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Klára Drličková, Tereza Kyselovská (eds.)

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Resolution of International Disputes
Public Law in the Context of Immigration Crisis

Conference Proceedings

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PREFACE

The conference "COFOLA = Conference for Young Lawyers" is annualy organized by the Masaryk University, Faculty of Law from 2007. The main aim of this conference is to give floor to the doctoral students and young scientists at their early stage of career and enable them to present the results of their scientific activities.

Since 2013 COFOLA has been enriched by special part called "COFOLA INTERNATIONAL". COFOLA INTERNATIONAL focuses primarily on issues of international law and the regulation of cross-border relations and is also oriented to doctoral students and young scientists from foreign countries. COFOLA INTERNATIONAL contributes to the development of international cooperation between students and young scientists from different countries. It constitutes the platform for academic discussion and develops scientific and presentation skills of young scientists. Such a platform for scientific debate beyond the boundaries of one country contributes to the global view on the law, which is so important in current days.

COFOLA INTERNATIONAL 2016 had two main topics: Resolution of International Disputes and Public Law in the Context of Immigration Crisis. The area of dispute resolution has become the core topic of COFOLA INTERNATIONAL. Disputes are inevitable part of international (cross-border) relationships. Same as in 2015, the participants of COFOLA INTERNATIONAL 2016 have chosen interesting issues concerning international commercial arbitration, international investment arbitration as well as online dispute resolution and have tried to elaborate on them. Moreover, the organisers of COFOLA INTERNATIONAL 2016 wanted to reflect the situation of migration wave in Europe and added the second topic into the programme of the conference. The doctoral students and other young scientist spent two days of fruitful discussion on both topics which is reflected in the following papers.

Klára Drličková

(scientific and organizational guarantor of COFOLA INTERNATIONAL)

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LIST OF ABBREVIATIONS

Arbitration Act 1996	UNITED KINGDOM. Arbitration Act 1996
Brussels Ibis Regulation	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters
CJEU/Court of Justice	Court of Justice as a part of the Court of Justice of the European Union
Czech Arbitration Act	CZECH REPUBLIC. Act No. 216/1994 Coll., on Arbitration and Enforcement of Arbitral Awards
European Convention	European Convention on International Commercial Arbitration of 21 April 1961
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms of 3 November 1950
EU	European Union
ICC	International Chamber of Commerce
ICC Court	ICC International Court of Arbitration
2012 ICC Rules	Rules of Arbitration of the International Chamber of Commerce in force as from 1 January 2012
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958
SCC	Stockholm Chamber of Commerce
UN	United Nations

UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNICEF	United Nations Children's Fund
TEC	Treaty Establishing European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

RESOLUTION OF INTERNATIONAL DISPUTES

INTERNATIONAL COMMERCIAL ARBITRATION

LEGAL BASIS OF PARTIES' DUTY TO MAINTAIN CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION

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Abstract

Confidentiality is traditionally taken as one of the main advantages of arbitration and is often automatically connected with it or it is simply assumed. However, there are lot of questions that remain unsettled. One of key issues is the legal basis of parties' duty to maintain confidentiality in international commercial arbitration. The aim of this paper is to analyse the legal basis of the parties' obligation to maintain confidentiality. At present, it is widely accepted that notions privacy and confidentiality have different meanings and the privacy itself does not ensure confidentiality of arbitration. In various jurisdictions, three positions as to what can constitute the legal basis of the parties' duty to maintain confidentiality occur. First, in some jurisdictions confidentiality is regarded to be the general principle of international commercial arbitration. Secondly, several national regulations of arbitration expressly prescribe the parties' duty to maintain confidentiality. And finally, other jurisdictions accept the duty only if there is a confidentiality agreement of the parties including the reference to arbitration rules providing for such a duty.

Keywords

International Commercial Arbitration; Confidentiality; Legal Basis; Privacy.

1 Introduction

International commercial arbitration as a mechanism for resolving disputes has gained a wide recognition by business circles. In these days it is the leading way of dispute resolution arising from international commercial

transactions. There are several reasons why parties prefer arbitration before court proceedings. Confidentiality is traditionally taken as one of the main advantages of arbitration.[1]

Confidentiality is often automatically connected with international commercial arbitration or it is simply assumed.[2] *Smeureanu* states that *"arbitral confidentiality proved a manifest lack of conceptual uniformity and showed clear limitations"*.[3]

As it is not possible to analyse all issues related to confidentiality, this paper focuses only on the issue of legal basis or source of confidentiality in international commercial arbitration. To be more precise the aim of this paper is to analyse the legal basis of the parties' obligation to maintain confidentiality. The paper will try to verify the hypothesis that the parties to international commercial arbitration have the obligation to maintain confidentiality only if there is an agreement between the parties on this issue.

The structure of the paper will correspond to its aim and hypothesis. First, the notion of confidentiality will be explained and the distinction between privacy and confidentiality will be analysed. Secondly, various positions concerning the legal basis of confidentiality will be presented and analysed.

