



ARBITRATION e-REVIEW

SPECIAL EDITION



ARBITRATION E-REVIEW

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DR. BEATA GESSEL-
-KALINOWSKA
vel KALISZ

President of the Lewiatan
Court of Arbitration

Dear Readers,

This time we would like to present to you a special issue concerning arbitration in Ukraine. On 26 April 2013 in Kiev there is held a twin-conference organized by the Lewiatan Court of Arbitration (Poland) and the Committee for ADR of Ukrainian Bar Association (Ukraine). It is a great opportunity to learn more about the theory and practice of arbitration in Ukraine.

This issue is opened by the article of dr. Andrzej Tynel „Poland and Ukraine on the road to international arbitration”, which compares development of arbitration law in Poland and Ukraine during the last two decades.

Prof. Oleksandr Merezhko indicates psychological aspects of award activity of arbitrators with regard to theory of well-known polish scientist, Leon Petrażycki.

Very controversial topic, as usually, is a matter of applicable law for the arbitration agreement. In this matter the view has been presented by Irina Nazarova. Moreover, you can find in this issue few comments about the effectiveness of arbitration procedure in the article of prof. Mykola Selivon, bifurcation – raised by Sergei A. Voitovich and enforcement of investment arbitration awards in Ukraine in the article of the authorship of German Galuschenko.

We wish you having a good reading!

Dr. Beata Gessel-Kalinowska vel Kalisz
President of the Lewiatan Court of Arbitration

International Commercial Arbitration from the Perspective of the Psychological Theory of Law

■ Prof. Oleksandr Merezhko

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To adequately understand mechanisms of the international commercial arbitration, as well as decision making process within an arbitration court, we need to subject it to the psychological analysis which would allow us to shed a new light upon the nature of this process, as well as upon its some crucial problems.

To begin with, we need to present basic premises upon which psychological theory of law, as developed by its founder Leon Petrazycki, is based. These methodological premises could be summarized as follows:

In the light of the psychological theory, law is part of reality, but its reality is psychological; in other words, it can be observed in the content of mental processes. This is the methodological point of departure for the psychological theory of law which, however, does not negate law as a social phenomenon, since law is related to psychological adaptation of a human being to social realities and social roles the human being is supposed to play in the society. For example, playing a social role of the arbitrator inevitably exerts influence upon behavior of a human being and its psychological perception of law.

Legal psychic experience (“legal emotion” or “legal impulsion” in terms of Petrazycki’s theory) is primarily the consciousness of will being bound by duty.

Law is an impulsion (psychic experience) of imperative-attributive character. In other words: everything what we view (or perceive) in our consciousness in terms of inextricably linked rights and duties is law.

Of course, this definition of law might look too broad, but it’s the only one scientifically adequate definition of law, encompassing all kinds of law (including international law and “divine law” or *jus divinum*).

Polish author Aleksander W. Rudzinski explains that Petrazycki’s concept of legal “emotions” (impulsions) are “complex psychological imperative-attributive experiences, having a double passive (stimulus) and active (reaction) nature. The image of an observed or imagined action releases an emotional repulsion or attraction and a conviction that actor A is obliged to behave in a certain manner (duty impulse), and that the behavior of actor A is due to person B as his right. Actors A and B may be both extraneous and observed, or

imagined by the person experiencing a legal emotion, or the experiencing person may be one of the two (A or B). The kind of action or behavior may be physical or even psychical in nature”.¹

According to the psychological theory, there are the following types of law:

- 1) official law;
- 2) unofficial law;
- 3) positive law;
- 4) intuitive law.

It is noteworthy that what lawyers normally regard as law is only one of these types of law, namely – official law, that is law recognized and supported by official bodies of state power.

There can be the following classification of law from the perspective of the psychological approach:

- 1) positive and official;
- 2) positive and unofficial;
- 3) intuitive and official; and
- 4) intuitive and unofficial².

The meaning of this classification may be demonstrated by the following examples: 1) When a court renders a decision and refers to Article X of the Civil Code, or to a precedent, this is positive law (because of the reference to a normative fact; in this case concrete article of the Civil Code) and simultaneously official law (because of the character of the agency – state court). 2) When a freely chosen arbitrator solves an international commercial case

(conflict) by reference to a well-established practice, this is a positive law (because of the reference to a normative fact) and simultaneously unofficial law (because of the character of the agency – autonomous court of arbitration rather than state court). 3) When an Anglo-Saxon court decides a case on the foundation of equity, or a Swiss judge decides a case on the basis of a norm which he would enacted if he was the legislator, this is intuitive law (because of the lack of reference to a normative fact), but official law (because of the character of the agency – state court). 4) When, in a frontier situation, men take the law in their hands and hang a “bad man” because he “deserves” it, this is intuitive law (because of the lack of reference to a normative fact) and unofficial law (because of the absence of an official agency).

Regarding concept of the “normative fact” in the psychological theory of law, generally speaking, it’s a substitute for the concept of the source of law in general theory of law and state. At the same time concept of the “normative fact” is much broader than the concept of the source of law and might include such phenomena as: custom, practice, usage, textbook, arbitral award, opinion of legal scholars etc.

In terms of international commercial practice there could be following normative facts, which exert influence upon decision-making, or, to be more precise, arbitration award-making process: contract, made by the parties; established practice, followed by these parties; trade usages; relevant international conventions; international customary law; general principles of law; standard forms and contracts; decisions of international commercial arbitrations; doctrinal opinions, *communis opinio doctorum* (prevailing in the legal science point of view regarding certain legal issue) etc.

1. Aleksander W. Rudzinski, *Petrazycki’s Significance for Contemporary Legal and Moral Theory*, 21 *The American Journal of Jurisprudence*, 1976, p. 113.

2. See: Timasheff N.S. *Introduction // Law and Morality: Leon Petrazycki*, Cambridge, Massachusetts: Harvard University Press, 1955, p. xxviii.

Against this backdrop we could argue that the law of international commercial arbitration is always unofficial law, due to the fact that court of arbitration is by its nature non-state court, and, at the same time, it can be either positive law (if there is a reference to a normative fact in the arbitration award) or intuitive law (if there is no such a reference).

Now let's consider decision making process within the court of international commercial arbitration from the psychological theory's perspective.

First of all, let's take as an example the rules of some courts of arbitration, where we can find formulae, behind which intuitive law could be concealed or, in other words, which could serve as the instruments to express intuitive law of the arbitrators.

For example, part 2 of the paragraph 38 of the Rules of the Court of Arbitration at the Polish Confederation of Private Employers Lewiatan envisages that in case if the parties to the dispute had failed to designate the applicable law, then "the arbitral tribunal shall apply the substantive law which it determines to be appropriate". It is quite obvious that in determining the appropriate law the arbitrators proceed from their intuitive legal perception of what the "appropriate law" is in each given case.

Part 3 of the paragraph 38 states that: "The parties may authorize the arbitral tribunal in writing to decide the dispute in accordance with the general rules of law or *ex aequo et bono*".

From the perspective of the psychological theory, the phrase "the general rules of law or *ex aequo et bono*" is one of the names given to the intuitive law. Figuratively speaking, intuitive law wears different masks, hiding its true identity.

It is also argued that in the case, when the arbitrator decides "*ex aequo et bono*", as "*amiable compositeur*", or in "*equity*", these three expressions being often considered interchangeable. So, for example, the power of the arbitrators to decide *ex aequo et bono* is viewed as giving the tribunal a certain element of discretion with regard to the selection of "the principles of equity".³

At the same time, some authors are trying to draw a line between these concepts. So, for example, *ex aequo et bono* can be viewed as a dispute settlement out of law, according to moral principles. An arbitrator deciding as *ex aequo et bono* is allowed to disregard not only the non-mandatory rules, but also the mandatory provisions of law, as long as they respect international public policy.⁴

Regarding concept of *amiable compositeur*, Czech author Jana Hebroczkova points out: "Traditionally, *amiable composition* provided an equity correction to strict rules of law applicable to a dispute. Today an *amiable compositeur* has a power to depart from the strict application of rules of law and decide the dispute according to justice and fairness. This concept is usually chosen by the parties as a substitute for, rather than an addition to, national law. It is therefore sometimes regarded as a "negative choice of law" as the arbitrator is appointed to apply "equity and fairness" instead of a specific national law".⁵

3. Christoph H. Schreuer: *The ICSID Convention: A Commentary*, Cambridge University Press, 2005, p. 638.

4. Bühring-Uhle, Ch.: *Arbitration and Mediation in International Business*, The Netherlands: Kluwer Law International, 2006, p. 40.

5. Jana Hebroczkova, *Amiable Composition in the International Commercial arbitration* // <http://www.law.muni.cz/sborniky/cofola2008/files/pdf/mps/herboczkova_jana.pdf>.

Another important concept in the field of arbitration, which is also related to the theory of intuitive law, is the concept of public policy (*ordre public*). Czech specialist on arbitration law Alexander J. Belohlavek absolutely rightly considers public policy "an important term of international arbitration", which constitutes "a relevant factor in many stages of arbitration, starting from the application and applicability of an arbitration agreement, up to the enforcement of awards made within the proceedings before arbitrators".⁶

In legal literature public policy (*ordre public*) is considered to be "a classic reason for excluding the application of foreign law by domestic courts" and represents "the superiority of basic value choices of the local community over the technical application of conflict of laws rules".⁷

The meaning of the concept of public policy till now remained a mystery needing scientific explanation. According to Petrazycki, those lawyers who tried to unravel this enigmatic concept turned their attention in the wrong direction: instead of paying attention to the content of their own psyche, they turned to the analysis of laws.⁸ Petrazycki was confident that at the heart of public policy lies conflict between intuitive law of the judge and foreign positive law.⁹

In other words, behind public policy are hidden intuitive-legal convictions of the judge,

6. Alexander J. Belohlavek, *Arbitration, Ordre Public and Criminal Law (Interaction of private and public international and domestic law)*, Volume I, Kyiv: Taxon, 2009, p. 1115.

