as expressly selecting a foreign procedural law, courts have been reluctant to interpret choice-of-law clauses as selecting the "external" procedural law of the arbitration."¹¹ This happens because of the number of reasons. Courts in one jurisdiction are unfamiliar with laws of foreign forums. Unlike arbitrators judges are used to applying law of their state, they are not flexible on this matter. Another reason is that choice of external *lex arbitri* of foreign forum may lead to confusion and clashes between norms of the forum where the court is located and foreign forum. So it is important to keep in mind that if the parties submit their disputes to review by a certain state court they will have to obey procedural rules of that court.

1.2 Seat theory.

"For a long time it has been held, and not only in England, that the choice by the parties of the place of arbitration automatically involved the application of local procedural law, which in practice prevented the parties from choosing a different procedural law."¹² This view was strongly connected with a concept of state sovereignty and territorial link of arbitral proceedings. There is no possibility of ultimate detachment of arbitral proceedings from some system of law because every

¹¹ Gary B. Born , *International Commercial Arbitration*, (Kluwer Law International, 2009), 1330 [hereinafter Born]

¹² Mauro Rubino-Sammartano, *International arbitration Law and Practice*, (Kluwer Law International, 2001), 476

award must be enforced by some jurisdiction and the enforcement of the award will be a subject to the law of that jurisdiction.

Although arbitration is a completely independent mode of solving disputes historically it remained in the shadow of court proceedings and as a result law of the place of arbitration was given high priority. Geneva Convention of 1927 established a “double exequatur” principle which meant that the party had to seek the confirmation of the award in courts of the State where award was rendered in order to enforce the award elsewhere. Protocol on Arbitration Clauses in Commercial Matters, signed in Geneva on September 24, 1923: “The arbitral procedure, including the constitution of arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place”.¹³ In these circumstances submission of the dispute to procedural law of the place of arbitration was the only logical option available to parties.

One of the most famous proponents of seat theory of international commercial arbitration was F.A. Mann. He claimed that: “Every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law which may conveniently and in accordance with tradition be called the *lex fori*, though it would be more exact (but also less familiar) to speak of the *lex arbitri*.”¹⁴ He claimed that arbitral awards are binding and enforceable if there is a link between arbitral proceedings and a certain system of national law where arbitration took place. He rests his argument on the theory of territoriality of arbitral proceedings.

“The traditional theory of territoriality is based on the general principle of international law that a state is sovereign within its own borders and that its law and its courts have the exclusive right to determine the legal effect of acts done (and

¹³ Article 2 of the Protocol on Arbitration Clauses in Commercial Matters, September 24, 1923, http://interarb.com/vl/g_pr1923 (accessed in March 2010)

¹⁴ Petrochilos *supra* note 1, p. 22

consequently of arbitral awards made) within those borders.”¹⁵ Territoriality means that the link between arbitral proceedings and the state in which these proceedings are conducted is strong enough to allow imposition of state laws upon these proceedings and it is a duty of that State to control arbitral proceedings.

In support of this argument it was claimed that no other State except where arbitration takes place can exercise effective control over proceedings, the concept of state jurisdiction is strong enough to be extended to arbitral proceedings which take place in that State. Also the law of the seat of arbitration is the law which has the closest connection to the proceedings and by their choice of the seat parties implied this connection.¹⁶ Court judges also certainly have some “judicial jealousy”¹⁷ towards arbitration which is competing mechanism of dispute resolution.

The notion of the seat of the arbitration is meant to mean a mere formal legal domicile of the arbitration which establishes a territorial link of the proceedings with the law of the country where the arbitration takes place.¹⁸ The arbitration legislation of the arbitral seat provides the basic, and often mandatory legal regime within which international arbitral proceedings take place; that law addresses virtually all aspects of an international arbitration including with regard to arbitration agreements, arbitral proceedings and arbitral awards. On the other hand there is a possibility that procedural law of the seat of arbitration may leave an option for parties to choose foreign procedural law as the law of the seat of arbitration to be applied on a local territory.¹⁹

¹⁵ Roy Goode, “The Role of the Lex Loci Arbitri in International Commercial Arbitration”, *Arbitration International* 17, no. 1 (2001): 23 [hereinafter Goode]

¹⁶ Petrochilos *supra* note 1, p. 23

¹⁷ Lew *supra* note 2, p. 182

¹⁸ Klaus Peter Berger *supra* note 2, p. 100

¹⁹ Born *supra* note 10, p.1330

Seat in arbitration proceedings must be distinguished from the place of arbitration. Place of arbitration is a place of physical location of arbitrators or a place where hearings before arbitral tribunal are performed. In *Naviera Amazonia Peruana SA v Compania Internacional de Seguros del Peru* it was held that the legal place of arbitration remains the same even if the physical place changes from time to time, unless parties agree to change it.²⁰ “It may often be convenient to hold meetings or even hearings in other countries. This does not mean that the ‘seat’ of the arbitration changes with each change of country. The legal place of the arbitration remains the same even if the physical place changes from time to time, unless of course the parties agree to change it.”²¹ Article 14 of ICC Rules of Arbitration contains a provision on the place of arbitration: “The place of the arbitration shall be fixed by the court unless agreed upon by the parties. The Arbitral Tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate unless otherwise agreed by the parties. The Arbitral Tribunal may deliberate at any location it considers appropriate.”²²

In practice arbitrators need to evaluate wording of arbitration agreement to establish party’s intentions as to the seat of arbitration. If arbitration agreement fixes a certain place as a place of arbitration arbitrators have to decide if parties intended to fix the seat of arbitration at that place which sometimes may not be true. Most of jurisdictions still have the norms in their laws which establish the link between the seat of arbitration within their territory and applicability of their procedural laws. For example, even such a delocalization friendly jurisdiction as Switzerland under its

²⁰ *Naviera Amazonia Peruana SA v Compania Internacional de Seguros del Peru*, [1988] 1 Lloyd’s Rep. 116

²¹ Alan Redfern, Martin Hunter, *Law and practice of International Commercial Arbitration* (Sweet and Maxwell, 2004), 2-16 [hereinafter Redfern, Hunter]

²² Article 14 of the ICC Rules of Arbitration, January 1, 1998
http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf (accessed on March, 2010)

laws stipulates that national provisions “shall apply to any arbitration if the seat of arbitral tribunal is in Switzerland and if, at any time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland”²³, nevertheless leaving parties with a choice to opt out by the virtue of their agreement.

Seat theory clashes with the concept of party autonomy which is recognized as a cornerstone principle in modern arbitration proceedings. Parties may choose the forum state not because they want to avail themselves to laws of that state but for reasons of convenience both for parties and for arbitrators. If parties choose neutral state as forum for arbitral proceedings what is the interest of that state regarding these proceedings and what right does it have to impose its laws on the parties? Although New York Convention eliminated the “double exequatur” requirement of the Geneva Convention of 1927; “the winning party need not, as a precondition of enforcement elsewhere, seek a confirmation of the award by the courts of the country where it was rendered”,²⁴ law of the seat of arbitration still plays a major role in shaping arbitral proceedings.

