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ARBITRATION E-REVIEW

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EDYTORIAL

ANALYSSES & OPINION – POLAND

ANALYSSES & OPINION – UNITED STATES

ANALYSSES & OPINION – EUROPE

Dear Readers,

We would like to present to next double issue of Arbitration e-Review. The leading topic are problems regarding post-arbitration proceedings.

The first part treats on Polish legal system and covers two articles: first one on enforcement proceedings with regard to annulment proceedings (Piotr Golędzinowski) and on annulment proceedings regarding sport arbitration court at the Polish Olympic Committee (Katarzyna Grabska-Luberadzka). In the second part, there are two articles focusing on the US legal system treating on manifest disregard of law as a ground for an annulment of arbitral award (Łukasz Gembiś; James H. Boykin, Jan K. Wąsowicz). In the third part we are going back to Europe. Firstly there are discussed issues regarding post-arbitration proceedings in Italy (Pietro Balbiano di Colcavago), in Ukraine (Wojciech Bazan, Mykola Zembra), in Belgium (Lidia Sokołowska) and in Spain (Katarzyna Skowrońska). The last article also regards post-arbitration proceedings via analysis of arbitration agreements in annulment proceedings in cases based on intra-EU BITs (Marta Cichomska, Ignacy Janas).

At the very end I would like to recommend reading the report from negotiations on EU-US commercial-investment treaty (TTIP) authored by Katarzyna Michalowska.

We wish you having a good reading,
Dr. Beata Gessel Kalinowska vel Kalisz
President of the Lewiatan Court of Arbitration

DR. BEATA GESSEL-KALINOWSKA vel KALISZ
President of the Lewiatan Court of Arbitration

The consequences of setting aside an arbitral award following a final decision ending the procedure for declaring the award enforceable

Piotr Golędzinowski

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An arbitral award may be vacated also after it is declared enforceable. In such a case, usually, the performance awarded by the arbitral tribunal has already been made or an enforcement procedure to have it made is under way. This article is a contribution to the discussion about the legal remedies available to a party seeking to recover a performance made as part of enforcement of a vacated arbitral award or to prevent enforcement sought against it under such award.

Types of post-arbitration procedures

The Polish legislator has stipulated two types of procedures as part of which judicial review of an arbitral award is made. One is the procedure for recognizing an arbitral award or declaring the same enforceable. Its purpose is to give to an arbitral award legal force equivalent to that of a common court's judgment (Article 1212 of the Code of Civil Procedure).

Decisions not capable of being enforced under the enforcement procedure are subject to recognition (Article 1214 § 1 of the Code of Civil Procedure). Decisions capable of being enforced under the enforcement procedure are, in turn, declared enforceable by the court (Article 1214 § 2 of the Code of Civil Procedure). Given the subject matter of this article, further discussion is limited to the latter type of decisions only.

An arbitral award is declared enforceable under an enforcement clause attached to it (Article 1214 § 2 of the Code of Civil Procedure). This requires the satisfaction of two conditions, considered by the court ex officio. First, the resolved dispute needs to be arbitrable (Article 1214 § 3.1 of the Code of Civil Procedure). Second, the enforcement of the award may not be contrary to the fundamental rules of public policy of the Republic of Poland (Article 1214 § 3.1 of the Code of Civil Procedure). The party opposing the enforcement of an arbitral award rendered abroad may, in addition, invoke the grounds listed in Article 1215 § 2.1-5 of the Code of Civil Procedure.

However, such party is not permitted to initiate the other type of procedure as part of which the correctness of an arbitral award is subject to review, i.e. the proceedings instituted under a petition to set aside an arbitral award. This remedy is available exclusively in respect of an award rendered in the Republic of Poland.

The setting aside of an arbitral award as a result of such petition having been granted, disqualifies the award from legal transactions and "changes the legal situation as between the parties, resulting from [this award], by invalidating the legal relation or right in place."[1] There is an ongoing debate in the jurisprudence as to whether the setting aside of an award triggers effects ex tunc or ex nunc. The majority of opinions appear to support the first option[2]. This is also the assumption made for the purposes of this article.

The setting aside of an arbitral award and the declaration of its enforceability

In the case a domestic arbitral award is vacated, the court before which the procedure for declaring it enforceable is conducted is bound by the decision of the court considering the petition to set the award aside[3]. Thus, if set aside, a domestic arbitral award may not be declared enforceable. A conflict between those two decisions could not be reconciled with the principle of the legal system coherence. Such a solution is also justified by the scope of judicial review exercised by courts in each of those procedures. In the case of domestic awards, the scope of grounds for a petition to set aside an arbitral award is much broader than the scope of grounds for refusing declaration of its enforceability.

A foreign arbitral award may be set aside too. However, in this case, the competent court and the applicable law are those of the state in which or under the laws of which the arbitral award was rendered. Pursuant to Article 1215 § 2.5 of the Code of Civil Procedure, wherever a foreign arbitral award has been set aside, this fact may serve as a ground for refusing declaration of its enforceability. It should be pointed out, however, that this ground is taken into account by the court before which the procedure for declaring the award enforceable is conducted exclusively at a party's request. This leads to the conclusion that the legislator does not preclude a foreign arbitral award vacated by a competent court from triggering legal effects under Polish law.

A similar regulation is stipulated in Article V.1.3 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on June 10, 1958 (Dz. U. [Journal of Laws] of 1962 No. 9, Item 41; the "New York Convention"), to which the Republic of Poland is a party. It is worth noting that pursuant to Article 91 of the Constitution [of the Republic of Poland][4], wherever any matter is regulated by a convention, the provisions of the convention take precedence over the provisions of the Code of Civil Procedure.

1. Łaszczuk M., Szpara J. [in:] Arbitraż handlowy. System Prawa Handlowego Tom 8. A. Szumański (ed.), C.H. Beck 2010, p. 638
2. Ibidem, p. 639
3. Ibidem, p. 641
4. The Constitution of the Republic of Poland of April 2, 1997 (Dz. U. [Journal of Laws] of 1997 No. 78, Item 483, as amended)

The situation of the participants of the procedure gets complicated if the arbitral award is vacated only after it is declared enforceable in Poland. The court before which the procedure for declaring the award enforceable is conducted may, but is not under obligation to, adjourn examination of the request for declaring the arbitral award enforceable until the procedure instituted under a petition to set the same aside or under an equivalent remedy available pursuant to the law of the state in which the foreign award was rendered is completed. Thus an arbitral award may be declared enforceable even before the petition to set the same aside is considered (Article 1216 § 1-2 of the Code of Civil Procedure).

As regards domestic arbitral awards, the court considering a petition to set aside such an award may stay its enforcement. However, as is the case with Article 1216 of the Code of Civil Procedure, Article 1210 of the Code of Civil Procedure also provides for a power vested in the court and not its duty. Thus the legislator admits of a situation in which an arbitral award is enforceable despite the fact that a procedure instituted under a petition to set it aside is under way.

This, in turn, can result in the institution of an enforcement procedure or in the obligor voluntarily making the performance, while wishing to avoid coercion and the additional expenses it entails. Therefore, it is worth considering what legal remedies are available to an entity that managed to have an arbitral award vacated but only after the enforcement procedure had been instituted or the performance awarded by an arbitral tribunal had been made.

T. Ereciński and K. Weitz conclude that, in such a case, "the party should be allowed to request revocation of the decision recognizing the foreign arbitral award or declaring it enforceable."[5] However, the authors point out that "the provisions of law do not offer such a possibility."[6]

Enforcement of a vacated arbitral award

The jurisprudence has not developed a consistent position on the effects that the setting aside of an arbitral award has on the enforcement procedure under way based on the enforcement clause issued in the procedure for declaring the award enforceable[7].

However, it seems that the legislator solved this problem when amending the Code of Civil Procedure under the Act of May 10, 2013.[8] Under the above Act, Article 825 of the Code of Civil Procedure was amended, stipulating the grounds for enforcement procedure discontinuation at a party's request. Prior to July 7, 2013, Article 825.2 of the Code of Civil Procedure provided that the authority conducting an enforcement procedure shall discontinue the same if the enforcement title is deprived of its enforceability under a final and unappealable decision. Pursuant to the amended wording of this provision, the request for discontinuation may also be based on the fact that the decision in respect of which the enforcement clause was issued was vacated or lost force[9]. Thus the amended Article 825.2 of the Code of Civil Procedure applies not only when the enforcement title is deprived of enforceability but also whenever the decision in respect of which the same was issued is vacated. And such decision can be an arbitral award.

The purpose of the discussed amendment was to consolidate the obligor's legal position in an enforcement procedure conducted under an enforcement title issued on the basis of a payment order or a default judgment, i.e. a decision which is relatively often vacated or loses force in the course of the enforcement procedure[10]. The setting aside of an arbitral award to which an enforcement clause has been attached should be considered an analogous situation. Therefore, Article 825.2 of the Code of Civil Procedure should apply in this case too.

The above discussion is not affected by the nature of the petition to set aside an arbitral award which is a debated issue in the jurisprudence. For some authors, the petition is a type of action, whereas others consider it a type of an extraordinary means of recourse. However, since the hypothesis of Article 825.2 of the Code of Civil Procedure speaks only of "vacatur" or "loss of force" of a decision, the issue of how the procedure which has this effect should be classified does not appear to affect the scope of this provision application.

What should be determined, however, is whether a foreign court's decision vacating an arbitral award needs to be recognized by a Polish court pursuant to Article 1145 et seq. of the Code of Civil Procedure. After the amendment to Book Three of the Code of Civil Procedure that took effect on July 1, 2009[11], recognition takes place ipso jure (Article 1145 of the Code of Civil Procedure). Nevertheless, the court to which a foreign decision subject to recognition is submitted makes ex officio an evaluation of its compliance with the criteria set forth in Article 1146 of the Code of Civil Procedure.

It should be noted in this connection that in line with the Supreme Court's position, the provisions of Regulation (EC) No 44/2001 of 20 December 2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L of 1.12.2001) do not apply in the case in question. In accordance with the decision taken by the Civil Chamber of the Supreme Court on November 6, 2009, docket No. I CSK 159/2009, "it follows directly [from Article 1.2(d) of the above Regulation] that the Regulation does not apply to courts of arbitration. This exclusion extends to cover also the procedure conducted before state courts in order to make judicial review of an arbitral award."

In the decision quoted above, issued under the law as in force prior to the effective date of the above mentioned amendment to the

5. Ereciński T., Weitz K., Sąd arbitrażowy, LexisNexis 2008, p. 379

6. Ibidem, p. 379

7. Łaszczuk M., Szpara J., op.cit., p. 642

8. Act on May 10, 2013 on Amendment to the Code of Civil Procedure (Dz. U. [Journal of Laws] of 2013, Item 654)

9. Pursuant to Article 2 of the Act on May 10, 2013 on Amendment to the Code of Civil Procedure (Dz. U. [Journal of Laws] of 2013, Item 654), the amended provision of Article 825.2 of the Code of Civil Procedure applies also to procedures instituted and not completed prior to the effective date of the amendment.

10. Ibidem, p. 6

11. Act of December 5, 2008 on Amendment to the Code of Civil Procedure and Certain Other Acts (Dz. U. [Journal of Laws] of 2008 No. 234, Item 1571)

rules governing the recognition of foreign decisions, the Supreme Court held that a ruling dismissing a petition to set aside an arbitral award is not recognizable. The primary reason for such decision appears to have been the intention to avoid a situation in which Polish courts considering requests for declaring foreign arbitral awards enforceable would be bound by the determinations of facts and conclusions of law made by foreign courts.

The Supreme Court also found that "it follows from the specific nature of the arbitral award, which is rendered at a mutual request of the parties, and from the role of a decision made by the foreign court which dismisses a petition to set aside the arbitral award, that there are no legal grounds for recognizing such foreign court's decision, which actually has merely the nature of a review and not of a decision on the merits. The inseparability of such foreign court's decision from the arbitral award and, in consequence, its not fully independent nature is thus the fundamental obstacle which prevents it from being a decision recognizable in Poland pursuant to Article 1145 § 1 of the Code of Civil Procedure."

The above reasoning applied consistently to a decision vacating an arbitral award could produce the conclusion that such decision is not recognizable either. While not attempting at this point to deliver polemics against the views expressed by the Supreme Court, one should nevertheless note that it is also possible to consider an opinion to the contrary.

Specifically, there is a need for foreign courts' decisions which are in conflict with the fundamental rules of the Polish public policy not to have the effect provided for in Article 825.2 of the Code of Civil Procedure. This is necessitated by the principle of the legal system coherence, as referred to above.

It seems desirable for the issue under analysis to be resolved by the legislator. Otherwise, a relevant solution will have to be developed as part of the jurisprudence and case law. This is so due to the fact that the discussed issue is of critical importance wherever one of the parties to proceedings before a Polish court refers to a foreign court's decision vacating an arbitral award previously declared enforceable.

The setting aside of an arbitral award and the right to request the return of an undue performance

An arbitral award may also be vacated after the awarded performance was already made. In such a case, the remedies available to the obligor under the provisions of law governing the enforcement procedure do not apply. Therefore, one should consider the steps that an entity which made the performance awarded under a vacated arbitral award might undertake. It seems that the answer is to be found in the provisions on return of undue performance.

In international cases, the substantive law applicable in this respect will be identified by the conflict of laws rules. In accordance with the law currently in force, the provisions of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (the "Rome II Regulation") will apply.

Pursuant to Article 10(1) of the above Regulation, "if a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract (…), that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship." Thus, what is relevant is whether the performance made in connection with the vacated arbitral award may be deemed to refer to the arbitration agreement and to be in a close relation to the same. If so, the substantive law applicable to the claim for return of such performance is the governing law of the arbitration agreement.

However, the above reasoning appears to be too far-reaching. The basis of the undue performance is, as discussed in more detail below, the vacated award and not the arbitration agreement. Therefore, it is rather the provisions of Article 10(2)-(3) of the Rome II Regulation that should apply here. Pursuant to those provisions, the applicable law is the law of the state in which the parties had their habitual residence when the event giving rise to unjust enrichment occurred, and in the absence of the possibility to determine such law, the law of the country in which the unjust enrichment took place.

However, it should always be borne in mind that pursuant to Article 10(4) of the Rome II Regulation, if the obligation to return an undue performance is manifestly more closely connected with a country other than that indicated in paragraphs (1)-(3), the law of such other country applies.

Under Polish law, pursuant to Article 411 § 2 of the Civil Code, an undue performance occurs whenever "the person who made it had not been under obligation to make it or had not been under obligation to make it for the benefit of the person to whom he made it, or whenever the basis of the performance had ceased to exist or the intended purpose of the performance had not been achieved, or whenever the legal transaction under which the obligation to make the performance had arisen had been invalid and did not become valid following the provision of such performance."

Performance is understood as the obligor's conduct which complies with the obligation and serves to satisfy the obligee's interest.[12] Thus the basis of a performance is provided by the legal relation holding between the parties. In line with the view quoted above, the setting aside of an arbitral award "changes the legal situation as between the parties, resulting from the arbitral award, by invalidating the legal relation or right in place."[13] If we consider this view correct, the setting aside of an arbitral award may render a performance made as part of enforcement of such award an undue performance within the meaning of Article 411 § 2 of the Civil Code.

One can also come across the opinion that the basis of a performance within the meaning of Article 411 § 2 of the Civil Code can take the form of a decision attaching an enforcement clause to an arbitral award. As a result,

12. Dybowski T., Pyrzyńska A. [in:] Prawo zobowiązań – część ogólna. System Prawa Prywatnego tom 5, E. Łętowska (ed.), C.H. Beck 2013, p. 186

13. Łaszczuk M., Szpara J., op.cit., p. 638

the return of a performance made as undue performance might be requested only after such decision is effectively challenged. However, this view should be considered incorrect. As part of the procedure for granting an enforcement clause, a civil law case is not examined on its merits and the decision issued does not have the force of res judicata[14]. Instead it produces public law consequences, authorizing the institution of an enforcement procedure.

Thus it is not necessary to challenge a decision attaching an enforcement clause in order to effectively claim the return of a performance made. In numerous instances, such a requirement would be impossible to be satisfied anyway, given that it is frequently the case that when the performance basis ceases to exist, the enforcement has already been completed. Challenging the correctness of the enforcement clause granting at this stage will not have the desired effect. At an earlier stage, however, the legal relations holding between the parties did not provide grounds for doing so. The above discussion holds equally true for the decision ending the procedure for declaring an arbitral award enforceable.

It should also be pointed out that the issue of recognizability of a foreign court's decision vacating an arbitral award, as mentioned above, refers also to the procedure for return of an undue performance.

Summary

In conclusion, it should be stated in the first place that the legislator admits of a situation in which an enforcement clause is attached to an arbitral award despite the fact that a procedure instituted under a petition to set it aside is under way in Poland or abroad.

Whenever an enforcement procedure has been instituted based on an arbitral award to which an enforcement clause was attached, such procedure may be discontinued at a party's request pursuant to Article 825.2 of the Code of Civil Procedure after such award is vacated.

If the performance awarded under an arbitral award was already made, whether voluntarily or under state coercion, the entity that made it should be permitted to raise a claim for return of an undue performance.

It remains debatable, however, whether a foreign court's decision vacating an arbitral award is subject to recognition pursuant to Article 1145 et seq. of the Code of Civil Procedure. To dispel the existing doubts in this respect may be a de lege ferenda postulate addressed to the legislator.

14. Pietrzkowski H., Komentarz do art. 781 k.p.c. [in:] Kodeks postępowania cywilnego. Komentarz. Postępowanie egzekucyjne, LexisNexis 2012, nb. 2

The petition to set aside an arbitral award and the practice of the Court of Arbitration for Sport at the Polish Olympic Committee

Katarzyna Grabska – Luberadzka

Polish Olimpic Committee

The Court of Arbitration for Sport at the Polish Olympic Committee ("POC") – specificity of the procedure

The Court of Arbitration for Sport at POC ("TASPOC") was established in 1994. Two years later the Physical Fitness Act provided grounds for its operations. TASPOC has thus become, from 1996 on, the leading Polish center for sports-related dispute resolution. Its powers translate into two fundamental roles. The first one is that of an arbitral tribunal adjudicating in arbitration proceedings sports-related disputes involving property or other arbitrable rights. The other one is that of an authority hearing appeals against final decisions of Polish sports associations in disciplinary disputes and disputes over breaches of regulations, as part of special procedures designed to handle cases of such type. Over the years, TASPOC has consolidated its position, and its role as a center for resolving sports-related disputes in Poland has gained importance. Responding to these developments, the Polish legislator has been introducing new solutions over the years,[1] intended to ensure the correctness of proceedings in disputes involving sports relations and to guarantee – as part of the system for sports-related dispute resolution in Poland – the indispensable rights of participants to proceedings before arbitral tribunals held in a democratic state under the rule of law, including the right to have arbitral awards reviewed by state courts.

1. For a more detailed discussion see Grabska-Luberadzka K., Sports arbitration in Poland – a history of legislation, Arbitration e-Review 2012 (2), pp. 5 et seq.

The role as an arbitral tribunal (ordinary arbitration proceedings)

TASPOC has been acting as an arbitral tribunal since its establishment. In this capacity, its primary function has been to resolve sports-related disputes involving property and other rights, capable of being resolved under a court settlement, submitted to TASPOC pursuant to an arbitration agreement. In the above respect, TASPOC has always acted on the same principles as other permanent courts of arbitration, such as the Court of Arbitration at the Polish Chamber of Commerce or the Court of Arbitration at the Polish Confederation Lewiatan, i.e. directly on the basis of the provisions of the Code of Civil Procedure.

It is the provisions of the Code of Civil Procedure, supplemented by the detailed provisions of TASPOC's internal documents, such as its statutes and by-laws, that determine the form of the arbitration agreement, the rules to be followed when deciding on its effectiveness, the manner of appointing arbitrators and conducting the proceedings as such, as well as the enforceability and admissibility of judicial review of TASPOC's awards rendered as part of ordinary arbitration proceedings.

Ordinary arbitration proceedings before TASPOC are, as a rule, of a single-tier nature (unless the parties decide otherwise in the arbitration agreement, pursuant to Article 1205 § 2 of the Code of Civil Procedure). Proceedings held by TASPOC according to the ordinary procedure guarantee, under the common provisions of law, the freedom to exercise the constitutional civil rights, and in particular the right to recourse to a common court, through the availability of the institution of the petition to set aside an arbitral award[2].

As is the case with awards rendered by other arbitral tribunals in Poland, an award rendered by TASPOC as part of ordinary arbitration proceedings may be vacated by a common court exclusively in proceedings instituted under a petition to set the same aside, being a special form of judicial review. Thus awards rendered by TASPOC in ordinary arbitration proceedings have the attribute of finality.

TASPOC's awards rendered in ordinary arbitration proceedings are enforceable according to the general rules stipulated for arbitral awards in the provisions of Title VI Part Five of the Code of Civil Procedure. Pursuant to Article 1212 § 1 of the Code of Civil Procedure, an arbitral award, including TASPOC's award, rendered by, or a settlement reached before, an arbitral tribunal has, following its recognition or enforcement by a common court, the legal force equivalent to that of a judgment made by, or a settlement entered into before, a common court. The above framework is conducive to maintaining reliability and stability of the system of sports-related dispute resolution in Poland, thanks to expanding the case law established within this system.

However, it is worth noting that despite the fact that TASPOC was established as a permanent court of arbitration to hear sports-related disputes and this role was considered to constitute its core operations, TASPOC has not seen a great number of such cases over the years. The vast majority of cases heard by TASPOC have always been procedures of the other type, i.e. procedures instituted under complaints against decisions of the competent authorities of Polish sports associations.

The role as an authority hearing appeals against decisions of Polish sports associations (procedures for disciplinary disputes and disputes over breaches of regulations)

The procedure instituted under a complaint against a final decision of the competent authorities of Polish sports associations was set up to meet the sports community's need for a prompt and binding review of decisions issued by sports organizations. As such decisions only very rarely referred directly to property rights[3] involved in the relations holding between parties, it proved necessary to establish a special procedure to be held before TASPOC. Such a procedure was introduced and legitimized in 1996, by the enactment of the Physical Fitness Act[4], and subsequently sustained under the Competitive Sports Act[5]. It remained regulated within this statutory framework until 2010, when the Sports Act entered into force[6]. An express provision, contained in an act having the force of legislation, to the effect that disciplinary disputes and disputes over breaches of regulations may be submitted for resolution to TASPOC, which is a permanent court of arbitration, offered an alternative to the ordinary arbitration proceedings, in the form of the procedure conducted by TASPOC pursuant to Article 40.1 of the Physical Fitness Act and subsequently pursuant to Article 42 of the Competitive Sports Act, i.e. as a permanent court of arbitration. The provisions referred to above expressly permitted submission to an arbitral tribunal of disputes involving property rights and, as of 2005, also of disputes of other nature which, however, had capacity for settlement. Their wording did not provide direct grounds for submission to arbitral tribunals of disciplinary disputes or disputes over breaches of regulations. To prevent controversies over interpretation, the legislator introduced an overt ground for TASPOC's competence to consider cases of this type, incorporating it into the provisions of the Physical Fitness Act and subsequently transferring such provisions to the Competitive Sports Act.

2. However, the way in which the right to recourse to a court by means of the petition to set aside an arbitral award is exercisable leaves out, in the author's opinion, the issue of arbitration proceedings ending in the issuance of a procedural rolling. According to the literal interpretation, the provision of Article 1205 § 1 of the Code of Civil Procedure should be construed to mean that the petition may be filed with a common court to challenge a ruling made by an arbitral tribunal in the form of an award only. However, there is also room for a situation in which enforcement of rights or protection of interests is prevented by an arbitral tribunal issuing a decision ending the proceedings, such as a decision rejecting the statement of claims e.g. due to the determined lack of the capacity to sue. Such fact does not affect the validity of the arbitration agreement, which may in turn, in the event an action is brought in a common court and the adverse party raises the objection under Article 1165 § 1 of the Code of Civil Procedure, prevent examination of the case. In such a case, i.e. where there is, for instance, a controversy as to whether or not a party has the right to submit a dispute to arbitration, such party - if deprived of the right to file a petition to set aside the arbitral tribunal's decision rejecting the statement of claim - has a very limited right of recourse to a common court as part of the proceedings before TASPOC. This issue is of special importance in view of the prohibition, as frequently stipulated in the rules of international sports associations, to refer disputes resulting from sports relations to state courts for resolution.

3. The proprietary aspect of a dispute is relevant from the point of view of our discussion, as it determines (pursuant to Article 40 in connection with Article 39 of the Physical Fitness Act and subsequently pursuant to Article 42 in connection with Article 41 of the Competitive Sports Act) whether or not a dispute is capable of being resolved by TASPOC in ordinary arbitration proceedings.

4. Act of January 18, 1996 (Dz. U. [Journal of Laws] 1996.25.113, as amended)

5. Act of July 29, 2005 (Dz. U. [Journal of Laws] 2005.155.1298, as amended)

6. Act of June 25, 2010 (Dz. U. [Journal of Laws] 2010.127.857, as amended)

The established appeal procedure before TASPOC departed to some extent from the rules of procedure before arbitral tribunals, as generally accepted and stipulated in the Code of Civil Procedure, due to its special nature and the specific nature of sport and its regulations. In the years 1996-2010, this procedure was governed by the provisions of the Physical Fitness Act, and subsequently by the provisions of the Competitive Sports Act, as supplemented by the clauses incorporated into statutes or by-laws of Polish sports associations and permitting appeal to TASPOC against decisions of the associations' authorities. The method of appointing arbitrator as part of the appeal procedure before TASPOC was also different. As regards the rules of procedure, endeavors were made to make them similar in a sense to the rules of criminal procedure, due to the repressive nature of disciplinary relations. Procedures in disciplinary disputes and disputes over breaches of regulations lacked a uniform solution in respect of the number of instances at which they were to be held. Depending on the Polish sports association, there were two- or three-tier procedures, most often with TASPOC as the authority of last resort. Enforceability and enforcement of decisions issued by TASPOC in this type of procedure also differed from the typical solutions adopted in standard procedures before arbitral tribunals, including in ordinary arbitration proceedings before TASPOC. Special solutions were also called for in the field of review of TASPOC's decisions in disciplinary disputes and disputes over breaches of regulations, which resulted in the extraordinary appeal procedure being introduced by the legislator in 2005, in the form of a cassation appeal against TASPOC's rulings to the Supreme Court. This solution raised concerns among sports law practitioners as to whether the right of recourse to a court was guaranteed in disciplinary disputes and disputes over breaches of regulations submitted to TASPOC for resolution.

Unlike the ordinary arbitration proceedings, the appeal procedure before TASPOC was intended by TASPOC's founders to have an important, but supplementary, role, in a way secondary to the role of the tribunal as a permanent court of arbitration specializing in sports-related disputes. However, the practice developed over the years has shown that 90% of the disputes submitted for resolution refer to disciplinary issues and breaches of regulations.

The cassatory nature of the petition to set aside an arbitral award and the awards rendered by TASPOC

As a rule, there is no classic means of recourse available against awards rendered in arbitration proceedings governed by the Code of Civil Procedure. However, with a view to protecting the constitutional rights, the legislator provided for a petition to set aside an arbitral award in order to ensure judicial review of the correctness of procedure and compliance of arbitral awards with the common provisions of law. Nevertheless, state courts' interference in arbitration proceedings is limited and allowed only to a strictly defined extent, so that it could not adversely affect the arbitral tribunal's freedom to adjudicate, which is one of the fundamental attributes of alternative dispute resolution methods, including arbitration. This concept is reflected in the established nature of TASPOC's decisions issued both in ordinary arbitration proceedings and procedures instituted under complaints against decisions of Polish sports associations, deemed to be of a final nature.

Admissibility of the petition to set aside an award rendered by TASPOC in ordinary arbitration proceedings

In ordinary arbitration proceedings, TASPOC's rulings are rendered pursuant to the provisions of Part Five of the Code of Civil Procedure, take the form of rollings or awards, and are subject to the limited review referred to above, exercised according to the rules and procedure set forth in the Code. The provisions of Part Five of the Code of Civil Procedure list exhaustively the grounds for setting aside an award rendered by TASPOC and determine the cassatory nature of a common court's decision concerning such award. As a rule, a common court does not reestablish the facts of a case or subsequently examine it on the merits[7]. As a result of the cassatory construct adoption, the common court is bound by the motions included in the petition as to the scope of review of the challenged award. However, regardless of the provisions of the petition, the court examines ex officio whether the dispute was at all capable of being decided by an arbitral tribunal. A list of arbitrable disputes follows from Article 1157 of the Code of Civil Procedure, pursuant to which, as a rule, parties may submit to arbitration disputes involving property rights or disputes involving non-property rights that have capacity for court settlement, excluding claims for alimony. Thus awards rendered in disputes submitted to TASPOC for resolution in ordinary arbitration proceedings, i.e. awards in the so-called arbitration cases, are subject to review by common courts under the petition to set aside an arbitral award, pursuant to Article 5 of TASPOC's statutes and in accordance with Article 1157 of the Code of Civil Procedure. This procedure is used by common courts to verify the outcome of the proceedings held by TASPOC, while following clear rules and respecting the principle of minimum state courts' interference in the arbitral tribunal's freedom to adjudicate.