2 Confidentiality v. Privacy

Especially in the past privacy of arbitration and confidentiality were not distinguished. It was assumed that the private nature of arbitration implicitly obliged the parties to maintain confidentiality. In other words it was understood that privacy at the same time means confidentiality.[4] At present, privacy and confidentiality are distinguished. This trend originates mainly from the landmark *Esso v. Plowman* case decided by the High Court of Australia.[5]

1 BLACKABY, Nigel; PARTASIDES, Constantine; REDFERN, Alan; HUNTER, Martin. *Redfern and Hunter on International Arbitration*. Oxford: Oxford University Press, 2009, p. 136; NOUSSIA, Kyriaki. *Confidentiality in International Commercial Arbitration*. Berlin – Heidelberg: Springer – Verlag, 2010, p. 1; BUYS, Cindy G. The Tension between Confidentiality and Transparency in International Arbitration. *The American Review of International Arbitration*. 2003, Vol. 14, p. 121.

2 SMEUREANU, Ileana M. *Confidentiality in International Commercial Arbitration*. The Hague: Kluwer Law International, 2011, p. xvi.

3 *Ibid.*, p. xvi.

4 *Ibid.*, p. 1.

5 Decision of the High Court of Australia, Australia of 7 April 1995, Esso Australia Resources Ltd v. Plowman [online]. *Australasian Legal Information Institute* [accessed on 2016-03-10] ("Esso v. Plowman").

Both privacy and confidentiality are instruments which control the access of third parties to arbitral proceedings.[6] Privacy relates especially to the hearing phase and regulate the access of persons not involved in the proceedings to the arbitration hearing.[7] In other words, privacy means that the proceedings are not public.[8] On the other hand, confidentiality means that the information cannot be divulged to any third party.[9] *Mistelis* stated that *"confidentiality, in its purest forms, means that the existence of arbitration, the subject matter, the evidence, the documents that are prepared for and exchanged in arbitration, and the arbitrators' awards and other decisions cannot be divulged to any third parties"*.[10] Moreover, it is possible to differentiate between the "state" of confidentiality referring to the information and the "duty" to maintain confidentiality referring to the persons bound to respect it.[11] In the following parts this paper will deal with the obligation (of the parties to arbitration) to maintain confidentiality.

In conclusion, the difference between privacy and confidentiality is respected.[12] It is also widely accepted that the privacy itself does not ensure confidentiality.[13] Privacy is not controversial in international commercial arbitration.[14]

6 SMEUREANU, Ileana M. *Confidentiality in International Commercial Arbitration*. The Hague: Kluwer Law International, 2011, p. 3.

7 *Ibid.,* p. 4.

8 Decision of the Supreme Court, Sweden of 27 October 2000, No. T 1881-99, Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc. [online]. *Swedish Arbitration Portal* [accessed on 2016-08-08] ("Bulbank case")

9 MISTELIS, Loukas A. Confidentiality and Third Party Participation. UPS v. Canada and Methanex Corporation v. United States. *Arbitration International* [online]. 2005, Vol. 21, No. 2, p. 213 [accessed on 2016-08-08].

10 *Ibid.*

11 SMEUREANU, Ileana M. *Confidentiality in International Commercial Arbitration*. The Hague: Kluwer Law International, 2011, pp. 5–6.

12 DE LY, Filip; FRIEDMAN, Mark; RADICATI DI BROZOLO, Luca. International Law Association International Arbitration Committee's Report and Recommendations on Confidentiality in International Commercial Arbitration. *Arbitration International* [online]. 2012, Vol. 28, No. 3, p. 358 [accessed on 2016-08-08].

13 DIMOLITSA, Antonias. Institutional Rules and National Regimes Relating to the Obligation of Confidentiality on Parties in Arbitration. Special Supplement of the ICC International Court of Arbitration Bulletin 2009: Confidentiality in Arbitration: Commentaries on Rules, Statutes, Case Law and Practice [online]. In: *Dispute Resolution Library*. ICC, p. 6 [accessed on 2016-08-08]; YOUNG, Michael; CHAPMAN, Simon. Confidentiality in International Arbitration. *ASA Bulletin* [online]. 2009, Vol. 27, No. 1, p. 28 [accessed on 2016-08-08].

14 YOUNG, Michael; CHAPMAN, Simon. Confidentiality in International Arbitration. *ASA Bulletin* [online]. 2009, Vol. 27, No. 1, p. 28 [accessed on 2016-08-08]; CROOKENDEN, Simon. Who Should Decide Arbitration Confidentiality Issue. *Arbitration International* [online]. 2009, Vol. 25, No. 4, p. 603 [accessed on 2016-08-08].

In many countries, it is expressly provided for by national regulations or case law.[15] Even if the national regulations are silent, privacy of hearings is not disputed.[16] Also arbitration rules regularly provide for privacy of hearings.[17]

3 The Legal Basis of Parties' Duty to Maintain Confidentiality

The principle that international commercial arbitration is private and confidential would seem to be self-evident.[18] It is said that confidentiality

15 See e.g. Section 19 of Czech Arbitration Act; Section 14 A of NEW ZEALAND. Arbitration Act 1996, Public Act 1996 No. 99, reprint 1 January 2011 [online]. *New Zealand Legislation* [accessed on 2016-08-08] ("New Zealand Arbitration Act"); Article 40 of CHINA. Arbitration Law of the People's Republic of China, Order No. 31 of the President of the People's Republic of China, 1994 [online]. *World Intellectual Property Organisation* [accessed on 2016-08-08]; Sweden - Bulbank case; Australia - Esso v. Plowman; England - Decision of the Queen's Bench Division, United Kingdom of 26 June 1984, Oxford Shipping Co. Ltd. v. Nippon Yusen Kaisha [online]. *Trans-Lex.org* [accessed on 2016-08-08] or Decision of the Court of Appeal, United Kingdom of 12 March 2008, John Forster Emmott v. Michael Wilson & Partners Limited [online]. *British and Irish Legal Information Institute* [accessed on 2016-08-08] ("Emmott v. Wilson").