Despite that submission of the dispute to the *lex loci arbitri* is not required anymore it may have good implications such as subjecting the question of the validity of the award solely to a decision of the court where arbitral proceedings took place. Departure from this principle gives parties an opportunity for “forum shopping” in search for a jurisdiction that will deem the award, which courts of the seat may not enforce, to be valid.²⁵

²³ Article 176 of Switzerland’s Federal Code on Private International Law, <http://www.umbricht.com/pdf/SwissPIL.pdf> (accessed in March, 2010)

²⁴ Jan Paulsson, “Arbitration Unbound: Award Detached from the Law of Its Country of Origin”, *International and Comparative Law Quarterly* 30, no. 2 (1981): 373 [hereinafter Paulsson]

²⁵ Goode *supra* note 15, p. 33

1.3 *Delocalization theory.*

As it was stressed above party autonomy is a basic principle which guides arbitration proceedings. In practice parties to arbitration may choose to arbitrate in a country, laws of which are hostile or unknown to both or either one of the parties and the jurisdiction was chosen for purposes of neutrality or convenience. *Lex arbitri* of the seat of arbitration may impose unwanted restrictions on parties. “Even if the parties have chosen the place of arbitration in their contract, it is most doubtful that by such choice they intended to follow the rules of national procedure applicable to domestic arbitrations at the seat, let alone the practices followed in judicial proceedings there. More likely, they have chosen a site which is neutral and geographically convenient and has a reputation for the successful conduct of international commercial arbitration.”²⁶

“As international arbitration grows by leaps and bounds, increased attention has been given to what has variously been called a-national, floating, and stateless arbitration and arbitral awards.”²⁷ Parties may submit their dispute to “procedural principles of public international or transnational law without any connection to domestic arbitration law.”²⁸ This concept in international arbitration became known as delocalization of arbitral proceedings which means detachment of the proceedings from a jurisdiction of the place of the arbitration and its laws. Because of the fact that particular state does not have jurisdiction over delocalized arbitral proceedings Lew argues that the role of state courts should be also limited and they should only “interfere with the arbitration process in exceptional circumstances”.²⁹

²⁶ W. Lawrence Craig, William W. Park, Jan Paulsson, *International Chamber of Commerce Arbitration*, (ICC Publishing 1990), 270

²⁷ Hans Smit, “Proper choice of law and *lex mercatoria arbitralis*”, *Lex Mercatoria and Arbitration A Discussion of New Law Merchant* (Juris Publishing Inc., 1998): 93

²⁸ Klaus Peter Berger *supra* note 2, p.480

²⁹ Lew *supra* note 2, p. 195

Pierre Lalive reasons as follows in support of the thesis of detachment of the proceedings from national law of the seat:

The municipal judge necessarily applies the rules of conflict to the forum, which represent the political-juridical concepts – particularly as to the territorial limits of legislative power – of the State which he has his authority. The international arbitrator is in a fundamentally different position. Whatever one might think of a contractual source of an arbitral tribunal's authority as a purely internal matter, it is difficult to consider the international arbitrator as a manifestation of the power of a State. His mission, conferred by the parties' consent, is of a private nature, and it would be a rather artificial interpretation to deem his power to be derived, and very indirectly at that, from the tolerance of the state of the place of arbitration.³⁰

Delocalization theory in international arbitration was developed in contemporary cases of oil disputes between governments of Arab countries and Western oil corporations. The case which gave rise to this theory was a dispute between the *State of Saudi Arabia and Arabian American Oil Company (Aramco)*. The tribunal held that the law of the seat should not be applied to arbitration. "Due to jurisdictional immunity of foreign states, the Tribunal was unable to hold that arbitral proceedings to which a foreign state is a party could be subject to the law of another state, and consequently it held that the arbitration, as such, can only be governed by international law."³¹

Two cases of Libyan petroleum nationalizations developed the reasoning of the *Aramco* case: *British Petroleum Company v State of Libya* and *Texaco Overseas Oil Company, and California Asiatic Oil Company v State of Libya*. After nationalizations of their businesses in Libya major petroleum corporations brought claims against the state of Libya. Concession agreements included procedural norms on the appointment of arbitrators. After the State of Libya failed to appoint arbitrators from its side, sole arbitrators were designated by the President of the International Court of Justice. Judge Gunnar Lagergren was appointed as a sole arbitrator as regards to

³⁰ Paulsson *supra* note 21, p. 362

³¹ Edin Karakas, "Origin of Arbitral Awards and Its Impact on Applicable Enforcement Regime", *Croatian Arbitration Yearbook* 11, (2004): 32

British Petroleum Company claim and Professor Rene-Jean Dupuy was appointed as a sole arbitrator with respect to the joint claim of Texaco Overseas Oil Company and California Asiatic Oil Company. From the beginning of the proceedings both arbitrators encountered problems as to establishing jurisdiction and law applicable to the proceedings. Seat theory could not solve the problem because both claims were brought against the State which enjoys sovereignty and is immune to the law of any other State. The arbitrators did not want to render an unenforceable award so they had to assign certain nationality to their awards in order to ensure effective enforcement.

Lagergren fixed the place of arbitration in Copenhagen (Denmark) and deemed his award to be Danish. He concluded that the effectiveness of the a-national award is more limited than the award which was tied to some system of national law and deemed the attachment of the award to a legal system of a certain state to be “both convenient and constructive.”³² Dupuy took a different approach declaring his award to be international without tying it to the municipal law of the place of arbitration which was Geneva. He also came to a conclusion that effects of the award that lacks nationality may be lesser but recognized that parties by their will granted him powers to render international award.³³

The challenges as to enforcement of a-national awards were tested in a case between the Swedish shipyard Gotaverken and Libyan Maritime Company. In 1973 the Swedish shipyard and Libyan maritime Co. concluded contracts for the construction of three oil tankers. Each contract contained the following provisions in the arbitration clause:

³² British Petroleum Company v State of Libya, Award on the Merits of 10 October 1973 in Pieter Sanders (ed), Yearbook Commercial Arbitration Volume V - 1980, Volume V (Kluwer Law International 1980)

³³ Paulsson *supra* note 21, p. 378

The arbitration shall be held in Paris and conducted in accordance with the Rules of Conciliation and Arbitration then in force of the International Chamber of Commerce. The award of the arbitration as to any question referred to the arbitrators provided shall be final binding, conclusive upon and enforceable against the parties hereto and their respective successors and assigns and each party agrees to abide by such a decision.³⁴

Libyan maritime Co. refused to transfer the payment for constructed vessels and alleged that Gotaverken violated Libyan regulations on the boycott of Israeli products and that vessels constructed did not match technical specifications stipulated in the Contracts. Gotaverken initiated arbitration and the award was rendered by a tribunal in favour of Swedish shipyard. The arbitrator, assigned by Libyan Maritime Co. refused to sign amended award. Libyan Maritime Co. filed suit before courts in Paris challenging the validity of the award. At the same time Gotaverken started an action to enforce the award in Sweden. "One of the Libyan Maritime Co's central defenses against actions to enforce the award in Sweden was to argue that the award was not binding anywhere pending its challenge before the courts in the country where it was rendered."³⁵ Swedish court refused to accept the reasoning of Libyan Maritime Co. and deemed the award to be binding from the time it was rendered basing its argument on arbitration clause in a contract in which parties had waived their right to appeal.