Admissibility of the petition to set aside an award rendered by TASPOC in appeal procedures (in disciplinary disputes and disputes over breaches of regulations)

Controversies surround the procedure initiated before TASPOC under a complaint against a final decision made by the competent authorities of a Polish sports association. In line with the practice established over the years, this procedure was conducted by TASPOC not pursuant to the provisions of the Code of Civil Procedure but on the basis of the special provisions of the sports acts (i.e. the Physical Fitness Act and subsequently the Competitive Sports Act). As a result, disciplinary disputes and disputes over breaches of regulations submitted to TASPOC were not treated as civil law cases having capacity for settlement and considered in

7. This is confirmed by the Supreme Court in its judgments of December 13, 1967, docket No. I CR 445/67, and of June 27, 1984, docket No. II CZ 67/84

arbitration proceedings, but as a special type of disputes for which the legislator stipulated a special procedure8. In consequence, while wishing to ensure parties' right to have awards rendered in appeal procedures held by TASPOC reviewed by a court, in 2005 the legislator provided for a cassation appeal that might be filed with the Supreme Court against TASPOC's awards rendered in procedures instituted under complaints against decisions issued by Polish sports associations in disciplinary disputes or disputes over breaches of regulations. Interestingly, the way in which this regulation was structured compelled its civil law nature, as a result of which such cassation appeals were heard by the Labor Law, Social Security and Public Affairs Chamber of the Supreme Court. It should be noted that this state of affairs was to some extent in conflict with the then generally accepted view that it was not the provisions of the Code of Civil Procedure but those of the Code of Criminal Procedure that applied specifically in disciplinary disputes9. At the time the Physical Fitness Act and the Competitive Sports Act were in force, the Supreme Court used to point out that sports-related disciplinary cases were not of contractual nature and were governed directly by the provisions of the sports acts, made specific by the internal regulations in place at sports associations, and were thus of special nature10. In light of such assumptions, procedures before TASPOC involving disciplinary disputes or disputes over breaches of regulations had to be deemed to be left outside of the concept of arbitration proceedings and constitute a special type of procedure not governed by the provisions of Part Five of the Code of Civil Procedure. In consequence, in accordance with the provisions of the Physical Fitness Act or the Competitive Sports Act, the filing of a petition to set aside an arbitral award with a common court had to be considered inadmissible. At that time, TASPOC's awards rendered in appeal procedures were subject to review by the Supreme Court conducted under cassation appeals filed pursuant to Article 41(a) of the Physical Fitness Act and subsequently Article 44 of the Competitive Sports Act11. However, the legislation in force was essentially transformed after the effective date of the Sports Act in which the legislator actually omitted to provide at all for issues relating to disciplinary procedures and resolution of sports-related disputes. The sports-related disciplinary procedure thus lost its special nature resulting directly from the statutory provisions, [12]and was once again subjected to the general rules of the common provisions of law. Thus, given the fact that issues of disciplinary liability and liability for breaches of regulations were entrusted exclusively to Polish sports associations or other entities carrying out sports activities, it seems justifiable to assume that such liability acquired civil, quasi-contractual nature. If we agreed that it is legitimate, this assumption would once and for all reconcile the divergent opinions on the nature of cases that combine contractual and regulations-based relations, such as disputes between a sports club and a competitor over contract termination[13]. Recognition of the civil law nature of the appeal procedure would also be of crucial importance from the point of view of the protection of interests of the participants of an appeal procedure before TASPOC. One should bear in mind the fact that the Sports Act abolished the possibility of filing cassation appeals against TASPOC's rulings with the Supreme Court. As a result, there is no judicial review procedure currently in place for TASPOC's rulings made in disciplinary disputes and disputes over breaches of regulations. But parties to procedures held by TASPOC in connection with disciplinary disputes and disputes over breaches of regulations keep waiting for and seeking to obtain such judicial review or recognition of rulings made by that tribunal. One of the options chosen by interested parties is to make use of the institutions provided for in Part Five of the Code of Civil Procedure, such as the request for recognition of an arbitral award and declaration of its validity or the petition to set aside an arbitral award, which is an institution typical of the system of dispute resolution through arbitration. What is extremely important here is that common courts regard such conduct as admissible, appreciating the need for parties to TASPOC's procedures to enjoy protection corresponding to that available to parties to any standard proceedings before an arbitral tribunal. It is under such procedure that in March 2012 the Regional Court in Cracow, acting pursuant to Article 1213 of the Code of Civil Procedure, in case docket No. I Co 43/12[14], recognized a TASPOC's award revoking a decision of a Polish sports association and attached an enforcement clause to the relevant part of that award. Following this line of reasoning and bearing in mind the recognition of the civil law nature of the award rendered by TASPOC in the appeal procedure, the authorities of the Polish sports association decided to file a petition to set this award aside. In case docket No. I C 1280/12[15], the Regional Court in Cracow rendered another judgment under which it vacated the TASPOC's award in question along with the supplementary decision. The latter judgment was appealed against by the other party. As a result of the appeal having been rejected, the judgment of the Regional Court in Cracow, rendered in case docket No. I C 1280/12, became final and unappealable. The situation described above shows that, when confronted with the provisions on sports, sports-related disciplinary procedures and resolution of sports disputes, as amended under the Sports Act,

8. Vide Chapter 6 of the Physical Fitness Act and subsequently Chapter 4 of the Competitive Sports Act

9. Vide Article 87(a) of the Rules of the Court of Arbitration for Sport at POC, as amended on October 22, 2007 and as in force prior to that date.

10. Vide the statement of reasons to the judgment of the Supreme Court, dated April 12, 2006, docket No. III PO 1/06.

11. It is worth noting in this connection that, unlike in the case of the petition to set aside an arbitral award stipulated in the provisions of Part Five of the Code of Civil Procedure, which is a remedy available against TASPOC's awards rendered in ordinary arbitration proceedings, the scope of the review initiated under the cassation appeal covers not only awards (which leaves outside the scope of judicial review cases ended in a decision issued by TASPOC) but all rulings regardless of their form. However, in the statement of reasons to its judgment of January 7, 2009, rendered in case docket No. III PO/08, the Supreme Court holds that "[…] the cassation appeal is available against Court's of Arbitration rulings on the merits. It [Article 44 – author's note] does not refer to Court's of Arbitration rulings […] remanding the case." The Supreme Court concludes that this provision is in accord with Article 398[1] of the Code of Civil Procedure, which contains a general rule to the effect that the cassation procedure is of special nature and the cassation appeal is available exclusively against final and unappealable rulings on the merits which end the procedure.

12. Cf. Article 28.4, Article 29.2.4 and Article 39.1 of the Competitive Sports Act.

13. For more details see the statement of reasons to the judgment of the Supreme Court rendered in case docket No. III PO 2/10, dated September 28, 2010.

14. Unpublished

15. Unpublished

common courts recognize their jurisdiction to review TASPOC's rulings made in appeal procedures. In consequence, it should be assumed that such practice can be considered to amount to acknowledgement of the civil law nature of sports-related disciplinary disputes or disputes over breaches of regulations that have capacity for settlement. Therefore, it is actually worth the while to analyze the issue of admissibility of submission of such disputes for resolution by arbitral tribunals, that is, inter alia, by TASPOC which, while handling appeal procedures, i.e. while hearing complaints against decisions made by Polish sports associations in disciplinary disputes or disputes over breaches of regulations, would thus conduct arbitration proceedings which, however, would be held according to a special procedure, i.e. the appeal procedure[16].

Importantly, should we make an assumption to the contrary and maintain the way in which disciplinary disputes and disputes over breaches of regulations have so far been perceived and classified, the undesirable practice of parties to TASPOC procedures seeking common court protection by any available means not designed to serve that purpose will continue to strive. To illustrate this, one can refer to the case heard by the District Court in Sanok, docket No. IV P 68/13, where the party who did not agree with a TASPOC's decision made in a disciplinary dispute and wished to challenge the same, brought in a labor court an action for "quashing disciplinary penalties" against the Polish Olympic Committee and the sports club of the competitor's affiliation. While providing reasons why the above entities were sued, the plaintiff argued that the Court of Arbitration for Sport operates at the Polish Olympic Committee and that is why it is POC, as the entity having capacity to be a party to civil proceedings, that is responsible for the decisions made by that tribunal. As regards the sports club, it was sued due to the employment relation holding between it and the competitor, which relation, however, did not cover the disciplinary procedure under way. The latter resulted from the competitor's professional sports license, granted by the Polish sports association. This was confirmed by the Court of Appeal in the statement of reasons to its judgment rendered as a result of the appeal filed by the plaintiff (i.e. the competitor)[17]. In the statement of reasons referred to above, the Court pointed out that "by taking part in sports competition […], the Plaintiff, as a competitor […], accepted the rules of such competition, which provided, inter alia, for specific disciplinary doping penalties, including disqualification resulting in the suspension of the competitor's rights. Therefore, a sports competitor should be deemed to bear disciplinary liability governed by the rules established by the Polish sports association […], regardless of whether or not there is an employment or other contract in place between him and the sports club." The Court proceeded to conclude that "[…] the Polish sports association holds the exclusive right to […] establish and enforce sports, organizational and disciplinary rules governing the sports competition organized by that association. The legislator has thus granted a special status to Polish sports associations, by permitting them, or even imposing on them the obligation, to establish rules governing the organization and holding of sports competition in specific disciplines, applicable to persons taking part in such competition. This means that everyone who wishes to voluntarily take up professional sports activities within a given sporting discipline, establishes a relation with the organizations managing that sporting discipline and, as part of such relation, accepts the rules they have established. Therefore, it should be assumed that, while wishing to take part in the competition […], the plaintiff voluntarily accepted the rules of sports competition established by the Polish sports association and the resultant risk that a failure to comply with the anti-doping regulations might prevent him from further participation in the sports competition." The above arguments permit, or even authorize, the statement that, under the Sports Act, sports-related disciplinary disputes should be treated as arbitrable and, as such, subject to resolution by arbitral tribunals. Specifically, such a statement appears to be justified in light of Article 1163 § 2 of the Code of Civil Procedure, which permits submission to an arbitral tribunal of association-related disputes on the basis of an arbitration clause contained in the statutes of the association. Incorporation into statutes of Polish sports associations of arbitration clauses specifying TASPOC as the tribunal competent to hear cases initiated under complaints against final decisions of Polish sports associations is becoming ever more popular under the Sports Act.

In the statement of reasons quoted above, the Court of Appeal also confirmed that "[…] there is no legal possibility for a common court to change the disciplinary penalties meted out by the Court of Arbitration at POC. Pursuant to § 87 of the Rules of the Court of Arbitration, there is no appeal available against the decision the Court issued, having considered a complaint against the decision made by the competent authorities of Polish sports associations in a disciplinary dispute or a dispute over breaches of regulations. While bringing an action against POC, the plaintiff attempts to otherwise challenge the final decision of the Court of Arbitration, incorrectly assuming that POC bears liability for the rulings of the Court of Arbitration. There are no factual or legal grounds to assume that the Court's of Arbitration affiliation with POC establishes the right to sue the latter before a common court in connection with a ruling rendered by the Court of Arbitration, as those entities are independent of each other in institutional terms. Specifically, it should be pointed out that the exhaustive list of POC statutory authorities contained in Article 14 of POC Statutes does not include the Court of Arbitration. It should also be noted that the defendant, i.e. POC, being an organization with no functional or substantive links with the Court of Arbitration, does not have access to the files of cases heard by the Court of Arbitration, hence it is not able to know the actual or legal facts of those cases, which clearly renders it unable to address the

16. Such a solution was adopted by the Court of Arbitration for Sport in Lausanne (CAS), which is the supreme international authority adjudicating disputes involving sports relations. Proceedings before this permanent arbitral tribunal are conducted by two Divisions, i.e. the Ordinary Arbitration Division and the Appeals Arbitration Division (Rule S20 of the CAS Statutes of the Bodies Working for the Settlement of Sports-Related Disputes). Decisions of that tribunal, regardless of the procedure as part of which they were made, may be appealed against to the Swiss Federal Supreme Court, pursuant to Article 199 of the Switzerland's Federal Code on Private International Law. This fact seems to conclusively determine the nature of various types of disputes submitted to and decisions made by CAS when resolving the same, regardless of the procedure used, as arbitration cases, i.e. cases heard and resolved according to the rules governing proceedings before arbitral tribunals.

17. Judgment of the Regional Court in Krosno, docket No. IV PA 53/13, IV PZ 53/13, dated December 27, 2013; unpublished.

objections raised in the plaintiff's pleadings. As a result, it should be concluded that a judgment granting the claims against POC could not be performed by POC, as it does not have the power to change the decision made by the Court of Arbitration, due to the fact that it does not have the capacity to be sued in the case at hand." The Court thus confirms that there is no iunctim between a decision of TASPOC and POC's liability, TASPOC operates pursuant to its statutes, and is free and independent to act. Thus the quoted statement of reasons eliminates the risk that would arise if the argument that organizations at which permanent courts of arbitration operate are liable for the latter's rulings were assumed to be legitimate, thus establishing a dangerous precedent threatening the operations and future of permanent courts of arbitration in Poland, such as the Court of Arbitration at the Polish Chamber of Commerce, the Court of Arbitration at the Polish Confederation Lewiatan or, last but not least, the Court of Arbitration for Sport at the Polish Olympic Committee.

What should be borne in mind in the first place is that, to avoid the situation mentioned above, the Polish legislator stipulated a special procedure for judicial review of arbitral awards (Part FIve Title VII of the Code of Civil Procedure), in the form of a petition to set aside an arbitral award, which does not permit claims against entities under the auspices of which arbitral tribunals operate. Therefore, attempts to seek review of arbitral awards by common courts under a procedure other than that stipulated for that purpose by the reasonable legislator should be deemed pointless or even inadmissible.

In light of the foregoing, it is also worth considering how the right of recourse to a court is guaranteed as part of the disciplinary procedures held by Polish sports associations. Although a detailed analysis of how this right, being one of the fundamental constitutional rights, is guaranteed in disciplinary procedures would require a separate paper, the very need to ensure the possibility of exercising the right of recourse to a court does not raise any concerns. Concurrently, it should be pointed out that according to the view expressed by the Constitutional Tribunal in its "decision of December 8, 1998, docket No. K 41/97 (OTK ZU 1998 No. 7, Item 117), […] Article 45 of the Constitution, which guarantees everyone's right of recourse to a court, does not make this guarantee conditional upon a case being heard at two court levels, unless the case falls within the jurisdiction of common courts from beginning to end. The two-tier nature of judicial review (provided for in Article 176 of the Constitution) refers exclusively to cases which fall within the jurisdiction of common courts under statute, i.e. cases heard by such courts "from beginning to end." The Tribunal expressly confirmed this view, inter alia, in its judgment of June 12, 2002, docket No. P 13/01, OTK ZU 2002 No. 4A, Item 42. Since the sports-related disciplinary procedure does not fall within the jurisdiction of common courts, the claim that the right of recourse to a court and the principle of two--tier court proceedings have been breached is not legitimate[18]. Therefore, it is necessary to find – within the system of sports-related dispute resolution in Poland – a way in which this right could be exercised that would be both efficient and appropriate to the nature of sport. International practice developed in this respect shows that a feasible and tested solution is to assume that disciplinary disputes resulting from relations voluntarily established by sportsmen with organizations managing sports competition fall within the contract law regime and are governed by the principle of freedom of contract. This makes it possible to recognize such cases as arbitrable and thus governed by the general provisions of law, specifying rules for amicable dispute resolution. As pointed out above, such a solution was adopted by the legislator in the Swiss Confederation which is the seat of CAS and thus the cradle of sports arbitration. Disciplinary disputes or disputes over breaches of regulations are heard by CAS as part of the appeal procedure, which has been established as a parallel (to the ordinary arbitration proceedings) type of procedure which, however, falls within the scope of powers CAS has a permanent court of arbitration.

Given the overall discussion presented above, it is worth the while to consider adopting a solution resembling the practice in place in international sports arbitration, and deciding that disciplinary disputes and disputes over breaches of regulations resolved by sports tribunals are heard by them as part of their role as a court of arbitration. A decision to that effect would make equal the rights of parties to proceedings held as the ordinary arbitration proceedings and as the appeal procedure, by equipping them with an identical right to have TASPOC's decisions reviewed by common courts under the petition to set aside an arbitral award, and would concurrently limit the need (that has arisen after the effective date of the Sports Act) for sports-related dispute resolution to be provided for in detail separately, under statute, thus ensuring that the principle of keeping state interference in sports relations to a minimum is respected. In addition, proceeding in this direction seems to be gaining in popularity in the jurisprudence worldwide, and countries looking for new solutions, such as Portugal, are inclined to accept a solution resembling the one under discussion[19]. Therefore, this option deserves consideration as one that guarantees exercise of the fundamental constitutional rights as part of the procedural law institutions that are already in place, in line with the worldwide tendencies.

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18. Cf. the statement of reasons to the judgment of the Supreme Court, rendered in case docket No. III PO 1/06, dated April 12, 2006

19. For more details see Santos R.B., Mestre A.M., De Magalhães F.R., Sports Law in Portugal, Kluwer Law International 2011, Netherlands, pp. 77 et seq.

International Association of Sports Law, 2009); the 1st and 2nd Sports Law Conferences (POC, 2010); the Sports Arbitration Seminar (the International Association of Young Lawyers, 2011); Kibicowanie2012.pl (the Polish Association for Sports and Leisure Facilities, 2012); the Allerhand Summit: Sports and Events Law (the Allerhand Institute, 2012)

Manifest disregard of the law as a ground for vacatur domestic and international arbitral awards in the United States

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The doctrine of manifest disregard of the law has been a subject of controversy in the American case law for years now, as it permits judicial review of arbitral awards without express statutory grounds. Manifest disregard of the law is to be found where an arbitral tribunal is aware of the applicable law but omits to apply it when deciding a specific dispute. Although some federal courts continued for quite a long time to recognize manifest disregard of the law as a valid ground for vacating arbitral awards rendered under the Federal Arbitration Act ("FAA")[1], no express provision establishing such a basis is contained in the Act itself.

The concept of manifest disregard of the law has evolved over more than 60 years after the decision in Wilko v. Swan[2], i.e. one of the first rulings to touch upon this issue, had been rendered. The 2008 U.S. Supreme Court's decision in Hall Street v. Mattel[3], in which the Supreme Court held that it was only the exhaustive list of FAA grounds that might form a basis for setting aside an arbitral award, could have settled the issue of the validity of manifest disregard of the law as a ground for vacatur. However, the reasoning presented by the Court, being convoluted and non-exhaustive, resulted in a split among both federal[4] and state courts, and failed to clarify numerous issues concerning the application of the doctrine of manifest disregard of the law. As shown below, this may also affect arbitral awards involving an international element.

1. Federal Arbitration Act, 9 U.S.C. §§ 1-14 (available at: http://uscode.house.gov/download/annualhistoricalarchives/pdf/2012/2012usc09.pdf; accessed February 15, 2014)

2. Wilko v. Swan, 346 U.S. 427 (1953)

3. Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008)

4. For the purposes of the federal court system, the territory of the United States is divided into judicial districts and circuits which form the appellate level. These operate in total independence from the divisions used by state courts. Each district is permanently assigned to a circuit, and all appeals against district courts' decisions are heard by the court of appeals for a given circuit. (A detailed division of the federal court system is available at: http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/FederalCourtsStructure.aspx; accessed February 15, 2014)

The doctrine of manifest disregard of the law

The doctrine of manifest disregard of the law is a non-statutory ground for setting aside an arbitral award, and the fact that it operates outside of the FAA entails certain difficulties to be dealt with within the U.S. system of arbitration law. The doctrine has always raised much controversy for at least two reasons. First, as already mentioned, it is not expressly provided for in the FAA, and its origins are to be found mainly in the dictum[5] contained in the decision in Wilko v. Swan. Second, it leaves open the possibility of vacating an arbitral award which should be final in nature, just as arbitration should be perceived as a dispute resolution method which is more efficient than proceedings before common courts[6]. The doctrine of manifest disregard of the law does not apply where the infringement of the law is of a minor nature or where arbitrators fail to identify the applicable law, and, by the same token, an arbitral award is unlikely to be set aside if a party merely disagrees with the arbitrators' interpretation of the law[7]. Manifest disregard of the law occurs where the arbitral tribunal is aware of the applicable law or binding contractual provisions but omits to apply the same while deciding a given dispute[8]. According to Thomas Oehmke, there are three conditions that need to be satisfied in order for a party to be able to invoke manifest disregard of the law by arbitrators[9]:

– the law which was disregarded or improperly applied by the arbitrators needs to be clear, unambiguous, and readily applicable to the dispute;
– the arbitral award may not be set aside if application of the applicable law had the same effect as its non-application; and
– the arbitrators are aware of the applicable law. If the applicable law is identified in the agreement, the arbitrators' cognizance of such law is obvious. If, however, there are no provisions identifying the applicable law, the arbitrators' knowledge and deliberateness of conduct can be established if their conclusion of law is so clearly erroneous that it would be discovered by an average person qualified to act as an arbitrator.

In international arbitration, U.S. courts take account of the doctrine of manifest disregard of the law in specific cases only, depending on whether a party seeks to have a foreign arbitral award recognized or set aside, as discussed further on in this article[10].

The Federal Arbitration Act

The Federal Arbitration Act takes precedence over any other piece of legislation forming part of the U.S. arbitration law. Since this statute provides for enforcement of an award rendered in international arbitration in the United States, international arbitration practitioners find it useful to have an overall knowledge of its basic regulations.

It was enacted in 1925 and amended in 1970 to implement the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")[11] into the U.S. legal system. Chapter I of the FAA contains provisions on domestic awards which are rendered in the United States in arbitration proceedings between U.S. citizens, and do not involve any foreign element. Chapter II provides for implementation of the New York Convention mechanisms and for recognition and enforcement by federal courts of foreign and non-domestic arbitral awards rendered in commercial disputes that arose between entities who: 1) are not U.S. citizens; 2) are U.S. citizens; however, the award is rendered in a dispute arising out of their relation that involves property located in a foreign state, envisages performance or enforcement abroad, or has some other reasonable link with one or more foreign states. Chapter I of the FAA applies to international arbitration proceedings insofar as its provisions are not in conflict with the provisions of the New York Convention and of Chapter II of the FAA.

The court with which an application for an award-confirming order is filed under Chapter II of the FAA confirms an international arbitral award unless it determines one of the grounds for refusal specified in Article V of the New York Convention. Awards rendered in international arbitration held in the United States are (unlike foreign awards) subject to vacatur, modification or supplementation on the same conditions as domestic awards. In accordance with § 9 of the FAA, the court is under obligation to confirm an arbitral award unless the award has been vacated, modified, or corrected pursuant to §§ 10 and 11 of the FAA. The grounds for vacating an arbitral award are provided for in § 10 of the FAA, whereas the grounds for modifying the same are set forth in § 11.

Pursuant to § 10 of the FAA, an award rendered by an arbitral tribunal may be set aside by a common court exclusively in proceedings instituted under an application for an order vacating the award, and only in the event that:

– the award was procured by corruption, fraud, or undue means;
– there was evident partiality or corruption in the arbitrators, or either of them;
– the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
– the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

In turn, the provision of § 11 of the FAA sets out the grounds for modifying or correcting an award, and contains an exhaustive list of the following events:

5. Obiter dictum is the non-binding part of a precedent-setting court judgment, as opposed to the binding ratio decidendi. This concept is employed by the common law system of Anglo-Saxon origin. (available at: http://pl.wikipedia.org/wiki/Obiter_dicta; accessed February 15, 2014)

6. LeRoy M. C., Are Arbitrators Above the Law? The 'Manifest Disregard of the Law' Standard, Boston College Law Review 2011 (137), p. 137

7. Oehmke T. H., § 149:2 Manifest Disregard of Law or Evidence, [in:] Commercial Arbitration, J.M. Brovins, T. H. Oehmke (eds.), Thomas Reuters/West 2009, p. 1493

8. Ibidem, p. 1493

9. Oehmke T.H., op.cit, p. 1494

10. Reed L., Riblett P., Expansion of Defenses to Enforcement of International Arbitral Awards in U.S. Courts?, Southwestern Journal of Law & Trade in the Americas 2006 (13), p. 125

11. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958 (available at: http://www.newyorkconvention.org/texts; accessed February 15, 2014)

– there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award;
– the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted; or
– the award is imperfect in matter of form not affecting the merits of the controversy.

As can be seen, none of the above provisions addresses directly the situation in which an arbitral tribunal makes a decision which is totally contrary to the law applicable to the dispute.

The settings prior to the judgment in Hall Street

The Federal Arbitration Act might appear to lay down the exclusive grounds for vacating arbitral awards rendered in the Unites States. However, the case law established by U.S. courts proves that there are also grounds originating outside of this statute[12]. Among those, the most frequently invoked non-statutory ground for vacatur is manifest disregard of the law. The doctrine of manifest disregard of the law can be traced back to the judgment rendered by the Supreme Court of the Unites States in Wilko v. Swan[13], in which the Court held that "the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review." It is worth noting that the Court's opinion was not expressed in the binding part of the judgment but in obiter dictum. Prior to the decision in Hall Street, the doctrine of manifest disregard of the law was recognized as an independent basis for setting aside an arbitral award by all federal courts[14], except for the Court of Appeals for the Seventh Circuit[15]. However, for a long time the case law of federal courts was not coherent enough to establish a uniform and consistent approach to the doctrine of manifest disregard of the law. It should also be noted that although the majority of federal courts recognized this ground, in practice, it was on extremely rare occasions that they acknowledged the arguments of parties who invoked manifest disregard of the law by arbitrators[16]. This was, in the first place, a consequence of the relatively strict conditions adopted by courts and required to be satisfied in order to declare a specific conduct of an arbitral tribunal to have constituted manifest disregard of the law[17].

Despite recognition of the doctrine by federal courts, the inconsistency in the case law resulted mostly from the differing approaches to its application[18]. When considering the grounds for vacating an arbitral award, the Courts of Appeals for the First, Fourth, Eight, Tenth and Eleventh Circuits made vacatur dependent primarily on "deliberate disregard of the law" by arbitrators. In its decision in Hicks v. Bank of America[19], the Court concluded that arbitrators would have to deliberately disregard the applicable law, whereas in the ruling made in Alrdred v. Avis Rent-a-Car[20], the Court held that in order to determine the occurrence of manifest disregard of the law, it was necessary to find that the arbitrator had been aware of the applicable law and had deliberately omitted to apply the same. A slightly more restricted approach is to be found in the case law established by the Courts of Appeals for the Second, Sixth, and Ninth Circuits, and the District Court for the District of Columbia, which assumed that the necessary condition for vacatur due to manifest disregard of the law was that the deliberate disregard referred to the law which had been expressly identified in the agreement and which was indisputably applicable to the dispute. This approach is best reflected in the decision of the Court of Appeals for the Sixth Circuit in Dawahare v. Spencer[21], in which the Court found that an arbitral tribunal manifestly disregards the law if 1) the applicable legal principle/law is expressly set forth in the agreement and not subject to debate as between the arbitrators; and 2) the arbitrators refuse to heed that legal principle/law while making their decision. Yet another approach was taken by the Court of Appeals for the Fifth Circuit, which established, in its decision in Sarofim v. Trust Co. of the W.[22], two conditions required to be satisfied jointly in order for an arbitral award to be set aside. The Court held that an arbitral tribunal would have to be found to have acted contrary to the applicable law and that enforcement of the award rendered in manifest disregard of the law would have to be proven to result in significant injustice, given all circumstances of the case. An isolated approach to the application of the doctrine of manifest disregard of the law was adopted by the Court of Appeals for the Third Circuit, which concluded, in its decision in Sherrock Bros. v. Daimler Chrysler Co., LLC[23], that the error needed to consists in being contrary to the relevant precedent.

The decision in Hall Street

The dispute in Hall Street concerned lease of commercial premises by Hall Street and its legal predecessors as the landlords, and Mattel and its legal predecessors as the tenants. Hall Street brought action against Mattel, claiming breach of the lease contract through: 1) improper contract termination; and 2) failure to comply with the environmental laws during the term of the contract. While the proceedings before the federal court were under way, the parties entered into an agreement under which they submitted to arbitration the dispute

12. Sheinis R. N., Wingate C. A., Enforcement of International Arbitration Award, For the Defense 2010, vol. 52 (9), p. 78

13. Wilko v. Swan, 346 U.S. 427 (1953)

14. See e.g. the decisions made by the Court of Appeals for the First Circuit in McCarthy v. Citigroup Global Mkts, Inc., 463 F. 3d 87, 91 (1st Cir. 2006); the Court of Appeals for the Fifth Circuit in Kergosien v. Ocean Energy, Inc., 390 F.3d 346, 353 (5th Cir. 2004); the Court of Appeals for the Eighth Circuit in Hudson v. ConAgra Poultry Co., 484 F.3d 496, 504 (8th Cir. 2007).

15. The United States Court of Appeals for the Seventh Circuit, hearing appeals against the decisions of district courts in Illinois, Indiana, and Wisconsin.

16. Curtin K. M., Contractual Expansion & Limitation of Judicial Review of Arbitral Awards, Dispute Resolution Journal 2001 (56), p. 60

17. Grondlund A. C., The Future of Manifest Disregard As a Valid Ground for Vacating Arbitration Awards in Light of the Supreme Court's Ruling in Hall Street Associates, L.L.C. v. Mattel, Inc., Iowa Law Review 2010 (96), p. 1360

18. Chen A., Transnational justice: War crimes tribunals and establishing the rule of law in post-conflict countries: Note: The doctrine of manifest disregard of the law after Hall Street: Implications for judicial review of international arbitration in U.S. Courts, Fordham International Law Journal 2008 (32), p. 1881

19. Hicks v. Bank of America, 218 F. App'x 739, 745 (10th Cir. 2007)

20. Aldred v. Avis Rent-a-Car, 247 F. App'x 167, 169 (11th Cir. 2007)

21. Dawahare v. Spencer, 210 F.3d 666, 669 (6th Cir. 2000)

22. Sarofim v. Trust Co. of the W., 440 F.3d 213, 217 (5th Cir. 2006)

23. Sherrock Bros., Inc. v. Daimler Chrysler Co., LLC, 260 F. App'x 497, 499 (3rd Cir. 2008)

resulting from the latter breach of the contract. The arbitration agreement contained a peculiar clause permitting a party to apply to a court for an order vacating the arbitral award if the arbitral tribunal was found to have made significantly erroneous conclusions of law when rendering its award. By conferring upon a court the power to review an arbitral award due to erroneous conclusions of law, the arbitration agreement attempted in a way to expand the scope of grounds for vacating an arbitral award, as listed exhaustively in the FAA. It is worth pointing out that, as already mentioned, at the time the case was heard by the court, the case law on manifest disregard of the law as a ground for vacating an arbitral award was quite inconsistent. Furthermore, no court had previously decided whether or not parties were permitted to expand the list of grounds for vacatur contained in § 10 of the FAA.

Having completed the arbitration proceedings, the arbitral tribunal rendered an award dismissing the claimant's claims. However, Hall Street successfully argued before the district court that, when taking their decision, the arbitrators had acted in manifest disregard of the law. The district court set aside the arbitral award and made a decision in favor of Hall Street. As a result, Mattel appealed to the Federal Court for the Ninth Circuit, which found that the contractual provision expanding the scope of grounds for the parties to request judicial review in the case of arbitrators' erroneous conclusion of law was invalid. The Court overruled the court of lower instance and remanded the case for reexamination, concurrently instructing the lower court to recognize the arbitral award (despite the manifest disregard of the law), unless there existed grounds for vacating or modifying the same pursuant to § 10 or § 11 of the FAA.

In the end, Hall Street appealed to the Supreme Court of the United States, filing a petition for a writ of certiorari[24]. Having granted the petition, the Supreme Court of the United States had to provide an answer to the question whether "the FAA precludes federal courts from recognizing contractual clauses expressly formulated by parties to expand the narrow scope of the FAA grounds for requesting judicial review of an arbitral award."

