CENTRAL EUROPEAN UNIVERSITY

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# PUBLIC POLICY IN JUDICIAL CONTROL OVER ENFORCEMENT OF ARBITRAL AWARDS IN UKRAINE

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# ABSTRACT

Ukraine is a party to the New York Convention and a UNCITRAL Model Law state. Both of these legal instruments provide that enforcement of an arbitral award may be denied if it would contradict public policy. However, content of the public policy is left for the states to decide.

The main purpose of this thesis is to analyze case law on recognition and enforcement of arbitral awards to determine how the notion of public policy differs in Ukraine from the world's leading arbitration jurisdictions and to show which norms Ukrainian courts will apply as matters of substantive and procedural public policy. This thesis answers three main research questions. First, what definition of public policy do Ukrainian courts use in recognition and enforcement of arbitral awards? Second, which areas of law fall within the scope of public policy? Third, which procedural infringements are recognized as a part of public policy?

The analysis of the relevant practice reveals that despite courts generally take pro-enforcement position there are still problems with reasoning why certain mandatory rules constitute matters of public policy; with refusal to consider the public policy defense in the dispute between private enterprises; with enforcement of awards that settle corporate disputes; and with application of the separability doctrine. Thus, new review of court practice and recommendations of the Supreme Court of Ukraine, as well as amendments to the procedural laws, are necessary.

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# LIST OF ABBREVIATIONS

| | |
|---|---|
| AAA | American Arbitration Association |
| CCI | Chamber of Commerce and Industry |
| CCU | Civil Code of Ukraine |
| CIS | Commonwealth of Independent States |
| CJSC | Close Joint-Stock Company |
| CPC | Civil Procedural Code of Ukraine |
| Decree No. 15-93 | Decree of the Cabinet of Ministers of Ukraine "On System of Currency Regulation and Currency Control" |
| Draft Law | Draft Law of Ukraine "On Amendments to the Civil Procedural Code of Ukraine" (with regard to certain issues of recognition and enforcement of the decision of the foreign court, which is subject to compulsory enforcement) |
| HEC | Highest Economic Court of Ukraine |
| HSCU | Highest Specialized Court of Ukraine for Consideration of Civil and Criminal Cases |
| ICAC | International Commercial Arbitration Court |
| ICC | International Chamber of Commerce |
| ILA | International Law Association |
| IMF Agreement | Articles of Agreement of the International Monetary Fund (Bretton Woods, New Hampshire, 1944) |
| Law on ICA | Law of Ukraine "On International Commercial Arbitration" |
| Law on IPL | Law of Ukraine "On International Private Law" |
| LLC | Limited Liability Company |
| ML | UNCITRAL Model Law on International Commercial Arbitration |
| NBU | National Bank of Ukraine |
| NY Convention | United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) |
| OJSC | Open Joint-Stock Company |
| PJSC | Public Joint-Stock Company |
| Recommendations | Recommendations of the Plenary Assembly of the Highest Economic Court of Ukraine "On Practice of Application of Legislation while Reviewing Cases Arising out of Corporate Relations" |
| Resolution | Resolution of the Plenary Assembly of the Supreme Court of Ukraine "On Practice of Review of Corporate Disputes by Courts" |
| Resolution 2/2002 | Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards |
| Resolution No. 12 | Resolution of the Plenary Assembly of the Supreme Court of Ukraine "On Practice of Review by Courts of Applications on Recognition and Enforcement of Decisions of Foreign Courts and Arbitral Tribunals and on Setting Aside of Decisions Rendered in Course of International Commercial Arbitration within the Territory of Ukraine" |

| | |
|---|---|
| RF | Russian Federation |
| SCU | Supreme Court of Ukraine |
| SE | State Enterprise |
| UNCITRAL | United Nations Commission on International Trade Law |

# INTRODUCTION

International commercial arbitration is nowadays perceived as a well-recognized method for the adjudication of disputes in international business. Such status of arbitration may be explained, in particular, by its finality, meaning that arbitral awards are exposed to the relatively low risk of being annuled or changed by courts, and enforceability, since the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the "NY Convention") generally makes a foreign arbitral award easier to enforce than a judgment of a foreign court[1].

One of the most important features of the NY Convention is that in Art. V it provides exclusive list of grounds under which recognition and enforcement of a foreign arbitral award may be refused, *inter alia*, "if the competent authority in the country where […] enforcement is sought finds that […] [t]he recognition or enforcement of the award would be contrary to the public policy of that country[2]". According to the United Nations Commission on International Trade Law (hereinafter the "UNCITRAL") Secretariat, the NY Convention entered into force on June 7, 1959 and had 146 states as parties on January 1, 2012[3]. For Ukraine the date of signature of the NY Convention is December 29, 1958, the date of ratification – October 10, 1960, the NY Convention entered into force on January 8, 1961.

UNCITRAL Model Law on International Commercial Arbitration (hereinafter the "ML") in Art. 36 provides grounds for refusing recognition and enforcement of an award, which are

[1] James Carter, *Dispute Resolution and International Agreements*, INTERNATIONAL COMMERCIAL AGREEMENTS 435–445 (1995), 439, in TIBOR VARADY, JOHN J. BARCELO III & ARTHUR T. VON MEHREN, INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE (West, 4 ed. 2009), 23-24.
[2] UNITED NATIONS, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, June 10, 1958, 330 UNTS 38, Art. V(2)(b).
[3] UNCITRAL, Status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

identical to those of Art. V of the NY Convention. In turn, the Law of Ukraine "On International Commercial Arbitration"[4] (hereinafter the "Law on ICA") is based on the ML.

However, neither the NY Convention nor the ML gives a definition of public policy or specifies what matters fall within its scope. Thus, its interpretation is left for the courts, on the basis of national law of the state where enforcement is sought. Taking into account increasing popularity of arbitration and frequency in which public policy argument is raised in enforcement proceedings this issue is currently of the highest importance.

There is no clear uniformity with respect to the notion of public policy. The issue of public policy as a ground for refusal of recognition and enforcement of an arbitral award has been analyzed by well-known scholars in the sphere of international arbitration, such as H. Kronke, P. Nacimiento, D. Otto, and O. Elwan[5], A. Redfern and M. Hunter[6], T. Varady, J. Barcelo, and A. von Mehren[7]. In Ukraine this matter was addressed by O. Krupchan[8], M. Malskyy[9], O. Alyoshin and T. Slipachuk[10]. However, up to now there is no comprehensive work that would process and summarize Ukrainian court practice on the issue at hand.

The main purpose of this thesis is to analyze case law on recognition and enforcement of foreign arbitral awards to determine how the notion of public law differs in Ukraine from the



[4] LAW OF UKRAINE "ON INTERNATIONAL COMMERCIAL ARBITRATION" No. 4002-XII of 24 February 1994.
[5] HERBERT KRONKE ET AL., RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION (2010).
[6] ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (Sweet & Maxwell, 4th ed. 2004).
[7] TIBOR VARADY, JOHN J. BARCELO III & ARTHUR T. VON MEHREN, INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE (West, 4 ed. 2009).
[8] O. Krupchan, *International Standards of the "Public Order" Category in International Commercial Arbitration and Its Definition in the Legislation and Law-Application Practice of Ukraine*, LAW OF UKRAINE 158–166 (2011).
[9] MARKIYAN M. MALSKYY, RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN UKRAINE (2007).
[10] Oleg Y. Alyoshin & Tatyana Slipachuk, *Enforcement of Foreign Arbitral Awards in the Ukraine: To Be or Not to Be*, 22 JOURNAL OF INTERNATIONAL ARBITRATION 65–73 (2005).

world's leading arbitration jurisdictions and to show which norms Ukrainian courts will apply as matters of procedural and substantive public policy.

As it has been stated above, Ukraine is a signatory to the NY Convention and the ML country. Therefore, Ukrainian legal regime may be generally perceived as favorable to arbitration. However, first, some local particularities exist in Ukraine and, second, certain matters, *i.e.*, arbitrability and the procedure for the recognition and enforcement of arbitration awards, originally were left for the states to decide[11]. Thus, to test the hypothesis of Ukraine being an arbitration-friendly country, this thesis will answer three main research questions. First, what definition of public policy do Ukrainian courts use in recognition and enforcement of arbitral awards? Second, which areas of law fall within the scope of public policy? Third, which procedural violations are recognized as a part of public policy?

The main research method of this thesis is case analysis. Decisions of Ukrainian courts of all levels rendered while dealing with the issue of public policy in recognition and enforcement of foreign arbitral awards are analyzed. Also, certain court decisions on setting aside or recognition and enforcement of domestic arbitral awards are discussed for the purpose of comparative analysis of the notion of public policy as a ground to refuse recognition and enforcement of domestic and foreign arbitral awards. Furthermore, author takes into account relevant Ukrainian national laws, international treaties, and court decisions in leading arbitration jurisdictions (*e.g.*, France, Sweden, Switzerland, UK, US).



[11] Yulia S. Chernykh, *International Commercial Arbitration in Ukraine: Details Do Matter*, 26 JOURNAL OF INTERNATIONAL ARBITRATION 301–306 (2009), 301.

The use of case analysis as the main research method presupposes certain limitations. First, pursuant to the Law of Ukraine "On the Access to Court Decisions"[12] from June 1, 2006 court decisions are available in on-line database. In practice, however, not all decisions are accessible, and the database does not include decisions render prior to the adoption of this Law. Second, court judgments and relevant national legislation generally do not have official English translation, thus, all translations reproduced in the body of the thesis were done by the author. Furthermore, since the main focus of this thesis is application of public policy in proceedings on recognition and enforcement of arbitral awards, case law on setting aside of arbitral awards generally is not analyzed.

Research presented in this thesis is valuable from both theoretical and practical points of view. Its scientific significance lays in the fact that present research construes a definition of public policy of Ukraine, shows which legal rules are of such importance as to amount to matters of public policy, and illustrates how the notion of public policy in Ukrainian practice differs from perception of public policy in leading arbitration jurisdictions. Practical importance of this thesis is that it makes suggestions how current court practice may be changed to better accord to international interpretation of the NY Convention, and the thesis may also serve as working tool for arbitration practitioners to predict how Ukrainian courts are likely to treat public policy argument in enforcement of a particular award.

This thesis consists of the introduction, three chapters, and conclusion. First chapter focuses on public policy as a ground for refusal of recognition and enforcement of foreign arbitral awards in general, including the issues of definition of public policy in Ukrainian legislation and court practice, distinction between domestic and international public policy, and the

[12] LAW OF UKRAINE "ON THE ACCESS TO COURT DECISIONS" No.3262-IV of 22 December 2005.

difference in treatment of private and state-owned parties to arbitration. Second chapter analyzes how Ukrainian courts exercise limited review of arbitral awards on merits in the course of its recognition and enforcement, with special focus on areas of corporate law, energy safety, and currency regulations, since the review of court practice conducted by the author revealed that these areas of law are of particular importance in Ukrainian legal practice. Third chapter assess which procedural infringements, such as award based on a void agreement and inability of a party to present its case, shall be treated as violations of public policy.

On the basis of analysis of judicial practice author reaches the conclusion that despite courts generally take pro-enforcement position there are still problems with reasoning why certain mandatory rules constitute matters of public policy; with refusal to consider the public policy defense in disputes between private enterprises; with enforcement of awards that settle corporate disputes; and with application of the separability doctrine. Thus, new review of court practice and recommendations of the Supreme Court of Ukraine, as well as amendments to the procedural laws, are necessary.

# CHAPTER 1. PUBLIC POLICY AS A GROUND FOR REFUSAL OF RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

## *1.1 Definition of Public Policy*

Both the NY Convention and the ML, as it was stated in the introduction, provide that enforcement of an arbitral award may be refused if it would contradict public policy. However, neither the NY Convention nor the ML gives definition of public policy or suggests which categories of rules should fall within its scope. Thus, this chapter is aimed at analysis how court practice in Ukraine construes the definition of public policy and whether such definition accords to the international practice.