7. Christoph H. Schreuer, *Op. cit.*, p. 568.

8. L. Petrazycki, *O staroy shkole i nvyh techeniyah v nauke prava. Po povodu knigi professora A. Pilenko: "Ocherki po sistematike chastnogo mezhdunarodnogo prava"* 1911 g. // *Pravo. Ezhenedel'naya yuridicheskaya gazeta*, 1911, No. 52, p. 2996 (In Russian).

9. *Ibid.*, p. 2995-2996.

according to which practical consequences of foreign law's application are in evident conflict with the intuitive law of the given nation.

At the same time, in the case of international commercial arbitration, there is no domestic legal system which would provide the standards for public policy. For this reason, for the needs of international commercial arbitration, the concept of "international public policy" or "policy of the international community" might be used, the principles of which "would include but not be restricted to peremptory rules of international law".¹⁰ Examples of these international peremptory rules are: the prohibition of slavery, piracy, drug trade, terrorism and genocide, the protection of basic principles of human rights etc.

It also should be kept in mind that the only limit to the power of the arbitrator, deciding the case, lies in "international public policy", a breach of which might constitute a ground for refusing to enforce the arbitral award or for setting it aside. In addition, such concepts as public policy (*ordre public*) and mandatory (peremptory) rules of law, which the court of arbitration might have to take into consideration in the process of decision making, can also be considered as expressions of the intuitive law of the arbitrators¹¹.

Of particular interest in terms of the intuitive law, which might go under different names in the rules of the courts of arbitration, is article 42 (2) of the "Convention on the Settlement of Investment Disputes between States and Nationals of Other States" (ICSID Convention) which states: "The Tribunal may not bring in

10. Christoph H. Schreuer, *Op. cit.*, p. 569.

11. See: Alexander Merezko, *Psichologicheskaya teoriya prava (publichnogo i chastnogo)*, Odessa: Feniks, 2012, p. 222-224 (in Russian).

a finding of non liquet on the ground of silence or obscurity of the law”.

As Christoph H. Schreuer points out in his Commentary to the ICSID Convention, art. 42 (2) “directs that the tribunal may not refuse to give a decision on the ground that the law is not sufficiently clear” and the underlying assumption of this article “is that the body of law provided by Art. 42 (1) is sufficiently complete to provide an answer to every question which may come before tribunal”.¹²

Nevertheless, this underlying assumption is nothing more than a fiction, because no legal system, be it national or international, is capable of providing an answer to “every question which may come before tribunal”. In reality, art. 42 (2) means that the ICSID Tribunal, in order to avoid situation when there is no applicable law, should apply intuitive law.

It also hard to agree with the view that in the case of the ICSID’s practice “the combination of the host State’s law and international law offers such a broad range of authority that a genuine non liquet is almost unthinkable” and that “gaps in the host State’s law may be filled through international law’s supplemental function”.¹³

In actuality, since national law and international law are aimed at regulation of different social and legal relations, their combination might be another name used to hide application of the intuitive law.

Regarding such ideas as “justice”, “fairness” and “equity”, each of the arbitrators of the court of arbitration has his/her own perception of what is just and fair, which is expression of his/her intuitive law. At the same time, from

the psychological viewpoint, each of them wants to be acknowledged within this court, and aims at his/her intuitive law influencing the final outcome of the case to be solved. On the other hand, we have here also positive law, because the final decision (arbitration award) should be substantiated on the basis of or with reference to the certain normative facts (e.g. contract between parties to the dispute, trade usages, general principles of law, customary law etc). It can be argued that in view of numerous (often not hierarchically organized) normative facts the arbitrator might use these normative facts as the arguments in order to corroborate his/her preexisting intuitive opinion on what the arbitral decision should be.

What we might have here could be called “objectification of the subjectivity” or, in other words, “positivization of the intuitive law”.

At closer analysis some of the normative facts might also prove to hide the intuitive law. So, for example, according to prevailing theory and practice, general principles of law can be found through a process of comparative law whereby features common to domestic legal systems are established. These principles, formally equivalent to custom and treaty, can be used to fill gaps left by these sources. Among the general principles of law, used in practice of the international commercial arbitration, are mentioned such as: general principles of contract law, including *pacta sunt servanda* and the *exceptio non adimpleti contractus*; *estoppel*; unjust enrichment; full compensation of prejudice resulting from a failure to fulfill contractual obligation; general principles of due process; the claimant bears the burden of proof; *res judicata* etc.

Many of the general principles of law are so “general”, broad and abstract, that their

application to concrete cases allows the arbitrators to fill the content of these principles with their intuitive law.

The arbitrators, making up given arbitration court, form relatively autonomous legal system within which, on the basis of conflict and interaction between different intuitive laws of the arbitrators, the common intuitive law of the court emerges.

One of the concerns of the arbitrators is also something what could be referred to as the prestige of the given arbitration court and its decision. The arbitrators are well aware of the fact that unless their award is not viewed as impartial, unbiased, well grounded, just and fair by the parties to the case themselves, as well as by the international business community in general, the prestige of this court could be considerably jeopardized or damaged.

It is also noteworthy that intuitive law of each of the arbitrators is a result of his/her life experience and legal outlook. Let’s also not forget that these arbitrators might represent different legal traditions and cultures. They view legal issues through the prism of their own legal culture and upbringing. It might be said that within the court of international commercial arbitration a sort of intercultural dialogue might take place.

What are the legal phenomena and loopholes allowing the arbitrators to express their intuitive law in the guise of the positive law? Among these phenomena we could distinguish the following:

The lack of the clear-cut list of the legal sources they should use and the lack of hierarchy between them. Besides, as it was mentioned earlier, the arbitrators perceive these sources not directly, but through the prism of their legal culture and legal consciousness, in

other words through their intuitive legal convictions.

Social context of the case, which should be taken into consideration by the arbitrators. This context might sometimes play crucial role in adapting relevant rules, which the arbitrators are supposed to apply, to the circumstances of the concrete case or situation. By applying these rules to the given social context the arbitrators consciously or unconsciously resort to their intuitive legal convictions.

Gaps in law, which the arbitrators are supposed to fill. As a matter of practice, these gaps are often filled by the intuitive law of the arbitrators.

Often conflicting and diverse principles and means of interpretation, which allows giving different meanings to the normative facts. Sometimes the interpretation of the legal rule may be more important than the rule itself. Psychologically speaking, the arbitrators are prone to interpret legal rules in accordance with their intuitive legal convictions.

Semantic indeterminacy of the legal language. Since legal terms rather often lack necessary precision and are open to different interpretations, giving meaning to them might also depend upon intuitive law of the arbitrators.

Principles of good faith, equity and reasonableness which are prone to different interpretation on the part of the arbitrators. In fact, these principles are different names for intuitive law of the arbitrators.

To sum up, in the process of the decision making within a court of arbitration, the arbitrators should be aware of the psychological aspects of this process and not neglect its consequences and limits.

12. *Ibid.*, p. 632.

13. *Ibid.*

Poland and Ukraine on the road to international arbitration

■ Dr. Andrzej Tynel

Arbitrator, Of Counsel at Baker & McKenzie

The decision to dissolve the Union of Soviet Socialist Republics, taken on December 8, 1991 in Viskuli by the leaders of the three states that had founded the Union, i.e. the Russian Federation, Ukraine and Belarus, was an event of a truly revolutionary nature for the Union Republics. From one day to the next, the republics, so far under strict supervision by Russia, became independent states forced to themselves decide upon the shape of their sovereignty¹.

One of the most serious problems faced by the former Soviet Republics was administration of law under the new political system. The related difficulties were not mitigated by the formation of the Commonwealth of Independent States, which was not equipped with supranational prerogatives. Mostly, as in the case of Belarus where the Supreme Soviet (Supreme Council) of Belarus adopted on July 12, 1990 the Declaration of State Sovereignty of the Belarusian Soviet Socialist Republic², the individual parliaments took decisions concluding that so long as relevant normative acts were not

enacted, the laws of the former USSR were to remain in force in the newly-formed states.

Such decisions also referred to arbitration. Upon the dissolution of the Soviet Union, the Framework Civil and Union Republic Legislation of 1961 was in force, serving as grounds for the civil codes adopted by individual republics. Pursuant to Article 6 of the above statute, civil rights were protected, inter alia, by courts of arbitration.

The rules governing operations of courts of arbitration were laid down in Appendix No. 3 to the Code of Civil Procedure of July 11, 1964, which provided for arbitration in disputes between natural persons. Similar appendices were attached to the codes of civil procedure in place in individual Union Republics.

Another source of law pertaining to arbitration and in force upon the USSR dissolution was the Rules of Procedure at Courts of Arbitration Appointed to Resolve Economic Disputes Between Federations, Entrepreneurs and Organizations, adopted in 1975³.