At the same time French courts refused to examine the award arguing that the award did not bear French nationality. This was in line with Gotaverken argument that "there was no need for arbitral proceedings to be attached to a national legal system; under New York Convention, the law of the place of arbitration controls the proceedings only in the absence of a specific agreement by the parties."³⁶ However foreign courts will not take jurisdiction unless parties had expressly provided for it in

³⁴ Gotaverken v State of Libya, Pieter Sanders (ed), *Yearbook Commercial Arbitration Volume VI - 1981*, Volume VI (Kluwer Law International 1981) pp. 133 - 141

³⁵ Paulsson *supra* note 21, p. 365

³⁶ Paulsson *supra* note 21, p. 366

their agreement. The outcome of Gotaverken case leads to the conclusion that in the absence of parties agreement to submit their dispute to the law of a certain state the only court that will have the power to review the conduct of arbitral proceedings will be the court of jurisdiction where the enforcement of the award is sought and the scope of the review will be limited by provisions of the New York Convention.³⁷

It is difficult to establish a well balanced equilibrium between parties' stipulation and the extent of court intervention when it comes to denationalized proceedings. "The judge at the place of arbitration is seen as the best placed authority to control the award"³⁸ but he has no source to derive his power from in order for him to apply the laws of his jurisdiction. It is argued that his functions should be limited to guarantee "the conformity of the award to transnational minimum standards such as those embodied in the major international conventions."³⁹ By their agreement parties deviate from state authorities and their choice must be respected but this deviation cannot be a subject of abuse and lead to unjust result.

Competent authorities in the jurisdiction where recognition and enforcement is sought may question whenever a-national award will fall under the scope of New-York Convention. Relevant provisions of New York Convention⁴⁰ lead to a line of thinking that awards, enforcement of which is sought under Conventions enforcement system, should be a subject of a control by a certain State judicial system which is traditionally courts of the seat of arbitration and *lex loci arbitri* should be applicable.⁴¹ Despite this argumentation Supreme Court of Netherlands in the

³⁷ Goode *supra* note 15, p. 25

³⁸ Paulsson *supra* note 21, p. 370

³⁹ *Ibid.*

⁴⁰ Articles V 1 (a), V 1 (e) of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards [hereinafter New York Convention]

⁴¹ Klaus Peter Berger *supra* note 2, p. 483

case S.E.E.E. v Yugoslavia held that: “It is possible to enforce award rendered in the proceedings detached from any national procedural law.”⁴²

While submitting disputes to arbitration parties may pursue purposes other than the rendition of enforceable award and its final enforcement. Denationalized arbitrations often occur between States or States and business entities. Arbitral award rendered in favor of one party may put political pressure on another one or may lead to voluntary performance by the party which lost the proceedings. But if the ultimate goal is enforcement of the award in order to avoid unnecessary complications, I think it is reasonable to determine the seat of arbitration prior to the end of the proceedings. When choosing denationalized arbitration parties will also lose the level of support provided by national courts of the seat, which may be important in cases of interim measures, obtaining evidence and court sanctions. International procedural principles are silent on these matters and in some instances parties may have no means to perform a required action. In Belgium, for example, parties to international arbitration were left without court assistance by the virtue of wording of national legislation on arbitration. Belgian legislators adopted the most extreme model of delocalized arbitration in which courts lacked jurisdiction over arbitral proceedings in which neither one of the parties was Belgian,⁴³ this model failed to work and was later changed to more conservative one.

⁴² Vladimir Pavic, *Applicable procedural law in International Commercial Arbitration* (master thesis, Central European University, 1996), 78 [hereinafter Pavic]

⁴³ Goode *supra* note 15, p. 27

2. PARTY AUTONOMY AS THE CORE PRINCIPLE IN DEFINING PROCEDURAL LAW

2.1 Party's choice of applicable procedural law in ad hoc and institutional arbitration.

The freedom of the parties is recognized as being “probably the most important principle on which the Model Law should be based”.⁴⁴ Party autonomy is deemed to be a continuing right and not one to be exercised only during the period preceding the arbitration.⁴⁵

“The possibility of choosing procedural rules that are to be applied by the tribunal constitutes one of the major attractions for parties contemplating resolving their disputes via arbitration”⁴⁶. Although it is the right of parties to choose procedural law it is not their duty and in practice parties often prefer to skip the choice of procedural law and leave it to arbitrators. “Reasons for not exercising this freedom may be different: sometimes they cannot reach the agreement, sometimes they forget to insert the choice and sometimes they do not consider it to be the issue of great importance.”⁴⁷

2.1.1 Express choice of procedural law.

In exercising their autonomy parties can make express choice of the law which will govern their arbitral proceedings. If parties submitted their dispute to institutional arbitration normally rules of the relevant institution will be applied and model institutional clauses address this issue. For example, standard arbitration clause of

⁴⁴ Peter Binder, *International Commercial arbitration and Conciliation in UNCITRAL model Law Jurisdictions* (Sweet and Maxwell, 2005), 185 [hereinafter Binder]

⁴⁵ *Ibid.*, p. 187

⁴⁶ *Ibid.*, p. 190

⁴⁷ Pavic *supra* note 36, p.78

International Chamber of Commerce states: “All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”⁴⁸ If parties chose ad hoc arbitration they have a choice of either drafting their own rules governing conduct of arbitration proceedings or resort to rules which are already available such as UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law). Parties can also choose certain national system of law to govern their proceedings.

UNCITRAL Model Law provides: “Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by arbitral tribunal in conducting the proceedings. Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct an arbitration in such manner as it considers appropriate.”⁴⁹ Article 19 follows the “two-level system” of (a) granting the parties the freedom to determine the procedural rules and (b) providing, as an alternative, a default procedure in case the parties fail to stipulate specific rules.⁵⁰

In *Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Maritime S.A.* court held that if parties agreed to apply French law to the dispute the seat of which was chosen England, arbitrators had to follow parties' choice and apply proper law insisted upon by the agreement. In his decision Lord Diplock supported the view that: “if parties to a commercial contract have agreed expressly upon the system of law of one country as the proper law of their contract and have selected a different curial law by providing expressly that disputes under the contract shall be

⁴⁸ Standard ICC Arbitration Clause, <http://www.iccwbo.org/court/arbitration/id4114/index.html> (accessed in March, 2010)

⁴⁹ Article 19 of UNCITRAL Model Law on International Commercial Arbitration of 1985

⁵⁰ Binder *supra* note 37, p. 185

submitted to arbitration in another country, the arbitrators must apply as the proper law of the contract that system of law on which the parties have expressly agreed.”⁵¹

Institutional arbitration became the main stream in arbitration practice. According to recent research conducted in 2008 “corporations prefer institutional arbitration to ad hoc arbitration (86% of awards rendered through institutions)”.⁵² A number of international institutions are competing on this still growing market. To name a few: International Chamber of Commerce (ICC), American Arbitration Association (AAA), London Court of International Arbitration (LCIA), International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry. One of the consequences of this tendency to institutionalization of arbitral proceedings is that the dividing line between arbitration and litigation starts to blur, some parties may adopt such strategies which are inconsistent with informal idea of arbitration – insisting on formalistic approach and strict interpretation of the rules applicable to arbitration.⁵³ That is why rules of arbitral institutions are becoming more and more detailed and complex trying to cover every issue that may arise during the proceedings.