Due to the fact that Ukraine is a party to the NY Convention and the Law on ICA is based on the ML, the issue of public policy is not addressed at length. The only official document where the term "public policy" is interpreted specifically for the purposes of recognition and enforcement of arbitral awards is the Resolution of the Plenary Assembly of the Supreme Court of Ukraine (hereinafter the "SCU") "On Practice of Review by Courts of Applications on Recognition and Enforcement of Decisions of Foreign Courts and Arbitral Tribunals and on Setting Aside of Decisions Rendered in Course of International Commercial Arbitration within the Territory of Ukraine" (hereinafter the "Resolution No. 12"):

> In accordance with international treaties of Ukraine a court shall refuse application for recognition and enforcement […] when: […] In addition, the treaty with Mongolia provides that recognition and enforcement of a court's decision may be refused if it may harm the sovereignty, security or public policy of the Contracting Party, where recognition and enforcement is sought. Public policy, in this and other cases, when absence of harm to it is a precondition for recognition and enforcement of a decision, shall mean legal order of the state, fundamental principles and framework that constitute the basis of its order (are related to its independence, integrity, autonomy and immunity, fundamental constitutional rights, freedoms, guarantees, etc.)[13].

[13] RESOLUTION OF THE PLENARY ASSEMBLY OF THE SUPREME COURT OF UKRAINE "ON PRACTICE OF REVIEW BY COURTS OF APPLICATIONS ON RECOGNITION AND ENFORCEMENT OF DECISIONS OF FOREIGN COURTS AND

Such definition of public policy raises several points. First, the Resolution No. 12 is not formally a binding legal document, even though lower courts usually follow the guidelines established by the SCU. Nevertheless, at least a theoretical possibility exists that courts may render decisions not in line with the Resolution No. 12.

Second, the Resolution No. 12 may not be an example of perfect legislative drafting, as it gives the definition of "public policy", which is to be used in all cases where public policy is raised to oppose enforcement of the arbitral awards, in the context of the treaty with Mongolia that lists public policy alongside with other grounds, *i.e.*, sovereignty and security of the Contracting Party. Therefore, a question may arise whether Ukrainian courts shall interpret the term "public policy" in the context of the treaty with Mongolia or take into account only the last sentence of the above quotation.

Third, the Resolution No. 12 was adopted almost 13 years ago, before the International Law Association (hereinafter the "ILA") promulgated Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards[14] (hereinafter the "Resolution 2/2002"), before the ML was amended in 2006, and it does not take into account recent court practice.

Possible solution is for the SCU to produce a new review of court practice and provide the lower courts with guidelines on recognition or enforcement of arbitral awards. Such review and guidelines may and, in the author's opinion, should be more specific with respect to the

ARBITRAL TRIBUNALS AND ON SETTING ASIDE OF THE DECISIONS RENDERED IN THE COURSE OF INTERNATIONAL COMMERCIAL ARBITRATION WITHIN THE TERRITORY OF UKRAINE" No. 12 of 24 December 1999, Art. 12.

[14] ILA, Resolution 2/2002, RECOMMENDATIONS ON THE APPLICATION OF PUBLIC POLICY AS A GROUND FOR REFUSING RECOGNITION OR ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS.

issue which areas of substantive law or which rules of procedure should fall within the scope of public policy, or which criteria should Ukrainian courts employ while assessing these questions.

With respect to the substance of the definition contained in the Resolution No. 12, it suggests that public policy includes only the most general, fundamental, principles, which are related either to independence and integrity of Ukraine or to constitutional rights, freedoms and guarantees. However, the definition itself is too general and non-exhaustive, which may lead to possible abuse by courts. Therefore, analysis of court practice is of essence for the purpose of determination what standard of public policy is applied in the proceedings on the recognition and enforcement of arbitral awards in Ukraine.

On the other hand, court decisions of the developed arbitration jurisdictions show that approach of the Resolution No. 12 to public policy as the most basic norms of the state is in line with international view on this issue. In particular, in the landmark US case the court stated the following:

> The general pro-enforcement bias informing the [NY] Convention […] points toward a narrow reading of the public policy defense. An expansive construction of this defense would vitiate the [NY] Convention's basic effort to remove preexisting obstacles to enforcement. […] [C]onsiderations of reciprocity […] counsel courts to invoke the public policy defense with caution lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the [US]. We conclude, therefore, that the [NY] Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice[15].

However, it is worth mentioning that while the US court speaks of "basic notions of morality and justice", the Resolution No. 12 also makes a reference to "independence, integrity, autonomy and immunity" of the state. Thus, Ukrainian perception of public policy seems to

[15] *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2nd Cir. 1974), 974-975.

be more state-oriented. Such opinion is further evidenced by the fact that not only the Resolution No. 12 speaks about public policy, but the Art. 228 of the Civil Code of Ukraine (hereinafter the "CCU") also says that

> [a] transaction is considered to be in violation of public policy if it is aimed at infringement of constitutional rights and freedoms of a person and a citizen, destruction, damaging property of a natural or a legal person, state, Autonomous Republic of Crimea or local community, unlawful taking possession of such property[16].

The definition reproduced above is not specific for arbitration; it is located in the section of the CCU that addresses consequences of conclusion of an agreement in violation of legislative requirements. Besides, the scope of protection under this article is narrower and covers rather economic and political interests of the state. Author's position is that such definition shall not be used in proceedings on recognition and enforcement of arbitral awards, and courts are to apply public policy in its meaning as specifically stipulated in the Resolution No. 12. Problems connected with excessive state interest-oriented perception of public policy will be comprehensively analyzed in section 1.3 while dealing with the issue of different treatment of private and state-owned parties with respect to the public policy ground for refusing recognition or enforcement of arbitral awards.

In the author's opinion, clear and complete definition of public policy is made by the ILA. Initially, the Resolution 2/2002 states the following:

> […] "international public policy" […] designate[s] the body of principles and rules recognised by a State, which […] may bar the recognition or enforcement of an arbitral award […] when recognition or enforcement of said award would entail their violation on account either of the procedure pursuant to which it was rendered (procedural international public policy) or of its contents (substantive international public policy)[17].

Hereby procedural and substantive public policy are explicitly distinguished as they interfere with the form (procedure under which the arbitral award was rendered) and core (content) of

[16] CIVIL CODE OF UKRAINE No. 435-IV of 16 January 2003.
[17] Resolution 2/2002, *supra* n. 14, Recommendation 1(c).

an arbitral award, respectively. The question whether and which procedural rules Ukrainian court practice recognizes as matters of public policy is addressed in chapter 3.

The Resolution 2/2002 further enumerates three categories of rules and principles that are of such importance as to constitute public policy matters:

> The international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as "*lois de police*" or "public policy rules" and (iii) the duty of the State to respect its obligations towards other States or international organisations[18].

Such definition is well-structured and divides public policy of a state into three main groups of rules, namely, those related to justice and morality; protection of economic, political and social interests of a state; and international comity.

Important aspect of each and every definition of public policy applicable in the proceedings on recognition and enforcement of foreign arbitral awards is that public policy is limited and not every mandatory rule of a state where enforcement of an arbitral award is sought is automatically a rule of public policy of that state. To be a ground for refusing recognition and enforcement of an arbitral award, a mandatory rule should be of essential importance:

> An award's violation of a mere "mandatory rule" (i.e. a rule that is mandatory but does not form part of the State's international public policy […]) should not bar its recognition or enforcement, even when said rule forms part of the law of the forum, the law governing the contract, the law of the place of performance of the contract or the law of the seat of the arbitration[19]. […] A court should only refuse recognition or enforcement of an award giving effect to a solution prohibited by a rule of public policy […] when: (i) the scope of the said rule is intended to encompass the situation under consideration; and (ii) recognition or enforcement of the award would manifestly disrupt the essential political, social or economic interests protected by the rule[20].

[18] Resolution 2/2002, *supra* n. 14, Recommendation 1(d).
[19] Resolution 2/2002, *supra* n. 14, Recommendation 3(a).
[20] Resolution 2/2002, *supra* n. 14, Recommendation 3(b).

Unfortunately, even though the Resolution 2/2002 may provide necessary guidance to courts, they have never been mentioned in analyzed Ukrainian court practice.

Furthermore, Ukrainian courts do not always clearly use the definition of public policy, and the case No. 2-к-1/2010 is illustrative for this point. Delta Wilmar CIS LLC opposed recognition and enforcement of the arbitral award rendered in favor of OJSC Efirnoe by the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (hereinafter the "ICAC at the Ukrainian CCI") on April 9, 2009 in the case AC No. 200p/2008, alleging that "the abovementioned arbitral award cannot be enforced in Ukraine at all[21]". The court enforced the arbitral award and stated the following:

> [The court] does not find any grounds to refuse the application [for the recognition and enforcement] on the basis of Art. V of the NY Convention, since […] the recognition and enforcement of such arbitral award does not contradict public policy of Ukraine, does not infringe its independence, integrity, autonomy and immunity, and does not affect fundamental constitutional rights, freedoms, and guarantees of citizens[22].

Delta's appeal of the ruling of the district court was dismissed[23] by the appellate court , which also employed reasoning reproduced above.

Judging by the wording of this ruling, the court based its decision on the definition of public policy from the Resolution No. 12, but neither made a reference to the Resolution No. 12 nor cited it precisely. First, the court did not specify particular paragraph of the Art. V of the NY Convention and corresponding article of the Law on ICA. Second, textual interpretation of the wording of the court's ruling may suggest that "public policy", "independence, integrity, autonomy and immunity", and "fundamental constitutional rights, freedoms, and guarantees of citizens" are three separate concepts that shall not be infringed for the award to be

[21] *OJSC Efirnoe v. Delta Wilmar CIS LLC*, Case No. 2-к-1/2010, Yuzhnyi City Court of Odesska Oblast, decided on 3 November 2010.
[22] *Ibid.*
[23] *OJSC Efirnoe v. Delta Wilmar CIS LLC*, Appellate Court of Odesska Oblast, decided on 26 January 2011.

recognized and enforced, even though the two latter terms are sub-sets of the former. As a conclusion, for the purposes of clarity and transparency Ukrainian courts would rather clearly refer to the definition of public policy they use.

Again, the Resolution No. 2/2002 may be instructive on this point:

> If the court refuses recognition or enforcement of the arbitral award, it should not limit itself to a mere reference to [Art. V(2)(b) of the NY Convention] or to its own statute or case law. Setting out in detail the method of its reasoning and the grounds for refusing recognition or enforcement will help to promote a more coherent practice and the development of a consensus on principles and rules which may be deemed to belong to international public policy[24].

Sadly, Ukrainian courts are less likely to express their reasoning in an explicit, structured and coherent manner. Sometimes courts in their rulings reproduce the whole Art. V of the NY Convention; do not specify which exact circumstances, in opinion of the party that opposes recognition and enforcement of an award, would make recognition and enforcement of such award contrary to public policy; reproduce the whole text definition of public policy from the Resolution No. 12 without explanation which of the elements of this term is concerned, etc.

To summarize, in Ukraine the definition of public policy applicable in proceeding on recognition and enforcement of arbitral awards is given in the Resolution No. 12 of the Plenary Assembly of the SCU. This public policy refers to the basics of the legal order of Ukraine, is related to fundamental constitutional rights, freedoms, guarantees. Generally, such approach is in line with international practice, however, author suggests that new review of the court practice and recommendations are to be adopted employing the ILA Resolution 2/2002 to make enforcement of arbitral awards more transparent and predictable.



[24] Resolution 2/2002, *supra* n. 14, Recommendation 1(g).

### *1.2 Domestic and International Public Policy*

The NY Convention and the ML speak about "public policy of that country" and "public policy of this State", respectively. This section illustrates that "international" public policy is applicable to recognition and enforcement of foreign arbitral awards, and analyzes whether Ukrainian courts follow this pro-enforcement approach of narrowing public policy for the purposes of recognition and enforcement of foreign arbitral awards.

On the one hand, in the leading US case the court expressly distinguished national and international public policy with respect to recognition and enforcement of arbitral awards:

> In equating 'national' policy with [the US] 'public' policy, the appellant quite plainly misses the mark. To read the public policy defense as a parochial device protective of national political interests would seriously undermine the [NY] Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.' Rather, a circumscribed public policy doctrine was contemplated by the [NY] Convention's framers and every indication is that the [US], in acceding to the [NY] Convention, meant to subscribe to this supranational emphasis[25].

On the other hand, Ukrainian legislation does not provide for distinction between public policy applicable in cases on enforcement of domestic and foreign arbitral awards. Thus, case law may have provided some guidance on this issue.