Hall Street argued that §§ 10 and 11 of the FAA do not provide for exclusive grounds for vacatur, and that in its prior decision in Wilko the U.S. Supreme Court had recognized manifest disregard of the law as a non-statutory ground for vacatur. In its decision in Wilko, the U.S. Supreme Court held that "the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." Hall Street emphasized that in the above ruling the Supreme Court recognized non-statutory grounds for vacatur, hence the list contained in §§ 10 and 11 of the FAA is not exhaustive. In support of its petition, Hall Street argued that since, as stated in the decision in Wilko, manifest disregard of the law constituted a non-statutory ground for vacating an arbitral award, there were no obstacles preventing the parties from contractually expanding the scope of grounds provided for in the FAA to include bases that would allow them to request judicial review of an award.

The Court concluded that pursuant to § 9 of the FAA, the court has to confirm an award unless there occurs any of the grounds set forth in § 10 or § 11. The FAA does not provide for the possibility of expanding the list of grounds for requesting judicial review of an arbitral award under contractual provisions of the parties. The Court also noted that §§ 10 and 11 of the FAA contain an exclusive list of grounds for vacating or modifying an arbitral award. Therefore, the court does not have the power to vacate, modify or correct an award on a ground contained in a contractual clause.

The Supreme Court did not endorse Hall Street's stance, holding that the court's opinion in Wilko was quite vague and not binding. The Court did not express a clear and exact opinion on the issue of manifest disregard of the law, stating that "[m]aybe the term 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. Or, as some courts have thought, 'manifest disregard' may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when the arbitrators were 'guilty of misconduct' or 'exceeded their powers'."

The split among U.S. courts following the decision in Hall Street

As a consequence of the failure to provide in the decision in Hall Street a clear solution to the issue of whether or not the doctrine of manifest disregard of the law may serve as a ground for vacating an arbitral award, the case law split both at the federal and the state level.

Federal courts

As a result of the ruling in Hall Street, the case law split according to the two different concepts of the doctrine application. Interpretations of the ruling in Hall Street vary immensely, starting from the claim that it abrogated the doctrine of manifest disregard of the law altogether and ending with the view that manifest disregard of the law is a judicially-created common law ground for vacating an arbitral award[25].

In line with the first concept, the Courts of Appeals for the Fifth, Eight and Eleventh Circuits held that the FAA grounds were of an exclusive nature and neither manifest disregard of the law nor any other judicially-created ground for vacatur was valid[26]. In its decision in Citigroup Global Mkts., Inc. v. Bacon[27], the Court of Appeals for the Fifth Circuit presented an elaborate discussion of manifest disregard of the law, concluding that it was no longer valid as a ground for vacating an arbitral award. A similar stance, i.e. one claiming invalidity of the doctrine of manifest disregard of the law, was taken by courts in Frazier

24. Writ of certiorari – the Supreme Court grants a petition for a writ of certiorari if it decides to review the case on its merits at the request of the party who filed a petition to that effect. (available at: http://en.wikipedia.org/wiki/Certiorari; accessed February 15, 2014)

25. Huber S. K., State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts, Cardozo Journal of Conflict Resolution 209 (10), pp. 560-62

26. Wolper M., "Manifest Disregard": Not Yet Entirely Disregarded, Florida Bar Journal 2012, vol. 86 (8), p. 36

27. Citigroup Global Mkts., Inc. v. Bacon, 562 F. 3d. 349, 355 (5th Cir, 2009)

v. CitiFinancial Corp,[28] and in Medicine Shoppe International, Inc. v. Turner Investments, Inc.[29]

An utterly different view was adopted by the Courts of Appeals for the Second, Forth, Sixth, Seventh and Ninth Circuits, which in different forms recognized the ground of manifest disregard of the law[30]. Other federal courts have either not had a chance to take a stance on manifest disregard of the law, or have not yet adopted a clear stance on the issue.

As noted above, some federal courts upheld the doctrine of manifest disregard of the law, while defining its applicability in slightly different ways. In practice, definitions of manifest disregard of the law were restricted as compared with those from before the ruling in Hall Street. In Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.[31], the Federal Court for the Second Circuit held, when deciding on further validity of the doctrine of manifest disregard of the law, that this ground should continue to apply unmodified, whenever arbitrators were aware of the applicable law and disregarded it despite their knowledge of its applicability to the dispute[32]. The Court pointed out the responsibility that it bore when confirming an arbitral award that might be unjust due the arbitrators' misconduct, which would adversely affect the arbitration clause or agreement executed by the parties. In its further discussion, the Court proceeded to recognize manifest disregard of the law as a standard similar to the ground set forth in § 10(a)(4) of the FAA, which provides for vacating an arbitral award in the case the arbitral tribunal exceeded the scope of its powers. A similar stance was taken by the Court of Appeals for the Ninth Circuit in its decision in Comedy Club, Inc. v. Improv W. Assocs.[33], where the Court found that manifest disregard of the law was actually "shorthand" for the statutory ground provided for in § 10(a)(4) of the FAA. The Court pointed out the Supreme Court's failure to provide a comprehensive analysis of this issue in the decision it had taken in Hall Street, and the fact that it had not been clarified whether the doctrine of manifest disregard of the law did not fall within the scope of the FAA provisions. The Court addressed directly the statement by Justice Souter's, as referred to above in connection with the analysis of the decision in Hall Street, who inquired whether "'manifest disregard' might have been shorthand for § 10(a)(3) or § 10(a)(4)." Likewise, the Court of Appeals for the Sixth Circuit noted in its ruling in Coffee Beanery, Ltd. v. WW, L.L.C.[34] that the decision in Hall Street referred only to contractual expansion of the FAA grounds for vacating an arbitral award, which left room for non-statutory grounds for vacatur, originating in case law. Stephen K. Huber called this maneuver "effective rejection of manifest disregard."[35] The relatively most recent decision supporting the trend to maintain the doctrine of manifest disregard of the law is the ruling of the Court of Appeals for the Fourth Circuit in Wachovia Securities, LLC v. Brand[36], in which the Court endorsed the court's view adopted in the decision in Stolt-Nielsen and confirmed that manifest disregard of the law continued as a valid ground for vacating an arbitral award.

The Federal Courts for the First, Third and Tenth Circuits remained neutral or have not so far taken an unequivocal position on further validity of the doctrine of manifest disregard of the law. In its decision in Ramos-Santiago v. U.S. Postal Service[37], the Federal Court for the First Circuit might appear to have rejected further validity of the doctrine of manifest disregard of the law, but it actually refused to clearly state whether the decision in Hall Street had invalidated the ground of manifest disregard of the law. In Hicks v. The Candle Company[38], the Court held, in turn, that due to insufficient factual grounds, it was pointless in that case to consider application of the doctrine of manifest disregard of the law. It may be the case that those courts are waiting to see what the final resolution of this issue by the U.S. Supreme Court will be like[39].

State courts

After the decision in Hall Street state courts also faced the difficult task of providing an answer to the question of whether the precedent established in Hall Street and applicable for the purposes of the FAA was also valid for the federal level case law[40]. As noted by the Supreme Court in one of its decisions, the FAA "create[d] a body of federal substantive law," which is applicable both in federal and state courts[41]. Nevertheless, state courts are not bound by the judgment rendered in Hall Street, which is a federal court's decision, when rendering decisions based on state arbitration law. State legislation may permit expansion of the scope of grounds for requesting judicial review, however, it may do so insofar as this does not deprive parties of the rights conferred upon them under the FAA[42].

The pivotal state court's decision in this regard was the ruling in Cable Connection, Inc. v. DIRECTV, Inc.[43], which, while not referring directly to manifest disregard of the law, showed how the influence of Hall Street on the state court system should be read and, consequently, how further application of the doctrine of manifest disregard of the law by state courts was affected thereby. The key issue under examination by the Court in Cable Connection was whether the decision issued by the Supreme Court of the United States in Hall Street excluded application of the California common law which permits contractual expansion of the scope of grounds for requesting

28. Frazier v. CitiFinancial Corp, 604 F. 3d 1313, 1324 (11th Cir, 2010)

29. Medicine Shoppe International, Inc. v. Turner Investments, Inc., 614 F.3d 485, 489 (8th Cir. 2010)

30. Wolper M., op.cit., p. 36

31. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 548 F.3d 85, 95 (2nd Cir. 2008)

32. A similar stance is to be found in the decisions in T. Co.Metals, L.L.C v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 339 (2nd Cir. 2010); NYKCool A.B. v. Pacific Fruit, Inc., 2010 WL 4812975, (S.D.N.Y. 2010)

33. Comedy Club, Inc. v. Improv W. Assocs., 553 F.3d 1227, 1283 (9th Cir. 2009)

34. Coffee Beanery, Ltd. v. WW, L.L.C., 300 F. App'x 415 (6th Cir. 2008)

35. Huber S. K., op.cit., p. 560

36. Wachovia Securities, LLC v. Brand, 671 F.3d 472 (4th Cir. 2012)

37. Ramos-Santiago v. U.S. Postal Service, 524 F.3d 120, 120, 124, n.3 (1st Cir. 2008)

38. Hicks v. The Candle Company, 355 Fed. Appx. 186, 197 (10th Cir. 2009)

39. Wolper M., op.cit., s. 38

40. Berger J. E., Sun C., The Evolution of Judicial Review Under the Federal Arbitration Act, New York University Journal of Law and Business 2009 (5), p. 745

41. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006)

42. Wolper M., op.cit., s. 38

43. Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586 (Cal 2008)

judicial review. The Court pointed out that the Supreme Court of the United States had deliberately left this question open, quoting the Supreme Court's statement to the effect that "[t]he FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable." The Court observed that since the judgment in Hall Street had been rendered by a federal court and the applicable law had been the federal law, it should be recognized as applicable in this regard only. In consequence, neither the decisions on judicial review under the FAA nor the common law on this matter apply, hence the application of the state legislation is not precluded. In conclusion, following the direction already set by the California common law, the Court decided to permit contractual expansion of the grounds for requesting judicial review.

Despite the fact that some state courts took a similar stance on the FAA, numerous others decided to apply both the FAA's procedural and substantive rules in the proceedings they handled[44]. To give an example, the Alabama Supreme Court ruled that the FAA applies to any dispute arising out of a contract executed by parties from different states, hence manifest disregard of the law is not, in such a case, a valid ground for vacating an arbitral award[45]. To support its view, the Court referred to the supremacy clause and pointed out that since the decision in Hall Street had changed federal law, the manifest disregard doctrine was no longer a valid ground for vacatur for a state court either. The state courts in Texas and New York took a similar position and also recognized the precedent established under the decision in Hall Street to be the applicable law.[46]

The impact of the doctrine of manifest disregard of the law on international arbitration

Arbitral awards which are not purely domestic in nature and are sought to be recognized or enforced in the United States are governed by the provisions of the New York Convention. In order to identify the applicable law, a U.S. court, having received a request for recognition of or refusal to recognize an arbitral award to which the New York Convention applies, has to establish whether such award is a foreign award or a non-domestic award[47]. To determine whether a given award has the nature of a foreign or a non-domestic award, one should consult the text of the New York Convention. Pursuant to Article I(1) of the New York Convention[48], a foreign award is an award rendered in a state other than the one in which its recognition or enforcement is sought. Hence, in the context of our discussion, a foreign award is an award sought by a party to be recognized or enforced in the United States but rendered in another state. It should also be noted that, pursuant to the provisions of Chapter 2 of the FAA, a U.S. court may only refuse to recognize a foreign arbitral award, but does not have the power to vacate it[49]. A non-domestic award is, in turn, an award which is neither purely domestic nor foreign in nature[50]. Every award should be examined separately; as a rule, a non-domestic award is a decision which was rendered in the United States but involves one or more entities who are not U.S. citizens or refers to foreign property, or was rendered in proceedings based on an arbitration clause providing that the arbitration is to be held or the award is to be enforced outside the United States[51]. A non-domestic award is also an award rendered outside the United States, in proceedings governed by U.S. laws.[52] Therefore, even if one of the parties is a foreigner and the arbitration proceedings are to be held and the award is to be enforced in the United States, the New York Convention applies in addition to U.S. laws. This is illustrated e.g. by the award rendered in Lander Company, Inc. v. MMP Investments, Inc.[53], in which an arbitral tribunal with its seat in New York decided a dispute between two U.S. corporations, concerning distribution agreements performed in Poland. As a result of the presence of a foreign element, the Court deemed the award to be a non-domestic award. Unlike in the case of a foreign award, here a U.S. court has the power to vacate the arbitral award.

The New York Convention contains an exhaustive list of grounds for refusal of an arbitral award recognition by a common court in a contracting state. Such grounds include, inter alia, invalidity of the arbitration clause, non--compliance with the arbitration procedure, decisions on matters not submitted to arbitration or violation of the public policy[54]. Thus, the list included in Article V of the New York Convention does not contain a ground for a party who does not agree with the reasons provided by the arbitral tribunal to request refusal of an award recognition or enforcement. Due to the fact that some courts continue to recognize the manifest disregard doctrine as a valid ground for vacating an arbitral award, a non-domestic award subject to judicial review by a U.S. court may potentially be vacated on that ground. In its decision issued in Yusuf Ahmed Alghanim & Toys "R" Us, Inc.[55], the Court of Appeals for the Second Circuit held that a court might apply the FAA grounds to vacate a non-domestic award sought to be recognized under the New York Convention. In its ruling, the Court deemed manifest disregard of the law to constitute a constructive ground for vacatur. A similar stance was taken by the court in its decision in Jacada (Europe), Ltd. v. International Marketing Strategies56, where it found that it was the grounds for vacatur provided for both in the New York Convention and in the FAA that applied to non-domestic awards rendered in the United States.

44. Bolt Weathers P., Much Ado About Nothing: The Effect of Manifest Disregard on Arbitration Agreement Decisions, Alabama Law Review 2011 (63), p. 161

45. Ibidem, p. 161

46. Royce Homes, L.P. v. Bates, 315 S.W.3d 77, 90 (Tx. Ct. App. 2010); Chase Bank Usa, N.A. v. Hale, 859 N.Y.S.2d 342, 349 (N.Y. Sup. Ct. 1998)

47. Jacada, Ltd. V. Int'l Mktg. Strategies, Inc., 401 F.3d 701, 708-709 (6th Cir. 2005)

48. Article I(1) of the New York Convention (available at: http://www.newyorkconvention.org/texts; accessed February 15, 2014)

49. Sheinis R. N., Wingate C. A., op.cit., p. 75

50. Reed L., Riblett P., op.cit., p. 126

51. Sheinis R. N., Wingate C. A., op.cit, p. 75

52. Ibidem, p.75

53. Lander Company, Inc. v. MMP Investments, Inc., 107 F.3d 476, 477 (7th Cir.), cert. denied, 522 U.S. 811 (1997)

54. Article V of the New York Convention (available at: http://www.newyorkconvention.org/texts; accessed February 15, 2014)

55. Yusuf Ahmed Alghanim & Toys "R" Us, Inc., 162 F.3d 15, 20 (2nd Cir. 1997)

56. Jacada (Europe), Ltd. v. International Marketing Strategies, 401 F.3d 701, 709 (6th Cir. 2005)

With a foreign award, the situation is totally different. In accordance with the New York Convention, manifest disregard of the law is not a valid basis for refusal to recognize and enforce an arbitral award rendered in arbitration proceedings conducted outside the U.S. and governed by laws other than those of the United States. The only grounds deemed by U.S. courts to be valid for refusal to recognize or enforce a foreign arbitral award are those set out in Article V of the New York Convention[57]. In M & C Corp. v. Erwin Behr GMBH & Co., the Court decided that neither the grounds provided for in the FAA nor the doctrine of manifest disregard of the law applied to a foreign arbitral award[58]. The Court pointed out that pursuant to Title 9 § 207[59] of the United States Code60, the federal court is expressly required to confirm a foreign arbitral award, unless it finds one of the grounds for refusal of its recognition or enforcement specified in Article V of the New York Convention, and manifest disregard of the law is obviously not to be found among the grounds listed therein. In its decision rendered in NTT Docomo, In., v. Ultra D.O.O., the Federal Court for the Southern District of New York held that the public policy clause the non-compliance with which is an obstacle to award enforcement under Article V(2)(b) of the New York Convention has a narrow scope, hence an erroneous conclusion of law or an improper application of law does not constitute violation of public policy within the meaning of the New York Convention. So far, no federal court has refused to recognize or enforce a foreign arbitral award on the ground of manifest disregard of the law[61].

As a result of the split in the federal case law following the decision in Hall Street, arbitration attorneys are interested to know the approach to manifest disregard of the law as a ground for vacatur that prevails in the circuit where a party can seek confirmation of a non-domestic award. Viewed from the perspective of a party aiming to preclude the possibility for the losing party to invoke this ground, the jurisdiction desirable for award recognition or enforcement seems to be that of the Courts of Appeals for the Fifth, Eight and Eleventh Circuits.[62] However, what should be the decision of parties who, when executing an arbitration agreement, intend to stipulate judicial review of an award in the event of manifest disregard of the law by arbitrators? One option is to provide for two-tier arbitration proceedings with the parties' right to appeal against the tribunal's decision to a tribunal appointed specifically to conduct the appeal procedure. But if parties wish to provide for judicial review of an award, they should, when drafting the arbitration clause, exclude the application of the FAA altogether, and select such governing law applicable both to the clause and award enforcement, and such seat of arbitration that will permit judicial review of an arbitral award on the ground of manifest disregard of the law by arbitrators. Parties should also be careful when appointing arbitrators – although appointment of the experienced ones does not guarantee success, it certainly substantially contributes to the quality of case law and thus makes it less likely that a party will have to request a common court to vacate an award on the ground of manifest disregard of the law by arbitrators[63].

Corresponding constructs in other countries

Apart from the United States, the doctrine of manifest disregard of the law does not operate as an independent ground for vacating an arbitral award in any other country. Although some countries have in place corresponding legal constructs available when seeking to have an arbitral award vacated, such constructs are known under different names[64]. An inquiry into which of the categories of grounds for refusing award recognition and enforcement contained in the UNCITRAL Model Law the manifest disregard might be classified into reveals that it resembles most closely the provision of Article 36(1)(a)(iii)[65], referring to decisions made by arbitrators on matters beyond the scope of the submission to arbitration, or of Article 36(1)(b)(ii)[66], referring to non-compliance with the fundamental rules of the public policy of a given state. Similar regulations are to be found in arbitration laws enacted by the majority of countries. It is worth noting that there are also systems of law permitting a broader scope of judicial review of arbitral awards, e.g. on grounds such as "award internal inconsistency" or "award soundness"; it seems reasonable to consider such constructs to resemble most closely the doctrine of manifest disregard of the law[67]. Corresponding legal concepts operating in countries which are frequently the forum for arbitration proceedings are briefly discussed below.

France

The French Code of Civil Procedure ("CPC") stipulates five grounds for vacating an international arbitral award[68]. In the majority of cases, parties refer to the following grounds: the arbitral tribunal ruled without complying with the mandate conferred upon it, due process was violated when rendering the award and the award is contrary to the public policy. The French case law has not established any judicially-created grounds for refusing recognition or vacating an arbitral award in addition to those set forth in the CPC. None of the grounds provided for under Article 1520 of the CPC

57. M &C Corp. v. Erwin Behr GMBH & Co., KG, 87 F.3d 844, 851 (6th Cir, 1996)

58. NTT Docomo, In., v. Ultra D.O.O., No. 10 Civ. 3823 (S.D.N.Y. Oct. 12, 2010)

59. 9 U.S.C. § 207 (available at: http://www.law.cornell.edu/uscode/text/9/207; accessed February 15, 2014)

60. The United States Code (U.S.C.) is the codification of the federal laws of the United States. U.S.C. was compiled to facilitate access to statutes enacted by the Congress, by organizing and consolidating such statutes, and accounting for the amendments introduced thereto to repeal existing provisions or enact new ones. (available at: http://www.gpo.gov/fdsys/browse/collectionUScode.action?collectionCode=USCODE; accessed February 15, 2014)

61. The "Manifest Disregard of Law" Doctrine and International Arbitration in New York, [in:] Report by the Committee on International Commercial Disputes of the Association of the Bar of the City of New York 2012, p. 11

62. The Federal Court for the Fifth Circuit has jurisdiction over the district courts in Texas, Louisiana, and Mississippi; the Federal Court for the Eight Circuit has jurisdiction over the district courts in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota; and the Federal Court for the Eleventh Circuit has jurisdiction over the district courts in Alabama, Florida, and Georgia.

63. Wolper M., op.cit., p. 40

64. The "Manifest Disregard of Law"..., op.cit, p. 12

65. Article 36(1)(a)(iii) of the UNCITRAL Model Law (available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html; accessed February 15, 2014)

66. Article 36(1)(b)(ii) of the UNCITRAL Model Law (available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html; accessed February 15, 2014)

67. The "Manifest Disregard of Law"..., op.cit, p. 12

68. Article 1520 of the French Code of Civil Procedure (available at: http://www.parisarbitration.com/French-Law-on-Arbitration.pdf; accessed February 15, 2014)

permits judicial review of the statement of reasons to an arbitral award[69].

However, it should be noted that in one of its decisions concerning domestic arbitral awards, the French Court of Cassation (Cour de Cassation) overrode an award rendered by an arbitral tribunal in disregard of the principles of equity that it should have been guided by in accordance with the arbitration agreement executed by the parties[70]. In the event the parties claim that the arbitrators failed to act in compliance with their mandate under the arbitration clause, the scope of judicial review of the arbitral award is limited to determining whether or not the tribunal applied specific contractual provisions. However, it is not examined as part of judicial review whether the arbitral tribunal applied such provisions erroneously, unless erroneous application results in violation of the public policy. Nevertheless, French courts only rarely decide to set aside arbitral awards due to arbitrators' failure to comply with their mandate under an arbitration clause/agreement[71]. In order to effectively invoke violation of the public policy, a party needs to prove that the recognition or enforcement of the award will result in an "actual, gross, and specific" violation[72].

Thanks to the pragmatic and uniform approach they have taken, consisting in exclusive reliance on the grounds stipulated in the CPC, French courts appear to be a secure forum for an arbitral award enforcement. The case law demonstrates that the primary goal is to protect the fundamental virtues and principles of the French public policy, and it is violation of such virtues and principles that provides a major ground for vacating an arbitral award[73].

England

A characteristic feature of the English arbitration law is a very cautious approach to obstacles that might prevent confirmation or recognition of an arbitral award rendered in arbitration proceedings conducted in England[74]. Section 68 of the Arbitration Act of 1996 (the "English Arbitration Act") contains a list of grounds for vacating or refusing the recognition of an arbitral award due to "serious irregularity affecting the tribunal, the proceedings or the award."[75]

While identifying grounds for vacating an arbitral award under English law, one should also take notice of the provision of Section 69 of the English Arbitration Act which provides for appealing to the court on a question of law arising out of an arbitral award. In its decision in Mary Harvey v. Motor Insurer's Bureau[76], the Court held that this provision applies in very specific circumstances only. The Court explained what conditions needed to be satisfied in order for it to give its consent to judicial review of an arbitral award. The Court also clarified that its task was to examine the legal aspects of the award. Evaluation of the facts falls within the exclusive powers of the arbitrators, hence it may not be assessed by the court as part of judicial review[77]. The need for a question of law arising out of an arbitral award to be examined by a common court may occur where the conclusion reached by the arbitral tribunal based on the facts it determined goes beyond the scope of conclusions that the tribunal could draw as a result of proper application of the governing law. It should be noted that in the English system of law it is on extremely rare occasions that an arbitral award is effectively challenged on the ground that arbitrators exceeded the scope of their powers or the public policy was violated[78].

In the case law established so far by English Courts, the decision involving considerations that most closely resemble the question of a legal construct corresponding to the doctrine of manifest disregard of the law was the decision in B. v. A.[79]. The Court ruled that the existence of a ground for vacatur was conditional upon proving that the arbitral tribunal had deliberately omitted to apply the governing law. In this dispute, the arbitration clause executed by the parties provided for judicial review of the statement of reasons offered by the arbitral tribunal. One of the parties claimed that the arbitrators omitted to apply Spanish law which was the law applicable to the dispute. The party invoking the provision of Section 68(2)(b) (referring to the tribunal exceeding its powers) of the English Arbitration Act claimed that this fact resulted in material irregularities in the proceedings conducted by the arbitrators. The Court did not, however, concur with the arguments raised by the party and pointed out that so long as the arbitrators had not deliberately disregarded the law chosen by the parties, an error in its application did not constitute an instance of the arbitral tribunal exceeding its powers. In the decision issued in Hussman (Europe), Ltd. v. Al Ameen Dev. & Trade Co.[80], the High Court vacated the arbitral award in part, concluding that the arbitrator had incorrectly invoked implied assent of the party who had not had any knowledge of the alleged agreement. The arbitral tribunal cannot make its decision based on an implied agreement to which the parties had not expressly and clearly consented.

The above discussion shows that thanks to the possibility to review an arbitral award on its merits, as provided for under the English Arbitration Act, English courts can vacate awards to a similar extent as U.S. courts.

Switzerland

The grounds for vacating an arbitral award in Switzerland are restricted to those set forth in a statute. A party may challenge an arbitral award before the Federal Supreme Court of Switzerland (the "Swiss Supreme Court"), invoking one of the grounds specified in Article 190(2) of the Swiss Private International Law

69. The "Manifest Disregard of Law"..., op.cit., p. 27

70. Cour de cassation, civile, Chambre civile 1, 1 February 2012, Pourvoi N. 11-11084

71. The "Manifest Disregard of Law"..., op.cit., p. 31

72. Cour de cassation, civile, Chambre civile 1, June 4 2008, SAS SNF v Société Cytec Industries BV [2008] JDI 1107

73. The "Manifest Disregard of Law"..., op.cit., p. 31

74. The "Manifest Disregard of Law"..., op.cit., p. 13

75. Section 68(2) of the Arbitration Act of 1996 (available at: http://www.legislation.gov.uk/ukpga/1996/23/contents; accessed February 15, 2014)

76. Mary Harvey v. Motor Insurer's Bureau (QBD Manchester), Claim No. 0MA40077, 21 December 2011)

77. Cannon A., Appeals on a Point of Law in the English Courts: further Restrictions, Kluwer Arbitration Blog, (available at: http://kluwerarbitrationblog.com/blog/2012/01/27/appeals-on-a-point-of-law-in-the-english-courts-further-restrictions/; accessed February 15, 2014)

78. The "Manifest Disregard of Law"..., op.cit., p. 14

79. B. v. A., [2010] EWHC 1626 (Comm)

80. Hussman (Europe), Ltd. b. Al Ameen Dev. & Trade Co., [2000] EWHC 210

Act of 1987 ("PILA")[81]. Acting pursuant to Article 190(2)(d) of the PILA (which provides for vacatur in the event the principle of equal treatment of the parties or the right of a party to be heard was violated), the Swiss Supreme Court set aside an award rendered by an arbitral tribunal based on contractual provisions and statutory regulations that neither party deemed binding and applicable to the legal relation holding between them. What is more, neither party referred to such provisions or regulations in its pleadings or while presenting its case before the tribunal[82]. The Swiss Supreme Court concluded that the tribunal's failure to consider a legal issue referred to by a party in its arguments was also a sufficient ground for vacating the arbitral award[83]. The Swiss Supreme Court set aside an award rendered in international ad hoc arbitration in Geneva on the ground that the arbitral tribunal disregarded the respondent's legal arguments concerning the statute of limitations. The Court held that due to the arbitral tribunal's failure to take into account the respondent's arguments, the respondent was deprived of his right to be heard[84].

Despite the fact that neither Swiss law nor the case law established by Swiss courts contains a construct corresponding to the doctrine of manifest disregard of the law, the above presented cases prove that the effects of illegal disregard of the applicable law may be similar to those triggered by the U.S. doctrine of manifest disregard of the law.

Conclusion

Although some U.S. courts continue to recognize the doctrine of manifest disregard of the law, they have set stringent criteria that need to be satisfied in order for a court to declare a specific arbitrators' conduct to constitute a sufficient ground for vacating an arbitral award. To determine whether an arbitral tribunal indeed manifestly disregarded the law, the court has to consider whether the allegedly disregarded law was clearly and expressly identified, and whether it was indisputably applicable. Concurrently, the court has to establish whether the tribunal was aware of such law and considered it applicable but omitted to apply it altogether when making its final decision. The practice and case law show that parties seeking to have an arbitral award vacated on this ground achieve their intended goal only rarely.

In view of the growing popularity of arbitration in the United States[85], it seems reasonable to stipulate grounds for parties to request judicial review of an award in which the arbitral tribunal – while being aware of a specific applicable law – deliberately disregards the same. Considering the advantages offered by the ultimate abrogation of the manifest disregard doctrine, one can point out that such a move would consolidate a major property of arbitration, i.e. single-instance proceedings and the final nature of the award rendered. Thanks to the foregoing, parties know the specific criteria to be taken into account by the court when considering an application for an order confirming or vacating and arbitral award. To permit parties to invoke manifest disregard of the law is also to enable them to keep delaying the award enforcement through filing illegitimate petitions for award vacating, which also increases the overall cost of arbitration proceedings.

Potentially, manifest disregard of the law can serve as a ground for vacating an award rendered by an international arbitral tribunal and sought to be recognized or enforced under the New York Convention, provided that such award is a non-domestic award. An attempt should be made to identify the courts which continue to recognize the doctrine of manifest disregard of the law. As regards foreign awards, parties should not be anxious about refusal to recognize such an award on a ground which is not set out in the New York Convention. The case law is consistent on this issue and no grounds in addition to those specified in Article V of the New York Convention may serve as a basis for refusal to recognize or enforce a foreign arbitral award in the United States. However, it should be noted that the fact that the issue of the manifest disregard doctrine has not been unambiguously settled might potentially, on account of the uncertainty faced by parties, make the United States a less attractive forum for resolution of international arbitration disputes[86].

Two solutions appear desirable to fully clarify the confusion over further application of the doctrine of manifest disregard of the law. First, a decision by the United States Congress to amend the FAA and incorporate the ground of manifest disregard of the law into the United States Code. This solution would offer the major advantage of having the ground democratically regulated by the legislative body. The other option is for the Supreme Court of the United States to make a final decision that would clearly and exhaustively address the split among federal courts over the validity of the doctrine of manifest disregard of the law and its further application[87].