Choosing national system of procedural laws to apply to arbitral proceedings may be reasonable if the party arbitrates in its home forum state. State norms will provide adequate procedural framework for arbitral proceedings, combined with principles which belong purely to arbitration this will lead to acceptable result. State courts will not question their ability to assist arbitral proceedings at least if parties’ chose the law of the forum. Parties should be very cautious as to foreign forums they

⁵¹ *Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Maritime S.A.* [1971] A.C. 572

⁵² Gerry Lagerberg, Loukas Mistelis, “International Arbitration : Corporate Attitudes and Practices 2008”, http://www.pwc.co.uk/eng/publications/international_arbitration_2008.html, p. 2 (accessed March, 2010)

⁵³ Pavic *supra* note 36, p.15

are unfamiliar with as that choice may pose more challenges than give positive effects.

As it was discussed above parties choice of choosing “external” *lex arbitri* is restricted. There are instances when local judges of one forum will have to evaluate provisions of the law of a foreign state.

2.1.2 Omission of the choice of procedural law.

Parties to the arbitration will often try to draft an arbitration clause by themselves at their own risk and might omit the choice of applicable procedural law. In case of omitting the choice of law the problem of applicable procedural law will nevertheless arise before arbitrators as soon as they will be appointed and they are provided with wide discretion regarding this issue. According to UNCITRAL Model Law in case parties did not agreed on the procedure arbitral tribunal “may conduct the arbitration in such a manner as it considers appropriate”.⁵⁴ Most of leading arbitral jurisdictions adopted this wording of UNCITRAL Model Law.

Although delocalization gains its importance in modern arbitration most arbitrators will act on assumption that the seat or place of arbitration will determine relevant norms of the law applicable to the dispute because it is most closely connected to arbitral proceedings. This line of thinking is historically supported by English judges and arbitrators. Despite the fact that “in England, the genesis of delocalization might be traced back almost three decades to the Arbitration Act 1979, which abolished the ‘case stated’ procedure”⁵⁵, case study shows that in the

⁵⁴ Article 19 of UNCITRAL Model Law on International Commercial Arbitration

⁵⁵ William W. Park, “Two Faces of Progress: Fairness and Flexibility in Arbitral Procedure”, *Arbitration International* 23, no. 3 (2007): 500

absence of party choice of procedural law English judges and arbitrators tend to interpret arbitration agreement in favor of applicability of *lex loci arbitri*.

2.1.3 Choosing foreign procedural law and combining procedural laws.

The case for parties to subject arbitration which takes place in one state to procedural norms of another state is rare but not uncommon in international commercial arbitration. Arbitrators must respect the choice made by the parties and apply relevant procedural norms but what about the attitude of states on this issue?

In the case *Naviera Amazonica Peruana S.A. v. Compania Internacional de Seguros del Peru* arbitration agreement in the contract provided that arbitration proceedings should be conducted in Lima, Peru but should be governed by English procedural law. The Court of Appeal interpreted arbitration clause as providing for arbitration in London rather than in Lima but noted that the choice of foreign procedural law was theoretically possible.⁵⁶ Stipulation of foreign arbitration law will most likely lead to inadmissibility of the case to court review due to lack of their jurisdiction. At the same time if English law will be chosen to guide proceedings in the foreign forum intervention by English courts is highly doubtful at least from theoretical point of view.

In *Union of India v McDonnell Douglas* despite the fact that arbitration clause provided for application of Indian Arbitration Act of 1940 while determining the seat of arbitration in London Saville J. held:

It seems to me that by their agreement the parties have chosen English law as the law to govern their arbitration proceedings, while contractually importing from the Indian Act those provisions of that Act which are concerned with the internal conduct

⁵⁶ *Naviera Amazonica Peruana S.A. v. Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's L. Rep. at 119

of their arbitration and which are not inconsistent with the choice of English arbitration law.⁵⁷

Saville J. gives priority to English curial law over Indian Arbitration Act and proclaims that the Act will be applicable only in those parts where it is consistent with English procedural law. This line of thinking disregards the purpose of stipulating foreign arbitration act in the contract. If parties wanted English procedural law to be applicable they would include this express choice in their agreement to arbitrate. *Union of India v McDonnell Douglas* gives a good example of bad drafting of arbitration clause and formalistic approach to its interpretation.

When choosing foreign procedural law to apply to arbitration the question of nationality of the award will arise. The award either bears the nationality of the state of rendition or the state the norms of which were applied during the proceedings. Different jurisdictions will apply either one of these criteria. In England the criterion of territoriality is accepted while in Germany procedural criterion is acceptable. If, for example, arbitral proceedings held in Switzerland will be subject to German law arbitrators will have discretion of rendering the award of either Swiss or German nationality. These differences may pose challenges to judges and arbitrators. In a mention example, if arbitrators will choose to determine of the award to be Swiss German judge may nevertheless treat the award to be of German nationality.

Parties may combine different procedural laws and put them in hierarchical order. In case procedural norms which must be applied in first place are silent on certain issues, “fall back” norms will come into play and cover these blank spots. For example, parties may stipulate that institutional rules are applicable but where these rules are silent on certain matters some national law will apply.

⁵⁷ *Union of India v McDonnell Douglas supra* note 9

2.2 Limitations to the party autonomy.

2.2.1 Mandatory norms of a state.

Mandatory norms of a state can be defined as imperative provisions of law of a certain jurisdiction which parties must comply with if they are to choose this law to govern their arbitral proceedings. “In order to protect their public interest, many countries have enacted mandatory norms as part of their substantive law which apply by virtue of their special purpose, irrespective of any choice of law rules.”⁵⁸ Antitrust and tax laws may be a good example of such mandatory provisions, these norms cannot be bypassed by arbitrators if they want to render a valid award. Lew argues that New York Convention stipulates just three standards that must be observed by arbitrators while conducting arbitral proceedings: “the arbitration must conform with or come within the terms of the arbitration agreement; the parties must be treated fairly and with equality (i.e. international due process); and the award must respect international public policy both with respect to its content and its subject matter.”⁵⁹ However if parties subjected their dispute to a certain *lex loci arbitri* compliance with mandatory provisions of that law cannot be ignored.