For instance, in the case No. 2-1628/10 the court decided on the application of the company Evertrade (France) for enforcement of the award of the Arbitration Institute of the Stockholm Chamber of Commerce of August 8, 2008, which ordered the SE Kherson Sea Port to pay Evertrade damages for the breach of the foreign economic contract. Enforcement of the award was opposed on the ground that it would contradict public policy of Ukraine. Tacking into account that one of the parties to arbitration was not Ukrainian, but French resident, and the

[25] *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2nd Cir. 1974), 975.

arbitration institution is situated not within the territory of Ukraine, but in Sweden, it may have been a perfect time for the Ukrainian court to speak on the difference between the national and international public policy, and to state which is applicable in proceedings on enforcement of foreign arbitral awards. In fact, the court made the following finding:

> Grounds for refusing enforcement of the arbitral award prescribed by Art. 396 of the Civil Procedural Code of Ukraine[26] or by an international treaty are not found.
> Reference […] to the fact that the award of the international arbitral tribunal contradicts public policy of Ukraine the court deems unjustified and non-grounded, since the award complies both with the national law of Ukraine and with international, which is a part of national as it is ratified by Ukraine; the award is rendered in compliance with legitimacy and subjective rights of the parties, herewith the legal order of Ukraine is not infringed in any way[27].

First, the court refers to the provision of the Civil Procedural Code of Ukraine (hereinafter the "CPC"). As it was noted above, the NY Convention does not provide procedural rules for enforcement of foreign arbitral rules by itself, but requires that "[e]ach 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[28]". Such rules were initially provided in the Law of Ukraine "On Recognition and Enforcement of Decisions of Foreign Courts in Ukraine"[29], considering that pursuant to its Art. 1 the term "a decision of a foreign court" included foreign arbitral awards. The CPC, adopted in 2004, repealed this Law and established new procedure for recognition and enforcement of foreign judgments. Even though Chapter VIII of the CPC explicitly referred only to judgments of foreign courts, "the scope of the CPC is not limited to its precise wording and applies also to the enforcement of foreign arbitral awards by virtue of the law analogy and since [Art. 81 of the Law of Ukraine



[26] CIVIL PROCEDURAL CODE OF UKRAINE No. 1618-IV of 18 March 2004.
[27] *Evertrade v. SE Kherson Sea Port*, Case No. 2-1628/10, Suvorovskyi District Court of Kherson City, decided on 21 April 2010.
[28] NY Convention, *supra* n. 2, Art. III.
[29] LAW OF UKRAINE "ON RECOGNITION AND ENFORCEMENT OF DECISIONS OF FOREIGN COURTS IN UKRAINE" No. 2860-III of 29 November 2001.

"On International Private Law"[30] (hereinafter the "Law on IPL")] interprets the term 'decisions of foreign courts' as not only court decisions, but also as 'decisions of foreign arbitral tribunals'[31]".

In addition, the CPC prescribes that decisions of foreign courts may be enforced (i) if their enforcement is provided under a treaty ratified by Ukraine or (ii) on the basis of the principle of reciprocity[32]. The CPC further stated that grounds for refusing enforcement of a decision of a foreign court are those provided in treaties ratified by Ukraine[33], or, if no such grounds are hereby provided, the CPC in Art. 396(2) lists eight possible grounds for refusal, including the case when enforcement of a decision would threat interests of Ukraine[34]. Due to the fact that Ukraine is a party to the NY Convention and list of grounds prescribed in its Art. V is exhaustive, Ukrainian courts may not invoke other provisions of Ukrainian legislation as a ground for refusing enforcement[35]. Thus, in the case No. 2-1628/10 the court rather misinterpreted the CPC if it made the foreign arbitral award subject also to Art. 396 of the CPC and not only to the Art. V of the NY Convention.

Second, the language of the court's ruling in the case No. 2-1628/10 seems to misinterpret the notion of public policy, since it suggests that enforcement of an award does not contradict public policy of Ukraine if it complies with provisions of the national law of Ukraine. Such interpretation of public policy seems to be too broad, as it requires compliance with the national law as such, not only with the limited set of mandatory rules of the highest importance, which amount to public policy rules.



[30] LAW OF UKRAINE "ON INTERNATIONAL PRIVATE LAW" No. 2709-IV of 23 June 2005.
[31] Pavlo I. Byelousov & Sergiy O. Uvarov, *Enforcement of Foreign Arbitral Awards in Ukraine: Mind the Gaps!*, UKRAINIAN JOURNAL OF BUSINESS LAW 14–17 (2010), 15.
[32] CPC, *supra* n. 26, Art. 390.
[33] CPC, *supra* n. 26, Art. 396(1).
[34] CPC, *supra* n. 26, Art. 396(2)(7).
[35] Byelousov & Uvarov, *supra* n. 31, at 17.

Third, the positive aspect of the court ruling at hand is that the court speaks of the necessity of enforcement of an award not to contradict the international commitments that Ukraine undertook by ratifying international treaties. However, the court seems to miss the point that enforcement of an award should not only non-contradict "international [law], which is a part of national [law] as it is ratified by Ukraine", but the existence of consensus within international community should also be evaluated. In particular, the Resolution 2/2002 expressly stated that international conventions may serve as proof of consensus of international community about importance of the matter:

> Nevertheless, in order to determine whether a principle […] must be considered sufficiently fundamental to justify a refusal to […] enforce an award, a court should take into account […] the international nature of the case and its connection with the legal system of the forum, and […] the existence or otherwise of a consensus within the international community as regards the principle under consideration (international conventions may evidence the existence of such a consensus). […][36]

Accordingly, another possible approach for Ukrainian courts is proposed in the Resolution 2/2002, which suggests to apply international public policy while dealing with issues of recognition and enforcement of the arbitral awards rendered in international commercial arbitration, irrespective of the place where such award was rendered, within the territory of the state whether enforcement is sought or not:

> The finality of awards […] should be respected save in exceptional circumstances[37]. […] Such exceptional circumstances may in particular be found to exist if recognition or enforcement of the international arbitral award would be against international public policy[38]. […] Whether the seat of the arbitration was located within the territory of the forum or abroad is not a consideration which should be taken into account by a court when assessing an award's conformity with international public policy[39].



[36] Resolution 2/2002, *supra* n. 14, Recommendation 2(b).
[37] Resolution 2/2002, *supra* n. 14, Recommendation 1(a).
[38] Resolution 2/2002, *supra* n. 14, Recommendation 1(b).
[39] Resolution 2/2002, *supra* n. 14, Recommendation 1(f).

Definition of the scope of public policy always involves balancing between the approach aimed at ensuring compliance of arbitral awards with mandatory rules of the state where enforcement is sought, and the pro-enforcement approach, which ensures enforceability of arbitral awards via narrowing the scope of public policy. In the author's opinion, the latter approach suggested by the ILA in the Resolution 2/2002 is more suitable for the international commercial arbitration and should be followed by Ukrainian courts. Applying international, and not domestic, public policy while dealing with recognition and enforcement of arbitral awards rendered in the course of international commercial arbitration, will provide legal certainty and ensure finality of arbitral awards, thus, make international commercial arbitration more attractive as a dispute resolution mechanism that is much needed by Ukrainian businesses to ensure prompt, flexible and fair dispute adjudication.

### *1.3 Private Parties – Why Do Some Ukrainian Courts Treat Them Differently?*

This section is devoted to the series of court decisions, which, in the author's opinion, misinterpreted the notion of public policy and, theoretically, left the public policy argument available only to the state-owned parties.

One of such cases is No. 22ц-2125, where Promeksim LLC appealed the Ruling of the Leninskyi District Court of Donetsk City of January 14, 2010 that enforced the arbitral award of ICAC at the RF CCI of September 10, 2009 in the case No. 75/2009 which prescribed Promeksim to pay StalUkrSnab LLC outstanding debt. The appellate court did not consider the argument that enforcement of the arbitral award would contradict public policy:

> [Promeksim] is not a state entity; it is, as an economic enterprise, independently responsible for its debts, and, thus, enforcement of the award of the [ICAC at the RF CCI] on recovery of payments from the [Promeksim] does not in any way infringe the

> fundamental principles of state order of Ukraine and is not contrary to the public policy of Ukraine[40].

In other words, the court's line of reasoning is that if a party that opposes enforcement of an arbitral award is a commercial enterprise, not a state entity, than it is solely responsible for its obligations *vis-à-vis* the third parties, thus, enforcement of an award against such party would not infringe the legal order of Ukraine and, subsequently, would not contradict public policy of Ukraine. Such argumentation should be erroneous for the two major reasons: (i) public policy, as it was pointed out above, is not simply an instrument of protection of state interests, but a broader notion, and (ii) it is clearly established in international practice that private (commercial) enterprises may successfully oppose enforcement of an arbitral award on the grounds of public policy.

The NY Convention applies to arbitral awards "arising out of differences between persons, whether physical or legal[41]", including natural and juridical persons[42], whereas the term "legal persons" or "judicial persons" shall include states, state entities and state enterprises[43]. Also, even though a Contracting State under the NY Convention may choose to "apply the [NY] Convention only to differences arising out of relationships, […] which are considered as commercial[44]", a narrow interpretation of the term "commercial" would be inconsistent with the purposes of the NY Convention and courts are encouraged to interpret such reservation in the broadest sense[45]. Since nothing in the NY Convention suggests that the scope of application of Art.V(2)(b) *in personam* is more narrow than applicability of the NY



[40] *StalUkrSnab LLC v. Promeksim LLC*, Case No. 22ц-2125, Appellate Court of Donetska Oblast, decided on 15 March 2010.
[41] NY Convention, *supra* n. 2, Art. 1(1).
[42] Kronke et al., *supra* n. 5, at 26.
[43] *Ibid.*
[44] NY Convention, *supra* n. 2, Art. 1(3).
[45] Bagner, *supra* n. 42, at 35.

Convention itself, both private and state-owned enterprises may invoke Art. V(2)(b) to oppose enforcement of an award.

The case analyzed above may have been an unlucky exception to generally flawless interpretation of the notion of public policy. However, there are other cases which employ the same argumentation, in particular, the case No. 22-22616/10 that dealt with enforcement of an arbitral award rendered by the Arbitration Institute of the Stockholm Chamber of Commerce on March 30, 2010 in the case of RosUkrEnergo AG v. National Joint-Stock Company "NaftoGaz of Ukraine". The case is described and discussed at length in the section 2.2, which deals with protection of the energy safety of Ukraine as a part of the public policy. For this section it is relevant that Naftogaz appealed the Ruling of the Shevchenkivskyi District Court of the City of Kyiv of August 13, 2010 claiming, *inter alia*, that enforcement of the award would violate public policy. However, the appellate court dismissed this allegation:

> Arguments […] that […] enforcement of the judgment of the foreign court contradicts public policy of Ukraine cannot be a basis for reversal of the Ruling of the Court, since decisions of the Arbitral Tribunal are rendered with respect to RosUkrEnergo and Nagtogaz, they extend their effect only to [RosUkrEnergo and Nagtogaz], and do not affect the independence, integrity, immunity, fundamental constitutional rights, freedoms, guarantees as integral parts of the order that exists in Ukraine[46].

Not surprisingly, this ruling was appealed to the SCU. However, the highest court in the system of courts of general jurisdiction[47] issued a ruling based on the same flawed argument. The SCU reproduced the definition of public policy from the Resolution No. 12 and noted the following:

> Also, in accordance with Art. 12(1) of the [Law on IPL] a rule of the foreign state law shall not be applied, if application of such rule leads to consequences, which are manifestly not compatible with the basics of legal order (public policy) of Ukraine. The debtor did not furnish such proof, herewith the parties in this dispute are legal entities incorporated in accordance with applicable law, [they] are independent participants of

[46] *RosUkrEnergo AG v. National Joint-Stock Company "NaftoGaz of Ukraine"*, Case No. 22-22616/10, Appellate Court of the City of Kyiv, decided on 17 September 2010.
[47] CONSTITUTION OF UKRAINE of 28 June 1996, Art. 125.

> commercial trade, endowed with full legal personality, and the dispute between them arose out of contractual legal relations[48].

Thus, even the SCU seems to take a restrictive position with respect to availability of the public policy ground for refusing recognition and enforcement of arbitral awards to be invoked by private entities.

Moreover, some more recent cases employ the abovementioned argument. In particular, the case No. 22ц-752/11[49] concerned appeal of the Ruling of the Korabelnyi District Court of Donetsk city of December 24, 2010, which enforced the arbitral award rendered by the Arbitration Court of Oslo, Norway on June 17, 2010 that ordered PJSC Wadan Yards Ocean to pay company Ukrshipping Limited and Joint-Stock Shipping Company "UkrRichFlot". Wadan Yards opposed enforcement of the award, claiming, *inter alia*, that it would be contrary to public policy of Ukraine. Unfortunately, neither the ruling of the district court nor the ruling of the appellate court specifies the grounds on which Wadan Yards based its allegation, but the appellate court reasoned the following:

> Appellant's arguments that recognition and enforcement of the decision of the foreign court contradicts the public policy of Ukraine cannot be a basis for reversal of the ruling of the district court, since the award […] was rendered with respect to [Ukrshipping Limited], [UkrRichFlot] and [Wadan Yards]; [the award] extends its effect only to the abovementioned legal entities and does not affect the independence, integrity, immunity, fundamental constitutional rights, freedoms, guarantees as integral parts of the order that exists in Ukraine.