16 For example, this is the case of Austria, Belgium, France, Germany, United States (see BALTHASAR, Stephan (ed.) *International Commercial Arbitration. A Handbook*. München: C. H. Beck, Hart, Nomos, 2016, pp. 205, 231, 367, 394, 611, 678) or Switzerland (RITZ, Philipp. Privacy and Confidentiality Obligation on Parties in Arbitration under Swiss Law. *Journal of International Arbitration* [online]. 2010, Vol. 27, No. 3, p. 230 [accessed on 2016-08-08]).

17 E.g. Article 26(3) of 2012 ICC Rules; Article 23(6) of 2014 International Arbitration Rules of International Centre for Dispute Resolution [online]. *International Centre of Dispute Resolution* [accessed on 2016-04-18]; Article 28(3) of 2013 UNCITRAL Arbitration Rules [online]. *UNICITRAL* [accessed on 2016-04-16] ("UNCITRAL Rules"); Article 23(6) of 2013 Arbitration Rules of the Belgian Centre for Arbitration and Mediation [online]. *The Belgian Centre for Arbitration and Mediation* [accessed on 2016-04-16]; Article 38 of 2015 China International Economic and Trade Arbitration Commission Arbitration Rules [online]. *China International Economic and Trade Arbitration Commission* [accessed on 2016-08-08]; Article 19(4) of 2014 London Court of International Arbitration Rules [online]. *London Court of International Arbitration* [accessed on 2016-04-18] ("LCIA Rules"); Article 27 of 2010 Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Rules [online]. *Arbitration Institute of the Stockholm Chamber of Commerce Arbitration* [2016-08-08]; Article 25(6) of 2012 Swiss Rules of International Arbitration [online]. *Swiss Chambers' Arbitration Institution* [accessed on 2016-08-08] ("Swiss Rules"); Article 30(2) of 2013 Rules of Arbitration of the International Arbitral Centre of the Austrian Federal Economic Chamber [online]. *Vienna International Arbitration Centre* [accessed on 2016-04-18] ("Vienna Rules").

18 FORTIER, Yves L. The Occasionally Unwarranted Assumption of Confidentiality. *Arbitration International* [online]. 1999, Vol. 15, No. 2, p. 131 [accessed on 2016-04-16].

is an inherent part of international commercial arbitration.[19] However, the discussions concerning the legal basis of confidentiality are ongoing. While the privacy of hearings is not controversial, confidentiality cannot be generally relied upon as a clear duty of the parties to international commercial arbitration.[20]

Basically, there are three main positions as to what can constitute the legal basis of the parties' duty to maintain confidentiality. First, confidentiality is regarded to be the general principle of international commercial arbitration. Secondly, the national law (*lex arbitri*) is the legal basis. And thirdly, it is the parties' agreement which forms the legal basis of their duty to maintain confidentiality.[21]

3.1 Confidentiality as a General Principle of Arbitration

The first position is based on the presumption that confidentiality exists as an implied term in every arbitration agreement. Thus, it is not necessary that the parties' duty to maintain confidentiality is expressly prescribed either by national law or by parties' agreement. This position has been confirmed especially by English case law.

At first, it is necessary to mention that the Arbitration Act 1996 makes no reference to the duty to maintain confidentiality. At present, English case law assumes that confidentiality is implied in every arbitration agreement as a matter of law.

The first relevant case was *Dolling-Baker v. Merret*.[22] In this case the plaintiff sought an order from the court to direct the disclosure of certain documents produced and/or disclosed by defendant in previous arbitrations. The Court

19 LAZAREFF, Serge. Confidentiality and Arbitration: Theoretical and Philosophical Reflections. Special Supplement of the ICC International Court of Arbitration Bulletin 2009: Confidentiality in Arbitration: Commentaries on Rules, Statutes, Case Law and Practice [online]. In: *Dispute Resolution Library*. ICC [accessed on 2016-03-10].

20 BLACKABY, Nigel; PARTASIDES, Constantine; REDFERN, Alan; HUNTER, Martin. *Redfern and Hunter on International Arbitration*. Oxford: Oxford University Press, 2009, p. 137.

21 SMEUREANU, Ileana M. *Confidentiality in International Commercial Arbitration*. The Hague: Kluwer Law International, 2011, p. 15.

22 Decision of the Court of Appeal, United Kingdom of 21 March 1990, Dolling-Baker v. Merrett and Another [online]. [accessed on 2016-03-12].

of Appeal came to the conclusion that the parties' duty to maintain confidentiality was the implied duty of both parties resulting from the very nature of arbitral proceedings.