It is much harder to pinpoint mandatory provisions of state laws which are related to arbitral procedure than which are related to substance of the dispute. Such provisions may include the following:

...a limitation of admissible evidence to that which would be admissible in court; a non-derogable obligation on the arbitrators to state reasons for an award; an obligation to have the award notarized; a requirement that the tribunal be composed of an uneven number of arbitrators; a prohibition on the tribunal to order any or certain forms of interim protection; requirements of nationality or religious conviction as necessary qualifications for an arbitrator.⁶⁰

⁵⁸ Klaus Peter Berger *supra* note 2, p. 688

⁵⁹ Lew *supra* note 2, p. 188

⁶⁰ Petrochilos *supra* note 1, p. 84

Parties will enjoy a level of assistance from *lex arbitri* of a chosen forum state, the price they pay is that they have to comply with mandatory norms of that jurisdiction regarding procedure which are not always beneficial. The application of mandatory procedural state norms to domestic arbitration is undisputed but as to international arbitration it can hardly be justified. This view was supported by ICC in the *Award No. 5029* in which arbitral tribunal stressed that the application of *lex arbitri* of the forum state (the Netherlands) does not imply the application of procedural norms which regulate litigation before Dutch State courts and parties by referring to ICC Rules had “internationalized” arbitral proceedings.⁶¹

However in case *Rederi Aktiebolaget Sally v S.R.L. Termarea* Court of Appeal of Florence refused recognition of the award rendered under procedural law of England because it concluded that arbitrators failed to appoint an umpire as it was required under English Arbitration Act of 1950.⁶² This was held to be sufficient to satisfy requirement of Article V 1 (d) of the New York Convention. At the same time in England court held that the award did not violate provisions of national law as to the appointment of the arbitrators. This case can be a good illustration of difficulties that may arise from an issue of mandatory procedural norms, the Italian court had to interpret provisions of foreign procedural law which it is unfamiliar with and failed to come to a right conclusion.

On the other hand national legislations are moving towards uniformity of law when it comes to international arbitration. Mandatory procedural norms are losing their importance and are replaced by procedural requirements of international nature

⁶¹ ICC Award No. 5029, Interim Award of 16 July 1986 in Case No. 5029 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration Volume XII - 1987*, Volume XII (Kluwer Law International 1987)

⁶² *Rederi Aktiebolaget Sally v S.R.L. Termarea*, Tibor Várady, John J. Barcelo III, Arthur T. von Mehren, *International Commercial Arbitration A Transnational Perspective*, (West, 2009) p. 82

such as requirements of due process and procedural fairness. These international principles are implemented in the law of the majority of leading jurisdictions and parties undisputedly must comply with these two limitations to their autonomy while conducting arbitral proceedings as they are also included as grounds for setting aside of the award in the New York Convention.

2.2.2 Due process requirements.

“The arbitration tribunal shall guarantee a number of principles that constitute the procedural “*magna carta of arbitration*.”⁶³ These two principles are included as grounds for refusal of the enforcement of the award under New York Convention⁶⁴ and are: due process and public policy of the state where recognition and enforcement is sought.

There is no agreement between scholars on definition and extent of due process norms. Kurkela argues that due process covers issues of: “natural justice, procedural fairness, the right or opportunity to be heard and equal treatment.”⁶⁵ UNCITRAL Model Law in Article 18 provides a definition of due process scope of which is much more limited: “The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.”⁶⁶

This provision needs to be examined more closely. Equality of the parties during arbitral proceedings can be interpreted in a strict way as duty of arbitrators to apply procedural norms to both parties in the same way. But sometimes parties are in unequal positions in the objective sense, laws of their local jurisdiction may impose

⁶³ Julian D. M. Lew, Loukas A. Mistelis, Stefan Kröll, *Comparative international commercial arbitration* (Kluwer Law International, 2003), 95 [hereinafter Lew, Mistelis, Kröll]

⁶⁴ Articles V 1 (b), V 2 (b) of New York Convention,

⁶⁵ Matti S. Kurkela, *Due Process in International Commercial Arbitration* (Oceana Publications Inc., 2005) p. 17 [hereinafter Kurkela]

⁶⁶ Article 18 of UNCITRAL Model Law on International Commercial Arbitration

restrictions as to obtainment of evidence, time limits etc. I think that drafters meant “equality of the outcome” or subjective equality – arbitration must be conducted in a way that at the end neither of the parties can claim that the other party was given preference even if objectively parties were treated unequally.

Each party must be given the opportunity to be heard in effective manner. This opportunity must be provided regarding all aspects of arbitral process, arguments of the opposing party and points of reasoning of the award.⁶⁷ Due process requirement provides parties only with an opportunity to be heard, it is parties duty to present its arguments in a timely and effective manner. If the party will abuse its right to be heard for purposes of delaying the proceedings it may be treated as a waiver of the right to be heard. It is also party’s duty to present evidence and arguments in a manner that will best serve their needs. Arbitrators are not in position to advise or assist parties on issues of presentation of arguments whatsoever.

Party may be refused recognition and enforcement of the award under New York Convention if: “A 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”⁶⁸. In accessing whether the notice was proper courts must be guided by arbitration agreement of the parties and applicable procedural rules which were chosen by the parties.⁶⁹ There is no uniformity as to the issue of proper notice, if parties submit their proceedings to certain system of law procedural requirements of serving the notice will be applied. If the party seeks enforcement in a jurisdiction which is foreign to arbitral proceedings foreign courts will be put in the same situation as in *Rederi Aktiebolaget Sally v S.R.L. Termarea*.

⁶⁷ Petrochilos *supra* note 1, p. 82

⁶⁸ Article V 1 (b) of the New York Convention

⁶⁹ Kurkela *supra* note 60,p.18

Kurkela further argues that the “two elements of Article V 1 (d) of New York Convention⁷⁰, i.e. the arbitration agreement and the law of the seat of arbitration, are part of due process and qualify and specify partly what constitutes due process in individual case.”⁷¹ If parties stipulated that procedural law of the seat of arbitration shall be applicable to arbitral proceedings these norms will serve as a fall back system of guarantees that the proceedings are conducted in line with the concept of natural justice, parties and arbitrators did not abuse their powers, and arbitrators performed their duties in a lawful manner.

2.2.3 Public policy limitations.

Public policy is a concept in international commercial arbitration which is hard to define and which “is never argued at all but where other points fail.”⁷² Attempts to define it may be traced as far as to 1853 when the House of Lords in England gave it a definition of “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 the public good.”⁷³ Final Report on Public policy by international Law Association defines international public policy as:

Body of principles and rules recognized by the State, which, by their nature, may bar the recognition or 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 either of procedure pursuant to which it was rendered or of its contents.⁷⁴

⁷⁰ Article V 1 (d) of New York Convention: “The composition of 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”

⁷¹ Kurkela *supra* note 60, p.19

⁷² Redfern, Hunter *supra* note 18, 10 - 51

⁷³ Lew, Mistelis, Kröll *supra* note 58, p. 722

⁷⁴ Report on Public policy by international Law Association, <http://www.ilahq.org/en/committees/index.cfm/cid/19> (accessed in March, 2010)

Public policy includes both procedural and substantive matters as expressed in the view of Commission on drafting UNCITRAL Model Law: “It was understood that the term public policy, which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural aspects.”⁷⁵ After examining case law of major jurisdictions International Law Association Committee on International Commercial Arbitration came up with a list of possible procedural public policy grounds which include “fraud in the composition of the tribunal; breach of natural justice; lack of impartiality; lack of reasons in the award; manifest disregard of the law; manifest disregard of the facts; annulment at place of arbitration.”⁷⁶

International public policy standards which are applicable to international arbitral awards must be distinguished from domestic ones. It can be seen as a domestic public policy which is narrowed to serve the needs of international arbitration or as a number of “most basic notions of morality and justice”⁷⁷ Public policy provisions vary from jurisdiction to jurisdiction, it is hard if almost impossible for arbitrators to comply with the norms of every jurisdiction in the course of arbitral proceedings. That is why there is a need for international public policy concept which will include basic substantive and procedural requirements that must be observed for the purpose of conducting arbitration in a way that will serve justice.