Therefore, the appellate court affirmed the decision of the district court and enforced the arbitral award. This time the court's ruling was also appealed, but the Highest Specialized Court of Ukraine for Consideration of Civil and Criminal Cases (hereinafter the "HSCU")



[48] *RosUkrEnergo AG v. National Joint-Stock Company "NaftoGaz of Ukraine"*, Supreme Court of Ukraine, decided on 24 November 2010.
[49] *Ukrshipping Limited and Joint-Stock Shipping Company "UkrRichFlot" v. PJSC Wadan Yards Ocean*, Case No. 22ц-752/11, Appellate Court of Mykolaivska Oblast, decided on 25 March 2011.

found that the Ruling was made in accordance with substantive and procedural norms of Ukrainian law, and dismissed the appeal of Wadan Yards[50].

Thus, as the court practice shows, different Ukrainian courts, including the SCU and the HSCU, used the same line of reasoning while dealing with the allegation that recognition and enforcement of an arbitral award would be contrary to the public policy of Ukraine. These courts, with slight textual differences, expressed an opinion that if parties to arbitration are private, not state-owned, entities, than recognition and enforcement of an arbitral award would not "affect the independence, integrity, immunity, fundamental constitutional rights, freedoms, guarantees" and, consequently, would not be contrary to public policy of Ukraine. Such argumentation is erroneous, as public policy is not just an instrument of protection of state interests, and international practice clearly shows that private persons may raise Art. V(2)(b) of the NY Convention for refusal to enforce an award.

Hence, in Ukraine the definition of public policy is given in the CCU, in the Law on IPL, and, specifically for the purposes of recognition and enforcement of foreign arbitral awards, in the Resolution No. 12 of the Plenary Assembly of the SCU. In general, the definition is in line with international practice and the ILA Resolution 2/2002, since it includes only to the basics of the legal order of Ukraine, is related to fundamental constitutional rights, freedoms, guarantees. However, courts lack clarity while analyzing public policy defense to recognition and enforcement of arbitral awards, and sometimes tend to mistakenly that public policy have no connection to the dispute if both parties are private entities. The next chapter is devoted to analysis which areas of law will constitute matters of public policy in Ukrainian court practice.



[50] *Ukrshipping Limited and Joint-Stock Shipping Company "UkrRichFlot" v. PJSC Wadan Yards Ocean*, Highest Specialized Court of Ukraine for Consideration of Civil and Criminal Cases, decided on 1 June 2011.

# CHAPTER 2. PUBLIC POLICY AND REVIEW OF ARBITRAL AWARDS ON MERITS

Generally, public policy exception provided in Art. V(2)(b) of the NY Convention, as it was shown in section 1.1, allows the state where enforcement of an award is sought to refuse enforcement if there is a threat to the most fundamental principles of morality and justice.

With respect to court practice, the Plenary Assembly of the SCU issued the Resolution "On Court Practice of Review of Civil Disputes on Finding Agreements Invalid" providing that the following transactions, which infringe social and economic foundations of the state, contradict public policy as prescribed under the Art. 228 of the CCU, if they are aimed at: (i) illegal use of municipal, state or private property; (ii) illegal alienation or illegal possession, usage or disposal of the property of Ukrainian nation – its land, subsoil, and other natural resources; (iii) alienation of the stolen property; and (iv) violation of legal regime of circulation of objects withdrawn from circulation or limited in circulation[51]. Thus, the category of "public policy" was slightly extended, at least in court practice, and specified within the framework of its international standard[52].

In turn, this chapter will show particular areas of law that Ukrainian courts are likely to treat as matters of public policy in recognition and enforcement of arbitral awards. As a preliminary issue, author will address the scope of review under the Art.V(2)(b) of the NY Convention.



[51] Resolution of the Plenary Assembly of the Supreme Court "On Court Practice of Review of Civil Disputes on Finding Agreements Invalid" No. 9 of 6 November 2009, Art. 18.
[52] Krupchan, *supra* n. 8, at 164.

To begin with, the first sentence of the Art. 12 of the Resolution No. 12 clearly states that enforcing court's authority is limited:

> Court shall consider motions for recognition and enforcement of foreign courts' (arbitral) decisions only within the boundaries [of such motions] and shall not engage in review of correctness of these awards on merits, amend them in any way.

Also, number of court cases illustrates the distinction between the limited judicial control and comprehensive review of arbitral awards on merits. First, before dismissing the appeal of Delta Wilmar in the case No. 2-к-1/2010, discussed in section 1.1, the appellate court expressly referred to Art. 12 of the Resolution No. 12 and refused review of the arbitral award on merits. Second, the case No. 22ц-4124/2010, which was analyzed in section 1.2, also exemplifies the issue of the scope of review – the appellate court affirmed the district court's ruling that enforced an award, and noted that

> [t]he appellate court does not take into consideration […] references in the appeal to the non-compliance by the court with the Art. V(2) of the [NY Convention], namely, to the fact that recognition and enforcement of the arbitral award contradict public policy of the state and is not based on the law[53].

To support its conclusion, the appellate court reproduced definition of public policy and the first sentence of Art. 12 of the Resolution No. 12, and refused to review whether the arbitral award was not "based on law".

To view this issue from a different perspective, a case on setting aside of an award for it being contrary to public policy is illustrative. For instance, in the case No. 22-4711 Appellate Court of the City of Kyiv heard an appeal of the Ruling of the Shevchenkivskyi District Court of the City of Kyiv of March 29, 2007 that refused to set aside an award rendered by the ICAC at the Ukrainian CCI on September 8, 2006 in the case AC No. 95и/2006, which rejected the claim of the company Rizza Trading Ltd. (Marshall Islands) to the company

[53] *Evertrade v. SE Kherson Sea Port*, Case No. 22ц-4124/2010, Appellate Court of Kherson Oblast, decided on 29 July 2011.

CommunicorpGroup (Ireland) for penalties for the breach of a contract. The appellate court affirmed the lower court's decision with the following reasoning:

> The claimant […] submitted that abovementioned award […] is illegal, since it […] contradicts public policy of Ukraine as it does not comply with the Constitution of Ukraine, laws and other legal acts of Ukraine, violates claimant's constitutional rights.
> […] Art. 34 of the [Law on ICA] prescribes exclusive list of grounds for setting aside of an award of an international commercial arbitration court. Circumstances, which the claimant's representative is referring to as grounds for setting aside of the award […], are not provided in the Art. 34 of the [Law on ICA].
> Moreover, […] grounds on which the applicant bases its request to set aside the award […] are, in fact, a request to review the award […] on merits, which does not fall within the competence of the courts of general jurisdiction[54].

Such ruling reveals that Ukrainian courts (i) refuse to broaden the notion of public policy so it would include "the Constitution of Ukraine, laws and other legal acts of Ukraine" and (ii) refuse to exercise control over arbitral awards, if it amounts to review of merits. Subsequently, the SCU affirmed district and appellate courts' rulings, dismissed the appeal[55].

Thus, Ukrainian court practice clearly shows that judicial control on the stage of recognition and enforcement of arbitral awards is limited and courts do not review the merits of the case as such. On this point, recommendation of the ILA is worth attention:

> When the violation of a public policy rule of the forum alleged by a party cannot be established from a mere review of the award and could only become apparent upon a scrutiny of the facts of the case, the court should be allowed to undertake such reassessment of the facts[56].

In the author's opinion, such recommendation may be a slippery slope argument. If such provision existed in Ukrainian legislation, than no clear rule as to when violation of public policy rule "could only become apparent upon a scrutiny of the facts of the case" and lack of



[54] *Rizza Trading Ltd. v. CommunicorpGroup*, Case No. 22-4711, Appellate Court of the City of Kyiv, decided on 19 November 2007.
[55] *Rizza Trading Ltd. v. CommunicorpGroup*, Supreme Court of Ukraine, decided on 31 August 2011.
[56] Resolution 2/2002, *supra* n. 14, Recommendation 3(c).

experience of Ukrainian judges in the sphere of international commercial arbitration may have led to abuse of the power to reassess the facts of the case.

This chapter further analysis how Ukrainian courts exercise judicial control over arbitral award with respect to such areas of law, as corporate law, energy security, and currency regulations.

### *2.1 Corporate Law*

Ukrainian legislation effectively restricts right of shareholders to regulate their relations by means of shareholder agreements. This subchapter is devoted to analysis when Ukrainian courts are likely to refuse enforcement of an award rendered on corporate law matters.

As an introduction to the topic, it is worth looking at the case that may have been a starting point for the change of regulation of shareholder agreements and arbitrability of corporate disputes[57]. Storm LLC (a subsidiary of Russian Alfa Group) and Telenor Mobile Communications AS (a Norwegian mobile carrier), which were both shareholders of Kyivstar (Ukrainian mobile carrier), entered into a dispute arising out of a shareholder agreement. Pursuant to the arbitration clause in the agreement, Telenor initiated *ad hoc* arbitration proceedings in New York requesting, in particular, to order Storm to participate in the governance of Kyivstar.

[57] Irina Nazarova, *Selected Issues and Case Studies for Enforcement of Arbitration Awards in Ukraine*, 9-10; Irina Nazarova, *Causes of Conflict between Investors and the State of Ukraine*, in 5(1) ABA SECTION OF INTERNATIONAL LAW RUSSIA / EURASIA COMMITTEE NEWSLETTER 6-8 (Summer 2008), 7; Gene M. Burd, *Selected Issues and Case Studies for Enforcement of Arbitration Awards in Russia and Ukraine*, 6; all in ABA TELECONFERENCE, PUBLICATION ON ENFORCEMENT OF ARBITRATION AWARDS IN RUSSIA AND UKRAINE: DREAM OR REALITY? (2009), available at http://www.americanbar.org/content/dam/aba/multimedia/international_law/docs/committees/russia_eurasia/enforcingarbitrationawardsinrussiaandukraineclematerials.authcheckdam.pdf (last visited March 20, 2012); Yaroslav Petrov, Oleksiy Demyanenko & Liudmila Dudnik, *How to Enforce Foreign Arbitral Awards in Ukraine*, 4 WORLD ARBITRATION & MEDIATION REVIEW 204-227 (2010), 223.

However, Alpern, Storm's shareholder and also a subsidiary of Alfa Group, applied to Ukrainian court and successfully invalidated the shareholder agreement, even though Telenor was not notified about the court proceedings and therefore did not participate. Consequently, Storm argued before the arbitral tribunal that Ukrainian court had already made a decision on the issue, thus, the tribunal should terminate proceedings. Instead, the tribunal found that Ukrainian court had not given "meaningful consideration" to certain key questions; therefore the tribunal had power to continue arbitration and rendered an award in favor of Telenor[58].

On the other hand, Ukrainian courts noted that the court's previous order, rendered in absence of Telenor, "shall […] be binding also upon those entities that were not among the parties to the [original] court proceedings"; "[s]hould the parties […] ignore the above circumstances and render an award on the dispute, such acts shall constitute a violation of the court decision"[59]. Furthermore, the Appellate Commercial Court of the City of Kyiv in its ruling of November 8, 2006 clearly ignored separability principle and stated that "since the Shareholder Agreement violated public policy of Ukraine and since the representative of one of the parties to the agreement – Storm LLC – was not authorized to execute the said Shareholder Agreement and the arbitration clause contained therein as an integral part, the arbitration agreement contained in the Shareholders Agreement […] is also invalid"[60].

Despite the fact that the award was rendered in favor of Telenor, Storm applied for enforcement of the arbitral award before Ukrainian court, and Pechersky District Court of the City of Kyiv on October 5, 2007 issued a ruling, which refused enforcement on the grounds of

[58] *Ibid.*
[59] *Ibid.*
[60] *Ibid.*

public policy. This case was subject to intensive public attention; the scheme employed to escape arbitration is discussed in section 3.1 among the similar cases.

Subsequently, Ukrainian courts were required to treat Ukrainian legislation in the sphere of company law as imperative norms that are to be applied only by national courts, not arbitral tribunals.