This idea was followed by the decision in *Hassneh Insurance v. Mew*.[23] In this case a defendant who was defeated in arbitration against insurer sought to rely upon documents used in that arbitration for the purposes of bringing a separate claim against its insurer broker.[24] It was decided that the implied duty to maintain confidentiality existed as a matter of business efficacy.[25]

The English position was party revisited in *Ali Shipping v. Shipyard Trogir*.[26] The Court of Appeal decided on an appeal of the defendant who was restrained by the High Court from deploying in arbitration against three Liberian companies certain materials generated in the course of an earlier arbitration between plaintiff and defendant. The court concluded that the implied duty of confidentiality existed, however, it arose as a matter of law. The court held that the considerations of business efficacy that had been adopted in *Hassneh Insurance v. Mew* were not appropriate. According to the court, the business efficacy test requires a detailed examination of presumed intentions of the parties and of the circumstances existing at the time of the contract. On the contrary, confidentiality in arbitration reflects wider policy considerations.[27] This position was confirmed for example in *Emmott v. Wilson*.

In summation, under English law it is presently presumed that as matter of law the parties' to arbitral proceedings have the duty to maintain confidentiality.[28]

23 Decision of Queen's Bench Division, Commercial Court, United Kingdom, Hassneh Insurance Co. of Israel and Others v. Stuart J. Mew.

24 YOUNG, Michael; CHAPMAN, Simon. Confidentiality in International Arbitration. *ASA Bulletin* [online]. 2009, Vol. 27, No. 1, p. 34 [accessed on 2016-08-08].

25 SMEUREANU, Ileana M. *Confidentiality in International Commercial Arbitration*. The Hague: Kluwer Law International, 2011, p. 17.

26 Decision of the Court of Appeal, United Kingdom of 19 December 1997, Ali Shipping Corporation v. Shipyard Trogir [online]. *British and Irish Legal Information Institute* [accessed on 2016-03-12].

27 THOMA, Ioanna. Confidentiality in English Arbitration Law: Myths and Realities About its Legal Nature. *Journal of International Arbitration* [online]. 2008, Vol. 25, No. 3, p. 309 [accessed on 2016-08-09].

28 SMEUREANU, Ileana M. *Confidentiality in International Commercial Arbitration*. The Hague: Kluwer Law International, 2011, p. 17.

The position that the confidentiality is the general principle of arbitration was rejected in several jurisdictions, e.g. Sweden,[29] United States,[30] Australia,[31] Germany[32] or in the Czech Republic.[33]

For example, French position is not completely clear. French regulation of international commercial arbitration[34] is silent as regards the confidentiality. French courts in several decisions recognised that confidentiality is inherent to arbitration.[35] However, at least in one case the Paris Court of Appeal seemed not to accept the position that the French law contained a presumption of confidentiality.[36]

To conclude, it is not widely accepted that the confidentiality is the general principle of arbitration.

3.2 National Law (lex arbitri) as the Legal Basis of Confidentiality

Parties to international commercial arbitration would be certainly bound by the duty to maintain confidentiality if a national law provides for such a duty. However, national arbitration laws only exceptionally expressly regulate the confidentiality in arbitration. UNCITRAL Model Law is silent on both privacy and confidentiality of arbitration. There are only few

29 See Bulbank case.

30 DE LY, Filip; FRIEDMAN, Mark; RADICATI DI BROZOLO, Luca. International Law Association International Arbitration Committee's Report and Recommendations on Confidentiality in International Commercial Arbitration. *Arbitration International* [online]. 2012, Vol. 28, No. 3, p. 365 [accessed on 2016-08-08].

31 Esso v. Plowman.

32 KREINDLER, Richard; WOLFF, Reinmar; REIDLER, Markus S. *Commercial Arbitration in Germany*. Oxford: Oxford University Press, 2016, p. 14.

33 BĚLOHLÁVEK, Alexander J. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů: komentář*. 2nd ed. Praha: C. H. Beck, 2012, p. 694.

34 FRANCE. Code of Civil Procedure, Book IV, Title II [online]. *Paris, the Home of International Arbitration* [accessed on 2016-04-16].

35 NOUSSIA, Kyriaki. *Confidentiality in International Commercial Arbitration*. Berlin – Heidelberg: Springer – Verlag, 2010, p. 64; PRYLES, Michael. Confidentiality. In: NEWMAN, Lawrence W.; HILL, Richard D. (eds.). *The Leading Arbitrators' Guide to International Arbitration*. 2nd ed. New York: Juris Publishing, Inc., 2008, p. 534.