As the legislation of the newly-formed states was taking shape, the authorities began to realize the need for a legislative framework

also in the field of arbitration. The findings of an analysis of the legislative process taking place in the states under discussion serve to identify certain regularities in the legislative authorities' actions. It turned out that the legislative authorities considered regulating arbitration in international relations to be a matter of a greater urgency than arbitration in internal relations. This was manifested in the accession of a large number of the CIS member states to international conventions, and in particular to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

Symptomatically, as a rule, CIS member states acceded to the Washington Convention before they did to the New York Convention. This was likely a result of the pressure from prospective foreign investors who made their local market presence conditional upon availability of an objective forum for resolution of possible disputes.

POLAND

The situation of the Polish legislature was much better. The provisions on arbitration incorporated in the Code of Civil Procedure, formally dating back to 1964, actually drew upon the model Code of Civil Procedure⁴ that had come into force in 1934.

In Poland, despite the relatively clear formal and legal status of arbitration, a few attempts to amend the Code of Civil Procedure

were made in order to bring Polish law closer to the modern standards.

The debate on this topic began with an article by Professor Sławomir Dalka, an outstanding arbitration expert. While presenting the advantages of arbitration, Professor Dalka was critical about the regulatory environment in place at that time and proposed specific solutions.

In the years 1990 - 2004, several attempts were made to amend the legal regulations pertaining to arbitration⁵.

Among other things, the Civil Law Codification Commission appointed a team of experts led by Professor Jerzy Rajski, which drafted a bill on international commercial arbitration.

Ultimately, despite the support from arbitration practitioners, the bill was not endorsed by the legislative authority, which opted not for a separate law but for preservation of the arbitration regulations as a part of the Code of Civil Procedure.

Thus, for the sake of civil law uniformity, the Polish legislative authority decided that the provisions on arbitration should continue to be incorporated in the Code of Civil Procedure. Nevertheless, those provisions draw upon the UNCITRAL Model Law⁶.

A new impulse to focus on drafting arbitration regulations came with the appointment of the Civil Law Codification Commission under

5. Cf. Dalka S. Propozycje nowelizacji w zakresie sądownictwa polubownego in <<Przegląd Sądowy>> No. 10/1992, p. 70; cf. also Świdorska A. Sądownictwo polubowne w perspektywie zmian (zagadnienia wybrane) in <<Palestra>> Nos. 1-2/1992, pp. 40 et seq.; Rajski J. W zgodzie ze światowymi standardami. Projekt ustawy o międzynarodowym arbitrażu handlowym in <<Rzeczpospolita>> No. 90 of April 17, 1998, p. 15; Rajski J. Nowe wyzwania wobec sądów arbitrażowych in <<PPH>> of February 2001.

6. Cf. Ludwik M. Ustawa modelowa UNCITRAL a projekt ustawy o międzynarodowym arbitrażu handlowym in <<Radca Prawny>> No. 1 pp. 63 et seq.

1. Cf. Tynel A. (1997) Międzynarodowy arbitraż handlowy w krajach Wspólnoty Niepodległych Państw. Warszawa, pp. 18 et seq.

2. Cf. Tynel A. Międzynarodowy p. 41; Tynel A. (2005) Sądownictwo arbitrażowe na Białorusi. Księga pamiątkowa Profesora Maksymiliana Pazdana. Kraków, pp. 551 et seq.

3. Cf. Tynel A. Międzynarodowy pp. 24 et seq.; Chwalej W., J. Funk, A. Tynel (2000) Podstawy prawa gospodarczego Rosji, Białorusi, Ukrainy. Warszawa, p. 56.

4. Cf. Kuratowski R. (1933) Sądownictwo polubowne, p. 4; Kroński A. (1933) Kodeks sądów polubownych, p. 1.

the Ordinance of the Council of Ministers, dated April 22, 2002⁷. Among the dedicated teams of the new Codification Commission, there was an arbitration team led by Professor Feliks Zedler. The team began its work on drafting new arbitration regulations. A German expert was consulted in this respect. Having taken into consideration the outcome of a large-scale public consultation and discussions held by the Commission, the Commission assumed to regulate this issue in the Code of Civil Procedure and to draft an additional part of the Code, the provisions of which would govern both domestic and international arbitration⁸.

Thus, despite the calls for enacting an entirely new Code of Civil Procedure⁹, the legislative authority decided that it was a matter of urgency to amend arbitration regulations before a new Code was adopted.

The consequence of this fact was the so-called “minor amendment” to the Code of Civil Procedure of July 2, 2004, which came into force on February 5, 2005¹⁰.

Among the introduced modifications there was a material change of conditions for recognition and enforcement of awards and settlements rendered by or executed before the court of arbitration (Article 711 of the Code of Civil Procedure). The regulatory environment, as in force prior to the effective date of the above amendment, provided for proceedings in this respect being conducted in two stages, which was

the source of a number of procedural difficulties and was criticized in the literature¹¹.

The “minor amendment” differentiated between enforceable and other awards and settlements rendered by and executed before the court of arbitration. As a result, unenforceable awards and settlements rendered by and executed before courts of arbitration had to be declared effective by a common court in order to take legal effect. Enforceable awards and settlements took legal effect upon declaration of their enforceability and their enforceability was declared under a procedure for enforcement clause issuance¹².

On May 17, 2005, the Extraordinary Commission of the Sejm for Amendment to the Code of Civil Procedure and the Bankruptcy and Rehabilitation Law (print No. 3434 – arbitration proceedings) completed its work on amendment to arbitration regulations and, concurrently, adopted the relevant bill. Professor Jerzy Młynarczyk acted as a floor manager. On June 30, 2005, the Sejm passed the bill referred to above and thereafter, during its session on July 15, 2005, the Senate made some minor modifications thereto, primarily of editorial nature. On July 28, 2005, the Sejm adopted the Amendment (the text will be made available on February 13, 2013).

7. Dz.U. [Journal of Laws] No. 55 Item 476.

8. Sprawozdanie z działalności Komisji Kodyfikacyjnej Prawa Cywilnego za okres od 1 lipca 2002 r. do 31 grudnia 2003 r. in <<Przegląd legislacyjny>> No. 1 (41) of 2004.

9. For more details see Ereciński T. O potrzebie nowego kodeksu postępowania in <<PiP>> No. 4/04 pp. 3 et seq.

10. Dz.U. [Journal of Laws] No. 122 Item 1804.

11. For more details see Tynel A. Wykonanie krajowych orzeczeń sądów polubownych in <<PUG>> Nos. 7-8/1997 pp. 9 et seq. and the literature quoted therein.

12. Cf. Tynel A. Drobne zmiany w oczekiwaniu na duże in <<Rzeczpospolita>> No. 231 of October 1, 2004; Uliasz M. (2005) Kodeks postępowania cywilnego, Komentarz do nowelizacji. Warszawa: C.H. Beck, pp. 207 et seq.

UKRAINE

As was the case with other CIS member states, Ukraine adopted the legislation of the former USSR and kept amending it. Gradually, regulations governing dispute resolution were incorporated into the new statutory solutions.

It was already in Article 49 of the Law on Foreign Investments of March 31, 1992, that parties were offered a choice of forum competent for resolution of disputes, where a distinction was drawn between two kinds of situations, namely, disputes between foreign investors and the state, concerning foreign investments and operations of joint ventures, which were to be considered by Ukrainian common courts unless international treaties on protection of foreign investments entered into by that state provided otherwise, and any other disputes, not specified above, which could be considered by common courts or courts of arbitration, also foreign ones if so agreed by the parties. The above solution was transplanted into Article 26 of the revised Law on Foreign Investments, dated March 19, 1996¹³.

It was relatively early, already in 1994, that Ukraine abandoned the legacy of the former USSR in the field of arbitration in international transactions and adopted, on April 20, 1994, the Law on International Commercial Arbitration (the “Law”), which followed the UNCITRAL Model Law.

Pursuant to Article 1.1 of the Law, the Law governs international commercial arbitration if the specified place of arbitration is within the Ukrainian borders.

In accordance with the Law on International Commercial Arbitration, arbitration is available,

13. Cf. Tynel A. and W. Chwalej (2001) Międzynarodny kommersyjny arbitraż gosudarstw Centralnoj i Wostocznoj Europy. Moskwa: SNG, p. 322.

with the consent of the parties, for resolution of disputes under contracts and other civil-law relations established as a result of transactions executed as part of broadly understood international trading, where the business enterprise of at least one of the parties is located abroad, as well as disputes between joint ventures, federations and international organizations set up in Ukraine, disputes between their founders, and disputes between the above entities and other Ukrainian law entities (Article 1.2).

Article 2 of the Law defines, inter alia, the term “commercial,” which is understood broadly and extends to cover issues resulting from any relations of a commercial nature, both contractual and non-contractual. The examples given are commercial contracts on delivery of goods or provision of services, or exchange of goods or services; agency agreements; factoring, lease and engineering agreements; contracts on construction of complete industrial plants; consulting services; sale of licenses; investment agreements; financing agreements; banking services; insurance agreements; use/operation or concession agreements; joint ventures and other forms of industrial or economic cooperation; transportation of goods and services of air, sea, railway and road transportation.

Arbitration (tretejski sud) was provided for in the Law on Arbitration of May 11, 2004¹⁴.

A number of issues and loopholes requiring statutory regulation were revealed already in the first years of the Law application. At that time, the Supreme Council of Ukraine recorded five bills proposed by deputies.