The Plenary Assembly of the Highest Economic Court of Ukraine (hereinafter the "HEC") issued the Recommendations "On Practice of Application of Legislation while Reviewing Cases Arising out of Corporate Relations" (hereinafter the "Recommendations"):

> Economic courts, while resolving disputes between the shareholders on the issues of corporate governance, shall take into account that contracts (agreements), concluded between shareholders – foreign legal or natural persons, that provide for the issues of corporate governance to be subject to foreign law, violate public policy and are void according to the Art. 228 of the [CCU][61].

Later, the Resolution of the Plenary Assembly of the SCU "On Practice of Review of Corporate Disputes by Courts" (hereinafter the "Resolution") affirmed the HEC's approach:

> In case shareholders – foreign legal or natural persons – conclude a contract (agreement) that makes relations between the shareholders, and also between the shareholders and the joint-stock company with respect to activities of the company subject to foreign law, such agreement is void pursuant to Art. 10 of the [Law on IPL] [62].

In other words, the Recommendations and the Resolution effectively prohibited choice of foreign law to be applied to the regulation of shareholder agreements, stating that such choice would be contrary to public policy. However, it is arguable whether the Recommendations (or



[61] Recommendations of the Plenary Assembly of the Highest Economic Court of Ukraine "On Practice of Application of Legislation while Reviewing Cases Arising out of Corporate Relations" No. 04-5/14 of 28 December 2007, Sec. 6.2.
[62] Resolution of the Plenary Assembly of the Supreme Court of Ukraine "On Practice of Review of Corporate Disputes by Courts" No. 13 of 24 October 2008, Sec. 9.

the Resolution) fit under any of the exclusions specified in the Resolution No. 12, Art. 12 of the Law on IPL, or Art. 228 of the CCU[63], discussed in section 1.1.

Furthermore, the Recommendations suggested that corporate disputes should be non-arbitrable:

> Participants of economic enterprises, without regard to personal composition of such shareholders, cannot make corporate disputes, related to the activities of economic enterprises, registered in Ukraine, in particular, those arising out of corporate governance, subject to resolution by international commercial arbitration courts[64].

This recommendation of the HEC also was transplanted into the Resolution of the SCU[65]. Thus, taking into account that lower courts generally follow recommendations of the higher court[66], corporate disputes are practically non-arbitrable in Ukraine.

It should be noted that, unfortunately, neither Ukrainian law provides an exhaustive list of non-arbitrable disputes nor it establishes a clear and transparent mechanism to determine the arbitrability of a particular dispute[67]. From these lists provided in Art. 1 of the Law on ICA and Art. 77 of the Law on IPL, no item expressly prohibits disputes between shareholders of a company to be resolved by international arbitration. It is evident that the Recommendations try to make corporate disputes arising out of shareholder agreements subject to exclusive competence of Ukrainian courts and Ukrainian law, however, without providing valid reasons for doing this[68].



[63] Timur Bondaryev & Markian Malskyy, *Recent Developments Concerning Dispute Resolution of Shareholder Agreements in Ukraine: For Better Or For Worse?*, STOCKHOLM INTERNATIONAL ARBITRATION REVIEW 83–95 (2008), 91.
[64] Recommendations, *supra* n. 61, Sec. 6.2.
[65] Resolution, *supra* n. 62, Sec. 9.
[66] Nazarova, *supra* n. 57, at 7.
[67] Petrov, Demyanenko & Dudnik, *supra* n. 57, at 220.
[68] Bondaryev & Malskyy, *supra* n. 63, at 93.

Nevertheless, the position expressed in Resolution and Recommendations was subsequently reflected in the Economic Procedural Code of Ukraine[69], which now indicates as non-arbitrable disputes arising out of corporate relations between an economic enterprise and its participant (founder, shareholder) and between participants (founders, shareholders) concerning incorporation, functioning, management and winding up of such economic enterprise. In opinion of some authors, such rule contradicts provisions of the Law on ICA and the Law of Ukraine "On Regime of Foreign Investments[70]" that entitle shareholders of companies with foreign investments to settle their disputes by means of international commercial arbitration[71].

On the other hand, restrictions on arbitrability of disputes between shareholders of joint-stock companies or between listed companies and their shareholders exist in some other states as well[72]. For instance, in Germany disputes between certain shareholders and a stock corporation are non-arbitrable; Indian Companies Act has a requirement for the mandatory jurisdiction of a Company Law Tribunal[73].

Moreover, the Recommendations clearly stated that an arbitral award that deals with corporate law matters and rendered under foreign law will be refused enforcement on the grounds of being in contradiction to public policy:

> According to the Art. 215(2) of the [CCU], if an agreement is void pursuant to the law, court recognition of such agreement as invalid is not required. Such void agreement does not create any legal consequences, except those connected to its invalidity.
> Proceeding from the above, a contract (agreement) that makes relations of corporate governance of an economic enterprise, registered in Ukraine, subject to foreign law, is invalid and is not subject to enforcement. Such agreement cannot be enforced, including

[69] ECONOMIC PROCEDURAL CODE OF UKRAINE No. 1798-XII of 6 November 1991, Art. 12.
[70] LAW OF UKRAINE "ON REGIME OF FOREIGN INVESTMENTS" No. 93/96-вр of 19 March 1996.
[71] Nazarova, *supra* n. 57, at 6.
[72] Kronke et al., *supra* n. 5, at 349-350.
[73] *Ibid.*

on the basis of an award of an international commercial arbitration court, as it violates public policy[74].

As a conclusion, indirectly, the Recommendations led to restrictions on (i) the choice of law applicable to the legal relations between shareholders of a company, and (ii) the settlement of disputes between shareholders of a company by means of international commercial arbitration[75]. However, the HEC ignored the choice of law rules and the Law on IPL, and based its recommendations only on *limited* analysis of legislation and court practice, therefore, acted in a manner, which would be unusual for the highest court of a developed country[76].

### *2.2 Energy Security*

Public policy, as it was discussed in section 1.1, is aimed, in particular, at protection of the fundamental principles of justice and morality. This section analyzes the issue whether public policy should also protect interests of the state when enforcement of an arbitral award would be detrimental to the economy of the country where enforcement is sought, particularly, to energy security of such country.

An example of such case is given in the ruling of the SCU on enforcement of the arbitral award in case of RosUkrEnergo v. Naftogaz, which was addressed in the section 1.3 while critically analyzing the view expressed by both the appellate court and the SCU that a party cannot claim pubic policy defense to enforcement of an arbitral award, if the party is a private, commercial enterprise.



[74] Recommendations, *supra* n. 61, Sec. 6.3.
[75] Bondaryev & Malskyy, *supra* n. 63, at 84.
[76] Bondaryev & Malskyy, *supra* n. 63, at 83-84, 89; Nazarova, *supra* n. 57, at 7.

Brief facts of the case are as follows. RosUkrEnergo and Naftogaz concluded several contracts, which provided for the resolution of all disputes between the parties by the Arbitration Institute of the Stockholm Chamber of Commerce, and Swedish law was chosen as substantive law governing the contracts. In April 2008 RosUkrEnergo filed a suit, and the arbitral tribunal rendered the Separate Award on March 30, 2010 and the Second Separate Award on June 8, 2010, which ordered Naftogaz to pay penalties and transfer prescribed amount of natural gas to RosUkrEnergo. Shevchenkivskyi District Court of the City of Kyiv by its ruling of August 13, 2010 enforced these arbitral awards, and the Appellate Court of the City of Kyiv affirmed on September 17, 2010[77].

Due to the fact that this case is so far the only one dealing with allegations of a threat to energy security of Ukraine, the appeal to the SCU, which made the final decision in the case, will be analyzed below at length.

First, the SCU expressed its policy choice that NY Convention obligates the state to respect the finality of arbitral awards and enforce them, and that list of grounds to refuse enforcement of an award, provided in Art. V of the NY Convention, is exhaustive:

> In particular, the [NY Convention], to which Ukraine is a party […], states a fundamental principle that the state, which signed [the NY Convention], shall recognize foreign arbitral awards as binding and enforce them.
> The [NY Convention], presuming binding character of an arbitral award, provides exhaustive list, which is not subject to a broader interpretation, of grounds, for which a competent court may refuse recognition and enforcement of an arbitral award.
> Such list is contained in Art. V of the [NY Convention], and also enumerated in Art. 396(2) of the [CPC]. Since obligatoriness and enforceability of an arbitral award is presumed under international and national law, burden of proof of existence of such grounds is placed on the party that objects to the recognition and enforcement of an arbitral award (Art. V(1) of the [NY Convention])[78].

[77] *RosUkrEnergo AG v. National Joint-Stock Company "NaftoGaz of Ukraine"*, Case No. 22-22616/10, Appellate Court of the City of Kyiv, decided on 17 September 2010.
[78] *RosUkrEnergo AG v. National Joint-Stock Company "NaftoGaz of Ukraine"*, Supreme Court of Ukraine, decided on 24 November 2010.

Such reading of the NY Convention is in line with the international practice in this field, which suggests that the NY Convention owes most of its success to the fact that it ensures that an arbitral award is final, does not allow states to refuse enforcement of an arbitral award on the purely local grounds, and places burden of proof of existence of circumstances, which justify refusal of enforcement, on the party opposing enforcement of an award.

Furthermore, this interpretation of the NY Convention by the SCU presupposed its opinion on the matter whether alleged threat to energy security of Ukraine as a result of recognition and enforcement of an arbitral award would contradict public policy of Ukraine:

> Reference made by [Naftogaz] that recognition and enforcement of the arbitral award contradicts public policy of the state are not justified and not evidenced by [the defendant], although, as it is mentioned above, it is [the defendant's] obligation to prove such circumstances. In particular, the debtor did not furnish any proof to prove its allegations that transfer to RosUkrEnergo of the prescribed amount of natural gas exceeds 50% of the overall annual natural gas production [in Ukraine] and 50% of the annual consumption of natural gas by [Ukrainian] inhabitants. Also, in the course of arbitral proceedings representatives of [Naftogaz] completely acknowledged that there were no legal basis [for Naftogaz] to acquire this disputed amount of natural gas, meaning that they acknowledged unlawful taking of natural gas from RosUkrEnergo, as it is stated in the Second Separate Award. At the hearing at the [SCU] representatives of [Naftogaz] confirmed that such explanations were given in the course of arbitration proceedings[79].

Thus, the SCU dismissed the appeal and affirmed rulings of the district and appellate court which enforced the arbitral award. As it is evident from the ruling of the SCU, the allegation of violation of public policy was made in the context of the fact that enforcement of the award would require to transfer an extremely huge amount of natural gas from the state-owned to private company. Even though the SCU did not completely agree with the reasoning of the party opposing enforcement, the court's argumentation to deny the allegation of public policy violation was based on two grounds: (i) "the debtor did not furnish any proof […] that transfer […] of the prescribed amount of natural gas exceeds […]", and (ii) "in the course of arbitral

[79] *Ibid.*

proceedings [the debtor] […] acknowledged unlawful taking of natural gas […]". Author's conclusion is that, *theoretically*, if Naftogaz furnished proof of the above-mentioned fact and did not acknowledge that it took the natural gas without legal basis, enforcement of the arbitral award may have been denied.

To compare, in the RF the Federal Arbitrazh Court for Volga-Vyatsky Circuit refused to enforce the arbitral award, which awarder large enterprise in Nizhny Novgorod to pay damages, for the reasons of violation of public policy, since such payment would drive the enterprise into bankruptcy and make negative impact on economic situation in Nizhny Novgorod city, in the region and in the state[80]. Such interpretation of the notion of public policy was contrary both to international and to prevailing RF standards, it was rather an exception than a general rule, and was subject to intensive criticism for being anti-arbitration and protectionist[81].

Also, some Chinese courts may be reluctant, for the reasons of violation of public policy, to grant enforcement to arbitral awards, if such enforcement would force a party, against which the enforcement is sought, into bankruptcy proceedings or out of business at all[82]. Thus, even though public policy exception was designed only for protection of the most fundamental rules and principles, it is sometimes used to deny enforcement of some sensitive or controversial awards that may affect core policies of the state where enforcement is sought[83].



However, in the author's opinion, principle of *pacta sunt servanda* should prevail over the willing of the party, which opposes enforcement of an award, to use the public policy defense

[80] Andrey Ryabinin, *Procedural Public Policy in Regard to the Enforcement and Recognition of Foreign Arbitral Awards*, (master thesis, Central European University, 2009), 16.
[81] *Ibid.*
[82] Kronke et al., *supra* n. 5, at 535, n. 11.
[83] Kronke et al., *supra* n. 5, at 535.

against an arbitral award that would force such party into financial difficulties. Thus, the ruling of the SCU, which enforced the arbitral award, accords to the pro-enforcement approach.