36 DIMOLITSA, Antonias. Institutional Rules and National Regimes Relating to the Obligation of Confidentiality on Parties in Arbitration. Special Supplement of the ICC International Court of Arbitration Bulletin 2009: Confidentiality in Arbitration: Commentaries on Rules, Statutes, Case Law and Practice [online]. In: *Dispute Resolution Library*. ICC, pp. 21–22 [accessed on 2016-08-08].

countries that explicitly address parties' duty to maintain confidentiality. They are for example New Zealand,[37] Australia,[38] Scotland[39] or Spain.[40]

In the Czech Republic, international commercial arbitration is mainly governed by Czech Arbitration Act. Several special provisions can be found in Act No. 91/2012 Coll., on Private International Law.[41] Neither of these acts expressly regulates the parties' duty to maintain confidentiality. Under the Czech regulation of arbitration parties do not have such a duty unless they agree on it.[42] Section 19(3) of the Czech Arbitration Act only states that the arbitral proceedings are not public. This provision is mandatory.[43] Section 6 of the Czech Arbitration Act then regulates the arbitrators' duty to maintain confidentiality.

To conclude, only few national arbitration regulations prescribe the parties' duty to maintain confidentiality. Thus, it is not widely spread that national regulations of arbitration prescribe the parties' duty to maintain confidentiality.

3.3 Parties' Agreement on Confidentiality

Parties are obliged to maintain confidentiality if they agree to bind each other with such a duty[44] ("confidentiality agreement"). There are several ways how the parties can make a confidentiality agreement. First, the confidentiality agreement may be part of the arbitration agreement. Secondly, parties can conclude confidentiality agreement as a separate legal instrument.[45] Thirdly, a main contract can contain a general confidentiality clause

37 Section 14 B of New Zealand Arbitration Act.

38 Section 23 of AUSTRALIA. International Arbitration Act 1974, Act No. 136 of 1974 as amended in 2011 [online]. *Federal Register of Legislation* [accessed on 2016-08-08].

39 Article 26 of Scottish Arbitration Rules which form Schedule 1 of UNITED KINGDOM. Arbitration (Scotland) Act 2010 [online] *legislation.gov.uk* [accessed on 2016-08-08].

40 Article 24(2) of SPAIN. Act 60/2003 of 23 December on Arbitration [online] *Ministerio de Justicia* [accessed on 2016-08-08]

41 CZECH REPUBLIC. Act No. 91/2012 Coll., on Private International Law.

42 BĚLOHLÁVEK, Alexander J. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů: komentář.* 2nd ed. Praha: C. H. Beck, 2012, p. 698.

43 See in more details *Ibid.*, pp. 698–699.

44 SMEUREANU, Ileana M. *Confidentiality in International Commercial Arbitration*. The Hague: Kluwer Law International, 2011, p. 10.

45 *Ibid.*, pp. 9–10.

which may also cover arbitral proceedings,[46] but this needs not be necessarily the case.[47] It seems practical to conclude confidentiality agreement before entering into arbitration agreement. However, it is possible and not unusual to conclude confidentiality agreement after the arbitral proceedings commence.[48]

Confidentiality agreement may also arise through the choice of arbitration rules. Concerning the confidentiality, the arbitration rules can be divided into three categories.[49] The first category includes the rules that contain no provision on confidentiality. An example is UNCITRAL Rules, 2012 ICC Rules or Vienna Rules.

UNCITRAL Rules in Article 28 provides only for the privacy of hearings. 2012 ICC Rules do not make an express reference to the duty of confidentiality. Article 22(3) of the 2012 ICC Rules only provides that *"upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information"*. Article 26(3) provides for the privacy of hearings. Under Article 6 of Statute of the International Court Arbitration[50] the work of the ICC Court is of a confidential nature. From this provision it is implied that confidentiality must be respected by arbitral tribunals, however parties to arbitration are not bound by this provision.[51] Vienna Rules in Article 30 only state that hearings shall be private. Article 41 then regulates the conditions for publication of awards.

46 SMEUREANU, Ileana M. *Confidentiality in International Commercial Arbitration*. The Hague: Kluwer Law International, 2011, p. 9.

47 DE LY, Filip; FRIEDMAN, Mark; RADICATI DI BROZOLO, Luca. International Law Association International Arbitration Committee's Report and Recommendations on Confidentiality in International Commercial Arbitration. *Arbitration International* [online]. 2012, Vol. 28, No. 3, p. 380 [accessed on 2016-08-08].

48 SMEUREANU, Ileana M. *Confidentiality in International Commercial Arbitration*. The Hague: Kluwer Law International, 2011, p. 13; PRYLES, Michael. Confidentiality. In: NEWMAN, Lawrence W.; HILL, Richard D. (eds.). *The Leading Arbitrators' Guide to International Arbitration*. 2nd ed. New York: Juris Publishing, Inc., 2008, p. 548.

49 See PRYLES, Michael. Confidentiality. In: NEWMAN, Lawrence W.; HILL, Richard D. (eds.). *The Leading Arbitrators' Guide to International Arbitration*. 2nd ed. New York: Juris Publishing, Inc., 2008, pp. 540–547.

50 Appendix I to 2012 ICC Rules.

51 SMEUREANU, Ileana M. *Confidentiality in International Commercial Arbitration*. The Hague: Kluwer Law International, 2011, p. 19.