14. Cf. Tynel A. Sądownictwo polubowne na Ukrainie in <<PUG>> No. 10 of 2007.

The bills were concerned, in particular, with the scope of powers vested in courts of arbitration, proceedings before the court of arbitration, as well as procedures for seeking reversal and enforcement of arbitral awards.

An important element shaping the framework for international commercial arbitration is permanent courts of arbitration. These are primarily formed at chambers of commerce or industry and commerce.

In Ukraine, the International Commercial Arbitration Court (ICAC) at the Ukrainian Chamber of Commerce and Industry was established on August 11, 1994. It is one, if not the only one, of major permanent courts of arbitration.

The principles governing resolution of disputes by the above Court are set forth in the Rules adopted by the Presidium of the Ukrainian Chamber of Commerce and Industry on August 25, 1994 (as amended)¹⁵.

When evaluating the legal framework for arbitration in Ukraine, one can argue that it does not depart from the regulations in place in other countries. This fact especially makes Ukraine stand out against other member states of the Commonwealth of Independent States.

Ukraine has fortunately avoided the terminological difficulties faced by Russia, where there are major controversies over the use of the notions of arbitration court and *tretejski sud*. Examples of such difficulties in the Russian practice are to be found in the article referred to in the footnote below¹⁶.

15. Cf. Tynel A. Nowy regulamin Międzynarodowego Sądu Arbitrażowego w Kijowie in <<BA>> No. 7 of 2008.

16. Cf. Tynel A. and W. Chwalej Arbitraż w krajach Wspólnoty Niepodległych Państw in <<Biuletyn Arbitrażowy>> No. 11/2009, pp. 35 et seq.

A comparison of the legislative procedure and the outcome of this procedure in Ukraine and in other CIS member states authorizes the conclusion that Ukraine has also managed to avoid difficulties of the kind faced by Kazakhstan, where the Prosecutor of the Republic of Kazakhstan raised a protest against the relevant resolution of the Supreme Court, claiming that arbitral awards were not subject to compulsory enforcement, as a result of which an award rendered abroad was enforceable in accordance with the New York Convention, whereas an award rendered "at home" was not¹⁷. The Ukrainian legislature has also avoided controversial solutions, such as the one in place in Georgia, where an enforcement clause in respect of an arbitral award may be issued by the court of arbitration that rendered the award¹⁸.

SUMMARY

Summing up the discussion presented above, one can conclude that there is a considerable affinity between the legal systems in place in Poland and Ukraine. This undoubtedly results from the fact that the arbitration regulations draw on the UNCITRAL Model Law.

Certain differences are the consequence of proceeding in different legislative directions. Three such directions may be distinguished:

- incorporation of all legal regulations pertaining to arbitration, both domestic and international, into a legislative act;

17. Cf. Tynel A. Arbitraż handlowy w Republice Kazachstan in <<PUG>> No. 2 of 2004, pp. 26 et seq.; Tynel A. Arbitraż w Republice Kazachstanu in <<PUG>> No. 10 of 2006, pp. 25 et seq.

18. Cf. Tynel A. Sądownictwo polubowne w Gruzji in <<PUG>> No. 2/2007, pp. 30 et seq.

- incorporation of the legal regime for international commercial arbitration into a number of legislative acts on international commercial arbitration;
- and incorporation of regulations on (domestic and international) arbitration into codes of civil procedure¹⁹.

Poland decided to provide for arbitration in its Code of Civil Procedure, concurrently making domestic and international disputes subject to a single legal regime.

Poland and Ukraine are parties to the same multilateral conventions, however, Ukraine is ahead of Poland in the sense that it is already a party to the Washington Convention.

Both countries attach much weight to arbitration. The major courts, i.e. the Court of Arbitration at the Polish Chamber of Commerce and the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, have normative grounds for their operations.

Amendments to the legal systems of the Central European countries tend to update arbitration law in order to conform it to the requirements of present-day international business transactions. This tendency is manifested, inter alia, in adoption of the solutions provided for in the UNCITRAL Model Law, which gradually makes this field of law internationally uniform. This universal trend of law development is broad enough to cover both the concept of the Polish regulations on international commercial arbitration and the provisions of the Ukrainian Law on International Commercial Arbitration²⁰. Adoption

19. Cf. Rajski J. Tendencje rozwoju prawa o międzynarodowym arbitrażu handlowym w państwach Europy Środkowej.

20. Cf. Dutka I. Oddziaływanie ustawy wzorcowej o międzynarodowym arbitrażu UNCITRAL w aspekcie prawa ukraińskiego o sądownictwie polubownym in <<Kwartalnik ADR>> No. 4/2008, pp. 221 et seq.

of the law referred to above helped update our regulations on international commercial arbitration and harmonize the same with the common solutions adopted internationally.

The road taken by both countries when developing their legal frameworks for international and domestic arbitration should be deemed the best possible one. Nowadays, there is no alternative to a legal regulation based on a model law.

One may anticipate further development of arbitration which faces ever new tasks as the economies keep integrating. Therefore, in addition to arbitration, development of other forms of alternative dispute resolution (ADR)²¹ should be also expected.

The similarity of uniform rules governing arbitration is conducive to various initiatives of international nature. This claim is proven by the seminars and other forms of cooperation which are held and established more and more frequently. Polish and Ukrainian arbitration practitioners can be expected to establish their presence on a scale greater than they did so far. This follows from the information obtained from SCC²².

21. Cf. Rajski J. Nowe wyzwania wobec sądów arbitrażowych in <<PPH>> of February 2001.

22. Cf., for instance, the Conference of the International Institute of Mediation and Arbitration, dated June 14, 2007; Nowaczyk P. Perspektywy rozwoju sądownictwa polubownego w Polsce in <<ADR>> No. 1 (2009), p. 145; Tynel A. Kierunki rozwoju sądownictwa polubownego (arbitrażu) w krajach Wspólnoty Niepodległych Państw in Księga pamiątkowa T. Szurskiego, pp. 761 et seq.

Arbitration Agreement: A Valid Meeting of The Minds on the Legal Theories' Cross-Road?

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Interpretation of arbitration agreement is an important player of too many faces. It can serve as the direct road to arbitration and it can also serve as an absolute deadlock on the way to obtain granted remedies, if it is successfully attacked at the stage of the enforcement.

In the absence of a choice-of-law agreement, and, inter alia, deficiencies of the latter (pathological, blank, combined arbitration clauses) determining the law applicable to the arbitration agreement and its interpretation can be a very complex and yet demanding task. The performance of this task is additionally complicated by the existence of a *dramatis personae* component. The arbitral tribunals and courts are independent actors in the play and may easily draw different legal inferences from the interpretation of the arbitration agreement.

This article addresses the topic of the law applicable to the substantive validity of an arbitration agreement and its interpretation, undertaking an attempt to find out common grounds in dealing with validity, existence and a scope of an arbitration agreement. The law applicable to the substantive validity, and the law applicable to interpretation of the

arbitration agreement, in the absence of a choice-of-law agreement, is examined first¹ (I), whereas the principles applicable to interpretation of arbitration agreement are examined afterwards (II).

I. LAW GOVERNING AN ARBITRATION AGREEMENT

Undoubtedly the choice of law is one of the most complicated issues in international arbitration.

There is the law applicable to formal validity (a), non-arbitrability (b) and the effects of the arbitration agreement on non-signatories (c). There is also the law applicable to (d) formation; (e) substantive validity; and (f) interpretation of the arbitration agreement.²

Overall, 'given that there is also the law applicable to the parties' capacity to conclude the

1. This article does not address issues relating to the law governing formal validity of the arbitration agreement (1), capacity of the parties to enter valid arbitration agreement (2), non-arbitrability (3), non-signatory issues

2. See Gary B. Born, *International Arbitration: Law and Practice*, Wolter Kluwer Law & Business, 2012, op. cit., reference in note 39 at p. 55

arbitration agreement, the law applicable to the arbitration proceeding (*lex loci arbitri*), the law applicable to the arbitrator's contract (*receptum arbitri*), the law applicable to the contract between the parties and the administering institution and the law applicable to the substance of the dispute, one would be faced with fourteen conflict of laws issues in international arbitration'.³

Therefore, this article does not intend to cover all of the possible choice of law options in arbitration, but the ones which the author considers to be the most significant of them – the choice of law applicable to the substantive validity, formation and interpretation of an arbitration agreement.

The seat of arbitration and the choice of law method

As a preliminary point, it shall be mentioned that the law governing the substantive contract and the law applicable to the arbitration agreement are not necessarily the same. This conclusion is based on the severability of the arbitration agreement from the main contract.

The law applicable to the arbitration agreement may be determined by using a choice of law method and, particularly, the principle of the closest connection.

This principle means giving priority to connecting factors which apply specifically to arbitration agreement.⁴ The factors may be the

3. See Klaus Peter Berger, *Re-examining the Arbitration Agreement: Applicable Law-Consensus or Confusion?* From Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?* ICCA Congress Series 2006 Montreal 13 (Kluwer Law International 2007) pp.301-304, at p. 1 with references in notes 7, 8, 9

4. See Fouchard/Gaillard/Goldman, *On International Commercial Arbitration*, 1999, paragraph 425, opt. cit., at p.223 with reference to note 115

seat of arbitration, the language of the arbitration, place of enforcement etc. The most significant of them is, however, the seat of arbitration.