Civil Code of France recognized this distinction between international and domestic awards as to the issue of international public policy: “Arbitral awards shall

⁷⁵ Audley Sheppard, Public Policy and the Enforcement of Arbitral awards: Should there be a Global Standard?, *Transnational Dispute Management*, Volume 1, issue 01, 2004, http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_67.htm (accessed in March,2010)

[hereinafter Sheppard]

⁷⁶ Report on Public policy by international Law Association, <http://www.ilahq.org/en/committees/index.cfm/cid/19> (accessed in March, 2010)

⁷⁷ Andrey Ryabinin, *Procedural Public Policy in Regard to the Enforcement and Recognition of Foreign Arbitral Awards*, (master thesis, Central European University), 2009, 5

be recognized in France where their existence has been established by the one claiming a right under it and where recognition of the same would not manifestly be contrary to public international order.”⁷⁸

In general state courts in most of leading jurisdictions apply more lenient public policy standards to international arbitral awards than to domestic ones. For example, “from 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.”⁷⁹ Article 190 of Swiss PILS stipulates that award may be challenged “If the award is incompatible with Swiss public policy (*ordre public*)”.⁸⁰ In one of the recent cases Swiss court held that “an award is inconsistent with public policy if it disregards the essential and widely recognized values which, according to the prevailing values in Switzerland, should be the founding stones of every legal order”⁸¹

While international public policy concept is a good tool for parties to challenge the award which was rendered with significant breaches of procedural laws on the other hand “uncertainty and inconsistencies concerning the interpretation and application of public policy by State courts encourage the losing party to rely on public policy to resist, or at least delay, enforcement.”⁸²

⁷⁸ Article 1498 of French Code of Civil Procedure

⁷⁹ Redfern, Hunter *supra* note 18, p. 459

⁸⁰ Article 190 of Switzerland’s Federal Code on Private International Law, <http://www.umbrecht.com/pdf/SwissPIL.pdf> (accessed in March, 2010)

⁸¹ X v Y, ASA Bulletin Vol. 4 no 3 (2006), 550 – 560

⁸² Sheppard *supra* note 74

3. APPLICABLE PROCEDURAL LAW IN UKRAINE

Arbitration became a well recognized alternative to court proceedings in Ukraine. State courts are overloaded with cases and proceedings may take up to several years making arbitration a reasonable alternative. While domestic arbitration is widely used by business community, in case of international disputes parties prefer to use services of well recognized international arbitral institutions rather than domestic ones. Statistics of the ICC show that the number of parties from CIS region (which includes Ukraine) increased by 10% compared to 2007.⁸³ International business relations are on the rise in Ukraine because of that number of international arbitrations had also increased.

There are more than 60 arbitral institutions in Ukraine which deal with domestic arbitration cases but only “two permanent international commercial arbitration courts (both situated in Kyiv): The International Commercial Arbitration Court of the Chamber of Commerce and Industry of Ukraine (the ICAC); and The Maritime Arbitration Commission at the Chamber of Commerce and Industry of Ukraine.”⁸⁴ According to statistics ICAC Ukraine, which is the major arbitration institution in the country, had altogether 1659 cases in 2003 – 2007, overwhelming majority of which were domestic arbitration cases.⁸⁵

While being a member of the New York Convention and UNCITRAL Model Law country Ukraine does not provide arbitration friendly environment and is not an easy

⁸³ Marcus M. Birch, “Challenges Ahead: Arbitrating with Russian and Eastern European Parties”, 2009 <http://www.klgates.com/newsstand/Detail.aspx?publication=5670>

⁸⁴ Legal Aspects of Doing business in Ukraine 2010, Gide Loyrette Nouel http://www.gide.com/front/EN/telechargement/pdf/bureaux/GLN_DoingBusinessInUkraine_EN_2010.pdf [hereinafter Legal Aspects of Doing Business in Ukraine 2010]

⁸⁵ School of International Arbitration, Arbitration Institutions / Statistics <http://www.arbitrationonline.org/research/ArbitrationInstitStat/index.html>

jurisdiction to arbitrate in.⁸⁶ International arbitration in Ukraine is regulated by a special domestic law “On International Commercial Arbitration” which, in general, mirrors provisions of UNCITRAL Model Law although the wording of the Law is not an exact translation of Model Law.

Article 1 (2) of the Law provides:

Pursuant to an agreement of the parties, the following may be referred to international commercial arbitration:

- disputes resulting from contractual and other civil law relationships arising in the course of foreign trade and other forms of international economic relations, provided that the place of business of at least one of the parties is situated abroad; as well as
- disputes arising between enterprises with foreign investment, international associations and organizations established in the territory of Ukraine; disputes between the participants of such entities; as well as disputes between such entities and other subjects of the law of Ukraine.⁸⁷

Second paragraph of this article treats disputes which are domestic in their nature (because they did not arise in a course of foreign trade and arose between parties which are located within the territory of Ukraine) as international disputes.⁸⁸ Awards which are rendered regarding this of proceedings are treated as domestic arbitral awards and provisions of New York Convention are held to be inapplicable to this type of ICAC awards in case of their enforcement in the territory of Ukraine.⁸⁹ In addition both Civil and Commercial Codes of Ukraine are silent as to the enforcement procedure for this type of arbitral awards. When filing an application to municipal courts for the enforcement of these awards as a rule parties must prove that the relevant court has jurisdiction to consider the issue of the enforcement and

⁸⁶ Marta Khomyak, “Emerging Trends and Realities of International Arbitration in Ukraine”, *Global Arbitration Review*, 2008 <http://www.magisters.com/publication.php?en/741//> [hereinafter Khomyak]

⁸⁷ Article 1(2) of the Law “On international commercial arbitration”, 24.02.1994, No. 4002-XII, Vidomosti Verhovnoi Radi Ukraini, 1994, No. 25, p.198, English version available at <http://www.ucci.org.ua> [hereinafter the Law “On international commercial arbitration”]

⁸⁸ G.A. Tsirat, *Mishnarodniy Komertsyyniy Arbitrash* [International Commercial Arbitration] (Istina, 2002), 104

⁸⁹ Ibid.

this should not be parties concern.⁹⁰ This lacuna of law must be addressed by the legislator in the near future.