81. Article 190(2) of the Federal Statute on Private International Law (available at: https://www.swissarbitration.org/sa/download/IPRG_english.pdf; accessed February 15, 2014)

82. X.___ Kft. v. Y. ___AG, 4A_108/2009 (Swiss Federal Tribunal, 2009)

83. X. GmbH v. Y. Sarl A.S.,4A_46/2011 (Swiss Federal Tribunal, 2012), ASA Bulletin 2011 Vol. 29

84. The "Manifest Disregard of Law"..., op.cit., p. 24

85. Chen A., op.cit, p. 1872

86. Ibidem, p. 1905

87. LeRoy M. C., Are Arbitrators Above the Law? The 'Manifest Disregard of the Law' Standard, Boston College Law Review 2011 (137), p. 186

Judicial Review of Arbitral Awards in the United States – the Uncertain Future of "Manifest Disregard of the Law"

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Introduction

"Manifest disregard of the law" is a non-statutory common law ground for a United States federal court to refuse enforcement of an arbitral award. It originated in one sentence of obiter dicta in a decision of the U.S. Supreme Court from 1953. In Wilko v. Swan, the Supreme Court observed that "the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation."[1] A subsequent decision of the U.S. Supreme Court has led to a split among the Circuit Courts of Appeals as to whether "manifest disregard of the law" continues to be a ground upon which courts may set aside an arbitration award.[2]

In the U.S. federal system, the Courts of Appeals are the intermediate appellate courts between the trial-level courts (the District Courts) and the Supreme Court. They are divided into the different geographical regions called "circuits."[3] The decisions of the Courts of Appeals constitute binding federal law within their respective geographic regions unless contradicted by decisions of the U.S. Supreme Court. This structure can lead to the result that the same federal law, such as the Federal Arbitration Act ("FAA"), will be applied differently by the federal courts in California than it would be by the federal courts in Virginia.

For example, after the Supreme Court's decision in Hall Street, whether an arbitral award may be set aside (or refused enforcement) by a U.S. court on the grounds that the arbitrator's decision was in manifest disregard of the law will depend on the seat of the arbitration (or upon where enforcement or annulment of the arbitral award is sought). The United States Supreme Court has recently been asked again to weigh in on the validity of "manifest disregard of the law" and thereby resolve an issue of tremendous significance to arbitration lawyers practicing in the United States.[4] While the Court declined the petition for a writ of certiorari, this latest development presents an interesting opportunity to discuss the state of the law on that point and further illustrates the uncertainty that attaches with the doctrine of manifest disregard.

Accordingly, this article will briefly review the standard for setting aside an arbitration award in the United States. It will then describe the facts of Dewan v. Walia, a case in which the United States Court of Appeals for the Fourth Circuit recently applied the doctrine of "manifest disregard of the law" to set aside an arbitration award subject to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and which the U.S. Supreme Court has been asked to review. This paper will survey the existing split between the various federal Courts of Appeals over the validity of this doctrine and will finally consider the possible impact of the split on arbitration practice within the United States.

Setting Aside Arbitral Awards under the FAA

By enacting the FAA in 1925, the United States Congress sought to express a "liberal federal policy favoring arbitration agreements" and as a corollary "limited judicial review of the resulting arbitral awards."[5] Manifest disregard of the law is not listed as a ground for vacatur under the FAA. The federal statute is clear. Section 10 of the FAA provides that courts may only set aside arbitral awards on one of four grounds:

- where the award was procured by corruption, fraud, or undue means;
- where there was evident partiality or corruption in the arbitrators;
- where the arbitrators were guilty of misconduct, or refused to hear evidence, or misbehavior by which the rights of any party have been prejudiced; or
- where the arbitrators exceeded their powers.

See 9 U.S.C. § 10.

The familiar grounds for vacating an award under the New York Convention are codified

1. 346 U.S. 427, 436-37 (emphasis supplied)(rev'd on other grounds).

2. Hall Street v. Mattel, 552 U.S. 576.

3. There are currently thirteen United States Courts of Appeals.

4. In Hall Street v. Mattel, the United States Supreme Court expressly declined to rule on the issue of whether manifest disregard of the law was an appropriate basis for setting aside an arbitral award. Since then, the Supreme Court has declined nearly a dozen petitions to review the question.

5. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); see Lindsay Biesterfeld, Courts Have the Final Say: Does the Doctrine of Manifest Disregard Promote Lawful Arbitral Awards or Disguise Unlawful Judicial Review, 12(2) Journal of Dispute Resolution 627, 631 (2006).

in Chapter Two in the FAA.[6] See 9 U.S.C. § 201. Chapter Two of the FAA applies to arbitration awards subject to the New York Convention. Chapter Two prevails over any conflicting provisions of Chapter One. See 9 U.S.C. § 208.

Dewan v. Walia[7]

The case of Dewan v. Walia is an alarming illustration of the potentially broad scope of the doctrine of manifest disregard of the law. While the facts of this case are rather straightforward, the holding in Dewan illustrates how the doctrine effectively provides for non-statutory appellate review of arbitral awards.

Mr. Walia was a Canadian national who worked as an accountant for a company owned by Mr. Dewan in the state of Maryland in the United States. Mr. Dewan's and Mr. Walia's relationship soured after several years. Mr. Dewan eventually terminated Mr. Walia's employment. As part of that termination, Mr. Dewan had Mr. Walia sign a document in which Mr. Walia agreed to release and discharge all claims against Mr. Dewan and his company. Mr. Walia further promised never to file a lawsuit or assist in or commence any action relating to his employment. In exchange, Mr. Dewan paid Mr. Walia $7,000. This "release and discharge" included an arbitration clause.

Less than three months after Mr. Walia signed the release, Mr. Dewan initiated arbitration against him. Mr. Dewan claimed that Mr. Walia had breached an employment agreement by competing with him and soliciting his clients in violation of their agreement. Mr. Walia asserted several counter-claims arising out of the employment relationship.

On July 11, 2011, after four days of hearings, the arbitrator issued an interim award that made certain factual findings. Among other things, she found that:

(1) Mr. Dewan had refused to produce in the arbitration a copy of a revised employment contract.

(2) Mr. Dewan had failed to properly terminate Mr. Walia's employment, and therefore the employment relationship continued;

(3) Mr. Dewan's claims were baseless;

(4) Mr. Walia voluntarily signed the release, accepted payment of $7,000, and was bound by it to the extent that it barred "all tort and contractual claims in federal or state courts as well as attorney's fees";

(5) The continuing "employment relationship" allowed for an award of compensatory damages stretching back to 2003 despite the bar of the statute of limitations;

(6) Punitive damages were justified because Mr. Walia had to defend himself against Mr. Dewan's baseless claims; and

(7) Evidence (specifically tax returns) that Mr. Dewan provided in the arbitration were significantly different from those that Mr. Dewan submitted to the U.S. Department of Labor.

On November 18, 2011, the arbitrator issued a final award. The arbitrator found that Mr. Dewan was party to fraud and awarded Mr. Walia $387,108.20 in compensatory damages and $70,000 in punitive damages. She found that Mr. Dewan and his company were jointly and severally liable for the total damages of $457,108.20. The arbitrator awarded these damages based on an interpretation of the release that precluded Mr. Walia from bringing claims in court but that did not preclude him from brining those claims in arbitration.

Mr. Walia sought to affirm the award in the U.S. District Court for the District of Maryland. Mr. Dewan asked the court to vacate the award. The U.S. District Court denied Mr. Dewan's motion to vacate. Mr. Dewan appealed that decision to the U.S. Court of Appeals for the Fourth Circuit. The Court of Appeals first acknowledged that "[j]udicial review of an arbitration award in federal court is substantially circumscribed. In fact, the scope of judicial review for an arbitrator's decision is among the narrowest at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all[.]"[8] However, a majority of the Court went on to observe that:

"The permissible common law grounds for vacating such an award 'include those circumstances where an award fails to draw its essence from the contract, or the award evidences a manifest disregard of the law. Under our precedent, a manifest disregard of the law is established only where the arbitrator understands and correctly states the law, but proceeds to disregard the same. Merely misinterpreting contract language does not constitute a manifest disregard of the law. An arbitrator may not, however, disregard or modify unambiguous contract provisions. Moreover, an award fails to draw its essence from the agreement if an arbitrator has 'based his award on his own personal notions of right and wrong. In such circumstances, a federal court has no choice but to refuse enforcement of the award."[9]

The Court of Appeals then found that "neither linguistic gymnastics, nor a selective reading of Maryland contract law, could support her

6. 9 U.S.C. § 201 reproduces the text of the New York Convention. Article V of the New York Convention provides: 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
(e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

7. Dewan v. Walia, 2013 WL 5781207 (4th Cir. 2013).

8. Dewan v. Walia, F. App'x , 2013 WL 5781207 at *5 (internal citations and quotations omitted).

9. Id. (internal citations and quotations omitted).

conclusion that the Release was enforceable but that Walia's claims were arbitrable anyway."[10] As a result, the Court vacated the arbitration award. The dissent responded that:

"We have consistently emphasized that, in reviewing an arbitration award, a district or appellate court is limited to determine whether the arbitrators did the job they were told to do – not whether they did it well, or correctly, or reasonably, but simply whether they did it. Thus, in reviewing an arbitrator's contract interpretation, a court must uphold it so long as it draws its essence from the agreement. … In contrast to the arbitrator, the majority interprets the agreement as releasing all claims regardless of forum. This interpretation, too, is reasonable and arguably may be the more logical one. … But it is not the only one. The arbitrator thus did not disregard or modify unambiguous contract provisions, and vacatur on that basis is thus unjustified. … Because the arbitrator unquestionably construed the release agreement at issue, we are not at liberty to substitute our preferred interpretation for the arbitrator's."[11]

On December 13, 2013, Mr. Walia filed a petition for a writ of certiorari with the United States Supreme Court asking that the Supreme Court review and overturn the Court of Appeal's decision.12 Mr. Walia's petition was supported by a group of professors and practitioners of arbitration law, who filed a brief amici curiae on June 16 urging the Court to grant review.

10. Dewan at *7.

11. Id. at *8-9 (internal citations and quotations omitted).

12. Walia v. Dewan, Case No. 12-2175. A petition for a writ of certiorari is a request that the United States Supreme Court review a decision of one of the Circuit Courts of Appeals. The Supreme Court typically grants only 1% of such petitions.

The parties exchanged briefs, and on April 7, 2014, the Supreme Court denied the petition. However, no conclusions about the views of the Court can be drawn from the Supreme Court's denial of the petition. The Supreme Court grants less than one-percent of such petition and it never provides an explanation of its reasoning. The Court's refusal to review Walia's claim does not mean that the Court may not, in the future decide to weigh in on the matter. Thus, the issue whether under federal law an arbitral award may be vacated for manifest disregard of the law stands until the Supreme Court deems it appropriate to rule on the matter.

Hall Street and the Circuit Split over "Manifest Disregard of the Law"

Mr. Walia and the amici argued that the Court of Appeal's decision directly conflicts with the U.S. Supreme Court's 2008 decision in Hall Street v. Mattel.[13] According to the amici, Hall Street made clear that sections 10 and 11 of the FAA "provide the FAA's exclusive grounds for expedited vacatur and modification" of an arbitral award.[14]

In Hall Street v. Mattel, Hall Street had brought an action in federal court against Mattel, its tenant, in a dispute over a property lease. Hall Street and Mattel subsequently agreed to arbitrate their dispute. An unusual feature of this case was that the parties' arbitration agreement stipulated that the District Court could override the arbitrator's decision if "the arbitrator's conclusions of law are erroneous." Importantly, that provision of the parties' arbitration agreement in Hall Street bestowed upon the federal courts a much broader role in supervising the arbitration than the one granted in the FAA. As seen above, the FAA specifically lists only a narrow set of circumstances under which courts can override an arbitration award.

13. 552 U.S. 576.

14. Walia v. Dewan, Case No. 12-2175, Brief of Professors and Practitioners of Arbitration Law as Amici Curiae in Support of .Petition for a Writ of Certiorari, at pp. 6-10.

The arbitrator rendered an award for Mattel. Hall Street sought review from the District Court, which found that the arbitrator's decision contained legally erroneous conclusions. The U.S. Court of Appeals for the Ninth Circuit overruled the lower court, although it recognized that the arbitrators may have made errors. The Ninth Circuit considered the FAA's list of grounds for vacating an award to be an exclusive list and found that, even if the arbitrator did make legal errors, the role of court is not to review the soundness of the arbitrator's decision. Because the original arbitration agreement expanded the scope of judicial review of the arbitration, the agreement could not be enforced.

Hall Street then petitioned the U.S. Supreme Court to review the decision. The question presented to the United States Supreme Court in Hall Street was whether parties to an arbitration agreement could supplement the grounds listed in Section 10 of the FAA by contractually agreeing for more expansive judicial review in their arbitration agreement.[15] To support its argument, Hall Street relied on the existence of the "manifest disregard of the law" doctrine.[16] Hall Street argued that the FAA does not prohibit parties from contractually expanding the scope of judicial review of an arbitration award based on the fact that the federal courts have exercised their common law powers to expand the grounds for review listed in Section 10 of the FAA.

15. 552 U.S. at 583.

16. Id. at 584-585.

In a 6-3 opinion the Court dismissed that argument and affirmed the Ninth Circuit ruling.[17] The Court noted that the words "must" and "unless" in the FAA evidence that the provisions of the statute were meant to be mandatory and that therefore could not be modified by the parties. Importantly, the Supreme Court in Hall Street specifically noted that it remained unclear whether manifest disregard of the law was intended to "name a new ground for review" or "as some courts have thought… may have been shorthand for [FAA] 10(a)(3) or 10(a)(4)."[18] For the Supreme Court, Sections 10 and 11 of the FAA "provide the FAA's exclusive grounds for expedited vacatur and modification" of arbitral awards.[19]

The Supreme Court's decision in Hall Street v. Mattel resulted in what U.S. lawyers refer to as a "circuit split" among the federal Courts of Appeals regarding the standard of manifest disregard of the law.[20]

The Good, The Bad, and The Ugly

In recent years, the Courts of Appeals have reached divergent conclusions about whether

17. Id. at 585.

18. Id.

19. Id.

20. See, e.g., Hiro N. Aragaki, The Mess of Manifest Disregard, The Yale Law Journal Online, 29 September 2009; see also., Chen, Note, The Doctrine of Manifest Disregard of the Law after Hall Street: Implications for Judicial Review of International Arbitrations in U.S. Courts, 32(6) Fordham International Law Journal 1872 (2008).

manifest disregard of the law survived the Supreme Court's decision in Hall Street. The Fifth, Eighth and Eleventh Circuits have held that manifest disregard of the law is no longer a basis to vacate an award. The Fifth Circuit Court of Appeals held, in 2009, that "to the extent that manifest disregard of the law constitutes a non-statutory ground for vacatur, it is no longer a basis for vacating awards under the FAA"[21] Similarly, the Eleventh Circuit Court of Appeals in Frazier v. Citi ruled, in 2010, that "judicially-created bases for vacatur are no longer valid in light of Hall Street."[22] In Air Line Pilots v. Trans States Airlines, for instance, in 2011, the Eighth Circuit Court of Appeals found that Hall Street "eliminated judicially created vacatur standards under the FAA, including manifest disregard for the law".[23] The Seventh Circuit has taken a somewhat different tack, but has effectively reached the same conclusion by holding that, if the doctrine exists at all, it is subsumed under Section 10(a)(4) of the FAA, which permits a court to set aside an award where an arbitrator has exceeded his or her powers.[24]

21. Citigroup Global Mkts., Inc. v. Bacon, 562 F.3d 349, 355 (5th Cir. 2009).

22. Frazier v. CitiFinancial Corp., 604 F.3d 1313, 1324 (11th Cir. 2010).

23. Air Line Pilots Ass'n Int'l v. Trans States Airlines, LLC, 638 F.3d 572, 578 (8th Cir. 2011).

24. For some, the Seventh Circuit has adopted its own "idiosyncratic approach." See Christopher R. Drahozal, Codifying Manifest Disregard, 8 Nevada Law Journal 234, 235 (2008). Judge Richard A. Posner, who sits on the Court of Appeals for that Circuit has himself expressed some skepticism about the doctrine, noting that "[t]he grounds for setting aside arbitration awards are exclusively stated in the statute. Now that Wilko is history, there is no reason to continue to echo its gratuitous attempt at nonstatutory supplementation" Baravati v. Josephthal, Lyon & Ross., 28 F.3d 704 (7th Cir. 1994).

The Fourth and Sixth Circuits make up the other side of the "split."[25] For these courts, manifest disregard of the law remains an independent ground for vacatur, even after the Supreme Court's decision in Hall Street. For instance, the Sixth Circuit described manifest disregard of the law as a "separate judicially created basis."[26] Finally, some circuits, including the Second and Ninth, continue to recognize the doctrine, although they recognize it as a "judicial gloss" on the "exceeding powers" provision in Section 10(a)(4) of the FAA.[27] The First, Third, and Tenth Circuits have declined to take a position on the issue.[28]

Mr. Walia and the amici argued that the Fourth Circuit's decision "deepens the existing circuit divide on the proper bases for vacatur"[29] and that the case presents "a highly opportune moment for this Court to clarify whether manifest disregard is a proper basis for vacatur of arbitral awards rendered in the United States and, if so, how that doctrine should be understood."[30] In support of the petition, the amici argue that the existence of the doctrine creates (i) "uncertainty and unpredictability" in arbitration, (ii) that the Fourth Circuit's application of the doctrine violates existing Supreme Court precedent, and that (iii) the current state of the law on manifest disregard "has negative implications for arbitration in the United States."

25. See Wachovia Sec., LLC v. Brand, 671 F.3d 472, 480 (4th Cir. 2012); Wells Fargo Advisors, LLC v. Watts, Nos. 12-1464, 12-1484, 2013 WL 5433635 (4th Cir. (N.C.) 2013); Coffee Beanery, Ltd. v. WW, L.L.C., 300 F. App'x 415, 418-19 (6th Cir. 2008).

26. Ozormoor v. TMobile USA, Inc., 459 F. App'x 502, 505 (6th Cir. 2012).

27. See, e.g,. T.CoMetals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 339-40 (2d Cir. 2010); Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987 (9th Cir. 2003). See also George Watts & Son v. Tiffany & Co., 248 F.3d 577 (7th Cir. Wis. 2001). Professor Smit explained that "[i]n subsequent lower court decisions, the courts have stressed that disregard implies an element of deliberateness and have required that the arbitrators knowingly and purposely disregarded what they knew the law to be. The circumstance that the errors of law had to be manifest or obvious, to a certain extent, facilitated the requisite finding of deliberateness." Hans Smit, Manifest Disregard of the Law in the New York Supreme Court, Appellate Division, First Department, 15 American Review of International Arbitration 111,121 (2004). Others have argued that the Supreme Court should affirm the doctrine because it "does not erode the finality and judicial review must be allowed to correct an arbitrator's intentional flouting of the law" Michael H. LeRoy, Are Arbitrators Above the Law? The "Manifest Disregard of the Law Standard", 52(1) Boston College Law Review 137 (2011).

28. See, e.g., Kashner Davidson Sec. Corp. v. Mscisz, 601 F.3d 19, 22 (1st Cir. 2010) (stating that the First Circuit "ha[s] not squarely determined whether our manifest disregard case law can be reconciled with Hall Street.").

29. Brief amici curiae of Professors and Practitioners of Arbitration Law in Support of Petition for a Writ of Certiorari, p. 1, Walia v. Dewan, Case No. 12-2175.

30. Id.

Difference Standards for Domestic and International Awards?

It is curious that the amici did not choose to make an alternative argument that the doctrine of "manifest disregard" applied only to domestic arbitration awards but not to international awards subject to the New York Convention. The award in Dewan v. Walia was rendered pursuant to an arbitration agreement between a United States citizen and a Canadian citizen. As a result, it is not considered a domestic award under the FAA and is subject to enforcement under the New York Convention.[31] Courts in several circuits have held that "manifest disregard" may not be applied to awards subject to the New York Convention.[32] As the Sixth Circuit explained:

"9 U.S.C. § 207 explicitly requires that a federal court 'shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.' In turn, Article V of the Convention lists the exclusive grounds justifying refusal to recognize an arbitral award. Those grounds…do not include miscalculations of fact or manifest disregard of the law."[33]

The reason for the amici's silence on this point may be that some courts have made an even finer distinction by differentiating between Convention awards rendered in the United States and Convention awards rendered abroad. According to these courts, awards subject to the New York Convention may be set aside on the basis of "manifest disregard" if the award was rendered in the United States, but not if the award was rendered abroad.[34] Those courts reason that "because the Convention allows the district court to refuse

31 The New York Convention applies to "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." New York Convention, Art. I(1). The FAA provides that an "agreement or award arising out of such a [commercial] relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." 9 U.S.C. § 202.

32 Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15 (2d Cir. N.Y. 1997); M & C Corp. v. Erwin Behr GmbH & Co., KG, 87 F.3d 844 (6th Cir. Mich. 1996); International Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Industrial y Comercial, 745 F. Supp. 172, 181-82 (S.D.N.Y. 1990) (refusing to apply a "manifest disregard of law" standard on a motion to vacate a foreign arbitral award); Brandeis Intsel Ltd. v. Calabrian Chems. Corp., 656 F. Supp. 160, 167 (S.D.N.Y. 1987) ("In my view, the 'manifest disregard' defense is not available under Article V of the Convention or otherwise to a party…seeking to vacate an award of foreign arbitrators based upon foreign law.").

33 M & C Corp. v. Erwin Behr GmbH & Co., KG, 87 F.3d 844, 851 (6th Cir. Mich. 1996).

34 Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15 (2d Cir. N.Y. 1997)

to enforce an award that has been vacated by a competent authority in the country where the award was rendered, the court may apply the FAA standards [including "manifest disregard"] to vacate a nondomestic award rendered in the United States."[35] In Dewan v. Walia, the award was rendered in the United States. Therefore, the applicability of the New York Convention may not be enough to prevent a federal court from applying the "manifest disregard" standard to its review of the award. If the Supreme Court grants certiorari, it remains to be seen whether Mr. Walia and the amici will make the alternative argument that "manifest disregard" should not apply to awards subject to the New York Convention regardless of where an award is rendered.

The Future of Manifest Disregard

The foregoing discussion has been intended to make clear the current need for consistency in the law. A decade ago, Professor Smit had already noted that "[t]he mere existence of this ground has proved a significant lure to losers in arbitration... Added to this has been the judicial reluctance to accept the loss of adjudicatory powers to arbitrators... [A]lmost surreptitiously, this power has, on occasion, been expanded... to manifest disregard of the terms of the agreement, which tends to expand judicial review of virtually the entire arbitral work product... By this process, the very foundations of the institution of arbitration are eaten away.[36]

As things stand now, a party to an arbitration seated in the United States (or seeking to enforce or annul an arbitration award in the United States) needs to be cognizant of the fact that the federal courts in the different judicial circuits may apply different levels of review to an arbitration award. In those circuits that continue to recognize "manifest disregard" as a common law basis for reviewing an award, the federal courts may decide, as the Fourth Circuit did in Dewan v. Walia, to second guess the arbitrator's interpretation of the contract.

The authors regret the U.S. Supreme Court's refusal to grant Mr. Walia's petition for certiorari but remain hopeful that the Court will have another opportunity, sooner rather than later, to bring the needed clarity to this area of the law. While it is impossible to speculate about the Supreme Court's reasons for denying the petition, it is useful to remember that arbitration-related cases represent only a small portion of the disputes in United States courts, and the Supreme Court may have other priorities for the upcoming term.

35. Id. at 21.

36. Smit, supra note 27, at 122.

Setting aside and refusing the recognition and enforcement of the awards in Italy: grounds and procedural issues

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Introduction on italian arbitration law

The main provisions regarding arbitration are set forth in the Italian Code of Civil Procedure (hereinafter the "c.p.c.") from art 806 to art. 840, as amended by the 2006 Italian arbitration law reform[1].

Considering the focus of this article, in this general overview we will introduce some provisions which reflect in two main groups of grounds for setting aside the awards i.e. possible scope and formal requirements of the arbitration agreement and the requirements of the award. We will end the paragraph with a short reference to an Italian peculiarity, the so called "arbitrato irrituale" which might create some confusion in understanding the Italian arbitration system, since it is an arbitration proceedings which ends with a "contractual" award with its own grounds for being set aside.

Arbitration – as an alternative to state courts – is based on the choice made by the parties trough the arbitration agreement and some main grounds for setting aside or refusing the recognition of an award are related to pathological arbitration clauses and the following lack of jurisdiction of the arbitral tribunal.

Generally speaking, since arbitration agreement is a contract with jurisdictional effects (i.e. the parties decide that they do not want state jurisdiction) an arbitration agreement can be non-effective because: (i) it refers to disputes which are not "arbitrable" under the applicable law; (ii) it does not meet the formal requirements, if any, provided by the law; (iii) it does not express the choice of the parties clearly enough.

Italian Code of Civil Procedure after the 2006 arbitration law reform addresses to these three topics in its section referring to arbitration agreements from art 806 c.p.c. to art 808-quinquies c.p.c.

1. Legislative Decree n. 40 of February 2nd, 2006.

First, as to the scope of the arbitration agreements, article 806 c.p.c. outlines the disputes that the parties can submit to arbitration providing for a general freedom to submit to arbitration any dispute arising from, or in connection with, a contractual relationship between the parties with the exception of the disputes prohibited by the law or related to rights which the parties cannot dispose of (e.g., personal status, personality rights).

Article 806, 2nd paragraph c.p.c. contains further limitations to the general arbitrability of disputes and provides that disputes on agency or employment agreements may be submitted to arbitration only if the relevant applicable law or labor collective agreement expressly authorizes the parties to do so. In any case, even if authorized by the law or by said collective agreements, the parties shall always retain a right to start a judicial action that cannot be waived.

Art 808-bis c.p.c. provides that the parties can refer to arbitration also disputes arising out of their non-contractual relationships

Secondly as to the formal requirements of arbitration agreements, art 807 c.p.c. provides that the arbitration agreements must be in writing (e.g., it can be proposed and accepted by fax or by certified e-mail pursuant to the applicable provisions regarding electronic transmission of documents).

Thirdly, as to the interpretation of the arbitration agreements, the 2006 Italian arbitration law reform introduced with art 808-quinqies c.p.c. the rule in dubio pro arbitrato which means that, if there is any doubt with regards to the scope of the arbitration agreement, the arbitration agreement must be interpreted as if all disputes, arising out of a contractual or non-contractual relationship between the parties, fall under arbitral jurisdiction.

The second group of grounds which we would like to introduce in this paragraph relates to the pathological award.

Generally speaking, under Italian law, an award can be pathological: (i) because it does not contain some elements provided by the law; (ii) because it has a defective reasoning or operative part; (iii) because it was issued after the time limit was expired or after another award (or state court decision) issued between the same parties with regards to the same dispute has become final in the sense that it can no longer be appealed (res iudicata rule).

As to the meaning of a pathological reasoning and the pathological operative part, we make reference to the following paragraph on setting aside the awards.

As to the requirements that an award must have, article 823 c.p.c. provides that the award must be in writing and that it must contain the elements listed in the provision itself.

Not all of these elements are relevant for setting aside the award. The award can be set aside only if the reasoning, the operative rule or the signatures of the majority of the arbitrators are missing. The lack of other elements provided by article 823 c.p.c. does not lead to the setting aside of the award.

As to the time limit for issuing an award, article 820 c.p.c. requires that the award is issued (i.e. signed at least by the majority of the arbitrators) within 240 days from the acceptance by the arbitrators of their appointment. The parties can provide for a different term in the arbitration agreement and the expiration of the term can be postponed if certain events listed in the same article 820 c.p.c. occur.

An award rendered after the expiration of the time-limit can be set aside according to article 829 c.p.c. provided that the party willing to set aside the award notified the counterparty(s) and the arbitrators of the expiration of the time limit before the arbitrators signed the operative part of the award (article 821 c.p.c.). Therefore, a party cannot wait to see the outcome of the award and then – if things go wrong – request the setting aside of the award.

As anticipated, we will conclude this introduction with a short reference to what we might call a peculiarity of the Italian legal system i.e. the arbitrato irrituale as the opposite of "normal" arbitration i.e. arbitrato rituale.

The 2006 reform (i.e. legislative decree of February, 2nd 2006 n. 40) contains under article 808-ter c.p.c. an express provision for the "arbitrato irrituale".

The award issued at the end of "normal" arbitration proceedings, once duly undersigned by the arbitrators produces effects similar to a judgment issued by a state judicial authority according to article 824-bis c.p.c.[2].

Art 808-ter c.p.c. expressly provides that article 824-bis c.p.c. does not apply. Excluding the applicability of article 824-bis c.p.c. to the award implies that the award will not have judicial authority but only contractual effects between the parties[3].

Considering the wording of article 808-ter c.p.c. and the circumstance that no other references to arbitrato irrituale are contained in the provisions on arbitration of the Italian code of civil procedure, it is debated whether other provisions related to "normal" arbitration can be applied to arbitrato irrituale also.

One set of provisions which is not applicable to arbitrato irrituale is the one related to the setting aside of the awards since art 808-ter c.p.c. provides for specifics grounds for declaring null and void the awards issued at the end of "arbitrato irrituale" (i.e. which is similar to the setting aside of the "normal" awards) and makes express reference to the ordinary commercial proceedings applicable to disputes on commercial contracts (i.e. ordinary proceedings before the civil courts).

Having clarified the above on arbitrato irrituale, in the following paragraph we will outline

2. In order to make an award enforceable, it is necessary to request the court of the seat of the arbitration to declare such enforceability in a specific decree. The opposing party may challenge the decree providing for the enforceability within 30 days and in this case, an ordinary proceedings on the enforceability of the award will start (art. 825 c.p.c.).

3. Due to this peculiarity Courts in Germany (see German Bundesgerichtsh, November 8th 1981, Compagnia Italian Assicurazioni vs Schwarzmeer und Ostee Versicherungs-Aktiengesellschaft) and elsewhere have refused to recognize and enforce decisions rendered with the "arbitrato irrituale" under the New York Convention. However, the Italian Supreme Court declared that the awards issued at the end of "arbitrato irrituale" can be recognized and enforced under the New York Convention (Corte di Cassazione, Junauary 15th 1992, n. 405). Due to these uncertainties the "arbitrato irrituale" does not seems an attractive dispute resolution mechanism for international commercial disputes, see F. Emanuele, M. Molfa, Selected issues in international arbitration: the Italian perspective, Thomson Reuters, London, 2014, p. 68 e ss.

the system for setting aside the awards rendered at the end of "normal" arbitration proceedings (i.e. arbitrato rituale).

Setting aside the awards under article 829 c.p.c.

Italian arbitration law contains a system which limits the grounds for setting aside the awards to the ones expressly provided by the law.

Those grounds are listed in article 829 c.p.c. and are generally related to procedural issues such as invalidity of the arbitration agreement, incorrect appointment of the arbitrators, lack of certain formal requirements of the award, breach of due process right, expiration of the time-limit for rendering the award.

It must be noted that after the 2006 arbitration law reform, if there is not a specific provision in the arbitration agreement, it is not possible to set aside the award for mistakes in establishing the facts of the dispute or in the application of the law on the merits of the case, except for the case of a decision against public policy (public order).