On the international treaty level essential inconformity of the arbitration agreement to the law of the seat of arbitration (*lex arbitri*) may result in refusal in recognition and enforcement of the arbitral award under Article V (1) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁵ Reference to the seat of arbitration may also be found in the European Convention⁶, UNCITRAL Model Law⁷ etc.

The importance of *lex arbitri* is also demonstrated by the case law. For instance, in *Sulamerica Cia Nacional de Seduros SA & Ors v Enes Engenharia* the English Court of Appeal ruled that the arbitration agreement was governed by English law despite parties' agreement to govern underlying contract by the laws of Brazil. The arbitration agreement was found to have the "closest and most real connection" to England due to choice of London as the seat of arbitration.⁸

Legal scholars seem to be in consensus that the law of the seat of arbitration is the most connected to the arbitration agreement, although a legal effect of other connecting factors shall not be ignored.

Thus, the law of the seat of arbitration has developed into a truly 'transnational conflict

5. Article V (1) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

6. Art. VI (a) and (b) of European Convention on International Commercial Arbitration

7. Arts. 36(1)(a)(i) of UNCITRAL Model Law

8. *Sulamerica Cia Nacional de Seduros SA & Ors v Enes Engenharia SA* 7 Ors [2012] EWCA Civ 638

rule' and appears to play a dominant role.⁹ 'That is, after all, the place where the arbitration agreement is to be performed'.¹⁰

The substantive rules methods, combined method

Another approach, which deserves serious attention, is 'the substantive rules method'.

The 'substantive rules method' was developed in contrast to the choice of law method and as an objective consequence of the application of the choice-of-law method. This method consists "in the exclusive application of substantive rules, independent of any applicable law".¹¹ [Emphasis added] The method has been actively used in France famous for its respective case-law.

On December 20, 1993 in *Comite populaire de la municipalite de Kohms El Magreb v Dalico*, the French Cour de Cassation held a decision, by which this method was endorsed: 'the existence and effectiveness of the arbitration agreement are to be assessed, subject to the mandatory rule of French law and international public policy, on the basis of the parties' common intention, there being no need to refer to any national law.'¹² [Emphasis added]

9. See Klaus Peter Berger, Re-examining the Arbitration Agreement: Applicable Law-Consensus or Confusion? From Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?* ICA Congress Series 2006 Montreal 13 (Kluwer Law International 2007) pp.301-304, cit. op., at p. 11 with references in note 87

10. See Fouchard/Gaillard/Goldman, *On International Commercial Arbitration*, 1999, paragraph 429 at p.225, p. 226 with reference to note 128

11. See Fouchard/Gaillard/Goldman, *On International Commercial Arbitration*, 1999, paragraph 435 at p.228

12. Cass. 1e civ., Dec 20, 1993; translation by Yves Derains, *Choice of Law Applicable to the Contract and International Arbitration*, *The ICC International Court of Arbitration Bulletin*, Vol.6, #1, 10-18, at p. 17

Swiss law contains an example of a substantive rule on the validity of an arbitration agreement combined with the conflict of laws rule. Swiss legal model may be described as follows: in the absence of the parties' choice-of-law an arbitration agreement shall be valid if it conforms either to the law governing the subject-matter of the dispute, in particular the law governing the contract, or it conforms to Swiss law.¹³

II. INTERPRETATION OF THE ARBITRATION AGREEMENT

Undoubtedly, a valid parties' consent is crucial for the validity of the arbitration agreement. It is, therefore, the task of arbitrators to find "a valid meeting of the minds", inter alia, by interpreting the arbitration agreement. The scope of the arbitration agreement can be also established by the means of its interpretation.

The law applicable to the existence and validity of the arbitration agreement is generally recognized to be the law which governs its interpretation. That is, however, the result of the choice of law application.¹⁴

It has also been widely held in France that the scope of the arbitration agreement "need only be examined by reference to transnational rules and trade usages".¹⁵ This approach may differ from traditional choice of law method seeking to resort to a particular legal system.

The arbitration agreement, which has "a validity and effectiveness of its own" shall be interpreted by using the ordinary rules of

13. Article 178 (2) of the Swiss Private International Law Statute

14. See Fouchard/Gaillard/Goldman, *On International Commercial Arbitration*, 1999, paragraph 475 at p.255 with reference to note 68

15. *Ib.*, with reference to note 69

contractual interpretation.¹⁶ This includes the principle of good faith (a), the principle of effective interpretation (b) and the principle of interpretation contra preferentem (c).¹⁷

a) Good faith

The UNIDROIT Principles of International Contracts ("UNIDROIT"), as a formulation of *lex mercatoria*, have frequently been accepted as trade usages applied in international commercial arbitration.¹⁸

Article 1.7. of the UNIDROIT emphasizes that 'each party must act in accordance with good faith and fair dealing in international trade'.

The good faith principle was also defined in the first AMCO award¹⁹ [subsequently annulled]²⁰ in which the arbitral tribunal inferred that the good faith requires fairness towards the contractual counterpart and forbids tricks or maneuvers designed to deceive and secure undue advantages; it also extends negotiations.

The general obligation of acting in good faith requires taking into account legitimate expectations that a party may have derived in good faith from its counterpart's attitude or behavior.

The intentions of the parties, the parties' legitimate expectations, subsequent conduct of the parties, the parties' attitude to the contract,

16. *Walter Rau Neusser Oel und Fett AG v. Cross Pac. Trading Ltd*, XXXI Y. B. Comm. Arb. 559 (Australian Fed. Ct. 2005) (2006)

17. See Fouchard/Gaillard/Goldman, *On International Commercial Arbitration*, 1999, opt. cit., at paragraph 476

18. See Pierre Mayer, *The Role of the UNIDROIT Principles in ICC Arbitration Practise*, ICC Court of Arbitration Bulletin, Supplement 202

19. 24 ILM 1022 (1985). See Commentary to Emmanuel Gaillard, *La Jurisprudence du CIRDI* vol I 152-162 (2004).

20. Patrick Rambaud, *L'annulations des sentences Kloeckner et Amco XXXII Annuaire Francais de Droit International* 259 (1986)

and, last but not least, the whole contract, including the history of its drafting, literal meaning, shall be taken into account while interpreting the arbitration agreement.

b) Effective interpretation

The principle of effective interpretation of the arbitration agreement, which has been adopted in the transnational context in UNIDROIT Principle 4.5., means that one shall 'prefer the interpretation which gives meaning to the words rather than that which render them nonsensical'.²¹

c) Contra preferentem

The third principle is the *contra preferentem* that the ambiguous terms of the agreement shall be interpreted against the party which drafted the clause or more accurately against the interests of the party which imposed it.

CONCLUSION

The arbitration agreement is "a self-contained regime" which has its own subjective and formal validity. It demands a separate legal attitude in determining the law applicable to the agreement itself, as well as the law applicable to the agreement's interpretation. There is common ground between the choice of law and the 'substantive rules methods' as the methods invoked to determine the law applicable to the substantive validity. This common ground seems to be the law of the seat of arbitration – the most closely connecting factor to the arbitration agreement, although one shall not ignore the other connecting factors and rules of conflict in particular circumstances.

21. See Fouchard/Gaillard/Goldman, *On International Commercial Arbitration*, 1999, opt. cit., at paragraph 478

The consent of the parties to arbitrate plays a fundamental role in the arbitration as a dispute resolution mechanism. The consent shall be established by all possible effective means. The roots of the consent to arbitrate are in the parties' intentions to refer the dispute to "private justice" excluding it from the state-court jurisdiction.

Arbitrators and judges are both competent to interpret an arbitration agreement, *inter alia*, its scope, and to consider application of different laws, in *favorem validitatis*. When interpreting an arbitration agreement a choice of the law method and (or) internationally recognized principles of interpretation can be applied. Particular attention shall be given to compatible application of international public policy with respective mandatory rules when undertaking interpretation of the arbitration agreement.

Price/quality/promptness ratio in the dispute resolution by the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry

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During many years the international commercial arbitration is one of the most effective methods of international commercial dispute resolution due to its widely recognized advantages such as supranational character, which gives the parties a greater confidence in its independence and impartiality than the state courts of the parties' countries; democratic procedures for the formation of the Arbitral Tribunal and conduct of the proceedings, promptness and relatively low costs of the arbitration, its confidentiality; finality of arbitration awards and existence of international mechanism of its enforcement.

These advantages of the arbitration are fully implemented into the activity of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, which was established in 1992 as a result of the democratization of economic life of independent Ukraine, granting of the right to all without exception businesses to be

involved in foreign trade activities and the revocation of the state monopoly in this area. The ICAC quickly passed the stage of its formation and in a short period became recognizable in the international business and legal environment due to the level of work that complied with international standards.

The authority of the ICAC is evidenced by the fact that the court considers annually 300-400 foreign economic cases, and by this indicator the ICAC ranks one of the first places in Europe. Within its 20-years' activities more than 7,500 cases from 110 countries all over the world were considered by the ICAC.

Image and reputation of any arbitration institution depends above all on the qualifications, independence and impartiality of arbitrators who consider disputes. Arbitrators are appointed by the parties or in the manner provided in the ICAC Rules. The ICAC has established a group of high-qualified arbitrators, whose professional and personal qualities

contribute to making impartial, objective, according to the circumstances of the case and the applicable law decision on the dispute.