Article 19 of the Law provides that the parties are free to agree on procedural rules to be followed by arbitral tribunal. In the absence of a party choice arbitral tribunal may conduct arbitral proceedings in a way it deems to be appropriate. At the same time Article 28 of the Law stipulates that any reference by the parties to a foreign system of law shall be interpreted as to indicate a system of substantive law applicable to the dispute. Some scholars in Ukraine argue that procedural norms of a foreign state cannot be applied to govern “internal” procedure in international arbitration that has a place in Ukraine.⁹¹ I disagree with this view. If the Law follows the logic of UNCITRAL Model Law such an opportunity must be provided. I think that parties to arbitration which will take place in Ukraine have an opportunity to indicate procedural law applicable to arbitration aside from substantive law. It is not enough for them to simply indicate the system of law applicable to the whole dispute because, abiding provisions of the law “On international commercial arbitration”, arbitrators will interpret their choice as a choice of substantive law. So far no case law had been developed on this issue and at the same time practice of permanent arbitral institutions favors the view that *lex arbitri* is *lex loci arbitri*.

Up until 2005 recognition and enforcement of foreign arbitral awards was regulated by the Law of Ukraine “On recognition and enforcement of foreign court judgements in Ukraine”. This law treated foreign arbitral award as a judgment by a foreign state court which is not correct but nevertheless certain unified and logical

⁹⁰ Olena Perepelinska, “Protsesyal’na analogiya abo yak vikonati v Ukraini rishennia MKAS tshi MAK pri TPP Ukraini” [Procedural analogy or how to enforce in Ukraine award of ICCA and MIC at the Chamber of Commerce and Industry of Ukraine.], *Yuridichniy shurnal*, no. 3, <http://www.kisilandpartners.com/ukr/publications/articles/21/>

⁹¹ V.V. Bogatir, “Moshlivist’ perevirki inozemnogo prava v mishnarodnomy komertsynomy arbitrashi”, [An opportunity to review foreign international law in international commercial arbitration], *Visnik Khmel’nitskogo institytu regionalnogo ypravlinnia ta prava*, (2003): 262

court practice was established. Under this law appellate courts had jurisdiction to hear cases of recognition and enforcement of foreign arbitral awards. After the enactment of new Code of Civil Procedure of Ukraine this law lost its force and jurisdiction to hear cases on recognition and enforcement of foreign arbitral awards was transferred to courts of first instance at the principal location of the debtor. In addition new Code of Civil Procedure didn't provide a definition of "foreign court judgment" and in a lot of instances inexperienced municipal courts failed to assume their jurisdiction or incorrectly applied provisions of New York Convention.

Because previous court practice was destroyed by enactment of the new Code of Civil Procedure higher courts had to clarify for local courts the procedure of recognition and enforcement of arbitral awards. In a case *Azerbaijan State Caspian Sea Shipping Company v Black Sea Shipping Company* Supreme Court of Ukraine concluded that the list of grounds of setting aside foreign arbitral awards, which is included in Article 34 of the Law "On International commercial arbitration" and mirrors relevant provisions of the New York Convention, is exclusive and cannot be extended.⁹² In *Stoninton v. OJSC Primorecs*, the Supreme Court of Ukraine confirmed that courts should not review arbitration awards on the merits: "while considering applications for recognition and enforcement of foreign arbitral awards the court cannot go into the merits of the case and must base its decision on grounds stipulated under the application for recognition and enforcement of foreign arbitral award"⁹³

⁹² T.G. Zaharchenko, "Protsesyalni pidstavi osporiyvannia rishennia mishnarodnogo komertsynogo arbitrashy I pravovi naslidki yogo skasyvannia", [Procedural grounds of setting aside of arbitral awards in international arbitration and legal consequences of its cancellation], *Syspilstvo. Dershava. Pravo*, no. 3, (2003): 72

⁹³ *Stoninton Ltd. v. OJSC "Primorecs"*, Supreme Court of Ukraine, no. 83/2007 Decided on 21.10.2009

It is necessary to point out that recognition and enforcement of an arbitral award is not a single step judicial action in Ukraine. In order for a party to apply for recognition and enforcement of the award two applications must be submitted to a relevant state court. Recognition of the award is seen as a special court procedure of spreading the judicial force of the award on the territory of Ukraine while enforcement is another procedure by which party can obtain a special court order for execution of the award.⁹⁴

Both New York Convention and Ukrainian law “On International Commercial Arbitration” include as one of the grounds for setting aside of arbitral award the occasion when “the subject matter of the dispute is not capable of settlement by arbitration under the law of that country”⁹⁵ where recognition and enforcement is sought. Law treats this right of States to control the subject matters capable of being resolved in international arbitration as a “nightmare scenario”⁹⁶. In case of Ukraine it is indeed so. Ukrainian legislation does not provide exhaustive list of disputes which cannot be submitted to international commercial arbitration, instead these instances are scattered through different legislative norms.⁹⁷ “Until 2005, under Ukrainian law, any dispute could be submitted to international arbitration, except a few exceptions listed in the Commercial Procedural Code, which were: disputes with respect to invalidation of acts (statutory and non-statutory acts); disputes arising from conclusion, amendment, termination or performance of commercial contracts related to state needs.”⁹⁸

⁹⁴ I.G. Pobirchenko, *Mishnarodniy komertsyyniy arbitrash v Ukraini: Teoriya ta zakonodavstvo*, [International Commercial Arbitration in Ukraine: Theory and Law] (In Ure, 2007), 150

⁹⁵ Article 34 of the Law “On International Commercial Arbitration” *supra* note 80

⁹⁶ Law *supra* note 2, p. 179

⁹⁷ Article 234 of the Code of Civil Procedure of Ukraine, Article 12 of the Code of Commercial Procedure in Ukraine

⁹⁸ Khomyak note *supra* 79

Act on Private International Law of 2005 dramatically extended a list of exemptions when exclusive jurisdiction of State courts cannot be circumvented and disputes cannot be submitted to international arbitration. Article 77 of this law provides that among others to arbitration cannot be submitted cases:

...where the dispute relates to immovable property located in Ukraine; a dispute arising from IP rights that are secured by registration or patent certification in Ukraine; a dispute relating to registration or dissolution of foreign companies, non-governmental organizations, charitable foundations or other associations, or a legal entity in Ukraine; cases involving issue or cancellation of securities officially registered in Ukraine; and other cases where Ukrainian law provides that national courts take precedence.⁹⁹

“According to the 2009 Amendments to the laws on arbitration, the competence of private arbitration tribunals became restricted in certain other issues, to be summarized as follows: arbitration tribunals are no longer competent to establish facts of legal importance; arbitral awards should not interfere in the public sector and cause issue of any public acts; facts established by arbitration tribunals do not have any “prejudicial effect” in commercial litigations.”¹⁰⁰ It is important to keep in mind that these restrictions apply to “arbitral courts” and, although international arbitration is regulated by separate law, legislator treats international arbitration tribunals and institutions which are located within the country as domestic arbitral courts.