Article 827 c.p.c. provides that only a final award can be challenged for the grounds listed in art 829[4] also partial awards can be set aside provided that they finally decide on some claims on the merits (i.e. provisional or interim awards cannot be set aside) and they do not decide preliminary issues only (e.g. on jurisdiction issues). In this second case the partial award can be challenged only with the final award.

The Court of Appeal where the seat of the arbitration was located has jurisdiction to decide on the setting aside of the award[5]. The request for setting aside the award has to be filed within 90 days from the notification of the award and, in any case, it is not possible to challenge the award after one year from the signature of the award by the arbitrators[6].

The grounds listed in article 829, first paragraph, c.p.c. operate notwithstanding any waiver made by the parties.

The grounds are: (1) invalidity of the arbitration agreement (2) breach of the rules agreed upon by the parties on the appointment of the tribunal (3) award rendered by arbitrators not having the requirements provided by the law (4) award deciding on issues not falling within the scope of the arbitration agreement (5) award not meeting the main requirements provided for in article 823 c.p.c. (i.e. reasoning, operative part, signature of the arbitrators)[7] (6) award rendered after the expiration of the time-limit provided for by the law or by the parties (7) breach of the procedural rules agreed upon by the parties under the express provision of nullity of the entire proceedings (8) award contrary to previous decisions having a res judicata status (9) proceedings violating the due process right (10) award not deciding on the merit even if the merit was to be decided by the arbitrators; (11) award containing contradictory provisions; (12) award not deciding on all the claims and objections made by the parties according to the arbitration agreement.

For the majority of these grounds, if the award is set aside, the Court of Appeal will directly decide on the merit of the case unless the parties have agreed otherwise (article 830 c.p.c.).

These grounds are the ones listed in article 829 n. 5, 6, 7, 8, 9, 11, 12 c.p.c. and are: 5) award not meeting the main requirements provided for in art 823 c.p.c. (i.e. reasoning, operative part, signature of the arbitrators); 6) award rendered after the expiration of the time-limit provided for by the law or by the parties; 7) breach of the procedural rules agreed upon by the parties under the express provision of nullity of the entire proceedings; 8) award contrary to previous decisions having a res judicata status; 9) proceedings violating the due process right; 11) award contains contradictory provisions; 12) award not deciding on all the claims and objections made by the parties according to the arbitration agreement.

In other cases, such as those related to validity of the arbitration agreement or its scope, the Court of Appeal will set aside the award and the parties will be free to start (or re-start, in case of a stay) the proceedings before national courts or before the arbitrators depending on the case.

We deem useful to end this paragraph with a clarification on the difference between the ground of lack of reasoning and operative part in the award (i.e. art 829 n. 5) and the further ground based on inconsistent and contradictory provisions of the award (i.e. 829 n. 11 c.p.c.).

According to article 829 n. 5 c.p.c. the award can be set aside if the reasoning or the operative part is entirely missing; article 829 n. 11 c.p.c. provides that an award can be set aside if it contains contradictory provisions.

A recent case law clarified that reference to inconsistent provisions of the award, contained in art 829 n. 11 c.p.c. has to be limited to the operative part of the award and not the entire reasoning. Therefore, the test for finding if a defective reasoning can be a valid ground for setting aside the award is different from the test referring to a pathological operative part.

The Court of Appeal of Milan issued on April 29, 2009 (C.G. Impianti SpA v. B.M.A.A.B. and Sons International Contracting Company WLL) a decision on the recognition and enforcement of foreign arbitral awards (see paragraph 3, below) which gave to the court the opportunity to clarify the abovementioned issue.

Even if the decision was issued in proceedings for the recognition and enforcement of a foreign arbitral award (see following paragraph 3) and not for setting aside the award, the Court as obiter dictum, clarifies the meaning of contradictory dispositions under article 829, paragraph 1, n. 11 c.p.c..

4. Art 827 c.p.c. makes reference to other two possibilities to challenge an award under Italian law named "revocazione" and "opposizione di terzo" which are very specific (and quite unusual) and will not be addressed in this article.

5. C. Santini, La revoca del provvedimento che decide sull'inibitoria dell'efficacia esecutiva del lodo arbitrale rituale impugnato per nullità, in Rivista dell'arbitrato, 2012 fasc. 3, pp. 603 – 613.

6. P. Licci, Brevi note sulla decorrenza del termine per l'impugnazione del lodo, in Rivista dell'arbitrato, 2012 fasc. 3, pp. 616 - 620

7. G. Ludovici, Il lodo (rituale) inesistente nell'ordinamento processual-civilistico italiano: Una figura sospesa tra mito e realtà normativa, in Rivista dell'arbitrato, 2012, fasc. 3, pp. 578 - 597;

The parties are an Italian Corporation, C.G. impianti S.p.A. (hereinafter "C.G.") and a Kuwaiti corporation B.M.A.A.B. and Son International Contracting Company W.L.L. (hereinafter "B.M.A.A.B.").

C.G. tried to oppose to the enforcement in Italy of the award rendered in an arbitration having its seat in Kuwait based on the fact that the reasoning of the arbitrators contained contradictory dispositions.

The Court of Appeal, as an obiter dictum, clarifies that the relevant inconsistencies are only the ones contained in the part of the awards granting or rejecting the remedies requested by the parties (i.e. the operative part). Inconsistencies in the reasoning are not relevant under art 829, paragraph 1, n. 11.

The decision further explains that the "inconsistencies of the reasoning" are not contemplated by article 829 c.p.c. as one of the grounds for setting aside the award. Inconsistencies of the reasoning can be a valid ground for setting aside the award only when they cause the absolute impossibility to identify the reasoning used by the arbitrators and therefore the reasoning is completely missing.

As mentioned above, after 2006 arbitration law reform, the award cannot be set aside for mistakes of the arbitrators in evaluating the facts, the evidence and in applying the law unless this ground is expressly provided by the parties in the arbitration agreement. Without an express provision by the parties this ground (errores in iudicando i.e. mistakes done by arbitrators in considering the factual and legal background of the merit of the case) is not applicable.

Therefore, after the 2006 arbitration law reform, mistakes and inconsistencies of reasoning can be a valid ground for setting aside the award only if due to such mistakes and inconsistencies is impossible to understand how (the ratio) arbitrators reached and grounded their final decisions.

Recognition and enforcement of foregin awards under art. 839 and 840 c.p.c.

Italy is a signatory of several international conventions such as the 1961 Geneva Convention on international commercial arbitrations and the 1958 New York Convention on the recognition and enforcement of foreign arbitral decisions.

In particular, the 1958 New York Convention was adopted with the law 19 January 1968 n. 62 and from that moment Italy was bound by art III of the 1958 New York Convention not to impose "substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.".

Now the recognition and enforcement of a foreign arbitral award in Italy is subject to the proceedings set forth by articles 839 e 840 c.p.c. which reflect the 1958 New York Convention and were introduced in the code of civil procedure by the law 5th of January 1994 n. 25 and remained unchanged after the 2006 arbitration law reform.

Furthermore, as a general rule, it should be noted that in case of inconsistencies between the provisions of the international treaties ratified by Italy and the internal provisions of the law the former should prevail. Therefore, it is possible that in the future, articles 839 and 840 c.p.c could be disregarded (in favour of a direct application of international treaties provisions) or interpreted in a way closer to the international treaties provisions.

As for the procedure, articles 839 and 840 c.p.c. provide for a two steps proceedings, the first phase is a one-party proceedings (i.e. it ends inaudita altera parte, without the participation of the party against whom the recognition and enforcement is sought).

The first phase will end with a decree granting or denying the recognition and enforcement. Such decree can be challenged in the second phase of the proceedings which consists in ordinary civil proceedings before the same Court of Appeal having jurisdiction over the first phase. This second phase will be with the participation of the petitioner and of the party against whom the recognition and enforcement is sought (e.g. a "contraddittorio pieno").

For the first phase, the President of the Court of Appeal where the party, against whom recognition and enforcement is sought, is domiciled has jurisdiction. Should this party be domiciled abroad the recognition and enforcement can be requested before at the President of Court of Appeal in Rome. As stated above the second phase will be before the same Court of Appeal.

Article 839 c.p.c. provides that the party requesting the recognition of a foreign award shall file, with the request for recognition, also: (i) the original award or a certified copy thereof, (ii) the original arbitration agreement or an equivalent document or a certified copy. If the above mentioned documents are not in Italian it will be necessary to file a certified translation.

According to article 839 paragraph 4 c.p.c., the President of Court of Appeal declares the award recognized and effective if it finds that the formal requirements of the award are met and the subject matter of the dispute was capable of settlement by arbitration under Italian law and the award does not breach public policy (art V, paragraph 2° of the 1958 New York Convention).

Therefore, it is possible that the President of the Court of appeal denies the recognition even during the inaudita altera parte phase (i.e. during the phase with the participation of the petitioner only).

While it is clear, the meaning of last part of provision – which makes reference to the subject matter of the dispute not capable of settlement by arbitration under Italian law and to the award breaching public policy – it is highly disputed which "formal requirements of the award" are referred to by article 839 c.p.c.

The 1958 New York Convention does not contain an express list of the mandatory elements of the award. The prevailing opinion deems an award existing under the 1958 New York Convention if three elements are found: (i) a proceedings based on an agreement of the parties[8], (ii) a decision by a third party (arbitrators) on a legal dispute as an alternative to state

8. Lazareff, l'arbitrage Forcé, Cahiers de l'arbitrage, 2006, 14.

courts[9], (iii) a final decision[10] (i.e. the arbitral tribunal cannot review and change it).

On the other hand, as mentioned in previous paragraph 1, article 823 c.p.c. contains a list of several elements which must be included in the award[11] and, as stated before, the lack of some of those elements can constitute a valid ground for setting aside the award[12].

Considering the above, it should be taken into account that under Italian law it is possible that the reference to the formal requirements of the award, contained in article 839 c.p.c., is interpreted as a reference to the elements of article 823 c.p.c. This conclusion, which has already been adopted, seems to be against the 1958 New York Convention since it seems to introduce a ground for refusing the recognition and enforcement (lack of the elements of the award provided by art 823 c.p.c.) which is not provided by the 1958 New York Convention.

Coming back to procedural issues, it is possible – according to a more recent opinion and case law – that the President of the Court of Appeal, during the inaudita altera parte phase (one party phase), requests the petitioner to supplement the documents submitted if (i) the original award or a certified copy thereof and/or (ii) the original arbitration agreement or an equivalent document or a certified copy and/or (iii) a certified translation of those documents is missing.

As stated above, after the decree of the President of the Court of Appeal is issued – either if the recognition is granted or if it is denied – a second phase of the proceedings might start if the decree is challenged. The decree can be challenged either by the petitioner or by the party against whom the enforcement is sought and this second phase will necessarily be with the participation of both parties.

As provided for by article 840 c.p.c., it is possible to file a challenge against the decree of the President of the Court of Appeal within 30 days after the communication of such decree.

The proceedings for challenging the decision of the President of the Court will be before the same Court of Appeal and the challenge of the decree starts with a summons against the other party before the competent court of appeal. The rules applicable to the proceedings are the ones of civil proceedings before the Court of Appeal, integrated with some special rules regulating the challenge of a decree issued by the civil court of first instance (the so called "giudizio di opposiozione a decreto ingiuntivo"). Basically reference to such rules implies that: (i) the decree of the President of the Court granting the recognition can become enforceable only after the decree is notified to the party against whom the recognition is sought and this party has not filed the challenge within the time limit provided by the law (i.e. within 30 days); and (ii) a preliminary and interim enforceability of the decree (and of the award) can be granted if the challenge does not seem prima facie grounded.

Art 840 c.p.c. makes express reference to the ordinary proceedings also for the case in which the President of the Court of Appeal issues a decree denying the recognition and the enforcement.

As stated above the cases in which such circumstance might occur are limited since the President of Court of Appeal cannot automatically ex officio investigate elements different from the ones mentioned above (i.e. i) meeting the formal requirements of the award; ii) dispute being capable of settlement by arbitration under Italian law; iii) the award not breaching public policy; see article 839 c.p.c.). For example, the President of the Court of Appeal could find that the dispute was not capable of being resolved by arbitration under the Italian law and he might deny the recognition. In such case, the petitioner must start the proceedings before the Court of appeal in order to challenge the decree and have the award recognized and declared enforceable.

On the other hand, the most common situation is the one of a decree declaring the award recognized and enforceable which might be challenged by the party towards which the enforcement is directed.

When such decree is issued, the petitioner must ask for a certified copy of it and serve the party against which the enforcement is sought.

The decree of the Court of Appeal must be challenged before the same Court within 30 days after the notification.

As stated above, the decree becomes definitive and enforceable only after it has been served to the party against whom recognition is sought and this party did not challenge it within the time limit stated above.

The grounds for challenging a decree of recognition are listed in Article 840 of the Italian Code of Civil Procedure and are the same of the ones provided for by art V of the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards.

Article 840 c.p.c. provides that the recognition of foreign awards can be denied if the party against which the recognition and enforcement is sought proves that: 1) the parties of the arbitration agreement, were under the applicable law, under some incapacity, or the arbitration agreement was invalid under the law to which the parties have subjected it, or absent any indication thereon, under the law of the state where the award was rendered; or 2) the party against whom the award is invoked was not informed of the appointment of the arbitrator or of the proceeding or was not able to properly present its case; or 3) the award dealt with and/or decided a controversy that was not contemplated in the arbitration agreement or in the arbitration submission in such case if the decisions on matters submitted to arbitration can be separated from those non submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or 4) the composition of the arbitral tribunal or

9. 1958 New York Convention, article I, 3 and article II, 1; Van Den Berg, Consolidated commentary on New York Convention Commercial Arbitration 2003, 219; G. Born International Commercial Arbitration, The Hague 2009, 2350.

10. Poudret, Besson, Comparative law of International arbitration, London 2007, § 853.

11. According to art 823 c.p.c., the award must contain: (i) the name of the parties and arbitrators, (ii) the seat of the arbitration, (iii) the arbitration clause, (iv) the relief made by the parties, (v) the reasoning (vi) the text of the operative part and (vii) it must be signed by the arbitrators.

12. i.e. (v) the reasoning (vi) the text of the operative part and (vii) the signature by the arbitrators

the proceedings was not in accordance with the agreement of the parties or failing such an agreement, with the law of the place where the arbitration took place; or 5) the award is not yet binding on the parties, or has been set aside or suspended by a competent authority of the state in which, or under the law of which, the award was made.

According to wording of the first paragraph of art 840 c.p.c. the abovementioned grounds for refusing recognition and enforcement of the arbitral award must be raised and proved by the party against whom the recognition and enforcement is sought and cannot be taken into consideration by the Court of Appeal automatically ex officio.

On the other hand, the second paragraph of art 840 c.p.c. reiterates the provision of the "one-party" proceedings (inaudita altera parte) according to which recognition and enforcement of an arbitral award is also denied if the Court of Appeal finds that 1) the subject matter of the dispute is not capable of settlement by arbitration under the Italian law or 2) the recognition or enforcement of the award would be contrary to the Italian public policy. Such finding can be made automatically by the Court of Appeal (ex officio) even if the party challenging the decree granting the recognition does not raise any objection in this respect.

Conclusions

As already pointed out Italy is a signatory country of several international conventions such as the 1961 Geneva Convention on international commercial arbitrations and the 1958 New York Convention. The aim of those conventions is to grant recognition of arbitral awards under a common set of rules and to limit the ground for refusing the recognition and enforcement of the awards.

The 1958 New York Convention provides that recognition and enforcement of a foreign award can be generally denied if such award is set aside or suspended by a competent authority of the state in which, or under the law of which, the award was rendered (1958 New York Convention, art V, paragraph 1, let e)).

Having in mind such general ground for refusing recognition and enforcement, Italian legislator tried with the 2006 arbitration law reform to reasonably limit the grounds for setting aside before Italian Courts of appeal the awards rendered in proceedings having their seats in Italy, in particular, providing that unless there is a specific provision in the arbitration agreement, it is not possible to set aside the award for mistakes – mentioned in the reasoning - in establishing the facts of the dispute or in the application of the law on the merits of the case, except for the case of a decision against public policy (public order).

Vacatur and review of an arbitral award in Spain

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Introduction

Vacatur and review of an arbitral award are stipulated in Title VII of the Spanish Arbitration Act, containing Articles 40 through 43, and in addition in Article 8.5, which also refers to the issue under discussion. The provision of Article 40 provides for "Action to set aside an arbitral award"; Article 41 is concerned with the "Grounds"; Article 42 speaks of the "Procedure"; Article 43 deals with "Res judicata and review of arbitral awards"; and, last but not least, Article 8.5 establishes courts competent to handle action to set aside an arbitral award.

Courts competent to consider action to set aside an arbitral award

Article 8.5 of the Arbitration Act provides that:

"The Civil and Penal Branch of the High Court of Justice of the Autonomous Region where the award is delivered shall be competent to rule on the application for setting it aside."

As can be seen, the court competent to handle action to set aside an arbitral award is the High Court of Justice for the place where the arbitral award is rendered. Such a solution appears to be best accommodating the nature of this procedure[1]. There are differences in the procedure duration, which can take from six months to three or four years. This inspired calls for "establishing dedicated Chambers at Provincial Courts to reduce the procedure duration and ensure homogenous criteria. It was argued that such a solution was in place at international arbitration centers, such as Paris."[2]

As a result of the above provision of the Arbitration Act, Article 73.1(c) (pertaining to the scope of powers vested in the Civil and Penal Branch of the High Court of Justice) of the Organic Act on the Judicial Power reads as follows:

"With inspection and support activities of arbitration, which are established in the Act, as well as with complaints on performance of the foreign arbitral award, as well as, with provisions set out in treaties or European Union

1. Barona S. Vilar, Comentario al. art. 42. Procedimiento, en AAVV, Comentarios a la Ley de Arbitraje (Ley 60/2003, de 23 de diciembre), Barona Vilar S. (Coord.), Thomson-Civitas 2004, p. 1452.

2. Rozas Fernández J.C., Ámbito de actuación y limites del juicio de árbitros tras la Ley 60/2003, de Arbitraje, en AAVV, La nueva Ley de Arbitraje, Madrid, Fernández Rozas, J.C. (Dir.), Editorial CGPJ, 1st ed. 2006, p. 155.

regulations, correspond the knowledge about another Court or Tribunal".

Partial arbitral award

The provisions of the Spanish Arbitration Act pertain to or affect cases where attempts are made to bring an action to set aside an award due to non-compliance, by introducing a presumption or prerequisite for such action, relating to the arbitral tribunal. Pursuant to Article 40 of the Arbitration Act (Action to set aside an arbitral award):

"Application may be made to set aside a final arbitral award under the terms envisaged in this title."

It should be noted that this ground for setting aside is specified in Article 41.1(c) of the Arbitration Act, which speaks of a situation in which "the arbitrators decide on matters not submitted to arbitration," and that other defects authorizing vacatur of an arbitral award include excessive non-compliance, i.e. an abuse by the arbitrators of their powers when rendering an award, consideration of or decisions on matters not submitted to arbitration and thus exceeding the limits set by the parties (i.e. non-compliance which is objective and not subjective in nature)[3]. And such non-compliance can be outside the petitum, i.e. it can occur when the arbitral award permits more than was requested. Or the non-compliance can take the form of an extra petitum, which is the case whenever an arbitral award grants something which was not requested, or when it grants or refuses to grant a request due to reasons other than specified[4]. The Arbitration Act (Article 39) provides ex novo for the possibility of seeking an additional award to be rendered by the arbitrators to supplement an incomplete award[5].

Actually, this statutory remedy makes it possible to have errors corrected at the same arbitral instance.

Grounds for setting aside an arbitral award

An arbitral award may be set aside exclusively on one of the grounds exhaustively listed in Article 41.1 of the Act, so there are no other grounds available and the ones provided for are stringently applied.

The grounds referred to above are taken from the UNCITRAL Model Law on International Commercial Arbitration (Article 34) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on June 10, 1958 (Article 36), and include:

a) The arbitration agreement does not exist or is invalid. Regardless of whether or not a distinction can be made between non-existence and invalidity, the Arbitration Act permits – perhaps due to the numerous difficulties of practical nature that it allows for – that reference be made to any reason for non-existence, substantial invalidity or invalidity of an arbitration agreement. Nevertheless, non-existence can be assumed to be the case when either the agreement, its object, or the reason for its execution is completely and unquestionably missing. As regards invalidity, it occurs whenever the agreement is defective or in conflict with a peremptory norm of law pertaining to it, as is the case when the purpose and the fact of submission to arbitration are not clearly stated.

b) A party was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings, or was otherwise unable to present its case. On closer inspection, two grounds are actually inferior, make up a ground for vacatur and their purpose is to impose sanctions in connection with the incapacity that they might trigger. In the case of the first ground, the incapacity derives from the lack of communication or its defective performance, wherever such absent or defective communication is attributable to the arbitral tribunal and not to a party's deceitful or negligent conduct. The other ground, being of a more vague nature, makes it possible to refer to any act that prevented a party from exercising the rights it had in the arbitration proceedings.

Motive for invalidating, which, as indicates paragraph 3 of article 42 of the Arbitration Act, is also taken into account ex officio.

c) The arbitrators made decisions on matters not submitted to arbitration. In order to make an arbitral award non-compliance in the form of extra petita legally valid, one should, even if through filing an application for setting aside, have the non-compliance rectified in accordance with Article 39.1 of the Arbitration Act[6].

Anyway, whenever the non-compliance is only partial, "it is only the part of the arbitral award that contains decisions on matters not submitted to arbitration that is set aside" (Article 42.2 of the Arbitration Act).

d) The appointment of arbitrators was made or the arbitration proceedings were conducted in breach of the agreement between the parties, unless such agreement was in conflict with an imperative provision of the Act or, in the absence of such agreement, the provisions of the Act were not applied. Among the above, the two that are actually grounds for vacatur refer to the appointment of arbitrators and to the arbitration proceedings. However, both these grounds are concerned with protecting the freedom of contract offered to parties under the law of the place of arbitration, provided that the agreements executed by the parties are not in conflict with a peremptory norm the compliance with which is mandatory.

e) The arbitrators made decisions on matters which are non-arbitrable. It is known, that arbitrariness or not of a dispute depends on whether or not it refers to the matter which, according to legal order would be independent order for the parties, in such a manner that because of this reason shall be invalidated sanction imposed on

3. Barona S. Vilar, Comentario al. art. 41. Motivos, en AAVV, Comentarios a la Ley de Arbitraje (Ley 60/2003, de 23 de diciembre). Barona Vilar, S. (Coord.), Thomson-Civitas 2004, p. 1400.

4. Aroca Montero J., Lección Séptima. La sentencja, en AAVV, Derecho Jurisdiccional II. Proceso Civil, Valencia, Tirant lo Blanch, 16ª. Ed., 2008, p. 360.

5. Barona S. Vilar, "Art. 41…", op. cit., p. 1394.

6. Article 39.1 provides that "Within ten days following the notification of the award, unless another time limit has been agreed upon by the parties, a party may apply to the arbitrators for any of the following, subject to a prior notice to the other party:… d) rectification of the part of an arbitral award containing decisions on matters not submitted to arbitration or on matters which are non-arbitrable. 2. After hearing the other parties, the arbitrators make a decision on … rectification within 20 days."

the arbitral award by excess of jurisdiction. Abuse of a law must first challenge protection imposed in Article 39 of the Arbitration Act, and invalidation only affects only announcement of the arbitral award in such cases, which are not susceptible to arbitration.

A court may consider this ground for setting aside ex officio (Article 42.2).

f) The arbitral award is in conflict with public policy. Before expanse and sometimes laxity, which part of the Provincial Courts defined as „public order" with intention to success or not of this cause of invalidation, one should indicate, that one should explain it in a limited manner and referring to only to mistakes in procedendo of the arbitral award, in such a manner, that prevent transformation of the process of invalidation in success of the second resort. Without conformity of the award, incompatible with public order are: (i) damage of judicial rules, contradiction or equality (ii) lack of the capacity to be sued wherever necessary; or (iii) absence of an adequate and sufficient statement of reasons for the arbitral award, as required by the Constitutional Tribunal.

Therefore „arbitral award is opponent of the public order". It should be clearly stated that both the jurisprudence and Provincial Courts insisted on a unanimous stance to the effect that a conflict with public policy be invariably interpreted restrictively.

It only defines meaning, if we take into consideration lack of the unanimity jurisprudence at the moment of interpretation of the legal term indefinite public order. Only must invalidate arbitral award by violation of the public order, if violated are basic laws and general freedoms, by significant majority of the awards.

This ground for setting aside may be considered by a court ex officio (Article 42.2).

Applies to procedural active capacity not only, for whom was party in arbitral process, but also, for whom is ensured direct and legal interest in performance of the action of invalidation[7], as well as the Ministry of Treasure, generally in the event where motive of invalidation were indicated in one of the paragraphs b), e) and f) of the Article 41.1, in accordance with this, what follows from paragraph 2 of the Article 41[8].

Nevertheless, one should bear in mind that Article 6 of the Arbitration Act provides for a tacit waiver of the right to bring an action to set aside on specific terms. Regardless of its terminological inaccuracy, this provision refers to a tacit waiver of the right to challenge an arbitral award, i.e. the right which, pursuant to the provisions of the applicable Act, is equivalent to the right to bring an action to set aside, which waiver takes place whenever a party to arbitration proceedings does not report without undue delay or reports in a defective manner a breach of a default rule contained in the Act or of any requirement contained in the arbitration agreement, and subsequently invokes such breach when bringing an action to set aside.

7. Zauważa się, że artykuł 41.1 stanowi, że „wyrok sądu polubownego tylko będzie mógł być anulowany, kiedy strona, która stara się o unieważnienie argumentuje i udowadnia…".

8. Artykuł 41.2: „Motywy zawarte w paragrafach b), e) i f) wcześniejszego ustępu będą mogły być brane pod uwagę przez sąd, który zna proces unieważnienia z urzędu albo instancji Ministerstwa Skarbu w związku z interesami tego, komu obrona jest prawnie przyznana".

The capacity to be sued is vested in persons who were parties to arbitration proceedings.

As regards the requirements of an arbitral award as such, it needs to be justified and exhaustive, as well as to address the claims raised by parties. Nonetheless and in line with the compliance requirements, it should be pointed out that the same requirements follow from the general provision of Article 218 of the Spanish Code of Civil Procedure ("LEC") and as a consequence, in the last instance, of the reduction instead of invalidation of the imperative rule. Therefore, in accordance with Article 41.1 of the Arbitration Act, it is possible for a court to set aside an arbitral award on grounds other than those invoked by the applicant, due to the fact that the grounds specified in letters (b), (e) and (f) of the above provision are considered by the court ex officio.

Furthermore, Article 41 Sections 3 and 4 provide that:

"3. In the instances provided for in Section 1 letters (c) and (e), only the decisions in the award on matters which were not submitted to the arbitrators or are non-arbitrable shall be set aside, provided that they may be separated from the other ones.

4. An application for setting aside an award has to be filed within two months after the date of notification thereof or, in the case a request is made for correction, interpretation or an additional award, of the date of notification of the decision thereon, or of the deadline for such notification."

The procedure for setting aside an arbitral award

As regards the procedure for setting aside an arbitral award, Article 42 of the Arbitration Act provides that an application for setting aside an arbitral award must be the object of an oral hearing and the procedure is conducted until duly completed with a rendered judgment. This Article refers to the type of procedure specified in LEC, which is not in conflict with the relevant provision.

Nevertheless, an application for setting aside has to be the object of an oral hearing and the Arbitration Act requires that the statement of claim comply, as in the case of other types of procedures held before common courts, with the requirements set forth in Article 399 LEC, and thus invariably specify the claim raised, i.e. in this case, a request for setting aside an arbitral award.

In addition to pleadings, also other documents of substantive nature, substantiating the claimant's request for setting aside (that is documents evidencing the ground or grounds for vacatur which is/are being invoked), as well as the arbitration agreement and the arbitral award, need all to be enclosed with the statement of claim.

In any case and as the preclusive norm provided for in Article 42.1(a), the statement of claim should specify all means of evidence requested by the claimant to be taken in order to prove the ground or grounds for setting aside the challenged arbitral award.

On the other hand, the statement of claim has to comply with the rule set forth in Article

400 LEC, which is applied complementarily, and requires that the statement of claim specify all the grounds for vacatur that are known or may be invoked when the statement of claim is filed.

b) A statement of defense filed in response to such statement of claim is also considered by a common court, needs to be drawn up in writing and submitted within 20 days following the date of the notice to the respondent, and accompanied by documents justifying the respondent's objections and specifying all means of evidence requested by the respondent to be taken.

c) A copy of the statement of defense and of the documents enclosed thereto is provided to the claimant, so that it "could submit additional documents or request specific evidence to be taken." The possibility of submitting additional documents or requesting evidence to be taken without the respondent's right to subsequently raise an objection can adversely affect the procedure, thus prejudicing the fundamental guarantees of due process.

Article 42 entrusts the Court Clerk with specific duties, such as setting the date of a hearing and notifying the parties, which – needless to say – translate into the acceptance of the case[9].

A court hearing is held if so requested by the parties in their respective pleadings and replies thereto; a reply to a pleading has to specify written evidence, as deemed expedient, and propose the same to the adverse party.

9. Gómez Jene M. op. cit., p. 6.

Article 42 – Procedure reads as follows:

1. An application for setting aside an arbitral award must be the object of an oral hearing, without prejudice to the following:

a) The application must be submitted as laid down in Article 399 of Act No. 1/2000 of 7 January on Civil Procedure Rules, in conjunction with any supporting documents, the arbitration agreement and the award, and, as appropriate, the claimant's proposal for the means of evidence to be effected.

b) The Clerk of the Court shall provide the respondent with a copy of the statement of claim in order for the respondent to submit its statement of defense within 20 days. In its statement of defense, the respondent shall propose all the means of evidence on which it will draw, and attach any documents substantiating its objection. The claimant shall receive copies of the statement of defense and the attached documents, to be able to submit any additional documents or propose further means of evidence.

c) After the statement of defense is received or the respective time limit elapses, the Clerk of the Court shall set the date of the hearing, if so requested by the parties in their respective statements of claim and defense. If the applications contain no request for a hearing, or if the sole piece of evidence proposed is documentary and the documents were furnished and not objected to, or in the event of expert reports no ratification is needed, the court shall render its judgment on those grounds."

When a statement of defense is received or the deadline for its submission is about to expire, the parties are called upon at a court hearing to present their claims and replies thereto in their respective pleadings. Nevertheless, should the only evidence proposed be a document which has not been objected to or an expert opinion, failing which the necessary information is missing, the hearing will not be held and the court will render its judgment anyway.