The Presidium of the Ukrainian CCI once in five years approves the Recommendatory List of Arbitrators of the ICAC at the UCCI; currently it includes 75 high-skilled professionals – scientists, university professors and experienced practitioners who have vast experience in arbitration practice. A majority (40) of them are foreign arbitrators from 24 countries of the world. As evidence of recognition and confidence in the Court it should be called the fact that the disputes between foreign parties who have entered into an arbitration agreement specifying the ICAC at the UCCI are often considered by the ICAC.

However, the quality of an arbitral award lies not only in its comprehensiveness, reasonableness and objectivity. For the party, applying to arbitration, it is important that the award should be executed and, if needed, enforced. For this purpose, during the arbitral proceedings and while making an award a scrupulous adherence to arbitration procedure specified by the parties and the provisions of the ICAC Rules, the procedure of formation of the Arbitral Tribunal and the ICAC jurisdiction as for the consideration of a particular dispute is observed in order to avoid grounds provided for by the international treaties and Ukrainian legislation for refusing recognition or execution of the award of the ICAC, or its recourse.

The Ukrainian legislation as well as the legislation of many other states provides for “double control” principle, that means the existence of a possibility to check the award rendered by the international commercial arbitration upon substantially the same reasons within

two different procedures: within recourse against an award and within its enforcement.

In particular, a non-prevailing party may initiate recourse against the award of the ICAC by making the application for setting aside to the Shevchenkivsky District Court of Kiev (being competent to consider such application with regard to the ICAC awards according to the ICAC location). The Shevchenkivsky District Court of Kiev obtains annually 15-25 applications for setting aside arbitral awards, and according to statistics only 2-3 awards are set aside upon these applications. Such a small quantity of awards under recourse by a non-prevailing party is explained, on the one hand, by the quality of the awards issued by the ICAC and fair consideration of disputes and, on the other hand, by the fact that a judicial system of Ukraine gained an extensive practice on hearing such cases according to the principle of a state court’s restricted competence in review of such applications. Neither award on the merits, nor dispute may be considered by a court, but only an award itself may be set aside solely upon grounds established by the law.

With regard to enforcement of the ICAC awards in Ukraine, in accordance with integrating data the ratio of cases of setting aside of the ICAC awards by local courts (state courts) and granting permissions for their enforcement in 2011-2012 is 1: 49, i.e. 1 award set aside: 49 awards left for enforcement. Recently we have analyzed practice of German courts as to considering of applications to enforcement of the award rendered by the ICAC at the UCCI. 13 of 14 awards of the ICAC were enforced. This is quite a good result.

One of the advantages of the Ukrainian jurisdiction is also promptness of dispute consideration.

Over recent years due to the efforts of arbitrators and employees of the Secretariat of the ICAC in ensuring efficient arbitral proceedings 75-80% of cases are considered within 6 months and almost 16-18% – within 9 months starting from the date of the acceptance of the dispute for consideration and issuing of the order on initiating arbitral proceedings. This proves to be a pretty good result especially in circumstances of a recent negative tendency when a defendant puts all possible efforts to delay consideration of the dispute. Since 2011 in order to expedite the arbitral proceedings and their completion, the ICAC has introduced the rule according to which the most important documents in the case (claim documents, notices of the oral hearing and rulings on postponement of the oral hearing) shall be sent to the parties by courier mail. At that, such costs are borne not by the parties but by the ICAC.

The particularities of the model of the arbitral proceedings existing in the ICAC contribute to prompt and qualitative consideration of cases. Such particularities are as follows:

- clear determination by the ICAC Rules of rights and duties of participants of the arbitral proceedings at all stages and strict observation of the provisions of the ICAC Rules by the Secretariat, parties to the dispute and arbitrators;
- an active role of the ICAC Secretariat. Without prejudice to the independence of arbitrators while consideration of a dispute and making an award and not interfering with the arbitrators’ functions, the ICAC Secretariat mediates between arbitrators and parties, provides material and technical as well as organizational assistance in the preliminary preparation of the case for arbitration, including hearing and

meeting facilities for the Arbitral Tribunal. Thus, the Arbitral Tribunal is not burdened with technical functions for the organization of the arbitral proceedings and is given an opportunity to focus on the merits of the dispute and its resolution;

■ granting to the ICAC President certain procedural powers. Thus, in accordance with the Statute and Rules of the ICAC the President apart from the functions on the organization of the arbitration institution’s activities shall:

- issue an order on commencement of the arbitral proceedings upon receipt of a duly Statement of Claim and payment of the arbitration fee;
- prior to the composition of the Arbitral Tribunal, at the request of a party, if he considers the request to be justified, issue an order for determination of the amount and the form of the security of the claim. Such an order is binding for the parties and shall be in force until a final arbitral award is made;
- prior to the composition of the Arbitral Tribunal, issue an order for the termination of the arbitral proceedings on the grounds specified in the Rules.

Such powers allow to resolve promptly procedural issues prior to the composition of the Arbitral Tribunal, in particular, refuse the institute of emergency arbitrator, whose competence would include the consideration of the applications for interim measures.

In order to cover costs connected with organization and conduct of the arbitral proceedings, the Claimant shall pay the arbitration fee, which, unless the parties have agreed otherwise, is to be reimbursed by the Respondent

according to the arbitral award if the claim is granted. Issues related to the arbitration fees and costs are regulated by the Schedule of Arbitration Fees and Costs which is an appendix to the ICAC Rules. The amount of the arbitration fee depends on the amount of claim and is far less than in the arbitration institutions of other countries. In particular, the minimum arbitration fee amounts to US Dollar 1,800. If the case is considered by a sole arbitrator, the arbitration fee shall be reduced by 20%. Therefore, the costs incurred by the parties are relatively low. At that it should be borne in mind that the ICAC provides the parties and arbitrators with free meeting rooms for the hearings, telephone and postal services, regulatory and reference books, and takes all measures to ensure smooth performance by the arbitrators (primarily foreign arbitrators) of their functions.

Ukraine is a state favorable to arbitration which is evidenced primarily by the availability of national legislation and internal regulation of the ICAC, which are based on international treaties of Ukraine and documents of the UN Commission on International Trade Law. Ukraine was one of the first countries of the former Soviet Union to adopt the Law on International Commercial Arbitration (on 24 February 1994), which fully reproduces the UNCITRAL Model Law; it is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and the European Convention on International Commercial Arbitration (1961). Such a legal framework of Ukraine allows the ICAC at the UCCI to operate in accordance with international standards, confirms democratic principles of the organization of arbitration and conduct of the arbitration proceedings, namely: the right of the parties to form the Arbitral

Tribunal and determine the procedure of case consideration and applicable law, adversarial principle and equality of the parties, confidentiality as to the information about disputes.

Bifurcation of Jurisdiction from the Merits in Investment Disputes: Follow-up Observations to Kiev Arbitration Days 2012

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This short article follows the discussion of the topic “To bifurcate or not to bifurcate” presented by Dr. Vojtěch Trapl at Kiev Arbitration Days 2012 in the panel with the author’s participation as a moderator.

The modern investment arbitration has seen the division of the proceedings into the following phases¹: (I) jurisdiction and admissibility of claims; (II) the merits and (III) the damages². Apparently, the bifurcation of jurisdiction from

the merits/liability is the most common practice in investment arbitration.

Whether a decision to bifurcate jurisdiction from the merits is justified?

Such bifurcation may be a useful filter for a tribunal to save time and costs if a final award states a lack of the tribunal’s jurisdiction over the claims. On the other hand, if the tribunal finds that it has jurisdiction in the case, bifurcation of a separate jurisdictional stage may ultimately seem unnecessary. Thus, to bifurcate or not to bifurcate is an uneasy question, and there is no clear test that demonstrates when bifurcation makes sense.

It is difficult to disagree with Dr. Trapl that the goal of an arbitral tribunal is to render a final decision in the arbitration proceedings in a reasonably speedy and efficient way. As a practical matter, a preliminary jurisdictional stage may either eliminate the entire consideration of the merits and reduce arbitration costs if

1. Dr. Trapl also mentioned a possibility of a separate preliminary issue of the applicable law. However, such bifurcation is hardly typical for investment arbitration cases.

2. In the investment disputes with participation of Ukraine a separate quantum stage occurred in the second Joseph Lemire v. Ukraine case (ICSID Case No. ARB/06/18), where Ukraine was found liable and the damages awarded. In Bosh International Inc. v. Ukraine (ICSID Case No. ARB/08/11) at the first session of the tribunal it was agreed that “any issue of quantum be bifurcated from the proceeding on jurisdiction and liability” (Award of October 25, 2012, para. 17), but the claims on the merits were dismissed. In several cases in which Ukraine prevailed on the merits the issue of damages was addressed in the parties’ written submissions, but, as a rule, not substantially debated at the hearing.

jurisdiction is rejected, or to add a year or more to the duration of an arbitration proceeding³ and increase costs if jurisdiction is sustained.

Even if the tribunal finds that it has jurisdiction in the case, bifurcation of a separate jurisdictional phase may not be necessarily superfluous. A focused consideration of the complex issues of jurisdiction may be more effective in a separate stage. When deciding to bifurcate or not, the tribunal may have substantial concerns about its jurisdiction, which can be clarified only in the course of a special preliminary proceeding. Thus, a tribunal's decision to dismiss jurisdictional objections at a preliminary jurisdictional phase per se does not mean that its prior decision to bifurcate was unjustified or may be put into doubt by further developments.