On the other hand, the enforcement of arbitral awards in the case of RosUkrEnergo v. Naftogaz got tremendous public attention and even triggered proposal of a draft law amending existing procedures for the recognition and enforcement of foreign courts' judgments, which were explained in section 1.2. The Draft Law[84] proposed to change the language of the Art. 396(2) of the CPC, which provides that if international agreements, to which Ukraine is a party, do not provide grounds for refusal of enforcement of a foreign court's decision, than application may denied "[…] 7) if enforcement of the decision threatens interests of Ukraine", by adding "including energy security of Ukraine".

Before going into the substance of the Draft Law, it should be noted that the significance of impact of the abovementioned arbitral awards on Ukrainian economy may well be illustrated by the Explanatory Note[85] to the Draft Law that in its pertinent part states:

> This amendments are exceptionally actual in light of the recent events, connected with two arbitral awards rendered by [the Arbitration Institute of the Stockholm Chamber of Commerce] under the suit of [RosUkrEnergo] to [Naftogaz] on recovery of USD 197 millions and transfer of 12.1 billions of cubic meters of natural gas.
> Thus, these arbitral awards give grounds to speak that significant harm has been caused to state entity – [Naftogaz], amount of which is appraised from UAH 4.5 to 46 billions.
> Important is that it is not only an issue that affects the state owned commercial entity, but also national, in particular, energy, security of Ukraine as such […].
> Furthermore, natural gas, which [Naftogaz] shall withdraw from the Gas balance of Ukraine and transfer to the non-resident, was purchased […] by the abovementioned state entity on its own expense in amount that exceeds UAH 13.5 billions.

[84] Draft Law of Ukraine "On Amendments to the Civil Procedural Code of Ukraine" (with regard to certain issues of recognition and enforcement of a decision of a foreign court, which is subject to compulsory enforcement) No. 334 of 17 June 2010.
[85] Explanatory Note to the Draft Law, *supra* n. 85.

However, the Draft Law plainly misses two points. First, there would be no sense in specifying which interests of Ukraine may be threatened so as to justify refusal of enforcement of an arbitral award. Second, as it has been explained in the section 1.2, grounds for refusal enforcement of a foreign court's decision (including arbitral awards) stipulated in Art. 396(2) of the CPC are applied only in case when international agreements, to which Ukraine is a party, do not provide grounds for refusal of enforcement. Taking into account that Ukraine is a party to the NY Convention, which has exclusive list of grounds to refuse enforcement of a foreign arbitral award, and that arbitral awards in the case of RosUkrEnergo v. Naftogaz were subject to enforcement under the NY Convention, grounds stipulated in Art. 396(2) of the CPC would not have been applicable to the enforcement proceedings. Thus, the Draft Law was not adopted by the Parliament.

Hence, the SCU ruling evidences that, despite some practice in other countries, Ukraine has adopted rather pro-enforcement approach in situations where enforcement of an award may lead the debtor into financial hardship or threaten energy security of the state.

### *2.3 Currency Regulation*

In this section author analyzes how Ukrainian courts treat the allegations that enforcement of an arbitral award would contradict requirements of currency regulation laws of Ukraine as matters of public policy, and whether Ukrainian practice differs from international tendencies.

Currency exchange restrictions may make enforcement of arbitral awards complicated, especially of the foreign arbitral awards that provide for payment in the currency different

from the official currency of the place of enforcement[86]. As the Articles of Agreement of the International Monetary Fund (hereinafter the "IMF Agreement") provide, "[e]xchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member[87]". Thus, both arbitrators, while deciding the case and rendering an award, and the courts, while determining whether the award is to be enforced, have a duty to examine whether the party concerned will be legally able to exercise the remedy awarded[88].

Turning into Ukrainian experience, it should be first noted that Ukraine has strict currency regulation and control provisions. Pursuant to the Decree of the Cabinet of Ministers of Ukraine "On the System of Currency Regulation and Currency Control"[89] (hereinafter the "Decree No. 15-93") the only legal means of payment within the territory of Ukraine are the currency of Ukraine. Foreign currency shall be used as means of payment for payments between residents and non-residents in the course of trade, and payments in Ukrainian currency between residents and non-residents in the course of trade are allowed only if an individual license from the National Bank of Ukraine (hereinafter the "NBU") is obtained[90]. Also, an individual license is required, for instance (with certain exceptions), to get credit in the foreign currency, to use foreign currency as means of payment or pledge in Ukraine, to place monetary values on accounts and deposits outside of Ukraine, to make investments abroad, etc.[91]



[86] Kronke et al., *supra* n. 5, at 384.
[87] IMF, Articles of Agreement of the International Monetary Fund (1944).
[88] Kronke et al., *supra* n. 5, at 384-385.
[89] DECREE OF THE CABINET OF MINISTERS OF UKRAINE "ON THE SYSTEM OF CURRENCY REGULATION AND CURRENCY CONTROL" No. 15-93 of 19 February 1993, Art. 3(1).
[90] Decree No. 15-93, *supra* n. 89, Art. 7.
[91] Decree No. 15-93, *supra* n. 89, Art. 5(4).

Having such strong regulations, it is not surprising that a number of cases represent attempts to oppose enforcement of arbitral awards on the grounds of violations of currency regulations as a part of the public policy. There are cases known when a party opposed enforcement of an arbitral award claiming that withdrawal of money stipulated in the foreign currency would contradict public policy of Ukraine[92].

In particular, in the case No. 6-39/2007 enforcement of the arbitral award of the ICAC at the Ukrainian CCI of December 22, 2006 in the case AC No. 190y/2006, which ordered OJSC Baltsem (Ukraine) to pay Ranmacassociates Limited (UK) outstanding debt, was at issue. Baltsem opposed enforcement of the award claiming that "the award, which the claimant seeks to enforce, first, contradicts the public policy of Ukraine, and, second, its enforcement will lead to a violation of the legally prescribed regime of currency regulation[93]". The court did not find any grounds to refuse enforcement of the award, but, unfortunately, did not provide any reasoning as to why the enforcement of the arbitral award would or would not contradict currency regulations of Ukraine as a matter of public policy.

Also, even though the payment at the case at hand was to be made by the resident of Ukraine (OJSC Baltsem) to the account of the non-resident (Ranmacassociates Limited) outside of Ukraine, the court noted that in the award of the ICAC at the Ukrainian CCI the amount to be paid is stipulated in the foreign currency and, referring to the Art. 395(8) of the CPC, prescribed the sum to be paid in Ukrainian currency at the exchange rate set by the NBU[94].



[92] Malskyy, *supra* n. 9, at 48, n. 78.
[93] *Ranmacassociates Limited v. OJSC Baltsem*, Case No. 6-39/2007, Balakliiskyi District Court of Kharkivska Oblast, decided on 20 March 2008.
[94] *Ibid.*

The court correctly pointed out that the Art. 395(8) of the CPC requires Ukrainian court, if in the decision of a foreign court the sum to be paid is set in the foreign currency, to set the sum to be paid in Ukrainian currency at the exchange rate set by the NBU for the date the court makes a ruling on enforcement. Some practice suggests that courts, while dealing with the issue of enforcement of an arbitral award, need to analyze whether the award is sufficiently specific to grant enforcement of such arbitral award, and this analysis "may require a court to add specific terms to an award in order to facilitate its recognition[95]". Such assessment should be done carefully, as, on the one hand, the court shall not interfere with the substance of the award and not amend the award on the merits, whereas, on the other hand, if the only way to make the enforcement of the award possible is to add specific details to it, it would be in line with the pro-enforcement intent of the NY Convention to allow the court to make necessary amendments[96].

One of such common concerns of enforcing courts is the specification of currency of the award, and the court may allow the conversion of the sums of money due under the arbitral award to the currency of the state where the enforcement of the award is sought[97]. In particular, the Supreme Court of the RF ruled that "by virtue of […] the Constitution […], rouble is the currency in the RF, therefore all payments [...] on the territory of the RF should be executed in rouble equivalent, including the amounts recovered under the award[98]".

However, in the abovementioned case No. 6-39/2007 the arbitral award was rendered by the ICAC at the Ukrainian CCI, which has its seat in Kyiv, Ukraine, and the tribunal ordered the resident of Ukraine to pay the non-resident, not *vice versa*. Thus, such award lawfully

[95] Kronke et al., *supra* n. 5, at 129.
[96] *Ibid.*
[97] *Ibid.*
[98] Supreme Court of the Russian Federation, Judicial Collegium, Decided on 22 May 1997, *YCA* XXV 757-760 (2000), 760.

provided for payment in foreign currency, taking into account Art. 7 and Art. 5(4) of the Decree No. 15-93. In the author's opinion, the court misinterpreted the Art. 395(8) of the CPC and thus made the enforcement of the award complicated in light of the Decree No. 15-93.

With respect to international practice, even though currency exchange restrictions may affect the currency in which payment under the award will be made, rarely they completely prevent an award from being enforceable[99]. For instance, the Supreme Court of India held that currency exchange restrictions do not prevent the foreign arbitral award from enforcement, but stressed that the party seeking enforcement would subsequently need to get exchange control clearance to actually collect money owed under the award[100].

Similarly, the Supreme Court of Italy did not find a violation of public policy when the arbitral award to be enforced prescribed the payment to be made in a currency that did not have an official exchange rate in Italy (gold dollars and lei) and noted the following:

> […] this only concerns the enforcement decision, which could not modify the arbitral award rendered in that national and international currency by exchanging it into Italian currency. There are provisions in our legal system […] which make it possible for the debtor of a sum in a non-recognised currency to pay his debt. In the present case, the […] award, once enforced, could be executed by applying these provisions. We can only add that the currency provisions denying the possibility of payment in a foreign currency […] do not invalidate the obligation[101].

Thus, even though Ukraine has strict rules on currency exchange, such regulations generally will not make the arbitral award unenforceable, but require the enforcing court to change the currency to be paid into the official currency of Ukraine. Such approach corresponds to international practice that allows courts to modify the award with respect to the currency to be

[99] Kronke et al., *supra* n. 5, at 385.
[100] *Ibid*, referring to *Renusagar Power Co. Ltd. v. General Electric Co.*, AIR 1994 S.C. 860 (Supreme Court, India), 894.
[101] *Vicerè Livio v. Prodexport*, no. 8469, Decided on 11 July 1992, *YCA* XXII (1997), 715-724 (Supreme Court, Italy), 723.

paid, and does not recognize award stipulated in foreign or unofficial currency as a violation of public policy.

In addition, in the case No. 22ц-2125 the court dealt with another side of financial restrictions (factual circumstances of this case are briefly explained in the section 1.3). The court in the pertinent part of its ruling stated:

> Appellant's reference to the violation of the Law of Ukraine "On prevention and Counteraction to the Legalization (Laundering) of the Proceeds from Crime"[102] by the district court cannot be taken into account by the appellate court, since this Law regulates the relations in the area of prevention and counteraction to the infiltration into the legal turnover of the proceeds from crime, it is aimed at the fight against the financing of terrorism, and it is not applicable to legal relations of the parties to the dispute[103].

Unfortunately, the ruling does not specify what exactly were the allegations that the enforcement of the award could have interfered with the public policy of Ukraine, and what evidence was provided to support such legal position in the case.

However, money laundering was and continues to be subject of international attention. In 1980, the Council of Europe issued the Recommendation No. R (80) 10 on Measures against the Transfer and the Safekeeping of Funds of Criminal Origin[104]. In 1988, the Vienna Convention criminalized laundering of money derived from drug trafficking[105]. Similarly, the Palermo Convention criminalizes money laundering of the proceeds of crime[106].



[102] LAW OF UKRAINE "ON PREVENTION AND COUNTERACTION TO THE LEGALIZATION (LAUNDERING) OF THE PROCEEDS FROM CRIME" No. 249-IV of 28 November 2002.
[103] *StalUkrSnab LLC v. Promeksim LLC*, Case No. 22ц-2125, Appellate Court of Donetska Oblast, Ruling of 15 March 2010.
[104] Council of Europe, Recommendation No. R (80) 10 of the Committee of Ministers to Member States on Measures against the Transfer and the Safekeeping of Funds of Criminal Origin (1980).
[105] UN CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES, December 20, 1988, 1582 U.N.T.S. 164 (1988), Art. 3.
[106] UN CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME, November 15, 2000, G.A. Res. 22, U.N. GAOR, 55th Sess., Annex 1, art. 6, U.N. Doc. AJRES/55/25 (2000), Art. 6.