Regardless of the foregoing, the judgment rendered in a procedure for setting aside an arbitral award is not appealable (Article 42.2 of the Arbitration Act).

Res judicata and review of arbitral awards

In accordance with Article 43, the setting aside of an arbitral award is a means of nullifying substantive res judicata originating from its invariability, according to Article 43: "an arbitral award constitutes res judicata, i.e. it may be set aside or, as appropriate, the object of a request for review pursuant to the provisions on final and unappealable judgments contained in Act No. 1/2000 of 7 January on Civil Procedure Rules, but of no other action."

Article 22.3 of the Arbitration Act[10] speaks of a situation in which a party challenges the arbitral tribunal's jurisdiction to adjudicate the dispute and the tribunal makes a decision on such a plea as a preliminary question and not in the final award. An arbitral award, towards which the rule provides literally possibility of development of the process of invalidating. It is arbitral award, which doesn't put an end to proccess not even, obviously, doesn't express about the crux of the case, by what one should not speak about effectiveness material res judicata, in which is situated proccess of invalidating.

Means or process withdrawing from invalidation, which is different from competent arbitral process and whose subject is described exclusively to determinate law and order of the arbitral process in one's shaping, development and termination, and not, therefore, to the new judging of issue of nature resolution in arbitral award.

It is required that the authorities a quo and ad quem belonged to the same order and so as to execute action in the same manner[11]. According to Silvia Barona Vilar, review is an appeal available to a party to proceedings who seeks a verification of actual or legal matters which were decided upon in a judgment rendered in a manner such party deems unjust, in order to ultimately have such judgment corrected or replaced with another decision which supplements the judgment or sets it aside. The setting aside cannot be considered to constitute review, either an ordinary or an extraordinary one. As pointed out in the Explanation of the Grounds for Setting Aside and Reviewing

10. Article 22.3 reads as follows: "Arbitrators may rule on a plea referred to in this Article either as a preliminary question or in an award on the merits. An arbitrators' decision may only be objected to by lodging an application for setting aside the award in which it is adopted. If the decision is adopted as a preliminary question and overrides the plea, the institution of an action to set aside the award shall not imply suspension of the arbitration proceeding."

11. Samanes Ara, C., La acción de anulacción contra el laudo arbitral de consumo a la luz de la Ley 60/2003, de 23 de diciembre, de Arbitraże, en AAVV, Curso de mediación y arbitraje. Nuevos retos del arbitraje de consumo. Dirección General del Consumo del Gobierno de Aragón, 2005, s. 33.

Awards (Section VIII), "Action for setting aside involves an objection to the validity of the award. It is conducted on the understanding that the grounds for setting aside the award must be appraised and must not, as a general rule, allow for a review of the arbitrators' decision on the merits." The purpose, therefore, of the process is possibility of prosecution of the validity of the arbitral award[12], with entire series of „own profiles, which distinguish it from jurisdictional review"[13].

Action of invalidation treats of means of appeal sui generis, whose purpose is striving for declaration (is declaratory process) of nullity of arbitral award with base in series established reasons (which themselves check if solutions of the arbitrators obey guarantees of the process), appreciate the beginning the new separate arbitral process (it is not the second instance in the same process) before other authority, with own and limited purpose, defined by Article 40 and subsequently [14].

An arbitral award is final and unappealable (and not just final) since rendered, due to the fact that the action to set aside is not a regular review[15].

Temporary enforcement is possible exclusively in respect of decisions on matters subject to review[16].

The place of an arbitral award enforcement

The deadline for filing an application for setting aside an arbitral award is two months after the date of notification thereof or, in the case a request is made for correction, interpretation or an additional award, of the date of notification of the decision thereon, or of the deadline for such notification.

The deadline is not subject to extension, from material nature and from loss of the legal force.

The reforms introduced under Organic Acts Nos. 8 and 20/2003 specify the scope of powers – vested in both Courts of First Instance and Commercial Courts for the place where an arbitral award was rendered – to enforce such arbitral award in their respective jurisdictions (civil and commercial).

Commercial Courts have the same scope of powers to decide on arbitral award enforcement, except for awards referring to tender procedures.

Article 955 of the Royal Decree of February 3, 1881 on Enactment of the Act on Civil Courts, Title VIII – Enforcement of Judgments, Section One – Judgments rendered by Spanish Tribunals and Judges, provides that:

"Without prejudice to the provisions of treaties and other international regulations, the power to consider requests for recognition and enforcement of a foreign judgment and other decisions of foreign courts, as well as foreign mediation settlements, is vested in Courts of First Instance competent for the registered office or place of permanent residence of the party, before which is applying for recognition or performance of a judgment, or for the registered office or place of permanent residence of the person, to which applies its results;; as an auxiliary means, territorial jurisdiction is determined by the place of enforcement or the place where the judgment or decision is to have an effect.

In line with the criteria set forth above, Commercial Courts are competent to consider requests for recognition and enforcement of foreign judgments and other decisions of foreign courts that fall within their jurisdiction.

The power to recognize arbitral awards or foreign arbitral decisions is, in line with the criteria set forth above, vested in the Civil and Penal Branch of the High Court of Justice, without which later there is no possibility to appeal against decision. The power to enforce arbitral awards or foreign arbitral decisions is vested in courts of first instance on the same terms."

Article 85.5 of Organic Act No. 6/1985, dated July 1, 1985, on the Judicial Power (in force until July 22, 2014), Title IV – The composition and powers of judicial authorities, Chapter V – Courts of First Instance and Examination Courts, Commercial Courts, Criminal Courts, Violence against Women Courts, Administrative Courts, Labor Courts, Penitentiary Courts, Juvenile Courts, provides that civil courts of first instance:

„With demand of recognition and performance of the award and other foreign legal decisions and performance of the arbitral awards or foreign arbitral decisions, unless according to arrangements in contracts and other international regulations, meets its acquaintance the other Court or Tribunal".

Article 86.3.3 of the same Act provides that:

"Commercial Courts shall have the power to recognize and enforce judgments and decisions of foreign courts wherever the same fall within their jurisdiction, unless – pursuant to the provisions of treaties and other international regulations – the power to do so is vested in another Court or Tribunal."

Final comments

Title VII provides for setting aside and reviewing arbitral awards. The term "recourse" is avoided with respect to setting aside, due to the fact that it proves to be technically incorrect. The provisions are inspired by the Model Law. An arbitral award is enforceable even if challenged. Invalidation proceedings determine the change requirements of the speed and better defence of the parties.

There are various reasons which don't allow possiblity to consider preparation of possibility of award cassation which resolves proceedings about invalidation of the arbitral award: A) base of minimum intervention of the jurisdictional authorities in arbitration (Article 7 of the Arbitration Act), which is described action of

12. Baron Vilar, S., op. cit., s. 1351 – 1362.

13. Senés Motilla, C., La intervención judicial en El arbitraje, Madrid, Civitas Ediciones, 1ª ed., 2007, s. 101-110.

14. Barona Vilar, S., Art. 40…, op. cit., s. 1446; Álvarez Sánchez de Movellán, P., Algunas cuestiones sobre la anulación judicial del laudo en la Ley 60/2003, de Arbitraje, en Diario LA LEY, núm. 6108, 18 octubre 2004, edición electrónica: www.diariolaley.laley, consultada en noviembre 2007, s. 2; Fernández Rozas, J. C., op. cit., s. 142 i 155.

15. Pardo Iranko, V. Titulo VIII. De la ejecución forzosa del laudo, en AAVV, Comentarios a la Ley de Arbitraje (Ley 60/2003, de 23 de diciembre), Barona Vilar, S. (Coord.), Thomson – Civitas, 2004, pp. 1559-1564.

16. Barona S. Vilar, Comentario al art. 37. Plazo, forma, contenido y notificación del laudo, en AAVV, Comentarios a la Ley de Arbitraje (Ley 60/2003, de 23 de diciembre), Barona Vilar, S. (Coord.), Thomson-Civitas, 2004, pp. 1211, 1212 and footnote 22.

the Tribunals in support functions or control deliberately stipulated by Article 8 of the Arbitration Act. B) This minimum intervention explains, that In Article 42.2, is agreed that, towards award, which is appointed in invalidation proceedings arbitral award is not appealable, legislator by one instance and with one procedural phase satisfy sufficiently need of the control jurisdictional of arbitral provisions, that, obviously, doesn't reach cause of a dispute, but only guidelines of arbitration and its development. C) Civil Justice Law sets limits to revision of the cassation to the awards set In the second instance by Provincial Courts (Article 477.2 LEC), which exclude revision of the provisions, which, as established in verbal courts about invalidation of the arbitral awards were established in one instance, in which intervention of the Provincial Courts doesn't coincide with revision in former instance.

Challenging of arbitral awards in Ukraine

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Introduction

In Ukraine, arbitration is governed at present by the provisions of the Arbitration Act, in force since 2004. Despite the fact that this year marks the tenth anniversary of the effective date of the Act, this method of dispute resolution is still not very popular. However, it has definitely been gaining in popularity of late.

The purpose of this article is to discuss the key legal regulations making up the concept of challenging arbitral awards, as adopted by Ukraine. To facilitate understanding of this system, the discussed regulations will be juxtaposed with their Polish counterparts.

Courts of arbitration in Ukrainian law

The court of arbitration is called in Ukrainian law tretejski sud (Третейський суд in Ukrainian) (court of arbitration). The rules governing the operation of courts of arbitration in Ukraine were set forth in the Arbitration Act of May 11, 2004 № 1701-IV (Закон України про третейські суди) (the Act)[1]. This is not the only statute covering this area, as the Act on International Commercial Arbitration (the Foreign Act), based on the UNCITRAL Model Law, is concurrently in place and applies wherever the registered office of at least one party to a dispute is located abroad, and wherever the dispute is between joint ventures, federations and international organizations set up in Ukraine, or between their founders, or between the above entities and other Ukrainian law entities (Article 1.2 of the Foreign Act). Thus Ukraine adopted a solution different from the Polish one, i.e. proceedings before a court of arbitration are governed by two separate statutes, and the provisions of the Ukrainian Code of Civil Procedure do not apply until the proceedings under a petition to set aside an arbitral award, if filed, are instituted.

1. The rules previously in force are discussed in more detail in: Tynel A., Poland and Ukraine on the road to international arbitration, Arbitration e-Review Special Issue, p. 12

In line with the definition contained in the Act (Article 2), a court of arbitration is an independent private authority established under an agreement executed between natural or legal persons pursuant to the procedure specified in the Act, to hear civil law or economic disputes. Parties can entrust resolution of disputes resulting from a specific relation holding between them to a court of arbitration by incorporating an arbitration clause into the contract or by executing an agreement on submission to arbitration of a dispute that has already arisen (Article 12 of the Act).

The rules of operation and the constitution of courts of arbitration in Ukraine were provided for in the Act (Article 4):
– the principle of legality;
– independence of arbitrators and their subjection to the law only;
– equality of all participants in proceedings before the law and the court of arbitration;
– the adversary procedure;
– binding nature of the arbitral award for the parties to proceedings;
– voluntary nature of arbitral tribunal constitution;
– voluntary acceptance by arbitrators of their appointments to adjudicate a specific case;
– arbitration;
– autonomy of courts of arbitration;
– dispute resolution in a comprehensive, complete and impartial manner; and
– assistance provided to parties at every stage of the arbitration proceedings in order for them to reach an agreement and enter into a settlement.

Ukraine permits of permanent courts of arbitration and arbitral tribunals appointed to adjudicate a specific dispute (i.e. ad hoc arbitral tribunals). One of the largest permanent courts of arbitration in Ukraine is the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (Международный коммерческий арбитражный суд при Торгово-промышленной палате Украины) which has been operating since 1992[2]. This court renders ca. 300-400 awards per annum[3].

The activities of courts of arbitration in practice

The operation of courts of arbitration in Ukraine is the subject of numerous discussions of theoretical and practical nature. For one thing, the activities of courts of arbitration certainly reduce the case load to be handled by common courts, and the very fact of their existence is a manifestation of a developing democratic society, striving to resolve disputes amicably. For another, due to certain legislative shortcomings, the activities of courts of arbitration do not always have the desired result and sometimes bring about additional complications. However, one should bear in mind the fact that those issues are not unique to courts of arbitration, as they frequently affect common courts as well, especially as regards enforcement and challenging of arbitral awards[4]. The major reason why such issues arise is poor adequacy of the law governing the operation of courts of arbitration and their cooperation with other authorities and common courts.

It should be noted at this point that an interesting example of a favorable development of courts of arbitration in Ukraine is provided by Ukraine's accession to the Washington Convention of March 18, 1965 on the Settlement of Investment Disputes Between States and Nationals of Other States[5].

The court of arbitration and the common court

The fundamental principle is that arbitral awards may not be challenged, except as expressly permitted in Article 51 of the Act and Article 34.2 of the Foreign Act. Thus, this solution corresponds to the Polish one, provided for in Article 120^5 § 1 in connection with Article 120^6 of the Code of Civil Procedure by specifying an exhaustive list of grounds for a petition to set aside an arbitral award6. However, this exhaustive list is substantially expanded by accommodating the blanket clause, i.e. conflict with the fundamental rules of the public policy of the Republic of Poland[7].

Pursuant to Article 51 of the Act, an arbitral award may be challenged before a competent common court where the Act so provides (a corresponding provision is contained in Article 34 in connection with Article 2 of the Foreign Act).

Pursuant to the Act, common courts consider the following cases:

– requests for declaring arbitral awards enforceable (Article 55 et seq. of the Act and Article 35 et seq. of the Foreign Act); and
– petitions to set aside an arbitral award (Article 51 of the Act and Article 34 of the Foreign Act).

The procedure to be followed in cases of such type was specified in Article 3891 of the Ukrainian Code of Civil Procedure (Цивільно процесуальний кодекс України).

Grounds for challenging an arbitral award

The grounds authorizing a petition to set aside an arbitral award are specified in the Act, and in particular in Article 51:
– a dispute in which a judgment was rendered is not arbitrable;
– the arbitral award rendered refers to a dispute outside of the scope of the arbitration clause/agreement; the award refers in part to matters not specified in the arbitration clause/agreement – in this case, the part of the award which relates to matter outside of the scope of the parties' consent to the dispute being resolved by an arbitral tribunal may be vacated if previously challenged;
– the composition of the arbitral tribunal that rendered the award did not meet the requirements set forth in Articles 16 -19 of the Act;

2. http://www.ucci.org.ua/arb/icac/en/icac.html

3. For a more detailed discussion see: Selivon M., Price/quality/promptness ratio in the dispute resolution by the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, Arbitration e-Review Special Issue, p. 23

4. Ohrimczuk L.I. (Justice of the Supreme Court of Ukraine), Практика застосування судами Закону України «Про третейські суди», ("Application of the Ukrainian Arbitration Act in practice"; available at the website of the Supreme Court of Ukraine: http://www.scourt.gov.ua/clients/vs.nsf/81b1cba591401 11fc2256bf7004f9cd3/bb0f2d6e20458292c 225766a004c 0fa4?OpenDocument

5.https://icsid.worldbank.org/ICSID/FrontServlet ?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main

6. Decision of the Supreme Court, dated January 6, 1961, docket No. II CR 532/59

7. Cf. Szpara J. [in:] Sąd Arbitrażowy. System Prawa Handlowego t. 8, A. Szumański (ed.), Warsaw 2010, p. 589

– the arbitral award contains decisions on rights and obligations of persons who did not participate in the proceedings; and
– the arbitration clause/agreement has been declared invalid.

It should be noted that the Foreign Act contains a separate and, most importantly, a different list of grounds for a petition to set aside an arbitral award (based on the UNCITRAL Model Law):

– one of the parties to the arbitration agreement did not have the capacity to enter into the same; or the arbitration agreement was invalid in light of the applicable law selected by the parties or, in the absence of such law, in light of Ukrainian law;
– the petitioner was not duly notified of the appointment of an arbitrator or of the proceedings before the arbitral tribunal, or was otherwise deprived of an opportunity to present its case;
– the award refers to a dispute outside of the scope of the arbitration agreement or contains decisions on matters not submitted to arbitration; however, if the decisions on matters submitted to arbitration can be separated from those on matters outside of the scope of arbitration, only the part of the award that refers to matters not submitted to arbitration may be set aside; and
– the requirements as to the composition of an arbitral tribunal or the arbitration procedure, as agreed between the parties, were not met, unless the agreement in the above respect is in conflict with the mandatory provisions of the [Foreign] Act or, in the absence of such agreement, the requirements set forth in the [Foreign] Act were not met.

Furthermore, an arbitral award is subject to vacatur wherever a common court finds that:

– in accordance with Ukrainian law, the dispute is not capable of being resolved through arbitration; and
– the award is contrary to the fundamental rules of the Ukrainian public policy.

The provisions referred to above show that the Foreign Act specifies, as does the Polish Code of Civil Procedure (Article 1206 § 2 of the Code of Civil Procedure), a group of grounds for vacating an arbitral award, to be examined ex officio[8].

Non-arbitrable disputes

While analyzing the above grounds for challenging and setting aside an arbitral award, one should consider in the first place what disputes are not capable of being resolved through arbitration, i.e. are non-arbitrable. This issue is provided for in Article 6 of the Act, pursuant to which arbitral tribunals may hear any civil law or economic disputes, except for:

– actions for nullification of legislative acts;
– disputes resulting from the execution of, amendment to, termination and performance of commercial contracts the object of which is the satisfaction of public needs;
– disputes involving a state secret;
– disputes resulting from family relationships, except for those resulting from marriage contracts;
– cases relating to the restoration of the debtor solvency[9] or the bankruptcy procedure;
– disputes in which one of the parties is an administrative authority, local authorities, their employees or other entities performing administrative duties on the basis of the provisions of law and contracted tasks, as well as other state authorities;
– disputes involving real estate, including land;
– cases involving the establishment of legally relevant facts;
– labor law disputes;
– disputes resulting from economic relations between business entities and their members (founders, shareholders), and disputes between members (founders, shareholders) of business entities, relating to the incorporation, operation, management and liquidation of such entities;
– cases which, if adjudicated, will require the state authorities, local authorities and their respective officers, as well as other interested parties, to undertake certain acts in respect of the arbitral award;
– other cases which, pursuant to the provisions of law, should be resolved exclusively by common courts and the Constitutional Court of Ukraine; and
– disputes in which at least one of the parties is not a resident in Ukraine.

In Article 1157 of the Code of Civil Procedure, the Polish legislator permitted submission to arbitration of disputes involving property or non-property rights that have the capacity for court settlement, except for actions for alimony.

Scope of the arbitration clause/agreement on submission to arbitration

Sometimes, despite the proceedings being conducted with utmost care, an arbitral award may happen to be rendered (in whole or in part) on matters outside of the scope of the arbitration clause/agreement on submission to arbitration. In such a case, both Acts permit, as does the Polish Code of Civil Procedure (Article 1206 § 1.3), that the part of the award referring to matters outside of the scope of the parties' consent to submission of the dispute to arbitration be set aside.

Declaration of invalidity of an arbitration clause/agreement on submission to arbitration

Although it has specific consequences of procedural nature, the procedure for declaring an arbitration clause/agreement on submission to arbitration invalid is provided for in the Ukrainian Civil Code. An arbitration clause/agreement on submission to arbitration may be declared invalid if at least one of the conditions listed below is satisfied:

– the arbitration clause/agreement on submission to arbitration does not comply with the legal regulations; or
– the form in which the arbitration clause/agreement on submission to arbitration was entered into is inappropriate; or
– the parties did not have the capacity to execute the arbitration clause/agreement on submission to arbitration and were not free to decide to execute the same.

8. Cf. Morek R. [in:] Kodeks postępowania cywilnego. Komentarz, E. Marszałkowska-Krześ (ed.), Warsaw 2014; commentary on Article 1206, proposition 29

9. Proceedings resembling the settlement procedure under Polish law

However, in practice, invalidity is only very rarely declared on the above grounds. The reason is that the formal requirements are relatively lenient. The provisions of law require that an arbitration clause/agreement on submission to arbitration be drawn up in writing (or in other more strictly prescribed form) by a person having the capacity to do so.

Illegal composition of the arbitral tribunal

Pursuant to the applicable provisions of law (i.e. the Act and the Foreign Act), the parties are free to appoint arbitrators. In accordance with the Act, candidates for arbitrators should have a law degree (Article 18). Where the tribunal is composed of three arbitrators, it is the presiding arbitrator that should meet the above requirement. It should be noted that this is the minimum statutory requirement and parties can provide for more stringent requirements to be met by arbitrators.

The fact that permanent courts of arbitration and parties themselves are to ensure appointment of arbitrators having appropriate education, as well as the freedom to appoint arbitrators, both limit the possibility of challenging an arbitral award on this ground. Although it is unlikely for a petition to set aside an arbitral award to be filed on this particular ground, there have been several such cases to this date[10].

10. Pusz M.M. (President of the Court of Arbitration at the Ukrainian grassroots organization "Law and Duty"), Порядок оскарження та виконання рішення третейського суду ("The procedure for challenging and enforcing an arbitral award"), 2009, available at: http://xn--d1abamebf8bmdccu.com/statti/12/

Decision on the rights and obligations of entities which did not participate in the proceedings

It is possible to file a petition to set aside an arbitral award if the award refers to the rights and obligations of persons who did not participate in the proceedings. This ground for challenging arbitral awards was introduced as part of an amendment to the Act, which entered into force on March 31, 2009.

Under the amended law, the arbitral tribunal and the parties are under obligation to ensure participation in the proceedings of all persons whose rights and obligations can be affected by the arbitral award to be rendered.

The procedure for challenging an arbitral award

Article 51 of the Act and Article 34 of the Foreign Act specify the grounds for challenging an arbitral award. Whereas the procedure instituted under the petition to set aside an arbitral award is provided for in the Ukrainian Code of Civil Procedure.

A petition to set aside an arbitral award may be filed with the competent court within three months after the date on which the award was rendered, and persons who did not participate in the proceedings may file such petition within three months following the day on which they learned, or should have learned, about the award rendered. An identical period was prescribed in the Polish civil procedure (Article 1208 § 1 of the Code of Civil Procedure), except for special cases, where the period runs as of the date on which one becomes aware of the ground for challenging the award.

An important issue to consider when filing a petition to set aside an arbitral award is identification of the common court competent to examine the petition. Pursuant to Article 2 of the Act and Article 3891.2 of the Ukrainian Code of Civil Procedure, the court competent to consider a petition is the common court competent for the seat of arbitration. For instance, the court competent to consider a petition to set aside an award rendered by the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry is the Shevchenkovsky District Court of Kiev. The Polish legislator adopted a different solution in this respect, introducing the provision of Article 1158 of the Code of Civil Procedure, under which consideration of a petition is entrusted to the court that would have been competent to hear the dispute if the parties had not executed the arbitration agreement.

Pursuant to the provisions of the Ukrainian Code of Civil Procedure, a petition to set aside is considered by a common court composed of a single judge, within one month following the date of its filing.

An arbitral award may be challenged by the parties to or other participants in the proceedings, or by persons who did not participate in the proceedings but the award refers to their rights or obligations. In the Polish jurisprudence, the admissibility of a petition filed by third parties is questioned[11]. However, the group of entities having the capacity to file a petition was expanded to include a public prosecutor (Article 7 of the Code of Civil Procedure) and the Human Rights Defender (i.e. the Ombudsman) (Article 14.4 of the Act on the Human Rights Defender).

Having examined a petition, the common court has the right to (i) dismiss it and thus leave the arbitral award unaffected thereby; or (ii) set aside the challenged award (Article 3894.6 of the Ukrainian Code of Civil Procedure). The party dissatisfied with the court's decision may appeal against it to a court of higher instance (Article 3894.6 of the Ukrainian Code of Civil Procedure). However, one should bear in mind that, both in Poland and in Ukraine, the common court does not act towards arbitral tribunals as a court of second instance, and the review it makes is limited to evaluating the challenged award in terms of the violations specified in Article 1206 of the Code of Civil Procedure.[12]

The vacating of an arbitral award by a common court does not deprive a party to the proceedings of its right to resubmit the dispute to the arbitral tribunal, except for the cases provided for in the Act (Article 3895.3 of the Ukrainian Code of Civil Procedure in connection with Article 51 of the Act), in which:

– the arbitral award was set aside in whole or in part as a result of the arbitration clause/agreement on submission to arbitration

11. Szpara J. [in:] Sąd Arbitrażowy. System Prawa Handlowego t. 8, A. Szumański (ed.), Warsaw 2010, p. 585

12. Judgment of the Court of Appeal in Poznań, dated November 16, 2005, docket No. I ACa 912/05

having been declared invalid by the competent common court;
– the scope of the award rendered in the arbitration proceedings was not provided for in the executed arbitration clause/agreement on submission to arbitration;
– the award contains decisions on matters outside of the scope of the arbitration clause/agreement on submission to arbitration;
– the award was rendered in a non-arbitrable dispute.

In Poland, the issue of admissibility of petition re-filing is provided for in Article 1211 of the Code of Civil Procedure, which permits petition re-filing, unless the parties agreed otherwise.

Summary

As can be seen from the above discussion, the procedure for challenging arbitral awards adopted by Ukraine bears a close resemblance to the Polish procedure in place in this respect. The similarity of grounds for filing a petition, which in numerous instances actually takes the form of an identical wording, results from the fact that both countries endeavor to draw upon the internationally developed UNCITRAL Model Law. It should also be pointed out that both countries are parties to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). This means that entrepreneurs based in each of these countries have a means of protecting their cooperation by entrusting disputes that arise between them to courts of arbitration for resolution. And in the event it appears that a given arbitral tribunal was biased in favor of the entrepreneur based in the "host" country, rendered its award contrary to the law, or otherwise acted in violation of the procedure, an entrepreneur can always seek vacatur of a given award under the petition to set aside, which closely resembles the procedure in place in its home country.

Arbitrability and its relevance as a ground for setting aside an arbitral award

– comparative law comments in light of the amended Belgian arbitration law

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The Belgian arbitration law reform of 2013

2013 seems to be a year that will be long remembered in the Belgian arbitration law jurisprudence. Although the number of publications in the above respect has not increased, the Belgian jurisprudence has already appreciated the nature of the recent modifications to the Belgian arbitration regulations and seen consolidation of Belgium's position as a country with arbitration-friendly legislation[1].

What deserves special attention among the changes in the Belgian arbitration system is, in the first place, a comprehensive amendment to Book Six of the Belgian Code judiciaire[2], containing provisions on arbitration, which – following its publication in the official journal, i.e. Moniteur Belge, on June 28, 2013 – took effect on September 1, 2013. Its primary purpose is to implement the UNCITRAL Model Law, although opinions have also been expressed recently in the literature that the scope of solutions in favorem arbitrandum, as introduced under the reform, is much broader.[3]

Another change was the enactment of the new CEPANI Arbitration Rules. Also in 2013, the Belgian Center for Arbitration and Mediation began to publish a new academic periodical « b-Arbitra », being a review of Belgian and international arbitration topics.

The Belgian arbitration law has for years had unique properties, some of which have been retained, despite the fact that never before in the history of Belgian legislation have

1. Caprasse O., Price Ch., The CEPANI 2013 Arbitration Rules, AssA bulletin 2013, No. 31 (4), p. 812.

2. Code judiciaire of October 10, 1967, as amended; hereinafter referred to as "C.j." (Articles 1676 – 1723).

3. Caprasse O., Price Ch., op.cit, p. 812; De Meulemeester D., Piers M., The New Belgian Arbitration Law, AssA bulletin 2013, No. 31 (3), p. 596; Philippe D., Modernisation of the Belgian law on arbitration, http://www.martindale.com/members/Article_Atachment.aspx?od=10162236&id=2080250&filename=asr-2080104.pdf, accessed: March 01, 2014.

the provisions on arbitration been based to such a large extent on the Model Law. The original Belgian arbitration regulations, taken from the Napoleonic Code de procédure civile of 1806, survived the unsuccessful attempts to modify them in 1876 and 1958, and were not amended until the act of 1972 entered into force[4], drawing upon the model provisions attached as an annex to the 1966 Convention of the Council of Europe[5]. Thereafter, the Belgian arbitration law was amended in 1985 and 1998, but these amendments were not of such a comprehensive nature as the latest one of 2013.

It is largely due to the reasons referred to above that the Belgian regulations, which to this date remain under the clear influence of French law[6], continue to stand out in arbitration by noticeably tending to maintain balance between the provisions becoming increasingly international in nature and the desire to retain domestic institutions, although they do so to a different extent than is the case with French law. It deserves to be noted that such tendencies manifest themselves, although are not always effective, even where attention is paid to arbitration attractiveness, which caused much debate in the jurisprudence. An example of such Belgian legislator's policy was the prohibition, introduced as part of the 1985 amendment to the arbitration law, of filing a petition to set aside an arbitral award in the case neither party was a Belgian citizen or had its registered office or representative office in Belgium. However, this solution proved not to produce the desired effect and instead of attracting parties interested in international arbitration, it discouraged them from choosing Belgium as the place of arbitration. The ICC International Court of Arbitration was also refraining at that time from designating Belgium in this respect.[7] In 1998, the Belgian legislator amended the above provision, transforming it into the right, which continues in force to this date, to incorporate into an arbitration agreement a prohibition of filing a petition to set aside an arbitral award under such circumstances.

While maintaining a uniform regulation of domestic and international arbitration, the Belgian lawmaker modified the arbitration law primarily through making the scope of dispute arbitrability more specific by abandoning the criterion of court settlement capacity for disputes involving property rights (Article 1676 § 1 C.j.), abolishing two-tier proceedings in the case of actions for setting aside an arbitral award and for recognition and enforcement of the same (Article 1680 § 5 C.j.), making the requirements as to the form of the arbitration agreement more lenient by abrogating the written form requirement (Article 1681 § 1 C.j.), permitting the parties to agree upon the procedure for arbitrator disqualification in the arbitration agreement (Article 1687 § 1 C.j.), making more specific the rules governing the use of interim measures and injunctive reliefs by an arbitral tribunal (Articles 1691 – 1697 C.j.), extending the scope of assistance to be provided to the arbitral tribunal by a state court at a party's request made in proceedings to take evidence (Article 1708 C.j.).

A description of the full scope of modifications to the new Belgian arbitration law exceeds, however, the framework of this article, the primary purpose of which is to make a comparative law assessment of the modifications affecting one of the grounds for the petition to set aside an arbitral award available under Belgian law, i.e. the dispute arbitrability. As regards arbitrability as a determinant of flexibility of the arbitration regulations, which is how this issue has been viewed so far in the jurisprudence, this article analyzes in addition the impact of the scope of disputes capable of being resolved through arbitration on the predictability of arbitral awards.