In some cases it is difficult to have a clear dividing line between jurisdiction and the merits with respect to the underlying facts. It may be also asked whether a tribunal is capable to take a well-grounded decision on jurisdiction without an assessment of the facts of the merits in a particular situation? If a tribunal has difficulty with such a dividing, it is likely that jurisdiction and the merits should be considered jointly⁴. In *Inmaris v. Ukraine* the tribunal noted that it cannot take the claimants' allegations on facts as true at the jurisdictional phase and wait until the merits stage whether those facts are established. Such disputed facts must be proven at the jurisdictional stage⁵.

3. See Lucy Reed, Jan Paulsson, Nigel Blackaby. *Guide to ICSID Arbitration*, Kluwer, 2004, p. 85.

4. Such approach was taken, for example, by the tribunal in the first *Lemire v. Ukraine* (ICSID Case No. ARB(AF)/98/1). Having reviewed the parties' submissions on jurisdictional objections in a preliminary jurisdictional phase, the tribunal decided to join the consideration of jurisdiction to the merits of the case.

5. *Inmaris v. Ukraine*. ICSID Case No. ARB08/8. Decision on Jurisdiction of March 8, 2010, para. 58.

Another question is whether bifurcation can be justified when it is clear that the tribunal is more likely to have jurisdiction over at least a part of the dispute, but at the jurisdictional stage some doubtful elements of the alleged investments might be "cut out" by the tribunal as unprotected? An attempt to achieve such a limited goal was taken by the respondent state in *Inmaris v. Ukraine*, but not supported by the tribunal at the preliminary jurisdictional phase.

Timing for jurisdictional objections and bifurcation

Normally, a decision on bifurcation of a separate jurisdictional phase is taken by the tribunal upon a request of the respondent state. As a general rule, jurisdictional objections should be raised "as early as possible", e.g. no later than the expiration of the time limit fixed for the filing of the respondent's counter-memorial⁶. It is suggested that certain admissibility objections should be made "immediately"⁷.

In case *Western NIS Enterprise Fund v. Ukraine* the respondent's objections on admissibility and jurisdiction were raised at the time of preparation of the counter-memorial on the merits. However, the tribunal decided to bifurcate the proceeding, and subsequently found that the claimant did not comply with its "waiting period" obligation⁸.

6. See e.g. Rule 41(1) of the ICSID Arbitration Rules.

7. In *Amto v. Ukraine* the tribunal stated that if a respondent state raises an issue that the amicable settlement requirements of Article 26(2) of the ECT have not been complied with by an investor, such objection should be made "immediately" "as a matter of procedural good faith" (*Amto v. Ukraine*, SCC Arbitration No. 080/2005, Final Award of March 26, 2008, para. 53).

8. See *Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2, the Tribunal's Order of March 16, 2006, which established that "proper notice of the present case was not given" by the claimant. This arbitration was ultimately discontinued upon the parties' agreement.

The new (undisclosed) facts may give ground for the additional objections on jurisdiction even at the merits stage after the tribunal issues a decision upholding its jurisdiction over the dispute. In *Tokios Tokelès v. Ukraine* at the merits stage (i.e. after the completion of the preliminary jurisdictional phase) the tribunal had to consider new jurisdictional objections of the respondent due to the fact that the claimant, "actively misleading the Centre and ultimately the Tribunal", had not disclosed the fact of transfer of the substantial part of its assets from one Ukrainian subsidiary to another⁹.

The Ukraine's experience

Dr. Trapl illustrated the practice of bifurcation in the selected investment disputes raised against the Czech Republic and the Slovak Republic. In turn, the Ukraine's experience shows that a preliminary jurisdictional stage was separated in at least 5 investment cases (out of 14 concluded cases) with participation of Ukraine¹⁰. These five bifurcation cases are: the first *Lemire* case, *Tokios Tokelès*, *Western NIS Enterprise Fund*, *Inmaris* and *Tatneft v. Ukraine*. However, in these cases Ukraine had not prevailed on the jurisdictional objections. Only in case *Western NIS Enterprise Fund v. Ukraine* prevailed on the matter of admissibility due to the non-compliance by the claimant with its "waiting period" obligation under the BIT (other jurisdictional objections were not considered due to the agreed settlement of this case). The first case, in which

9. *Tokios Tokelès v. Ukraine* (ICSID Case No. ARB/02/18), Award of July 26, 2007, para. 109.

10. On the Ukraine's experience in investment arbitration see: *Международный инвестиционный арбитраж: некоторые тенденции и опыт Украины. Под общей редакцией С.А.Войтовича. Киев: «Юстиниан», 2012 – 307 с.*

Ukraine was successful on the jurisdictional matter was *Global Trading v. Ukraine* (ICSID Case ARB/09/11). In this case, there was no bifurcation in a traditional sense, since Ukraine raised objections in the expedited procedure under Article 41(5) of the ICSID Arbitration Rules, and the tribunal found that the claims were manifestly without jurisdiction, and therefore without merits, due to the absence of protected investment.

Bifurcation of the jurisdiction from the merits of the case may be a useful procedural tool for the tribunal and the parties for a focused consideration of the complex legal issues. Bifurcation creates a hope to conserve the parties' resources if a decision on jurisdiction eliminates the need to arbitrate the remainder of the dispute. The involvement of a sovereign state in investment disputes adds complexity to the jurisdictional matters, and the tribunals not rarely prefer to resolve them in a separate preliminary phase.

Enforcement of investment arbitral awards in Ukraine

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Ukraine is young and democratic state. Under the law of Ukraine “On the Principles of the Domestic and Foreign Policy of Ukraine” the main principles of foreign policy are extension of international cooperation for the purposes of involvement of foreign investments, advanced technologies and of managerial experience to the national economy for the benefit of its reforming, modernization and innovative development.

Realizing undertaken international legal obligations, article 9 (1) of the Constitution of Ukraine provides that international treaties in force, consented by the Verkhovna Rada of Ukraine as binding, shall be an integral part of the national legislation of Ukraine.

For the purpose of comprehensive economic growth, integration of Ukraine into the world economic system, Ukraine has signed a number of international treaties, which shows the substantive steps towards declared policy. Particularly on 16 March, 2000 Ukraine has ratified Convention on Settlement of Investment Disputes between States and Nationals of Other States (hereinafter – the “Washington” Convention), on 10 October, 1960 Ukraine has signed Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the

“New York” Convention), on 06 February, 1998 Ukraine has ratified the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects. With approximately 70 states Ukraine has signed bilateral treaties on promotion and protection of investments.

Formation and maintenance on international area of the status of state with attractive investment climate particularly provided constant macroeconomic situation, stable legislation and coordinated actions of all state authorities. In this respect, Ukrainian legislator has worked out the relevant legislation inter alia the law of Ukraine “On the Regime of Foreign Investments”, the law of Ukraine “On Foreign Economic Activities”, the law of Ukraine “On State-Private Partnership”, the law of Ukraine “On Preparation and Realization of Investment Project on “One Contact” Principle”, the law of Ukraine “On Industrial Parks” and many other legislative acts.

Nevertheless, an entirely different matter in the question of formation of positive investment image of Ukraine is a question of recognition and enforcement of arbitral awards. However, some arbitration practitioners consider Ukraine as not entirely arbitration-

-friendly jurisdiction in the context of problematic enforcement of arbitral awards in Ukraine¹.

Washington Convention provides express mechanism of recognition and enforcement of arbitral awards whereas under the article 54 (1) of Washington Convention each Contracting State shall recognize an ICSID arbitral award as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention (art. 53).

Under the article 54 (2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General.

Under the law of Ukraine “On the State Budget” it is provided to the Ministry of Justice in accordance with the special budget program “Payments on enforcement of foreign judicial authorities judgments, awarded after the relevant arbitration process against Ukraine”.

For the purpose of enforcement of arbitral awards rendered against Ukraine it has been prepared relevant practical mechanism the Procedure of application of funds envisaged in the state budget on payments related with the enforcement of foreign judicial authorities judgments (hereinafter the “Procedure No 408”). Under the Procedure No 408 the basis for payments related to the enforcement of jurisdictional authority judgments is a judgment of the relevant foreign

jurisdictional authority. Therewith for providing of the abovementioned payments it is obliged to obtain the determination of State enforcement service rendered on the ground of judgment of the relevant court. With this regard “award” shall include any decision interpreting, revising or annull such judgment.

The requirements of the Washington Convention on direct recognition and enforcement of arbitral awards have some specificity under Ukrainian budgetary legislation. Notwithstanding the above mentioned requirements of Ukrainian legislation should not be deemed as impediments. The Ministry of Justice itself provides recognition and enforcement proceedings.

Therefore, Ukraine has provided Investor with the most comfortable conditions in respect of enforcement of ICSID tribunal decisions in Ukraine without burdening Investor with necessity to commit some compulsory acts under Ukrainian legislation.

In one case where Ukraine was a party to, the decision of the ICSID tribunal was rendered in favor of the Investor. Ukraine on its own initiative proceeded with the enforcement of arbitral award and filed to the relevant on territorial jurisdiction district court a motion on the recognition and enforcement of arbitral award whereby the Investor received the enforcements of the judgment.

In another case where the decision of the ICSID tribunal was also rendered in favor of the Investor Ukraine also filed a motion on the recognition and enforcement of arbitral award. The decision of ICSID tribunal was also enforced by Ukraine in good faith.