As Recommendation 2(b) of the Resolution 2/2002, discussed in section 1.2, suggests that international conventions may evidence the consensus as to the matters that fall within the scope of public policy, the UN conventions and legal instruments adopted by the EU[107] and international organizations may, according to some opinions, indicate that money laundering is of public policy importance[108]. In practice, money laundering can be involved in resolution of disputes by means of international commercial arbitration, *e.g.*, when a commercial dispute is simulated between two connected entities, which appear to be unrelated, solely for the purpose of money laundering[109]. Thus, in the opinion of the author, if the enforcing court is persuaded that enforcement of the award is aimed at money laundering, it shall refuse enforcement of such award as contrary to public policy.

Hence, the conclusions on the issue of public policy and review of arbitral awards on merits in Ukraine are the following. First, shareholders' power to make shareholder agreements subject to foreign law is restricted, and such agreements are void. Disputes arising out of shareholder agreements are non-arbitrable and enforcement of arbitral awards dealing with these matters will be refused on the grounds of public policy. Second, Ukraine has adopted rather pro-enforcement approach in situations where enforcement of an award may lead the debtor into financial hardship or threaten energy security of the state. Third, despite strict Ukrainian currency exchange regulation, these rules in themselves do not make the award unenforceable, but require the court to change the currency of the sum to be paid into the official currency of Ukraine.



[107] Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ L 166 of 28.06.1991); Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005).
[108] Andrew de Lotbiniere McDougall, *International Arbitration and Money Laundering*, 20 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 1021–1054 (2005), 1044.
[109] *Ibid*, 1023.

Generally speaking, both drafters of the NY Convention and of the ML made a decision that substance of an award *per se* is not a ground for refusal recognition and enforcement of an award, and in majority of cases enforcing courts "have proven to be faithful executors of the will of the [NY] Convention's drafters"[110]. In other words, the international practice under the Art. V(2)(b) of the NY Convention is that public policy defense is very often raised, but most such allegations fail[111].

With respect to Ukrainian practice there are several opinions. One is that Ukrainian courts sometimes interpret public policy too broadly, and some courts even consider non-compliance of the award or arbitration procedure with the ordinary rules of Ukrainian legislation to be contrary to public policy[112]. Another is that even though the category of "public policy" is often used to create negative impression about the position of arbitration in Ukraine, Ukrainian courts, indeed, rarely refuse to enforce arbitral awards on the grounds of public policy [113]. Author's conclusion on the basis of analysis of the judicial practice is that courts tend to be rather pro-enforcement, but, unfortunately, courts' rulings are far from being examples of perfect legal writing, reasoning for decisions is sometimes not clear and transparent, and the practice in general may not be consistent.



**110** Kronke et al., *supra* n. 5, at 11.
111 Nina Gumzej, *Certain Aspects of Public Policy in Enforcement of Foreign Arbitral Awards*, 10 CROATIAN ARBITRATION YEARBOOK 39–98 (2003), 41.
112 Petrov, Demyanenko & Dudnik, *supra* n. 57, at 223.
113 Krupchan, *supra* n. 8, at 165.

# CHAPTER 3. PROCEDURAL INFRINGEMENTS IN ARBITRATION PROCEEDINGS – A VIOLATION OF PUBLIC POLICY?

Grounds for refusal enforcement of an arbitral award in the NY Convention may be classified into two groups, those of Art. V(1), generally related to procedural aspects of arbitration, and those of Art. V(2), which include non-arbitrability of a dispute and violation of public policy. There are several views on interrelation between these groups.

One view is that procedural infringements cannot be a violation of public policy and may be addressed only under relevant paragraphs of Art. V(1) of the NY Convention. For instance, Moscow City Court noted that "a procedural infringement in the arbitration proceedings had no relevance to the notion of "public policy"[114]".

On the other hand, majority of scholars and practice tend to consensus that public policy may be divided into two major categories, substantial and procedural public policy[115]. Grounds for refusal to enforce an award, provided in Art. V(1) and Art. V(2) of the NY Convention, may overlap - most of the Art. V(1) grounds may be viewed as violations of public policy under Art. V(2) of the NY Convention[116]. Such fundamental procedural requirements that shall be obeyed at all times, include, judging on international arbitration and court practice, "impartial administration of justice, due notification as regards appointment of the arbitrators and the proceedings, and an equal opportunity for the parties to present their case[117]".



[114] Moscow City Court, 10 November 1994, in United Nations Commission on International Trade Case Law on UNCITRAL Texts (CLOUT), A/CN.9/SER.C/ABSTRACTS/10, in Varady et al., *supra* n. 2, at 781.
[115] Gumzej, *supra* n. 111, at 39, 43.
[116] Kronke et al., *supra* n. 5, at 207, referring to KARL-HEINZ BÖCKSTIEGEL, STEFAN KRÖLL & PATRICIA NACIMIENTO, ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE (Kluwer Law International, 2007), s. 1061, paras. 52, 53, 68, 95.
[117] Gumzej, *supra* n. 111, at 43-44.

It should be noted that Article V(2) of the NY Convention is governed by the principle of *lex specialis*, meaning that the law that governs a general subject matter does not trample the law that governs a specific matter[118] - "under [the NY Convention] the regularity of the proceedings must in the first place be ascertained in the light of Art. V(1) and only subsidiarily from the point of view of internal public policy.[119]" However, not all jurisdictions follow this approach, and in many cases the same facts are simultaneously considered both under the Art. V(1) and Art. V(2) of the NY Convention[120]. The tendency in Ukraine is that enforcement of arbitral award is rarely opposed only on the ground of public policy; as a rule, defense against enforcement is usually based on Art. V(2)(b) along with other ground provided in Art. V of the NY Convention[121].

This chapter analyzes how Ukrainian courts will threat certain procedural infringements, in particular, arbitral award based on a void agreement and inability of a party to present its case, in the context of public policy defense to enforcement of an arbitral award.

### *3.1 Award Based on a Void Agreement*

This section of the thesis is devoted to analysis of cases where courts held that enforcement of arbitral awards, which were rendered on the basis of agreements that Ukrainian courts found to be invalid, would contradict public policy.



[118] Kronke et al., *supra* n. 5, at 367.
[119] *Chrome Resources S.A. v. Léopold Lazarus Ltd.*, Decided on 8 February 1978, *YCA* XI 538-542 (1986), 540 (Federal Supreme Court, Switzerland).
[120] Kronke et al., *supra* n. 5, at 367.
[121] Bondaryev & Malskyy, *supra* n. 63, at 91-92; Malskyy, *supra* n. 9, at 65.

One of the early cases employing this pattern was reported by Oleg Alyoshin and Tatyana Slipachuk under the heading "an example of detrimental tactics"[122]. The arbitral tribunal in Stockholm on October 24, 2000 rendered an award in favor of a Finish company for the collection of debt from Ukrainian company under a construction contract. However, the debtor successfully requested Ukrainian state court to nullify the additional agreement, on which the award was based, for the reason that signature on the agreement was forged and the debtor became aware of this after the conclusion of the arbitration proceedings. Hence, the Appellate Court of the City of Kyiv on November 12, 2002 refused enforcement of the award on the grounds of it being contrary to public policy since there is a valid decision of Ukrainian state court between the same parties on the same subject, which declared the additional agreement and the arbitration clause in it to be null and void.

Another example is the case No. 06-12397, where Kyrovohrad Region Court and, subsequently, the SCU refused to enforce an arbitral award rendered by the International Centre of American Arbitration Association (hereinafter the "AAA") on January 30, 2011 in case Western N.I.S Enterprises Fund Corporation v. CJSC "Sonola" for collection of the debt under the loan agreement[123]. The ground for refusal was that mentioned loan agreement was nullified by the judgment of the Kirov District Court of Kyrovohrad city of May 25, 2000:

> The loan agreement was nullified by Ukrainian court. According to Art. 124 of the Constitution of Ukraine judgments of Ukrainian courts are subject to obligatory enforcement within the territory of Ukraine. Therefore, recognition and enforcement of the foreign arbitral award rendered by International Centre of [AAA] on January 30, 2001 will contradict the Constitution of Ukraine and, thus, conflict with the mandatory rules of Ukrainian law and violate Ukrainian public policy[124].



[122] Alyoshin & Slipachuk, *supra* n. 10, at 71-72; Malskyy, *supra* n. 9, at 56.
[123] O. Beketov & D. Marchukov, *Refusing Recognition and Enforcement of Foreign Arbitral Awards in Ukraine (Procedural issues and application of non-arbitrability and public policy grounds)*, TRANSNATIONAL DISPUTE MANAGEMENT 1–17 (2008), 14.
[124] Supreme Court of Ukraine, Case No.06-12397 kc 02, decided on 14 May 2003, in Beketov & Marchukov, *supra* n. 123, at 14-15.

The SCU also found that the AAA's award contained a finding that the ruling of Ukrainian court could not be dispositive as Ukrainian courts are subject to political pressure, corrupt and inefficient, and ruled that such conclusion was outside of the scope of the arbitration agreement and arbitrator's powers, thus, refused enforcement of the award[125].

Similar conclusion the SCU reached in the case on enforcement of the Arbitrarion Institute of the Stockholm Chamber of Commerce award on the motion of Quattrogemini Ltd:

> According to Art. 124 of the Constitution of Ukraine the decision of the Ukrainian court is rendered in the name of Ukraine and is subject to obligatory enforcement within its territory. Therefore, if the agreement is recognized null and void by Ukrainian court, then recognition of Stockholm arbitral award (which was based on this agreement) will contradict the Constitution of Ukraine and public policy[126].

Hence, in several cases Ukrainian courts invalidated agreements (contracts) or documents related to arbitration while foreign arbitration proceedings were ongoing[127]. If later enforcement of a foreign award rendered in the course of such arbitration proceedings is sought, there is a risk that Ukrainian court will refuse enforcement[128]. In particular, "[i]n *WNISEF* and *Argo Trading*, the [SCU] […] [held that] "when the agreement was invalidated by a Ukrainian court the enforcement of an award based on such agreement will contradict Constitution of Ukraine and hence, Ukrainian public policy[129]".

Comparable cases may be found in some other jurisdictions. For instance, Supreme People's Court in China refused to enforce foreign arbitral award, as the dispute has been already



[125] Malskyy, *supra* n. 9, at 63.
[126] Supreme Court of Ukraine, Case No.6-1459 kc 03, decided on 18 November 2004, in Beketov & Marchukov, *supra* n. 123, at 15.
[127] Serhii Sviriba, *Overview of the Arbitration Regime in Ukraine*, THE EUROPEAN ARBITRATION REVIEW 69–71 (2007), 71.
[128] *Ibid.*
[129] *Ibid.*

settled by a Chinese court before the arbitral award was rendered[130]. Similarly, a court in Chile "denied enforcement of a foreign award where an earlier domestic court had ruled on the conduct of domestic arbitration proceedings concerning the same dispute"[131].

However, one serious flaw of Ukrainian practice should be pointed out – courts often do not distinguish the validity of a contract and the validity of an arbitration clause in the contract[132], whereas Art. 16(1) of the Law on ICA and the ML unambiguously provide that an arbitration clause shall be treated as an agreement independent of the container contract, and the decision that the container contract is null and void does not entail *ipso jure* that the arbitration clause is invalid. This doctrine of separability (or of the autonomy of an arbitration clause) "is now well established", meaning that "even if the contract containing an arbitration clause […] has its validity challenged, the arbitration agreement remains in being"[133]. Even though Art. V(1)(a) of the NY Convention provides that enforcement may be refused if "the said agreement is not valid", such reference is to the container agreement, not to the arbitration agreement[134].

As a conclusion, in some cases Ukrainian courts refused to enforce foreign arbitral awards for the reason that a court judgment, regarding the same subject matter, had entered into force, primarily in the event when the party, which opposes enforcement of the arbitral award, nullified the container contract together with the arbitration clause in it[135]. Indeed, enforcement of an illegal contract would be contrary to public policy; however, this situation could be avoided should have such Ukrainian courts interpreted the separability doctrine



[130] Kronke et al., *supra* n. 5, at 349, 393, referring to Supreme People's Court, [2008] Min Si Ta Zi, No. 11 (Supreme People's Court, China).
[131] *Ibid*, referring to Corte Suprema, RoI 2087-1999 (Supreme Court, Chile).
[132] Alyoshin & Slipachuk, *supra* n. 10, at 71.
[133] NIGEL BLACKABY ET AL., REDFERN & HUNTER ON INTERNATIONAL ARBITRATION (5 ed. 2009), 20, § 1.53.
[134] Alyoshin & Slipachuk, *supra* n. 10, at 73.
[135] Bondaryev & Malskyy, *supra* n. 63, at 92.

correctly in the first place[136] and made a distinction between the validity of the main contract and validity of the arbitration clause contained therein.