Referring to an ongoing debate in the Polish literature which started a few years ago and is concerned with the way arbitrability is regulated in Article 1157 of the Polish Code of Civil Procedure[8] and the necessity, as pointed out by some authors in the jurisprudence, to revise those regulations and bring them in line with the tendencies observable nowadays in the legislations of other countries9, the findings of an analysis of the new Belgian solutions adopted in the discussed field appear to contribute to the discussion about the capacity of disputes for being resolved through commercial arbitration from the perspective of legislative demands.

The arbitrability criterion in Belgian law prior to the 2013 reform

Inarbitrability, being a standard ground for setting aside as well as for refusal to recognize and enforce an arbitral award, is also a permanent

4. Moniteur Belge, 8.08. 1972.

5. The European Convention providing a Uniform Law on Arbitration, dated January 20, 1966 (Convention No. 56).

6. The specific nature of the French arbitration law, which is in a way drawn upon by Belgian law, is exemplified by the calls made in the French case law (and specifically in the decision of the French Cour de Cassation made in Dalico on December 20, 1993) for abandoning the application of conflict of laws rules to arbitration agreements in international transactions, cf., for example, Fouchard P., Gaillard E., Goldman B., Traité de l'arbitrage commercial international, Paris 1996, pp. 245-254; and a critical analysis of the problem in the Polish literature: Tomaszewski M., Umowa o arbitraż [in:] Arbitraż handlowy, A. Szumański (ed.), pp. 354-355. The position of French courts - which stands apart from the ones taken based on other foreign legislations, especially as regards evaluation of the effectiveness of arbitration agreements in international transactions mainly based on the imperative norms of French law – bears resemblance to the Belgian concept of arbitration clause validity in the case of disputes resulting from exclusive sales contracts (contrat de concession exclusive de vente), cf., inter alia, Hanotiau B., op. cit., pp. 928-931 ; Nuyts A., La concession de vente exclusive, l'agence commerciale et l'arbitrage, Brussels 1996; rulings of: the Cour de Cassation in Audi/NSU, dated July 28, 1979; the Tribunal de Commerce de Bruxelles, dated September 13, 1979; and the Cour d'appel de Bruxelles, dated October 4, 1985.

7. Van Houtte H., Belgium [in:] Practitioner's handbook on international commercial arbitration, F. B. Weigand (ed.), Oxford 2002, p. 180.

8. What arouse the debate over how arbitrability is regulated at present in the Polish arbitration law was the issue, brought up by both legal theorists and practitioners, of whether or not arbitral tribunals are permitted to hear disputes involving corporate relations within companies, cf., for instance, Szumański A., Dopuszczalność kognicji sądu polubownego w sporach o zaskarżanie uchwał zgromadzeń spółek kapitałowych, [in:] Rozprawy prawnicze. Księga pamiątkowa Prof. M. Pazdana, Kraków 2005, pp. 540 – 567. What came under criticism was the criterion of capacity for settlement as a determinant of dispute arbitrability and the ambiguity of the provision which might raise doubts as to whether this criterion referred both to non-property and property rights, cf. Zieliński A., Kodeks postępowania cywilnego, t. II, Komentarz do art. 506–1217, Warsaw 2006, p. 1359; Morek R., Mediacja i arbitraż. Komentarz (art. 1831–18315, 1154–1217 k.p.c.), Warsaw 2006, p. 115 (the capacity for settlement criterion refers exclusively to non-property rights). The proponents of a different view assume the need to apply the capacity for settlement criterion also to claims involving property rights, cf., inter alia, Suliński G., Dopuszczalność poddania sporu ze stosunku spółki pod rozstrzygnięcie sądu polubownego, PPH 2005, No. 12; Bielarczyk P., Nowelizacja Kodeksu postępowania cywilnego w zakresie sądownictwa polubownego, Monitor Prawniczy 2005, supplement to issue No. 22.

9. The most thorough comparative law study of arbitrability criteria in the Polish literature: Wiśniewski A. W., Międzynarodowy arbitraż handlowy w Polsce. Status prawny arbitrażu i arbitrów, Warsaw 2011; and in the Belgian literature: Hanotiau B., L'arbitrabilité et la favor arbitrandum : un réexamen, Recueil des cours de l'Acedémie de droit international de la Haye, t. 296, La Haye 2002.

element of Belgian law which has not been affected by the 2013 reform. However, the arbitrability criterion as such has been substantially modified. When explaining the rationale by which the Belgian legislator has been guided, one should, before quoting the comparative law arguments referring to the current tendencies in national legislations to make arbitration laws more lenient and simplified, present the specific nature of the Belgian approach to arbitrability.

The point of departure for the Belgian arbitrability criterion was, as has been the case so far with French law, the freedom to dispose of rights (libre disponibilité des droits)[10]. However, according to the findings of an analysis carried out by experts of the Council of Europe, this construct appeared not to be precise enough[11], which is why, in 1972, disputes capable of being resolved through arbitration were defined in terms of a seemingly different general capacity criterion,[12] i.e. the capacity for settlement[13]. Although - unlike in the Polish literature, where the above criterion came under clear criticism[14] – this issue has not been thoroughly analyzed in the Belgian jurisprudence or case law, the available studies seem to consider the above criteria equal in terms of their function[15]. Following the model of the freedom to dispose of rights adopted in the French jurisprudence[16], the capacity for settlement is assessed under Belgian law against the general standard of disposability of rights[17], taken from the Belgian substantive law definition of settlement and made more specific – as in in the Polish jurisprudence[18] – by the rules of procedure[19]. However, as sometimes emphasized in the Polish comparative law literature, in the context of the Polish regulations too, a more adequate dispute arbitrability criterion would be one derived from the rules of substantive law, which appears to be of particular relevance where the jurisprudence output is modest (as is the case with Poland) and does not make arbitrability sufficiently specific due to the security of legal transactions[20].

The Belgians are also familiar with criticism of the capacity for settlement criterion as a vague notion[21] – in this connection, reference is also made to the division of the rights which are not freely disposable, as originally made in the French jurisprudence, into those "non-disposable" per se, partly "disposable," and those which become "disposable" when a dispute arises[22] (as is the case in Belgium with arbitrability of labor law disputes)[23]. The above distinction makes the heterogeneous nature of the criterion under discussion even more prominent. Furthermore, attention was drawn in the Belgian literature to the substantial overlap in meaning between the notions of arbitrability and ordre public[24], also found in French law[25], which was confirmed, inter alia, in the decision of the Belgian Cour de Cassation in Audi/NSU vs Adelin Petit S.A., dated June 28, 1979[26]. Despite the tendency to broaden the scope of public domain disputes heard by arbitrators[27] (also by making a clear distinction between

10. Article 1003 of the Napoleonic Code de procédure civile. The criterion of freedom to dispose of rights is to be found at present, in addition to Italian, Dutch and partly also Swiss laws among others, primarily in French law (Article 2059 of the French Code civil of March 5, 1803); for a more thorough study in the French jurisprudence see, inter alia, Fauvarque – Cosson B., Libre disponibilité des droits et conflits de lois, Paris 1996, pp. 104 et seq.

11. See Linsmeau J., L'arbitrage volontaire en droit privé belge, Brussels 1991, p. 38.

12. See Wiśniewski A. W., Zdolność i zdatność arbitrażowa, [in:] Arbitraż handlowy, A. Szumański (ed.), pp. 196 – 200.

13. Until amended in 2013, Article 1676 § 1 C.j. provided that any dispute which arose or might arise out of a specific legal relation and having capacity for settlement might be the subject of an arbitration agreement (Tout différend déjà né ou qui pourrait naître d'un rapport de droit determiné et sur lequel il est permis de transiger, peut faire l'objet d'une convention d'arbitrage). In the Polish literature, the Belgian arbitrability criterion is sometimes called disposability of rights, which is also supported by the Belgian jurisprudence; see. Wiśniewski W, Zdolność…, pp. 196 – 200; see also, inter alia, the notions of aliénabilité and indisponibilité in the Belgian literature; cf. Keutgen G. and Dal G. – A., L'arbitrage en droit belge et international, t. 1. Le droit belge, Brussels 2006, p. 106.

14. For the criticism of the Polish arbitrability criterion, as introduced under the 2005 amendment to the arbitration law, see Wiśniewski W., Zdolność… pp. 237 et seq. In the author's opinion, the major shortcoming of the capacity for settlement as a determinant of dispute arbitrability is its inadequacy for disputes involving property rights; however, this criterion was adopted in Polish law despite the German and Austrian experience in this respect.

15. See, inter alia, van Houtte H., L'arbitrage: son territoire et ses fronières, Rev. de droit international et comparé, t. LIII, No. 2, 1976, p. 142; L. Dermine, L'arbitrage commercial en Belgique. Commentaire de la loi du 4 juillet 1972, Brussels 1975, p. 21.

16. A freely disposable right is one which is under full control of its holder and is transferrable, cf. Level P., L'arbitrabilité, Rev. arb., 1992, p. 219

17. Article 2045 of the Belgian Code civil currently in force.

18. Wiśniewski W., Zdolność… pp. 237 - 243.

19. The traditional list of rights which are not freely disposable by the parties (including the rights derived from family relationships) is included as the "communiquées au ministère public" in Article 764 C.c. For a more detailed discussion of the capacity for settlement criterion in the Belgian substantive and procedural laws, see De Gavre J., Le contrat de transaction en droit civil et en droit judiciaire privé, t. I, Brussels 1967, p. 270.

20. See Wiśniewski W., Zdolność… pp. 237 - 243.

21. The relative and casuistic nature of the right disposability criterion and the absence of any express reference to the list of rights deprived of the capacity for settlement, as contained in Article 764 C.c., is pointed out, inter alia, by van Houtte H., op.cit., p. 142 et seq., and by Keutgen G. and Dal G.–A., op.cit., p. 111.

22. Level P., op.cit., p. 222.

23. It is a characteristic feature of Belgian law that arbitrability of labor law disputes is limited to compromise only. This has not changed after the 2013 reform (cf. Article 1676§5 C.j.). A similar restriction is imposed in Belgium on social security disputes.

24. See Linsmeau J., Vº Arbitrage: RPDB, Supplément, t. VII, No. 65. The author says that the object of settlement is to be consistent with the law and not in conflict with the public policy ("licite et non contraire a l'ordre public").

25. The criterion of freedom to dispose of rights (which was also provided for in the Polish prewar Code of Civil Procedure of 1930/1932, in the form of the "capacity to independently assume obligations") was not viewed in the French jurisprudence is isolation from the notion of public policy (as the public domain) due to the lack of a clear normative definition of disposable rights. Therefore, traditionally, while referring to the French arbitrability criterion, the literature made reference to public policy and lists of rights which were not freely disposable. Such a trend, observable in the literature, appears to itself emphasize the non-autonomous nature of the arbitrability criterion adopted in French law (cf. Cosson F., op.cit., pp. 104 et seq.). It was not until the early 1990s that the French case law developed a different view (judgments rendered by the Cour d'appel de Paris inter alia in Ganz vs Tunisian Railways, dated March 29, 1991; Labinal S.A. vs Mors & Westland Aerospace Ltd., dated May 19, 1993; Thalès Air Defence BV vs GIE Euromissile, dated November 18, 2004); however, the independence of the arbitrability criterion from ordre public was established in the context of the specific nature of the structure of the French regulations, where this criterion is adjacent to the list of issues outside of the scope of ordre public, contained in Article 2060 of the French Code civil, as currently in force (among the non-arbitrable disputes this provision lists, as does the Polish jurisprudence, actions concerning rights derived from family relationships as well as divorce and separation); for lack of the capacity for settlement in the case a specific type of legal relations or the claims resulting therefrom are not disposable in whole or in part under substantive law, see, in the Polish literature, inter alia, Ereciński T., Weitz K., Sąd arbitrażowy, Warsaw 2008, p. 120; Ereciński T., Zdatność arbitrażowa, [in:] Międzynarodowy i krajowy arbitraż handlowy u progu XXI wieku. Księga pamiątkowa dedykowana doktorowi habilitowanemu Tadeuszowi Szurskiemu, P. Nowaczyk, S. Pieckowski, J. Poczobut, A. Szumański, A. Tynel (eds.), Warsaw 2008, p. 9.

26. Journal des Tribunaux, 1979, 625 (Gaja, V, 76; YCA, 1980,257) – criticism of the Cour d'Appel in Liège, May 12, 1977 (Journal des Tribunaux, 1977, 710).

27. A detailed analysis of this issue to be found in Caprasse O., Les sociétés et l'arbitrage, Brussels, Paris 2002.

peremptory norms and ordre public[28]), the issue of the meaning overlap referred to above as an argument in favor of a new arbitrability criterion to be introduced into Belgian law was also raised, in addition to the vagueness of the criterion in place at that time, in the parliamentary committees' report preceding the reform of 2013[29].

The arbitrability criterion in Belgian law after the 2013 reform

In view of the numerous concerns described above, the Belgian legislator abandoned the capacity for settlement criterion and decided that all "disputes involving property rights" were arbitrable[30]. As regards disputes involving non-property rights, in the case of which no concerns have been raised in the jurisprudence as to the applicability of the capacity for settlement criterion[31], this criterion has been retained[32]. Such a double arbitrability criterion in Belgian law was inspired by the German[33] and Austrian[34] arbitration law amendments, and by the Swiss international arbitration law[35]. In the above reports of Belgian parliamentary committees, the substantive law criterion used to determine the property-related nature of a case (and no longer of a "dispute") was interpreted in terms of the definition presented in a ruling of the Federal Supreme Court of Switzerland which pointed out the broad scope of the criterion, referring to the pecuniary (expressible in terms of money) nature of this type of claims[36]. Following the example of German law, the criterion under discussion also permits an action for the establishment and constitution of a legal relation, and an action for permanent injunction to be considered by an arbitral tribunal[37]. In the course of its legislative work, the Belgian Conceil d'Etat expressed an opinion that the former dispute arbitrability formula was sufficient to accommodate disputes involving both property and non-property rights[38], and that it should only be assumed in addition that, in the case of property rights, a dispute may be submitted to arbitration even if it did not have capacity for settlement. This view did not, however, win support.

Despite the fact that even before the reform of the arbitrability regime Belgian law permitted an arbitral tribunal to decide certain cases falling within the scope of ordre public, e.g. disputes involving pecuniary claims in connection with damage resulting from a committed offence[39], the introduction of an overt criterion referring to the property-related nature of a case has conclusively made arbitrable all cases involving pecuniary value, regardless of whether or not they fall into the public domain[40].

Arbitrability as a Belgian law ground for setting aside an arbitral award

The above discussion was an attempt to show that the change of the statutory dispute arbitrability criterion in Belgian law reduced the number of restrictions imposed on arbitrability and resulting from the ordre public domain. As emphasized in the course of the parliamentary debate on the arbitration law reform, this fact shifts in a way the responsibility for supervision over arbitration from the area of admissibility of a specific case submission to arbitration towards the arbitral award[41]. However, the Belgian Cour de Cassation has not so far taken any stance on the issue of the scope of state courts' review of arbitral awards in respect of the ordre public domain. In its judgment of June 22, 2009[42], the Cour d'appel de Bruxelles expressed, as did the French jurisprudence, an opinion in favor of a narrow interpretation of the grounds for setting aside an arbitral award[43].

However, both the setting aside of an arbitral award on the ground of a breach of ordre public and the challenging of an award on the ground of dispute inarbitrability are described in the Belgian jurisprudence as being rare[44]. This fact should be considered favorable in terms of arbitration efficiency. No significant changes in the above respect seem to be likely since the purpose of the described modification to the arbitrability determinant is to make the arbitration admissibility criteria more lenient and precise.

Before the reform of 2013, inarbitrability as a ground for setting aside an arbitral award to be examined ex officio[45], was considered in the Belgian jurisprudence[46] to constitute, in addition to the capacity to enter into an arbitration agreement, a fundamental condition of arbitration agreement validity which, if not satisfied, resulted, however – unlike the lack

28. See Hanotiau B., op.cit., p. 100. The author gives as an example the fact that disputes resulting from the termination of an exclusive sales contract were deemed arbitrable, although the mandatory provisions of the act of 27.07.1961, which governed this issue, precluded such a possibility if the applicable law specified by parties in the arbitration clause was Belgian law.

29. See the Bill and the justification for the amendment to Book Six of the Code judiciaire. DOC 53 2743/001 of April 11, 2013, and the Report of the parliamentary committee of the Chambre des Représentants de Belgique of May 8, 2013, DOC 53 2743/003 pp. 10-11, http://www.lachambre.be/FLWB/pdf/53/2743/53K2743003.pdf – accessed: 01.03.2014. Competition law was given as an example of the field of law that especially requires a detailed specification of the relations holding among arbitrability, disposability of rights and ordre public (under Belgian law, an arbitrator may find a breach of the competition law and award damages outside of the exclusive powers of the Conseil de Concurrence).

30. Under the 2013 reform, Article 1676§1 C.j. was amended to read as follows: Toute cause de nature patrimoniale peut faire l'objet d'un arbitrage. Les causes de nature non-patrimoniale sur lesquelles il est permis de transiger peuvent aussi faire l'objet d'un arbitrage.

31. Cf. the comments included in footnote No. 16.

32. As a rule, intellectual and industrial property disputes are arbitrable under Belgian law, as is, inter alia, patent right establishment.

33. Article 1030 §1 ZPO of 1996.

34. §582 öZPO of 2006.

35. Article 177§1 LDIP of 1987. It should be noted, however, that Swiss law does not regulate at all the capacity of disputes involving non-property rights to be resolved through international arbitration, and as regards domestic arbitration, it provides for the criterion of freedom to dispose of rights.

36. "Toutes les prétentions qui ont une valeur pécuniaire pour les parties à titre d'actif ou de passif, autrement dit les droits qui présentent pour l'une au moins de celles-ci, un intérêt pouvant être apprécié en argent", ATF, 118, II, 353, c.3b, Rev. arb., 1993, p. 691.

37. Cf. Philippe D., op. cit., p. 2.

38. The Bill and the justification ...., op.cit., pp. 71 et seq.

39. See an analysis of the Belgian case law since 1975 in Linsmeau J., op.cit., p. 158, and subsequent rulings, including Ci. Charleroi, 15. 11. 1991, Journal de Tribunaux. 1992, p. 226.

40. Concurrently, exclusions are permitted under detailed regulations (Article 1676 § 4 C.j.).

41. See Caprasse O., Les sociétés..., pp. 33 et seq. See also the stance taken by the Belgian minister of justice A. Turtelbloom: Reports of the parliamentary committee..., op.cit., p. 11.

42. Bruxelles 22_juin 2009, RCB 2009, 41.

43. See a specification of the updated case law of Belgian courts: Caprasse O., Les grands arrêts de la cour de cassation belge en droit de l'arbitrage, b-arbitra 2013, No. 1, pp. 137 – 168.

44. Keutgen G. and Dal G.–A., op.cit., pp. 466 et seq.

45. Article 1704 § 2(b) C. j. as in force prior to the 2013 reform. The updated list of grounds for setting aside an arbitral award is included in Article 1717 § 3 C. j.

46. See Keutgen G. and Dal G.–A., op.cit., p. 467.

of capacity to enter into an arbitration agreement – in an absolute invalidity of the award[47]. After the reform, although its legal nature has remained unchanged, arbitrability appears, however, to have lost even more of its relevance as a ground for setting aside. While focusing on other issues, the literature points out in the first place and in light of the amendments to the Belgian act, the efficiency of single-tier proceedings instituted under the petition to set aside an arbitral award (where it is not possible to have the award rectified and the possibility of instituting a cassation procedure is available, the courts competent to consider a petition to set aside are at present the courts of first instance in Antwerp, Brussels, Liège, Mons and Ghent) and the closer connection between some of the grounds for setting aside an arbitral award and the arbitral award itself (the need to prove the impact on the arbitral award, as is the case, inter alia, whenever a party refers to irregularities in the arbitral tribunal constitution). Unaffected remains the right, unique to Belgian law, to contractually prohibit a petition to set aside an arbitral award at every stage of the proceedings, provided that the party is a natural person who is not a Belgian citizen or who does not have a place of residence or permanent stay in Belgium, or is a legal person which does not have a registered office, branch or representative office in Belgium.

Conclusions

The change of the arbitrability criterion and the modification to the procedure instituted under the petition to set aside an arbitral award, as introduced as part of the Belgian arbitration law reform, should be deemed favorable in terms of transparency of the statutory criteria and efficiency of arbitration. Undoubtedly, this is also a considerable step towards harmonization of arbitration laws in Europe.

It seems that, given the calls in the Polish jurisprudence demanding amendment to Article 1157 of the Code of Civil Procedure, the modification to the arbitrability criterion should also serve as an inspiration for the Polish legislator to respond to such calls. The little relevance of arbitrability as a ground for setting aside an arbitral award under the Belgian regulations just amended is not only confirmed by the fact that arbitral awards are not challenged on that ground, but also seems to prove a more general trend of the gradual disappearance of the concept of "inarbitrability" and the emergence of "universal arbitrability," going beyond the statutory criteria and the internal regulations in place as part of specific law orders[48].

47. Historically, the lack of capacity to enter into an arbitration agreement was also considered under Belgian law to be a ground for an absolute invalidity of the arbitral award; cf. Hanotiau B., Caprasse O., L'annulation des sentences arbitrales, Journal de Tribunaux 2004 , No. 413.

48. See Youssef K., The Death of Inarbitrability [in:] Mistelis L.A., Brekoulakis S.L., Arbitrability. International & Comparative Perspectives, Austin–Boston–Chicago–New York 2009, pp. 47-68.

The existence, validity and effectiveness of an arbitration agreement executed on the basis of an intra-EU BIT

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There are ca. 190 bilateral investment treaties in operation, executed exclusively between EU member states (so-called intra-EU BITs). Poland is a party to 23 such international agreements. The European Commission has been expressing concerns about the compliance of intra-community investment treaties with European Union law for years now. Concurrently, the majority of member states are opposed to their termination. In consequence, it is necessary to analyze the issue of existence, validity and effectiveness of arbitration agreements executed based on intra-EU BITs.

Investment treaties and membership in the European Union

The fundamental purpose of bilateral investment treaties ("investment treaties" or "BITs") is to create the right atmosphere for investors and thus attract foreign capital. Such treaties provide for essential foreign investment guarantees, including investors' rights to pursue claims for damages directly against the host state before an international arbitral tribunal. Under investment treaties, states agree to refrain from undertaking any acts aimed at expropriating or nationalizing investors' property, except on the terms and conditions set forth in a specific investment treaty and against compensation. In addition, such treaties guarantee fair and equitable treatment of foreign investments, non-discrimination, full protection and security, and fund transfer, and sometimes also contain the so-called most favored nation clauses[1]. Investment treaties used to be executed most frequently between highly

1. Świątkowski M., Naruszenie przez państwo umowy z inwestorem zagranicznym w świetle traktatów inwestycyjnych, C. H. Beck 2009, p. XV.

developed and developing countries. Under such treaties, investors from developed countries obtained additional international law guarantees, whereas developing countries could count on foreign capital inflow[2]. The first BIT was executed in 1959 between the Federal Republic of Germany (West Germany) and Pakistan. The 1980s saw investment treaties executed on a mass scale. The number of BITs in place at present is estimated at 2,500. Poland is a party to more than 60 investment treaties.

From the legal point of view, investment treaties are bilateral international agreements under which the contracting states assume public international law obligations. A characteristic feature of a BIT is that it grants specific directly enforceable rights to third parties, i.e. investors based in the contracting states. When membership in the European Union enters the picture, there arises the issue of compliance of the investment treaties holding between members states (i.e. of the international obligations resulting therefrom) with the provisions of EU law. Pursuant to the provision of the second sentence of Article 351 of the Treaty on the Functioning of the European Union (TFEU), to the extent that international agreements executed by a member state prior to the date of its accession to the European Union are not compatible with the Treaties, the member state is under obligation to take all appropriate steps to eliminate the identified incompatibilities. A failure to comply with the above obligation may result in proceedings before the Court of Justice of the European Union being instituted against the member state[3].

Investment treaties executed by member states fall into two groups. One contains investment treaties entered into by member states with third-party states (the so-called extra-EU BITs). The other one includes BITs executed between two member states, that is the so-called intra-community investment treaties (intra--EU BITs). It should be noted that no BIT has ever been entered into between two member states; however, numerous investment treaties acquired the status of intra-EU BIT as a consequence of the subsequent successive enlargement of the European Union through the accession of new member states. A number of those treaties were executed between the so-called old EU member states and the associated countries, preparing for accession.

Extra-community bilateral investment treaties (extra-EU BITs)

In view of the member states' obligation set forth in Article 351 TFEU and the fact that a significant number of extra-community investment treaties (ca. 1,200) continue in force, the European Commission considered it necessary to regulate this issue at the community level. Since the effective date of the Treaty of Lisbon, foreign direct investments are included in the list of common commercial policy items. And pursuant to Article 3(1)(e) and Article 207 TFEU, the European Union has exclusive competence in the field of common commercial policy. In consequence, it is only the European Union that may legislate and adopt legally binding acts in the respect. Member states may do so only if empowered by the Union (cf. Article 2(1) TFEU).

A legislative initiative undertaken by the European Commission resulted in the adoption of Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 December 2012, establishing transitional arrangements for bilateral investment agreements between Member States and third countries[4] ("Regulation No. 1219/2012"). The above regulation addresses the status of bilateral investment treaties executed by member states and establishes the terms, conditions and procedures under which member states are authorized to amend or enter into BITs (Article 1(1) of Regulation No. 1219/2012). In terms of its object, Regulation No. 1219/2012 covers exclusively bilateral investment treaties executed by member states with third-party countries, i.e. extra-EU BITs only (cf. Article 1(2) of Regulation No. 1219/2012). The primary purpose of Regulation No. 1219/2012 is to maintain in force extra-community investment treaties (and to make it possible for them to enter into force following the satisfaction of specific conditions) until a bilateral investment agreement between the European Union and a given third-party country enters into force (Article 3 of Regulation No. 1219/2012).

Intra-community bilateral investment treaties (intra-EU BITs)

Regulation No. 1219/2012 does not extend to cover the other group of investment treaties, i.e. intra-community BITs (cf. Article 1(2) of Regulation No. 1219/2012). At present, there are ca. 190 such international treaties in operation. For example, Poland is a party to no fewer than 23 intra-EU BITs. The fact that Regulation No. 1219/2012 does not extend to cover intra-community investment treaties by no means implies that their operation does not raise legal concerns, and in particular doubts as to whether such a state of affairs is compatible with European Union law. The European Commission has been pointing out for years numerous issues relating to intra--community investment treaties, has been making endeavors to actively participate in investment disputes involving intra-EU BITs and to present its stance in connection therewith while acting as an amicus curiae[5]. In the Commission's opinion, intra-community investment treaties are an "anomaly"; it is specifically noted that they may bring about disruptions to the internal market[6].

The European Commission is of the opinion that intra-community investment treaties should be terminated insofar as the matters covered therein fall under the competence of the European Union[7]. If only political will to do so

2. For a more detailed discussion see Kryczko P., Instrumenty zapewniające ochronę interesów inwestorów zagranicznych w Polsce, Państwo i Prawo 1994, No. 5, pp. 36-37.

3. Cf. the judgments of the European Court of Justice rendered in cases against Austria (C-205/06), Sweden (C-249/06) and Finland (C-118/07).

4. OJ EU L 351/40, 2012.

5. Levine E., Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation, Berkeley Journal of International Law 2011, vol. 1 (29), pp. 200-224.

6. Cf. quotations from the written observations submitted by the European Commission as an amicus curiae, as contained in the Award on Jurisdiction in Eureko B.V. vs. Slovakia, dated October 26, 2010, PCA Case No. 2008-13; available at: http://italaw.com/documents/EurekovSlovakRepublicAwardon Jurisdiction.pdf.

7. This is the position taken by the European Commission when acting as an amicus curiae in Eastern Sugar B.V. vs. the Czech Republic, UNCITRAL ad hoc arbitration, SCC Case No. 088/2004; quotation from the Partial Award of March 27, 2007; available at: http://italaw.com/cases/documents/369.

existed, the best solution would be to terminate all intra-EU BITs. In general, investment treaties are executed for a definite term (usually of 10 or 20 years). After the expiration of their terms, they continue in force if not terminated by either party with the applicable period of notice. Concurrently, BITs normally contain provisions extending the protection of investments completed during their terms by a specific period following the date of their expiration, e.g. by a successive 10 or 15 years (the so-called survival clauses or sunset clauses)[8]. An increasing number of non-European countries have decided of late to terminate the investment treaties they executed with EU member states[9].

However, the majority of EU member states were in favor of preserving the status quo, i.e. in favor of maintaining intra-EU BITs in place[10]. All initiatives to regulate the intra-EU BIT issue at the community level, and in particular the proposal to terminate such treaties,[11] have so far been firmly opposed by the so-called old EU member states, i.e. the member states whose investors are the potential beneficiaries of the special protective regimes established under investment treaties. However, understandably, the new member states, most frequently acting as the respondent in investment disputes, are interested in having intra-community BITs terminated. It is clear from the available statistical data that among the states against which claims were brought most frequently under intra-EU BITs the Czech Republic leads the way (14 disputes), and Poland (9 disputes)[12], Slovakia (7 disputes) and Hungary (6 disputes) follow. By way of comparison, no claims have ever been brought on the basis of intra-community investment treaties against Germany, France or Great Britain.

Validity of arbitration agreements executed on the basis of intra-EU BITs

In view of the statistical data presented above, it cannot possibly be surprising to find that new member states feel aggrieved by the operation of intra-community BITs and attempt, as part of the investment disputes under way, to prove by various means that intra-EU BITs have expired (are inapplicable or have been revoked), or to challenge the validity and effectiveness of the arbitration agreements executed based on the same. The most extensive analysis of the validity of an arbitration agreement entered into on the basis of an intra-community investment treaty was undertaken in connection with the dispute between Eureko B.V. and Slovakia[13]. The respondent state argued that the offer to enter into an arbitration agreement, as contained in Article 8.2 of the BIT between Slovakia and the Netherlands, expired upon Slovakia's accession to the European Union. The arbitral tribunal considered the issue of its jurisdiction and decided that it was competent to hear the dispute[14]. Given the place of arbitration agreed upon by the parties (i.e. Frankfurt am Main), Slovakia, acting pursuant to § 1040.3 ZPO[15], requested the Higher Regional Court in Frankfurt to rule on jurisdiction of the arbitral tribunal, raising the objection of the arbitration agreement invalidity. The Court in Frankfurt did not concur with the legal arguments raised by Slovakia and dismissed the plea of lack of the arbitral tribunal's jurisdiction[16]. Slovakia appealed against this decision to the German Federal Court of Justice (BGH). In its decision of September 19, 2013[17], BGH concluded that a ruling on the arbitral tribunal's jurisdiction became redundant due to the fact that, meanwhile, the arbitral tribunal rendered an award on the merits. Thus the investment arbitration practitioners were disappointed to find that, contrary to their hopes, the German Federal Court of Justice would not put a question for a preliminary ruling in connection with this case to the Court of Justice of the European Union, and thus the concerns surrounding effectiveness of arbitration agreements executed on the basis of intra-EU BITs would not be clarified in a final manner. Therefore, we should expect that respondent states will continue to raise objections as to the existence, validity and effectiveness of arbitration agreements. Further on in this article, we analyze the arguments raised against intra-community investment treaties.