Nevertheless, such a good will and practice of a state is not always taken into account. In one case in which Ukraine was a party to it

1. Ukraine. Arbitration-friendly jurisdiction: statistical report, 2011-2012. Pilkov, Ikonstantin. Kyiv: Cai & Lenard, 2012.

was obliged by the ad hoc committee on annulment of an arbitral award to set up an escrow account for the enforcement of interim arbitral award. The requirement on setting up of an escrow account occasioned certain surprise. Even though Ukraine has always followed the practice of fulfillment of its international obligations, after a long and complicated process of introducing of the relevant amendments to the effective legislation on parliamentary and governmental level Ukraine collected necessary funds and has enforced the above mentioned interim award. Ukraine has deposited the funds on the PCA account.

We should dwell on this issue more carefully. Definitely, every state could find financial abilities for enforcement of the judgment of foreign arbitral tribunal while more instant question in this regard is the problem of enforcement of specific interim awards.

Therefore, by obligating a state for example in a manner to provide financial guaranties of enforcement of arbitral interim awards arbitrator should realize and take into consideration the inner state mechanisms in a specific state for enforcement of arbitral awards and especially whether the domestic legislation, especially budgetary legislation which is very sensitive in relation of a pledge of budgetary funds, does not provide such possibility. I am sure that arbitrators should take these arguments into consideration while rendering its awards and setting procedural terms.

One of the practical problems of international investment arbitration is professional knowledge of arbitrators, which render interim awards consciously knowing that they could not be practically enforced under the law of the relevant state. Meanwhile it is not taken into the account state's endeavor to meet its

international obligations in good faith and its readiness to international cooperation with Investor.

In this regard a question has arisen on adherence by arbitrators of principle of fairness as they consciously knowing that parties to the arbitration are not equal financially allow a double standard policy and prepossession to the state as a party to the arbitration.

On our strong conviction any doubt on capability of a state to enforce a judgment should be grounded and compatible with domestic practice of a certain state.

Hence, the ICSID tribunal decisions should be rendered not only on the basis of arbitrator personal opinion; arbitrator should particularly take into account general international investment arbitration practice in the relevant sphere of enforcement of investment arbitration. Arbitrator should have profound knowledge of investment disputes in specific state and render an award not only on the basis of the factual background of one case considering mainly information on unfavorable investment climate, deficient state legislation or high level of corruption. Arbitral award should be not only equitable and impartial but also it must be practically enforceable in the relevant state.

Currently for the potential investor Ukraine is a receptive market with a stable and dynamic development rate. The key factors for the constant development of Ukraine as of every modern state are stable economic relations, involvement of investments to the leading economic industries and cooperation on advantageous conditions. Ukraine is opened for transparent cooperation and has many times demonstrated on real actions its readiness to meet its obligations.

Plurality of Legal Systems in Conflict of Laws

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From the standpoint of private international law, the plurality of legal systems or legal pluralism occurs in the following situations: first of all, when multiple legal systems exist in federal and confederate states. If reference is made to the legal system of such a state, this, in turn gives rise to the issue of the choice of law, involving the choice not only between the law of the federation and the law of the constituent entity of the federation, but also between legal systems of the various constituent entities of the federation. The rules of the conflict of laws, which determine the law of which particular territory among the constituent entities of one state is applicable, are called interregional (interstate) conflict of law rules and such a conflict of laws is known as interlocal. Secondly, a state can have multiple legal systems if the population of such a state is divided into separate communities; each of which is governed by its own laws. In this case, reference is made to the rules of the so-called interpersonal conflict of laws, which determine the law of which community is to be applied. This type of the conflict of laws is called interpersonal.

If the rules of the conflict of laws indicate the law of the state, where federal or political entities with their own legal systems and subsystems exist, statutory provisions shall be

used to determine the appropriate legal system for the regulation of specific legal relations. In many federal states, certain private law issues are often referred to the competence of the constituent entities of the federation in question (the USA, Russia, India, Mexico, Brazil, Germany, and Canada). For example, in the USA, each state has its own private legal system and several states (such as Montana, South Dakota, North Dakota, Georgia, and California) have civil codes, which are substantially different from the continental understanding of such codifications (they more closely resemble the systematisation of precedents). Louisiana has a classical civil code, which takes after the continental legal system. Things are somewhat different in the Russian Federation. The Constitution of the Russian Federation refers the civil, civil procedural and arbitration procedural laws to the exclusive competence of the federation. At the same time, labour, family, housing, land, water, forest, subsoil and environmental laws are referred by the Constitution of the Russian Federation to the joint competence of the federation and its constituent entities. Thus, the Family Code of the Russian Federation provides for issues falling within the competence of the constituent entities of the federation, namely, the procedure for, and terms of

obtaining a permit for entering into marriage before a person reaches the age of 16; the prohibition of adding the surname of one spouse to that of the other and a special procedure for exercising a child's right to name and surname. Thus, the federal structure of the state suggests that the constituent entities of the federation are entitled to enact their own laws, within the limits prescribed by the Constitution.

There are a lot of Asian, African and Latin American countries which, in addition to codified private law, apply customary, tribal and religious legal systems. The provisions of the latter often conflict with the provisions of general civil law and also among themselves. Therefore, in most of the countries which are traditionally referred to as the developing countries (mainly in Asia, Africa and Latin America), interpersonal conflicts of laws are the most commonly encountered. These arise primarily out of family and marriage issues and inheritance issues, i.e. in those areas where traditions and customs have historically had the most influence.

Interpersonal private law deals with situations where different systems of substantive private law govern relations between different groups of persons (members of a particular faith or religion or of a tribe). Interpersonal private law in this instance determines which laws must be applied.

Interpersonal conflicts of laws occupy a special place in the group of specific conflicts of laws under private international law. In reference to the hierarchy of laws, their temporal effect, or conflicts of laws involving different territorial units of one particular state – provided they fall under the same category of laws – these laws are established by the

state. As regards personal law, we deal with somewhat different sources of law. These may be religious and tribal customs and so on, which may conflict both amongst themselves and with domestic laws.

Interpersonal conflicts originate from the period of rule of the personal law system, which developed in Europe after the barbarian invasion in the V century B.C. and the fall of the Roman Empire. Various tribes (Romans, Salians, Ripuarians, etc.) had no clearly delineated states. Despite coexisting in the same area, they retained their own customs and laws. Thus, each individual was subordinate to the laws of the ethnic group to which he or she belonged. The presence in certain areas of both conquerors and conquered peoples did not lead to the disappearance of the laws of the latter in favour of the laws of the former. Almost always, from the days of antiquity to the present, the new ruling group permitted coexistence with the laws of the oppressed group (especially in private relations), if said suppressed group outnumbered the dominant group in the conquered territory.

Interpersonal conflicts that exist nowadays are in most cases determined by the colonial past of a large number of states. Originally, metropolitan countries rejected national legal systems or introduced foreign elements into them, but then gradually began to recognise some institutes of local law, such as family or inheritance law. For example, in India, Bangladesh and Pakistan personal standing orders and laws contain rules of Hindu, Muslim, Christian, Parsi, Sikh, Buddhist, Jainist and Jewish law. The rules of these religious legal systems apply, provided that the parties belong to the same religious community. If they are members of different religious communities, then, as a rule,

civil law of the respective country should be applied. There is a great likelihood of interpersonal conflicts in the Philippines where different religious and tribal legal systems exist for different ethnic groups; however, Islamic law plays the dominant role. For instance, Islamic law prevails when there is a conflict between Islamic law and another legal system (a divorce under Islamic law is recognised as valid if the husband is Muslim).

Laws of many African countries have special conflict of law rules which are applied to resolve conflicts between tribal customs; whereas, in some Latin American countries, courts settle such conflicts by analogy with the procedure used in resolving conflicts under the private international law of these countries.

Interpersonal conflicts arise within the same country, so, resolution of such conflicts is the responsibility of the country in question. Thus, if a conflict of law rule of a particular country points to the law of another country, where various personal or territorial legal subsystems exist, then the problem of interpersonal or interlocal conflicts arises. A court or another enforcement authority is obliged to apply foreign law as it would be applied in the legal system of the relevant foreign country. In other words, this foreign law should be used to determine which of the personal legal subsystems existing in the country is to be applied.

Below is the description of an approach established in the theory and practice of the conflict of law regulation of most legal systems:

Whether it comes to territorial or personal subsystems existing in the country to which the conflict of law rule refers, there is a uniform approach to applying a foreign law with plurality of legal systems. The law provides that parties must use those interregional, (interstate)

interpersonal conflict of law rules of the country to which the conflict of law rule of another country refers. In fact, this is a situation that rarely occurs in the system of legal regulation: the national court has to apply a foreign conflict of law rule. (For example, Article 15 of the Law of Ukraine "On Private International Law" dated June 23, 2005; Article 9 of the Law of the Republic of Poland "On Private International Law" dated February 4, 2011).

Where it is impossible to fully comprehend the features of the legal system of a country in which different legal systems are in place (which is especially important when dealing with interpersonal conflicts), or, when a foreign legal system provides no instructions on how to address this matter, or, it is impossible to determine under the legal system of a foreign country which of the legal systems is applicable, then the rules of the legal system which are more closely associated with the respective legal relations will apply. Thus, reference to a legal system which is more closely associated with legal relations is of a subsidiary (auxiliary) nature, while reference to the law of a country with plurality of legal systems, used to determine proper application of one of such systems, is primary.



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