A second category contains limited provisions on confidentiality which are applicable only to arbitrators and administrators. These rules do not, however, impose the duty on the parties to arbitration.[52]

A third category is formed by the rules that expressly provides for the parties' duty to maintain confidentiality. For example, LCIA Rules state that all hearings shall be held in private, unless the parties agree otherwise in writing.[53] Moreover, Article 30 deals expressly with the confidentiality of the parties. Under Article 30(1) *"the parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority".*[54]

German Institution of Arbitration (DIS) Arbitration Rules 98 ("DIS Rules")[55] expressly regulates confidentiality in Section 43. Under this provision the parties shall maintain confidentiality towards all persons regarding the conduct of arbitral proceedings, and in particular regarding the parties involved, the witnesses, the experts and other evidentiary materials. Section 42 regulates the publication of the arbitral awards.

It follows from the preceding paragraphs that not all arbitration rules address the confidentiality. Consequently, choice of arbitration rules does not automatically mean that the parties will be bound by the duty to maintain confidentiality. The parties may be required to enter into the confidentiality agreement. On the other hand, arbitration rules regulating the confidentiality put forward optional provisions leaving for the parties to adapt these provisions to their needs.[56]

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52 PRYLES, Michael. Confidentiality. In: NEWMAN, Lawrence W.; HILL., Richard D. (eds.). *The Leading Arbitrators' Guide to International Arbitration*. 2nd ed. New York: Juris Publishing, Inc., 2008, p. 542.

53 Article 19(4) of LCIA Rules.

54 Article 30(2) governs the confidentiality of the tribunal's deliberations. Article 30(3) then regulates the confidentiality (publication) of arbitral awards. Similar regulation as in Article 30(1) can be found in Article 44 of Swiss Rules.

55 German Arbitration Institute (DIS) Arbitration Rules 98 in force as of July 1, 1998 [online]. *German Institute of Arbitration* [accessed on 2016-04-18].

56 SMEUREANU, Ileana M. *Confidentiality in International Commercial Arbitration*. The Hague: Kluwer Law International, 2011, p. 17.

As was stated above, most national legal regulations of arbitration do not contain particular rules relating to confidentiality. On the other hand, modern regulations of arbitration respect party autonomy that is limited only by the mandatory provisions of *lex arbitri*. Thus, the parties are free to bind themselves by the obligation to maintain confidentiality either directly or by reference to arbitration rules that prescribe such an obligation. In lots of jurisdictions, confidentiality agreement is the only possible source of parties' duty to maintain confidentiality.[57]

To conclude, parties' agreement seems to be the main and uncontested legal basis of their duty to maintain confidentiality.[58]

4 Conclusion

The aim of this paper was to analyse the legal basis of the parties' obligation to maintain confidentiality. The paper tried to verify the hypothesis that the parties to international commercial arbitration have the obligation to maintain confidentiality only if there is an agreement between the parties on this issue.

Firstly, the difference between the privacy and confidentiality was explained. At present, it is widely accepted that these notions have different meanings and the privacy itself does not ensure confidentiality of arbitration. Privacy refers to the ability of the third parties to access to arbitral proceedings. On the other hand, confidentiality refers to the ability of the parties to arbitration as well as others to disclose documents and information used or related to arbitration. While the privacy of arbitration is not controversial, confidentiality cannot be generally relied upon as a clear duty of the parties to international commercial arbitration. Confidentiality cannot be perceived as given.

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57 E.g. Australia, Germany, Sweden, United Stated. See PRYLES, Michael. Confidentiality. In: NEWMAN, Lawrence W.; HILL, Richard D. (eds.). *The Leading Arbitrators' Guide to International Arbitration*. 2nd ed. New York: Juris Publishing, Inc., 2008, pp. 528–534; NOUSSIA, Kyriaki. *Confidentiality in International Commercial Arbitration*. Berlin – Heidelberg: Springer – Verlag, 2010, pp. 59–67.

58 SMEUREANU, Ileana M. *Confidentiality in International Commercial Arbitration*. The Hague: Kluwer Law International, 2011, p. 14.

In various jurisdictions, three positions as to what can constitute the legal basis of the parties' duty to maintain confidentiality occur. First, in some jurisdictions confidentiality is regarded to be the general principle of international commercial arbitration (e.g. United Kingdom). Secondly, several national regulations of arbitration expressly prescribe the parties' duty to maintain confidentiality (e.g. New Zealand, Australia, Spain, Scotland). And finally, other jurisdictions accept the duty only if there is a confidentiality agreement of the parties including to reference to arbitration rules providing for such a duty (e.g. Czech Republic, Germany, Sweden, United States). Consequently, confidentiality is subject to different treatment in different jurisdictions.[59]

If the parties agree on duty to maintain confidentiality most jurisdictions would respect parties' agreement as the legal basis. However, there are jurisdictions under which the parties will be bound by this duty even without their express agreement which means that hypothesis of this paper is not confirmed.

It thus can be said that the duty to maintain confidentiality is best left to parties' agreement.[60] Unfortunately, by concluding confidentiality agreement the problem of confidentiality is not solved. There are other issues that can arise, e.g. what are the limits of parties' duty or what are the possible consequences of the breach. These issues have not been subject of this paper.

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59 TRAKMAN, Leon E. Confidentiality in International Commercial Arbitration. *Arbitration International* [online]. 2002, Vol. 18, No. 1, p. 11 [accessed on 2016-04-15]; BĚLOHLÁVEK, Alexander J. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů: komentář*. 2nd ed. Praha: C. H. Beck, 2012, p. 694.