Intra-EU BITs in light of the law of treaties

The first case around which a debate over intra-community investment treaties arose was the dispute between Eastern Sugar B.V. and the Czech Republic, which ended in an arbitral award rendered in 2007[18]. The dispute was to a significant extent concerned with harmonization by the Czech Republic of its national laws governing the sugar market with EU law. In this dispute, the respondent state argued that the investment treaty had expired upon the entry into force of the accession treaty under which the Czech Republic joined the

8. See, for example, Article 11 of the Agreement between the Polish People's Republic and the Republic of Austria on Promotion and Protection of Investments, dated November 24, 1988 (Dz.U. [Journal of Laws] of 1989 No. 54, Item 321); Article 12 of the Agreement between the Government of the Polish People's Republic and the Government of the French Republic on Promotion and Reciprocal Protection of Investments, dated February 14, 1989 (Dz.U. [Journal of Laws] of 1990 No. 38, Item 220); Article 13 of the Agreement between the Republic of Poland and the Republic of Croatia on Reciprocal Promotion and Protection of Investments, dated February 21, 1995 (Dz.U. [Journal of Laws] of 1996 No. 28, Item 126).

9. Over the past months, the Republic of South Africa terminated the BITs it had executed with Germany, the Netherlands, Belgium, Luxembourg and Spain, and announced its intention to make a "review" of the other investment treaties in place. In March this year, Indonesia announced that it did not intend to extend the term of the BIT executed with the Netherlands. Likewise, a BIT with the Netherlands was terminated by Venezuela in 2008.

10. See the Report of the Economic and Financial Committee, dated December 17, 2008, on the Movement of Capital and the Freedom of Payments, ECFIN/CEFCPE (2008) REP/55806.

11. For a more detailed discussion see Ross A., Killing off intra-EU BITs: how the European Commission plans to level the playing field for investors, Global Arbitration Review 2011, vol. 6, Issue 5.

12. Claims were brought against Poland twice by Saar Papier Vertriebs GmbH (under the BIT between Poland and Germany), as well as by France Telecom (under the BIT between Poland and France), Lutz Ingo Schaper (under the BIT between Poland and Germany), Eureko B.V. (under the BIT between Poland and the Netherlands), Vivendi (under the BIT between Poland and France), Nordzucker AG (under the BIT between Poland and Germany), Crespo et al (under the BIT between Poland and Spain), Les Laboratoires Servier S.A.S., Biofarma S.A.S., Art et Techniques S.A.S. (under the BIT between Poland and France), and TRACO Deutsche Travertin Werke GmbH (under the BIT between Poland and Germany).

13. PCA Case No. 2008-13.

14. Cf. the Award on Jurisdiction in Eureko B.V. vs. Slovakia, dated October 26, 2010, PCA Case No. 2008-13; available at: http://italaw.com/documents/EurekovSlovakRepublicAwardonJurisdiction.pdf.

15. Corresponding to Article 1180 § 3 of the [Polish] Code of Civil Procedure.

16. Decision of the Higher Regional Court (Oberlandesgericht) in Frankfurt, dated May 10, 2012, Az. 26 SchH 11/10; available at: http://openjur.de/u/399128.html. Fo a more detailed discussion of the judgment see Tietje Ch., Investitionsschiedsgerichtsbarkeit im EU-Binnenmarkt, IPRax 2013, No. 1, pp. 64-69.

17. III ZB 37/12, BGH case law database, available at: http://www.bundesgerichtshof.de.

18. SCC Case No. 088/2004.

European Union. This argument was based on Article 59 of the Vienna Convention on the law of treaties, dated May 23, 1969[19] (the "Vienna Convention"), pursuant to which a treaty is to be considered terminated if all the parties thereto subsequently conclude a treaty relating to the same subject matter (the principle of lex posteriori derogat legi priori). A similar argument was raised by Slovakia in its dispute with Eureko. As regards public international law, arguments are also constructed on the basis of Article 30.3 of the Vienna Convention. In accordance with the provision referred to above, whenever all the parties to a treaty are also parties to a subsequent treaty but the preceding treaty is not terminated or suspended in operation under Article 59 of the Vienna Convention, the preceding treaty applies only to the extent that its provisions are compatible with those of the subsequent treaty. The provision of Article 30.3 of the Vienna Convention was invoked, inter alia, by Slovakia in its dispute with Eureko[20].

Objections based on the Vienna Convention have not been allowed so far by arbitral tribunals or state courts. Neither are such arguments endorsed by the European Commission which acts as an amicus curiae in a number of investments disputes. This is so due to the fact that arguments formulated on the basis of public international law are hardly convincing. Specifically, in the context of intra-EU BITs, there are no grounds for referring to Article 59 of the Vienna Convention. This provision requires that the subject matter of the first and the subsequent treaty be identical. One cannot talk about an absolute congruence between intra-community investment treaties and accession treaties in terms of their subject matters. However, according to some authors, this does not dispel all doubts. Specifically, attention is drawn to the provisions of intra-EU BITs relating to the transfer of investments and proceeds derived therefrom (i.e. payments) which may be deemed to be identical to the member states' obligations under Part Three Title IV Chapter 4 TFEU (Capital and Payments)[21], forming part of the acquis communautaire. The guarantees provided for under intra-EU BITs can also be viewed in relation to the EU principle of freedom of establishment[22]. However, according to Ch. Tietje, in the situation under discussion, there are no grounds for the application of the conflict of laws rules provided for in the Vienna Convention, as this is not a classic conflict between two international agreements[23]. It is also accurately pointed out in the literature that the purposes of bilateral investment treaties and the freedoms of the EU common market are different. Furthermore, it is noted that intra-EU BITs may not be considered to have expired insofar as their subject matter is identical to that of EU law due to the fact that the other conditions set forth in Article 59 of the Vienna Convention are not satisfied. In addition to the requirement for the subject matters of two treaties to be identical, this rule also requires that the contracting states express their intention to terminate the first treaty (Article 59.1(a)) or that the provisions of the subsequent treaty be in conflict with those of the first treaty to an extent rendering it impossible to concurrently apply both the treaties (Article 59.1(b)). None of these requirements is met in the relation between EU law and intra-community investment treaties. Member states may not justify violations of EU law by referring to their duty to perform the obligations under treaties executed with another member state. In this sense, the parallel application of investment treaties and EU law is possible[24]. Neither can it be assumed that the mutual intention of the contracting states was that investments implemented in the territory of the other contracting state should, following the accession to the European Union, be subject exclusively to the EU regime of free movement of capital[25]. Intra-EU BITs can thus be treated as lex specialis, limited to protection of investments in bilateral relations between contracting states. This constitutes a powerful argument against assuming the contracting states' intention to replace an investment treaty with a treaty whose subject matter covers a broader area[26]. For similar reasons, the objection based on Article 30.3 of the Vienna Convention also appears to be illegitimate[27].

The European Commission is of the opinion that although the provisions of intra-EU BITs that are in conflict with EU law have not become ineffective in light of public international law, they may not be applied insofar as such application would be incompatible with the application of EU law[28].

Supremacy of EU law

The major line of defense adopted by respondent states against whom claims were brought on the basis of intra-community investment treaties consists in raising not international law arguments but ones referring to the specific nature of EU law. In its dispute with Eureko, Slovakia argued that upon its accession to the European Union the intra-EU BIT became non-applicable by reason of the principle of supremacy (precedence) of EU law. These arguments were endorsed by the European Commission in its written observations submitted to the arbitral tribunal. According to the Commission, in the case of a conflict between treaties in place between member states and EU law, the rule of pacta sunt servanda may not be referred to due to the fact that EU law takes precedence not only over national legal systems, but also over bilateral agreements executed by member states[29].

Manifestations of the conflict between intra-community investment treaties and EU law are to be found, inter alia, in the violation of the principle of exclusive competence of the Court of Justice of the European Union, the

19. Dz.U. [Journal of Laws] of 1990 No. 74, Item 439.

20. Eureko B.V. vs. Slovakia, PCA Case No. 2008-13.

21. Cf. recital 4 of Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 December 2012.

22. Tietje Ch., Bilaterale Investitionschutzverträge zwischen EU-Mitgliedstaaten (Intra-EU-BITs) als Herausforderung im Mehrebenensystem des Rechts, Beiträge zum Transnationalen Wirtschaftsrecht 2011/104, p. 11.

23. Tietje Ch., Bilaterale Investitionschutzverträge…, pp. 11-12. For a different view see Wehland H., Intra-EU investment agreements and arbitration: is European Community law an obstacle?, International and Comparative Law Quarterly 2009, Vol. 58, Issue 2, p. 302.

24. Tietje Ch., Bilaterale Investitionschutzverträge…, p. 14.

25. See Eilmansberger T., Bilateral investment treaties and EU law, Common Market Law Review 2009, No. 2, pp. 383 et seq.

26. Wehland H., Intra-EU investment agreements…, p. 305.

27. Cf. Tietje Ch., Bilaterale Investitionschutzverträge…, p. 15; Wehland H., Intra-EU investment agreements…, pp. 305-306.

28. Cf. quotations from the written observations submitted by the European Commission as an amicus curiae, as contained in the Award on Jurisdiction in Eureko B.V. vs. Slovakia, dated October 26, 2010, PCA Case No. 2008-13; available at: http://italaw.com/documents/EurekovSlovakRepublicAwardonJurisdiction.pdf.

29. Ibidem.

violation of the principle of mutual trust in the administration of justice in place in the other member states, and the violation of the prohibition to discriminate on grounds of nationality.

Violation of the exclusive competence of the Court of Justice of the European Union

In its dispute with Eureko, Slovakia argued that the arbitration clause contained in the intra-community investment treaty was incompatible with the exclusive power of the Court of Justice of the European Union to construe EU law. Pursuant to Article 344 TFEU, member states undertake not to submit disputes concerning the interpretation or application of the treaties to any method of settlement other than those provided for therein. However, the Higher Regional Court in Frankfurt did not concur with this argument and held that there were no grounds to conclude that Article 344 TFEU extends to cover as well disputes between member states and investors from other member states[30]. This view is shared by the majority of authors[31].

In the dispute under discussion, Slovakia also referred to reasons of procedural efficiency, pointing out that in light of Article 267 TFEU, arbitral tribunals are not authorized to refer questions to the Court of Justice of the European Union for a preliminary ruling. In practice, however, when hearing investment disputes, an arbitral tribunal can relatively often be faced with EU law issues. A case in point is the situation where an investor claims investment expropriation by the host state, and such expropriation is a direct consequence of implementation by that state of a directive into its internal laws.

Violation of the mutual trust principle

It is also argued in the context of intra-community investment treaties that their operation is inconsistent with the principle of mutual trust (Vertrauensprinzip in German) in the administration of justice in place in other member states. Mutual trust in the legal protection guaranteed within the European Union is a fundamental principle, necessary for the sound operation of the internal market. However, the dispute resolution mechanisms provided for in intra-EU BITs are – at least in principle – a manifestation of mistrust of the state courts in the host state. A rationale of this kind is obviously out of the question wherever such state is another EU member state. Specifically, such "mistrust" is irreconcilable with the free movement of judgments which is a fundamental principle of the European law of civil procedure.

The European Commission has on numerous occasions expressed its belief that the overlap between EU law and intra-community investment treaties results in legal uncertainty. It has also been pointed out that such a state of affairs encourages forum shopping, as investors can refer investment disputes to arbitration instead of or in addition to state courts. In the latter case, we will be faced with the undesirable situation of proceedings being conducted in parallel, which can lead to compensation being awarded twice.

However, the objection based on violation of the mutual trust principle was not acknowledged by the Higher Regional Court in Frankfurt[32]. The Court pointed out that arbitration is a dispute resolution method generally recognized throughout the European Union, the status of which is, as a rule, equivalent to the legal protection guaranteed by state courts. Therefore, it is illegitimate to claim that permitting this method in respect of intra-EU BITs is, as a rule, irreconcilable with the fundamental principles by which the European Union is guided. Furthermore, one can also counter the objection alleging violation of the mutual trust principles by pointing out that the European Union is itself a party to an international agreement in the form of the European Energy Charter[33], which provides for arbitration as a method of dispute resolution. What is more, it should be expected that in the future the European Union will execute further international agreements stipulating the possibility of resolving disputes between investors and member states or the European Union itself. To this end, legislative work is under way at present to draft a regulation establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party[34].

Violation of the prohibition of discrimination (Article 18 TFEU)

The most serious objection raised against intra-community investment treaties and alleging their incompatibility with EU law is undoubtedly the one referring to violation of the prohibition to discriminate on grounds of nationality. As a rule, the protection offered to investors under investment treaties is stronger than that guaranteed under the internal laws of the host state or even under EU law. For instance, none of the legal systems has in place an obligation of such a broad and comprehensive scope as the principle of fair and equitable treatment or a guarantee of broadly defined indirect investments. Another extra right is the choice offered to investors between submitting a dispute to a state court of the host state or to investment arbitration. In this connection, it is argued that arbitration clauses contained in intra-EU BITs violate the prohibition of discrimination set forth in Article 18 TFEU, as they offer the arbitration option exclusively to investors based in the contracting states. They thus put investors based in other member states in a less favorable situation.

The significant risk of discrimination against investors based in member states which are not parties to an intra-EU BIT, being inconsistent with EU law, was pointed out by the European Commission, inter alia, in its written observations submitted while acting as an amicus curiae in

30. See the decision of the Higher Regional Court (Oberlandesgericht) in Frankfurt, dated May 10, 2012, Az. 26 SchH 11/10, available at: http://openjur.de/u/399128.html. However, compliance of intra-EU BIT mechanisms for resolution of disputes arising between the contracting parties with Article 344 TFEU is quite another matter.

31. See Tietje Ch., Bilaterale Investitionschutzverträge…, p. 17. Similarly Wehland H., Intra-EU investment agreements…, pp. 318-319.

32. See the decision of the Higher Regional Court (Oberlandesgericht) in Frankfurt, dated May 10, 2012, Az. 26 SchH 11/10, available at: http://openjur.de/u/399128.html.

33. OJ EU L 389, 1994, p. 24. Resolution of disputes between an investor and a contracting party is provided for in Article 26 of the European Energy Charter.

34. Cf. the final version of the proposal for a regulation, KOM (2012) 335.

Eureko vs. Slovakia[35]. The objection based on violation of Article 18 TFEU was also addressed by the Higher Regional Court in Frankfurt which examined in this case the issue of the arbitral tribunal's jurisdiction[36]. Although the above Court did not rule it out that the arbitration clause incorporated into the intra-EU BIT was in conflict with the prohibition of discrimination, as resulting from EU law, it decided that this did not prevent the investor from submitting the dispute to an arbitral tribunal. The violation of the prohibition of discrimination, if any, may only result in the scope of rights vested in investors based in other member states becoming expanded, and not in the scope of rights vested in investors based in the contracting states being narrowed down. Neither does such violation provide grounds for concluding that the arbitration clause contained in the intra-EU BIT is invalid, if only by reason of the principle of protection of confidence and vested rights. However, the European Commission was firmly opposed to expanding the scope of privileged treatment consisting in offering the option of submitting a dispute to arbitration to cover all investors. In the Commission's opinion, it is not possible to permit a peculiar outsourcing of disputes which can potentially involve EU law issues to tribunals outside the EU courts[37].

35. Cf. quotations from the written observations submitted by the European Commission as an amicus curiae, as contained in the Award on Jurisdiction in Eureko B.V. vs. Slovakia, dated October 26, 2010, PCA Case No. 2008-13; available at: http://italaw.com/documents/EurekovSlovakRepublicAwardonJurisdiction.pdf.

36. See the decision of the Higher Regional Court (Oberlandesgericht) in Frankfurt, dated May 10, 2012, Az. 26 SchH 11/10; available at: http://openjur.de/u/399128.html.

37. Cf. quotations from the written observations submitted by the European Commission as an amicus curiae, as contained in the Award on Jurisdiction in Eureko B.V. vs. Slovakia, dated October 26, 2010, PCA Case No. 2008-13; available at: http://italaw.com/documents/EurekovSlovakRepublicAwardonJurisdiction.pdf.

State courts' rulings on arbitration agreements executed on the basis of intra-EU BITs

The above presented arguments against the existence, validity and effectiveness of arbitration agreements executed on the basis of intra-EU BITs have been raised so far by respondent states mainly when arbitral tribunals were deciding on their jurisdiction. However, those arguments can be of legal relevance also in proceedings before state courts. Under Polish law, the existence, validity and effectiveness of an arbitration agreement executed based on an intra-community investment treaty may be examined if a party raises an objection of an arbitral tribunal's lack of jurisdiction, and also in connection with a petition to set aside an arbitral award or as part of the procedure for recognizing an arbitral award or declaring the same enforceable.

Where the arbitral tribunal dismisses the objection of lack of its jurisdiction, each party may, within two weeks after the date of delivery of a decision to that effect, request a decision of a state court (Article 1180 § 3 of the [Polish] Code of Civil Procedure). While making a decision on the arbitral tribunal's jurisdiction, the state court is specifically examining the existence, validity and effectiveness of the arbitration agreement.

Pursuant to Article V.1(a) of the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards[38] (the "New York Convention"), recognition and enforcement of an arbitral award is refused if it is proven that the arbitration agreement is invalid under the law to which the parties have subjected it. Likewise, under Polish law, the absence of an arbitration agreement, its invalidity, ineffectiveness or expiration pursuant to the law applicable to it constitute a ground for setting aside the arbitral award (Article 1206 § 1.1 of the [Polish] Code of Civil Procedure), as well as a ground for refusing the recognition or declaration of enforceability of an arbitral award rendered abroad or of a settlement entered into before a foreign arbitral tribunal (Article 1215 § 2.1 of the [Polish] Code of Civil Procedure).

38. Dz.U. [Journal of Laws] of 1962 No. 9, Item 41.

It is thus possible for the losing state to challenge the validity and applicability of intra-community investment treaties on the basis of Article 59 and Article 30.3 of the Vienna Convention, in the course of the procedure under Article 1180 § 3 of the [Polish] Code of Civil Procedure and as part of post-arbitration procedures.

In line with the European Commission's position, an arbitral award rendered in breach of EU law may not be recognized or enforced in a member state. For example, member states are obliged under EU law to carry out decisions on state aid issued by the European Commission. If an arbitral tribunal rendered an arbitration award incompatible with the obligations binding on the respondent as a member state, such an award could not be enforced by virtue of the supremacy of EU law[39].

39. Cf. quotations from the European Commission's Submission of June 12, 2009, as contained in the Decision on Jurisdiction, Applicable Law and Liability issued in Electrabel S.A. vs. Hungary, dated November 30, 2012; ICSID Case No. ARB/07/19, available at: http://www.italaw.com/cases/380.

Otherwise, such member state would face a complaint procedure before the Court of Justice of the European Union[40].

According to the available information, it is only German courts, among member states' courts, that have so far considered the issue of arbitral tribunals' jurisdiction on the basis of intra-EU BITs. And there are no known instances of attempted enforcement in any member state of an arbitral award rendered on the basis of an intra-community investment treaty. Therefore, it is difficult to predict the extent to which the incompatibility of intra-EU BITs with EU law will be successfully argued in the course of post-arbitration procedures before state courts. In addition to the existence, validity and effectiveness of the arbitration agreement itself, the focus will be also on the manner in which the public policy clause is interpreted by member states' courts, and in particular on the extent to which the notion of ordre public may be construed to cover EU law. The public policy clause is stipulated in Article V.2(b) of the New York Convention, and in Polish law as well, as part of the procedure instituted under a petition to set aside an arbitral award (Article 1206 § 2.2 of the [Polish] Code of Civil Procedure) and the procedure for recognition or declaration of enforceability of an arbitral award (Article 1214 § 3.2 of the [Polish] Code of Civil Procedure)[41]. Thus, there

40. Cf. quotations from the written observations submitted by the European Commission as an amicus curiae, as contained in the Award on Jurisdiction in Eureko B.V. vs. Slovakia, dated October 26, 2010, PCA Case No. 2008-13; available at: http://italaw.com/documents/EurekovSlovakRepublicAwardonJurisdiction.pdf.

41. A breach of the public policy clause does not, however, serve as a ground for refusal of recognition or enforcement of an arbitral award rendered in a dispute resolved pursuant to the Washington Convention (ICSID).

arises the question to what extent courts in member states will be inclined to consider in this connection the compatibility of intra-EU BITs with EU law and take into account arguments based on violation of the principle of exclusive competence of the Court of Justice of the European Union, of the mutual trust principle or of the prohibition of discrimination under Article 18 TFEU. When holding post--arbitration procedures, state courts will have an opportunity to refer questions to the Court of Justice of the European Union for a preliminary ruling. So long as the above concerns are not fully clarified, issues relating to the effectiveness of the legal protection provided for in intra-community investment treaties will be the subject of an endless debate in the jurisprudence. Such a state of affairs ill serves the security of legal transactions and does not contribute to the sound operation of the internal market.

Summary

The arguments discussed above, raised against the validity of arbitration agreements incorporated into intra-EU BITs do not appear to be sufficiently convincing. Therefore, it should be assumed that if a Polish court were to examine the issue of existence, validity or effectiveness of such an arbitration agreement, it would not identify a ground on which to declare lack of an arbitral tribunal's jurisdiction.

However, the above view does not address the following two issues, namely, the rationale behind retaining intra-community investment treaties in legal transactions and the admissibility of referring to their incompatibility with EU law as the public policy in post-arbitration procedures. Intra-community investment treaties are, in principle at least, a manifestation of mistrust of the national judicial system of the other contracting state. Their original purpose was to protect foreign investors against local bias of the host state authorities. Thus, in axiological terms, further operation of intra--EU BITs appears to be at least difficult to reconcile with the fundamental principles on which the European Union has been founded. However, the future of intra-community investment treaties will be determined by decisions of political nature. So long as the so-called old EU member states continue to be driven by their particularistic interests, no breakthrough in this respect should be expected.

European Commission's Consultations on Investment Protection in TTIP

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The public consultations of the European Commission on investment protection and the investor-to-state dispute resolution mechanism ran until the beginning of July. The consultations were opened in connection with the negotiations between the EU and the USA on the Transatlantic Trade and Investment Partnership. The issues submitted for consideration signal possible developments in investment arbitration.

Negotiations between the European Union and the United States on the Transatlantic Trade and Investment Partnership have been underway for almost a year now. Before they began, in February 2013 the mixed high-level working group on employment and development in its final report recommended the conclusion of a complex commercial agreement covering liberalization and investment protection at the highest possible level of liberalization and in accordance with the highest protection standards followed by the parties. Next, the European Parliament called on the Council to implement the recommendations of the working group and to give approval to the Commission to start negotiations leading towards transatlantic trade and investment partnership with the United States (resolution 2013/2558(RSP) of 23 May 2013). The European Parliament stressed the need for a "proactive outreach and continuous and transparent engagement by the Commission with a wide range of stakeholders, including business, environmental, agricultural, consumer, labour and other representatives, throughout the negotiation process, in order to ensure fact-based discussions, build trust in the negotiations, obtain proportionate input from various sides, and foster public support by taking stakeholders' concerns into consideration" and encouraged "all stakeholders to actively participate and to put forward initiatives and information relevant to the negotiations". In June 2013, the Council authorized the Commission to start the negotiations. Several initial negotiating positions were published, including on technical barriers to trade, raw materials and energy, public procurement, and as the talks progress, other negotiating positions are published (including, in May 2014, on pharmaceuticals, the motor industry and cosmetics). The Commission publishes regular updates on the progress of the particular rounds of the negotiations (the fifth round was held from 19 to 23 May in Arlington, USA).

In January 2014, a 14-member consultation group to advise the Commission on the future treaty was appointed. It includes representatives of traders, consumers, trade unions and other non-governmental organizations operating in such areas as the services sector, industry, environmental protection, health and agriculture. As an experts discussion forum, it is to provide the Commission with an even better understanding of the needs and views of all stakeholders. Also in January 2014, Trade Commissioner Karel de Gucht announced the decision to hold public consultations, in view of great public interest and concerns voiced by various circles as to the coverage of protections offered to the investors and the need to ensure that the States could exercise the right to regulate without risking liability towards the investors on that account. The consultations started in March. Everybody is free to participate as an individual or in their capacity as a representative of a trade or non-trade organisation. The results of the consultations are to be presented to the European Parliament and to the Council and a report will also be published. The Commission is planning to publish the responses, but one can also decide that one's personal data and responses remain confidential. The consultations are thus a step towards the implementation of the objectives formulated by the European Parliament. The outcome of the negotiations will not bind the Commission but the fact that the public are given an opportunity to voice their views may in a long-term perspective help ensure support for the new treaty. This, in view of many concerns expressed by the various stakeholders, is not insignificant.

Western European countries and the United States have not entered into bilateral treaties for the promotion and protection of investments. For decades, such treaties were a reality in economic relations between capital exporting and capital importing states, i.e. the developed Western states, and transition economies and developing countries. This has changed with the arrival of multilateral treaties, the Energy Charter Treaty and NAFTA. NAFTA arbitrations have demonstrated which actions of a democratic state that has a well-functioning administration and independent judiciary can lead to investment disputes. Many of them concern regulatory actions that aim at implementing environmental, competition and public health policies. This explains why the proposed treaty, including whether it is recommended that it should include investor-to-state dispute resolution mechanism by way of arbitration, is attracting such great interest.

The range of the consultations is wide. There can be no doubt that divergences in the arbitral decisions have had an impact on what questions are being asked. They concern such basic issues as who should be protected, e.g., whether the protections should cover only those investors who carry out actual economic activity in the state of their nationality and exclude those who have only registered companies there and do not engage in business operations but use the corporate structures as investment vehicles in other countries; at what stage does an investment qualify for the protection; and whether and what use should be made of the most favoured nation clause in investment protection, in particular whether it can serve as the basis for the application of procedural rules concerning investment disputes that appear in investment treaties with other countries. Other questions concern the need to provide more precise rules on the fair and equitable treatment standard, expropriation and the State's right to regulate in the public interest. Although these are problems that regularly feature in arbitral awards, case law is not uniform. Negotiations concerning a new trade and investment treaty provide an opportunity to fine-tune the particular guarantees offered to investors and to balance the public interests and investor guarantees.

Seven out of the thirteen consultation issues concern procedural questions. Transparency of the arbitral proceedings (open hearings, availability to the public of case files while ensuring protection of trade secrets, the right of various organisations to submit amicus curiae briefs) has already been accepted in the new UNCITRAL Arbitration Rules. Now the consultations are asking whether these rules should apply in investment arbitration based on the proposed European-US treaty. The practice to date of the United States as a NAFTA party and the EU's support for the new UNCITRAL Rules clearly suggest that this is a solution preferred by the Parties; it could not fail to win the support of non-governmental organisations either.

When it presents its position on multiple claims, i.e. a situation where the investor and its associated companies initiate several disputes based on the same set of facts before national courts and in international arbitral tribunals, the Commission explains that it will strive to create incentives to use alternative means of dispute resolution and to fix a rule that a dispute submitted for resolution in one forum cannot be submitted to another forum.

Means for ensuring the high-quality of adjudication in investment disputes are submitted for consideration, including defining qualifications required of arbitrators and keeping a list of arbitrators from which the chairman would be selected should the parties fail to agree. Also, an ethical code is proposed in order to prevent a conflict of interests and other unwanted conduct of arbitrators. The Commission considers that retired judges could act as arbitrators, as they "generally have experience in ruling on issues that touch upon both trade and investment and on societal and public policy issues".

Under consideration is a mechanism for the quick dismissal of frivolous and clearly unfounded claims and a ruling that the costs of such cases should be borne by claimant-investors, as well as rules that would allow State parties to intervene, as a result of which the claims would not proceed. The consultation reference texts present this last idea in the context of potential disputes concerning regulation of the financial sector, aimed at ensuring the stability and integrity of the financial system. The Parties would be given a right to formulate a conclusion, binding on the tribunal, that a given dispute concerns such matters, and this would lead to the discontinuance of the proceedings. The proposed solution can be evaluated in the context of the entire treaty, in particular its provisions that exclude protections for investors in some cases, one cannot however help concluding that the Parties reserve for themselves some adjudicating functions. Another of the proposed mechanisms, i.e., treaty interpretation by the Parties and the right to submit such interpretation to the tribunal sitting in a concrete case, is already used in NAFTA arbitrations.

The Commission says it will aim at creating a second instance in arbitration. This would be an important novelty. To date, a prospect that the State-Parties can, in future, consider an appeals mechanism is mentioned in several bilateral treaties of the United States. An annulment of an arbitral award (but not a merits award) is a feature of the ICSID system.

Sections of the EU-Canada treaty that is currently being negotiated are the reference texts for the consultations; those negotiations are more advanced and will most likely end earlier. The process of approval of the two treaties will be multi-stage, and this means they will enter into force across several years. The EC consultations give an insight into the possible directions of development of investment arbitration. If the Member States, the US and Canada decide to include investor-to state dispute settlement through international arbitration, and this has not yet been decided, then at least several of the proposed ideas will be implemented. This would mark the opening of a new phase in foreign investment protection and investment arbitration.

It should also be noted the multi-linguistic Union still remains an ideal to be achieved. The consultations questions have been presented in the languages of all Member States, but the reference text is available in English only. There are several mistakes in the Polish text (e.g., 'shell' or 'mailbox' companies owned by nationals of third countries' are not (reverse translation from Polish) 'shell companies that belong to State-owned enterprises from third countries', 'guidance by the Parties (the EU and the US) on the interpretation of the agreement' does not mean 'guidelines for the Parties (the EU and the US) on the interpretation of the agreement' and 'frivolous' claims are not always 'negligible') (last viewed on 09.06.2014).

The ideas submitted for consultation result from many critical comments on current investment treaties and arbitration. In view of the experience of the last several years when Poland and other countries of the region have been parties to investment disputes, participation of the legal circles in the consultations is desirable[1].

1. The European Commission has already published a statistical overview of the consultations. More than 149,000 online contributions were received. The largest number of replies came from the United Kingdom, followed by Austria, Germany, France, Belgium, Netherlands and Spain (a total of 97% of the replies). There were 200 replies from Poland.

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