These restrictions are applicable to international arbitral proceedings which were subjected to Ukrainian substantive and procedural law and the award may be set aside on one of these grounds which are very wide. In a case between Private Company “Ferrum Invest Plus” and Capital Investment Group Inc. Supreme Commercial Court of Ukraine refused to enforce foreign arbitral award on the ground that the dispute involved immovable property which is located on the territory of Ukraine and disputes regarding it cannot be subject to arbitration due to mandatory

⁹⁹ Article 77 of the Law of Ukraine “On Private International Law” № 2709-IV, 23.06.2005, Vidomosti Verhovnoi Radi Ukraini, 2005, No. 32

¹⁰⁰ Legal Aspects of Doing Business in Ukraine 2010 *supra* note 78

restriction of state law.¹⁰¹ In another case *State Property Fund of Ukraine v AutoVaz-Invest* Supreme Court of Ukraine held that “to arbitration cannot be submitted disputes which arise in connection with contracts which involve satisfaction of the needs of the state.”¹⁰²

Another two grounds which are commonly abused by Ukrainian courts when it comes to recognition and enforcement of foreign arbitral awards include public policy and due process. The Supreme Court of Ukraine defined public order as “... legal order of the State, defined principles that constitute the basis of existing legal system (which are relevant to its independence, integrity, self-determination and immunity, and basic constitutional rights, freedoms, liberties etc.)”¹⁰³ This definition is very wide and does not provide for the distinction of international public order from the domestic one which leaves space for abuse of this doctrine by courts. In a dispute between *Hatwave Hellenac Amerikan Telekommunikations Wave Ltd.* on one side and *Leafprem Company Ltd.* and *Ukrainska Hvilia Ltd.* on the other side parties submitted their shareholders agreement to the law of the US. The agreement also included an arbitration clause which provided that any dispute in connection with shareholders agreement shall be resolved by arbitral tribunal which will have its seat in New York, USA.¹⁰⁴ Supreme Commercial Court of Ukraine held that “relations between founders of a legal entity in Ukraine concerning formation of its organs, determination of its competence, procedure of decision making and shareholders meeting are subject to provision of Civil Code of Ukraine and the Law of Ukraine “On

¹⁰¹ Private Company “Ferrum Invest Plus” v Capital Investment Group Inc., Supreme Economic Court of Ukraine, no. 1/57-ПД-09, Decided on 30.11.2009

¹⁰² *State Property Fund of Ukraine v AutoVAZ – Invest* Supreme Court of Ukraine, no. 114/2006, Decided on 03.04.2008

¹⁰³ Resolution of Supreme court of Ukraine “On practice of reviewing by courts applications for recognition and enforcement of foreign judgments and arbitral awards rendered in international commercial arbitration within the territory of Ukraine”, December 24, 1999, no. 12

¹⁰⁴ *Hatwave Hellenac Amerikan Telekommunikations Wave Ltd. v Leafprem Company Ltd., Ukrainska Hvilia Ltd.*, Supreme Commercial Court of Ukraine, no. 29/117 Decided on 02.07.2009

commercial enterprises” and cannot be subjected to laws of a foreign State. These norms are imperative by their nature and their violation is inconsistent with public order. Joint stock companies that are registered in Ukraine do not have a right to submit corporate disputes between shareholders and other participants to international commercial arbitral tribunals.”¹⁰⁵

All these factors described above make Ukraine less competitive on global arbitration market. Foreign businessmen prefer to resort to either well known institutions or western jurisdictions. Laws of the state which are applicable to recognition and enforcement make this procedure a nightmare for the creditor. Courts are inexperienced when it comes to international commercial arbitration and judges are unwilling to become familiar with it.

¹⁰⁵ Hatwave Hellenac Amerikan Telekommunikations Wave Ltd. v Leafprem Company Ltd., Ukrainska Hvilia Ltd., Supreme Commercial Court of Ukraine, no. 29/117 Decided on 02.07.2009

CONCLUSION

In the past fifty years, international arbitration has seen drastic changes. In order to compete on the still growing market, leading arbitral jurisdictions have made their domestic laws more arbitration-friendly in order to enhance the party autonomy principle. Today, *lex loci arbitri* plays a much lesser role as it did prior to the New York Convention and the concept of delocalization is on the rise at least in scholarly works. Discussion on the topic of delocalized arbitration and a-national awards reveals that there are still several problems when it comes to the enforcement of such awards in a specific jurisdiction.

Although countries are moving towards uniformity of their domestic laws on international arbitration and although New York Convention contains an exclusive list of grounds for setting aside of the arbitral award, it is still the municipal judge who interprets these provisions and this interpretation will most likely vary from jurisdiction to jurisdiction. As shown on the example of Ukraine, even a country which is both a signatory of the New York Convention and an UNCITRAL Model Law country can remain hostile to international arbitral proceedings and awards by virtue of its domestic laws. Another complication is the so-called “forum shopping” and parallel proceedings. In the event that an award was denied recognition and enforcement in one jurisdiction, the party can still apply for it in a different jurisdiction judges of which are not bound in any sense by the decision of their colleagues. This reduces such positive effects of arbitration as finality and efficiency.

The author is of the opinion that detachment of arbitral proceedings from any system of legal order and from the law of the seat of arbitration is a mere option that cannot be seen as a nostrum. Parties may resort to this option only when extraordinary circumstances of the case require them to do so and must proceed

with great caution. For businesses which are inexperienced in arbitral proceedings resort to law of the seat of arbitration can be convenient for both certainty and the level of support provided by *lex loci arbitri*.

Arbitration in Ukraine may be a challenge for a western lawyer. Domestic arbitral tribunals, introduced shortly after proclamation of independence, did not serve their main purpose: justice. These institutions had been introduced to lower the pressure on the overloaded court system, but quickly became a tool for abuse in hands of big businesses. To fight this, heavy restrictions as to the extent of the authority of domestic arbitral tribunals were imposed by the legislature. Being of completely different nature, international commercial arbitration nevertheless became subject to these restrictions due to lack of dogmatic distinction between domestic and international arbitral proceedings and collateral effect of these norms.

Recognition and enforcement of an arbitral award rendered in Ukraine is also not an easy task and can be both resource and time consuming. There is no clear regulation as to the mechanism of enforcement of awards rendered in international arbitral proceedings and often the party seeking enforcement will have to prove to the relevant court that it has jurisdiction over the disputed matter using such unfamiliar to common law concepts as analogy of law.

The grounds for recognition and enforcement of arbitral awards stipulated in the New York Convention are subject to abuse and wide interpretation by Ukrainian courts (a good example is the requirement of compliance of the award with public policy of the state where recognition is sought). The powers of recognition and enforcement of arbitral awards were transferred from appellate courts to municipal courts of first instance, where the judges are unfamiliar with the New York Convention and may even deem it to be inapplicable. The author is of the opinion

that in order to make recognition and enforcement of arbitral awards rendered in international arbitral proceedings more efficient, it is necessary to include the definition of a “foreign arbitral award” into domestic legislation of Ukraine and add a relevant chapter to the Civil Code of Ukraine which would regulate the procedure in detail together with additional amendments of existing special statutes.

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