60 NOUSSIA, Kyriaki. *Confidentiality in International Commercial Arbitration*. Berlin – Heidelberg: Springer – Verlag, 2010, p. 23.

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IMMUNITY DEFENCES IN ENFORCEMENT PROCEEDINGS CONCERNING AWARDS RENDERED IN INTERNATIONAL COMMERCIAL ARBITRATION INVOLVING STATES AND STATE ENTITIES

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Abstract

Issue of state immunity against enforcement of arbitral awards in investment arbitration has always raised many concerns, especially among investors who could not be certain, whether they would receive what has been awarded to them by the arbitral tribunal. However, the purpose of this paper is to answer the question whether immunity defence may be similarly invoked in enforcement proceedings concerning awards rendered in international commercial arbitration involving states and state entities. Thus, the author will examine, whether both the state itself and/or a state entity, may rely on their immunity against execution, if they participated in international commercial arbitration. The general conclusion of the author is that in some instances such a possibility is ensured.

Keywords

International Commercial Arbitration; State Entities in Arbitration; Enforcement Proceedings.

1 Introduction

States, their organs and state entities with separate legal personality ("State Entities") are currently the main players in international commercial

transactions. Due to the large scale of such transactions, they serve an essential role in international trade. As a result, the traditional role of a state has evolved. Currently states are not only sovereign entities subject to international public law, but they and their emanations are also parties to a variety of commercial contracts.[1]

International commercial disputes are usually resolved through arbitration. According to the ICC Commission Report titled "States, State Entities and ICC Arbitration",[2] approximately 10% of all ICC arbitrations involve State Entities. However, if a State Entity is engaged in arbitration, several issues which can affect the proceedings may arise, including the issue of enforcement immunity.

Therefore, the subject of the paper is State Entities' immunity from execution which may result in impossibility to execute arbitral awards rendered in international commercial arbitration against State Entities' assets.

The aim of the author is to answer the question, whether State Entities acting as parties to international commercial arbitration may in principle invoke immunity defences during the enforcement phase. Furthermore, the author analyses whether there are any exceptions to immunity protection from execution.

For the purpose of this paper the author uses the terms "enforcement" and "execution" interchangeably, understanding them as actual exercise of coercive powers against State Entities' assets,[3] although the author is aware that these terms may be understood differently in various jurisdictions.

For instance, under Polish law, before the execution phase, an award of an arbitral tribunal needs to be either recognized or enforced in order to be granted the same legal effects as a court judgment.[4] The immunity

1 LEW, Julian D. M.; MISTELIS, Loukas A.; KRÖLL, Stefan M. *Comparative International Commercial Arbitration*. The Hague, New York: Kluwer Law International, 2003, p. 733.

2 *States, State Entities and ICC Arbitration* [online]. ICC [accessed on 2016-05-09].

3 SAGAR, Samarth. 'Waiver of Sovereign Immunity' Clauses in Contracts: An Examination of their Legal Standing and Practical Value in Enforcement of International Arbitral Awards. *Journal of International Arbitration*. 2014, Vol. 31, p. 617.

4 Article 1212 of POLAND. Official Journal 1964 No. 43 pos. 296, Code of Civil Procedure ("CPC").

defence may be raised during the execution phase.[5] In France, execution of the award requires prior obtainment of the *exequatur* which is a signed and dated stamp affixed on the arbitral award. The French authors submit that "*since this procedure* [obtainment of the exequatur] *does not result in any enforcement affecting the debtor, it does not raise issues of immunity from execution*."[6] Therefore in France, immunity defence could be raised only during the execution phase. The authors also seem to apply the terms "execution" and "enforcement" interchangeably.

The main conclusions of the author are presented in the form of the final thesis.

2 Are State Entities in Principle Granted Immunity from Execution?

2.1 Notion of Immunity from Execution Under International Law

In order to answer the question, whether State Entities may be in principle granted immunity protection from execution, it is first necessary to consider what enforcement immunity means.

Under both international and domestic law, sovereign states generally enjoy immunity from the territorial jurisdiction of another state.[7] The jurisdictional immunity means limitation on the forum state to exercise jurisdiction

5 According to Article 824 of the CPC, execution proceedings shall be terminated *ex officio* in whole or in part: 1) if it transpires that court authorities do not have jurisdiction to perform execution; 2) if the creditor or debtor does not have the capacity to be a party to court proceedings or if the subject of execution or identity of the debtor makes the execution inadmissible (…); GRZEGORCZYK, Pawel. *Immunitet Państwa w Postępowaniu Cywilnym*. Warsaw: Wolters Kluwer, 2010, p. 328.

6 FRANCOIS-PONCET, Sarah; HORRIGAN, Brenda; KARAM, Lara. Enforcement of Arbitral Awards Against Sovereign States or State Entities – France. In: BISHOP, R. Doak (ed.). *Enforcement of Arbitral Awards Against Sovereigns*. Huntington, New York: JurisNet, 2009, pp. 355–356; Judgment of the Court of Cassation, France of 11 June 1991, Civ. 1, Société Ouest-Africaine de Bétons Industriels (SOABI) v. Sénégal. *International Law Reports*. Vol. 113, p. 440. The court held that *"by submitting to arbitral jurisdiction, a State accepts that the award be granted exequatur, [a procedure] which does not constitute, in itself, a measure of execution of a nature to raise issues of immunity from execution of the concerned State"*.