### *3.2 Inability of the Party to Present Its Case*

Inability of a party to present its case is clearly a ground for refusal to enforce an arbitral award. This section will analyze under which circumstances Ukrainian courts found and are likely to find that certain facts precluded a party from presenting its case inasmuch as to deny enforcement of an award on public policy basis. As a preliminary matter, author will address the issue of correlation between Art. V(1)(b) and Art. V(2)(b) of the NY Convention.

First, exceptions under Art. V(1)(b) and Art. V(2)(b) of the NY Convention function slightly differently, *i.e.*, due process defense provided in Art. V(1)(b) should be raised by a party opposing enforcement of an award, whereas public policy argument of Art. V(2)(b) may be considered by the court *ex officio*[137]:

> The violation of due process in the arbitral proceedings alleged by the defendant is not only a ground for refusal of enforcement pursuant to Art. V(1)(b) [of the NY] Convention; it is also a violation of public policy which, pursuant to Art. V(2)(b) [of the NY] Convention, must be examined ex officio[138].

However, in both cases burden of proof lays on the party that opposes enforcement of an award[139]. As the Court of Final Appeal of the Hong Kong Special Administrative Region stated, when the respondent seeks to raise the due process exception of the Art. V(1)(b) of the

[136] Bondaryev & Malskyy, *supra* n. 63, at 92; Malskyy, *supra* n. 9, at 65.
[137] Kronke et al., *supra* n. 5, at 235.
[138] *Syrian Claimant v. Defendant*, Decided on 12 March 1998, *YCA* XXIX 663-672 (2004), 668 (Hamburg Court of Appeal, Germany).
[139] Kronke et al.*supra* n. 5, at 236.

NY Convention as a public policy ground under Art. V(2)(b) of the NY Convention, "it is only right that it should bear the onus of establishing that ground."[140]

Practically, enforcing courts generally consider Art. V(1)(b) and Art. V(2)(b) of the NY Convention jointly, "probably because the public policy exception is used as an umbrella escape clause by any party opposing enforcement" [141].

One of such cases in Ukraine is the so-called "sugar case"[142], where OJSC Sugar Plant opposed enforcement of an arbitral rendered by the Zurich Chamber of Commerce Arbitration Court in favor of K-Austria LLC, alleging that (i) Sugar Plant was not given proper notice about the time and place arbitration proceedings took place, and (ii) enforcement of the award would contradict the public policy. However, the Kyivska Oblast Court of Appeals reviewed the evidence furnished, including fax messages from the arbitrator to Sugar Plant (which were subsequently sent by registered mail) and post office confirmations of delivery of registered mail from Switzerland to Sugar Plant, and held that Sugar Plant was given proper notice, thus, enforced the award[143]. Because Art. V(1)(b) of the NY Convention lists lack of proper notice as a separate ground to refuse enforcement, the court did not engage in the analysis whether failure to make proper notification would constitute breach of public policy, however, Markiyan Malskyy suggests that it is "assumable that the court could follow the claim of the defendant that the lack of due process could indeed consist a public policy exception, as due process is of vital importance for any legal system[144]".



[140] *Ibid*, referring to *Hebei Import & Export Corp. v. Polytek Engineering C. Ltd.*, Decided on decided 9 February 1999, *YCA* XXIV 652-677 (1999), 668 (Court of Final Appeal, Hong Kong).
[141] Kronke et al., *supra* n. 5, at 237.
[142] Malskyy, *supra* n. 9, at 61-62.
[143] *Ibid.*
[144] Malskyy, *supra* n. 9, at 62.

Another case, No. 6-396/08[145], even though it deals with setting aside of an award, is also illustrative. Company Handelsunternehmen Franz Yan applied for setting aside of the award of the ICAC at the Ukrainian CCI of June 23, 2008 in the case AC No. 29a\2008 on the grounds that the arbitral tribunal heard the case and awarded enterprise Dominanta-Krym damages in absence of the representative of Franz Yan. The representative was not admitted by the ICAC at the Ukrainian CCI to the hearing as he did not possess proper power of attorney. The court found that the parties to the dispute were properly notified about the date and place of the hearing, however, Franz Yan did not timely provide power of attorney to its representative in Ukraine and, therefore, he was not admitted to the hearing. Rules of the ICAC at the Ukrainian CCI provide that if a party, being properly notified, fails to appear at the hearing without good excuse or fails to produce documentary evidence, the arbitral tribunal may continue the arbitration proceedings and render an award on the basis of documents in the case file. Thus, since procedural requirements were not infringed by the arbitral tribunal, the court refused to set aside the arbitral award.

The district court's ruling was appealed on the following grounds:

> In particular, [the appellant] notes that the award […] contradicts public policy of Ukraine, since [the ICAC at the Ukrainian CCI] denied applicant's motion to postpone the hearing due to inability of the officers of the applicant to be present at the stated date, and did not admit the representative of the applicant, which lacked proper power of attorney, to participate in the hearing as a representative or as audience[146].

However, the appellate court followed the reasoning of the district court, dismissed the appeal, and stated:

> Such conclusion of the court is in line with the circumstances of the case and Art. 34(2)(1) of the [Law on ICA], which prescribes exhaustive list of grounds for setting aside of an arbitral award. This list does not include such ground for setting aside

[145] *Handelsunternehmen Franz Yan v. Dominanta-Krym*, Shevchenkivskyi District Court of the City of Kyiv, Case No. 6-396/08, decided on 27 November 2008.
[146] *Handelsunternehmen Franz Yan v. Dominanta-Krym*, Case No. 22-1395/2009, Appellate Court of the City of Kyiv, decided on 4 February 2009.

> of an arbitral award as non-admission of a representative of the party, which did not have proper power of attorney, to hearing on the dispute.
> Arguments of the appeal that award […] is contrary to public policy this court deems to be non-justified, since content of the award does not evidence that it contradicts the legal order of the state, principles and framework that are the basis of the existing order, fundamental constitutional rights, freedoms, guarantees.

The appeal of this ruling to the SCU was denied[147].

To compare these rulings with international practice, it was held by German court that the arbitral tribunal did not have an obligation to postpone a hearing to accommodate business schedule of the defendant's managing director, if the party could have sent another counsel to the hearing, especially if the hearing had already been postponed at the defendant's motion[148]. Thus, Ukrainian approach is similar to that of foreign jurisdictions.

As a conclusion, the improper notification of a party is, according to some scholars and legal practitioners in Ukraine, one of the most frequently raised objections to enforcement of an arbitral award, and it is worth to make sure that all possible attempts were made to contact the other party to arbitration[149]. Also, Ukrainian courts do not treat absence of a party's representative at the hearing as a violation of procedural public policy in itself. As long as the party has been properly notified about the constitution of the arbitral tribunal, date and place of oral hearings, the party has the burden to provide its representative with proper power of attorney and secure his presence at oral hearings.

With respect to procedural infringements in arbitration proceedings as the grounds to refuse enforcement of an award, Ukrainian courts recognize both procedural and substantive public

[147] *Handelsunternehmen Franz Yan v. Dominanta-Krym*, Supreme Court of Ukraine, decided on 13 April 2009.
[148] Kronke et al., *supra* n. 5, at 295 referring to *Claimant v. Defendant*, Decided on 27 March 2006, *YCA* XXXII 342-346 (2007), 342 (Karlsruhe Court of Appeal, Germany).
[149] Malskyy, *supra* n. 9, at 62.

policy. First, invalidity of the contract, on the basis of which an arbitral award is rendered, and invalidity of the arbitration clause contained therein and, second, the lack of proper notice and other inability to present one's party case are the two most frequently invoked justifications to oppose enforcement of an arbitral award. Unfortunately, it should be noted that Ukrainian courts often do not follow the principle of separability of the arbitration clause and invalidate not only the container contract but also the arbitration clause provided in it without giving good reason for doing so.

# CONCLUSION

Ukraine is a party to the New York Convention and a UNCITRAL Model Law state. Both of these legal instruments provide that enforcement of an arbitral award may be denied if it would contradict public policy; however, content of the public policy is left for the state to decide.

The main purpose of this thesis is to analyze case law on recognition and enforcement of arbitral awards to show which norms Ukrainian courts will apply as matters of procedural and substantive public policy and to determine how the notion of public law differs in Ukraine from the leading arbitration jurisdictions. Thus, the thesis answers three main research questions. First, what definition of public policy do Ukrainian courts use in recognition and enforcement of arbitral awards? Second, which areas of law fall within the scope of public policy? Third, which procedural violations are recognized as a part of public policy?

With respect to the first research question, public policy is defined in several acts, including the Civil Code of Ukraine, the Law of Ukraine "On International Private Law" and the Resolution of the Plenary Assembly of the Supreme Court of Ukraine, only in the later case specifically for the purpose of enforcement of arbitral awards. The definition itself includes the fundamental principles related to the independence and integrity of the state, fundamental constitutional rights and freedoms, which accords to the international perception of this notion. On the other hand, practice reveals that Ukrainian courts often do not provide clear reasons why certain mandatory rule should constitute a matter of public policy, and sometimes even rule that enforcement of an award cannot affect public policy of Ukraine if both parties to the dispute are privately owned, not state entities.

While dealing with the allegation that enforcement of an award would contradict public policy, Ukrainian courts do not conduct the full-scale review of the award, but exercise the limited judicial control, which accords to international practice and is one of the most important advantages of the international commercial arbitration. Cases show that attempts were made to recognize at least corporate law, energy security, and currency exchange regulations as matters of public policy.

First, the Recommendations of the Plenary Assembly of the Highest Economic Court of Ukraine (i) prohibited, for the reasons of public policy, the choice of foreign law to be applied to regulation of shareholder agreements, (ii) suggested that corporate disputes should be non-arbitrable, and (iii) stated that an arbitral award that deals with corporate law matters and rendered under foreign law will be refused enforcement as being contrary to public policy. This position was later transplanted into the Economic Procedural Code of Ukraine, which now lists disputes between shareholders or between shareholders and a company as non-arbitrable. However, abovementioned Recommendations lack reasoning and are based on limited analysis of practice, whereas the provision of the Code, in opinion of some authors, violate guarantees of foreign investors.

Second, despite some practice in other countries, Ukraine has adopted rather pro-enforcement approach in situations where enforcement of an award may lead the debtor into financial hardship or threaten energy security of the state, and does not refuse enforcement of an arbitral award in such cases.

Third, Ukraine has strict currency exchange regulations, and there are cases known when a party requested to deny enforcement of an award on the grounds that payment of money stipulated in the foreign currency would contradict public policy. However, practice reveals that such regulations generally will not make the arbitral award unenforceable, but require the enforcing court to change the currency to be paid into the official currency of Ukraine. Such approach corresponds to international practice that allows courts to modify the award with respect to the currency to be paid, and does not recognize award stipulated in the foreign currency as a violation of public policy.

Regarding the third research question, Ukrainian courts recognize both procedural and substantive public policy. In some cases Ukrainian courts refuse to enforce arbitral awards for the reason that Ukrainian court decision on the same subject matter entered into force, mainly in the event when a party, which opposes enforcement of the arbitral award, nullified the container contract together with the arbitration clause in it. It should be noted that Ukrainian courts often do not follow the principle of separability of the arbitration clause and invalidate not only the container contract but also the arbitration clause contained in it without giving good reason for doing so.

Another frequently used objection to enforcement of an arbitral award is improper notification of a party. However, courts do not treat absence of a party's representative at the hearing as a violation of procedural public policy as long as the party has been properly notified about the constitution of the arbitral tribunal, date and place of oral hearings.

Author suggests that adoption of the new review of the court practice and recommendations by the Supreme Court of Ukraine, as well as amendments to procedural legislation are necessary for the following purposes:

(i) to specify which areas of substantive law and rules of procedure should fall within the scope of public policy, and which criteria should Ukrainian courts employ while analyzing this issue;

(ii) to clarify that public policy defense may be raised by the private enterprises as well as state-owned;

(iii) to allow foreign investors in Ukraine to resolve corporate disputes by means of international commercial arbitration;

(iv) to inform the courts of the necessity to apply the doctrine of separability of the arbitration clause.

Thus, even though Ukrainian court practice is rather pro-enforcement, changes are inevitable for Ukraine to become truly arbitration-friendly jurisdiction.

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