7 ZHENHUA, Li. International Commercial Arbitration and State Immunity, *AALCO Quarterly Bulletin*. 2005, Vol. 1, No. 1, p. 28.

over a foreign state.[8] Enforcement immunity is understood as immunity from execution, if execution measures are to be taken against state's assets.[9] Immunity from execution allows a sovereign state to resist attachment of its assets resulting from a court ruling or an arbitral award.[10] The problem of immunity from execution arises only when a foreign state possesses property within the jurisdiction of another state.[11]

There are two approaches towards immunity under international law – the restrictive approach, which recognizes certain exceptions to immunity protection and an absolute immunity approach.[12] However, nowadays, absolute state immunity is no longer a rule of international law.[13] According to *Reinish*, *"only very few cases reflect the understanding that immunity from enforcement measures should still be regarded as absolute in principle. Most of them are older cases, which no longer reflect the current law"*.[14]

The restrictive approach was also confirmed by the ICJ which decided in the *Villa Vigoni* case that

"before any measure of constraint may be taken with respect to property belonging to a foreign state,

> *(1) the property must be in use for an activity 'not pursuing government non-commercial purposes',*

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8 WIESINGER, Eva. *State Immunity from Enforcement Measures* [online]. 2006, Vienna, p. 3 [accessed on 2016-05-10].

9 *Ibid.*

10 FRANCOIS-PONCET, Sarah; HORRIGAN, Brenda; KARAM, Lara. Enforcement of Arbitral Awards Against Sovereign States or State Entities – France. In: BISHOP, R. Doak (ed.). *Enforcement of Arbitral Awards Against Sovereigns*. Huntington, New York: JurisNet, 2009, p. 358.

11 VIBHUTE, Khushal. *International Commercial Arbitration and State Immunity*. New Delhi: Butterworths India, 1999, p. 69.

12 BONO, Seema; CHARLES, Philippa et al. *Sovereign Immunity and Enforcement of Arbitral Awards: Navigating International Boundaries* [online]. Mayer Brown, p. 8 [accessed on 2016-05-10].

13 Report of the International Law Commission on the Work of its Forty-third Session (29 April-19 July 1991). In: *Yearbook of the International Law Commission*. 1991, Vol. II, Part 2, p. 23; WIESINGER, Eva. *State Immunity From Enforcement Measures* [online]. 2006, Vienna, p. 3 [accessed on 2016-05-10].

14 REINISH, August. European Court Practice Concerning State Immunity from Enforcement Measures. *The European Journal of International Law*. 2006, Vol. 17, No. 4, p. 807.

(2) the foreign state must have expressly consented to the measure, or (3) the foreign state must have allocated the property for the satisfaction of a judicial claim".[15]

Therefore, the ICJ in fact confirmed existence of certain exceptions to the immunity principle.

2.2 Which Entity Should be in Principle Granted Immunity Protection?

Unlike investment arbitration, international commercial arbitration derives its force from the agreement concluded between the parties.[16] Thus, it might be claimed that State Entities acting as parties to international commercial arbitration proceedings lose their "state" character and in consequence should be treated as purely private parties.

Nevertheless, the practice shows that this is not necessarily the case. Although the undertaking to arbitrate involves an obligation to honour the result of an award,[17] when a State Entity is a party to arbitration it almost always invokes its special privilege – immunity.

As indicated in the introduction, the author understands "State Entities" as states themselves, state organs and state entities with separate legal personality.

The question is whether these entities should be in principle granted immunity protection. There is no doubt that states themselves can in principle invoke immunity defence,[18] therefore the above question pertains to state organs and state entities with separate legal personality.

For instance, under French law, state organs are considered an emanation of the state and in consequence are endowed with immunity from

15 Judgment of the International Court of Justice of 3 February 2012. Germany v. Italy, Greece Intervening [online]. *ICJ*, paras. 118-119 [accessed on 2016-05-10].

16 VIBHUTE, Khushal. *International Commercial Arbitration and State Immunity*. New Delhi: Butterworths India, 1999, p. 62.

17 *Ibid.*

18 FOX, Hazel; WEBB, Philippa, *The Law of State Immunity*. 3rd ed. Oxford: Oxford University Press, 2013, p. 480.

execution.[19] But state entities with separate legal personality are deemed to be distinct from the state itself, and because they carry out separate commercial activities, the French Court of Cassation distinguishes the legal regime governing their immunity from execution from the one applicable to states and their organs.[20]

Thus, under French law, assets of states or states organs in principle benefit from immunity from execution, safe for certain exceptions (waiver, commercial purpose). To the contrary, the assets of state entities with separate legal personality may be generally seized, unless they are protected by certain exceptions.[21] This conclusion stems from the *Sonatrach* case in which the court found that *"unlike the assets of a foreign state, which cannot, in principle, be seized, save for exceptions* (…) *the assets of state entities – which are distinguishable from the foreign state, regardless of whether they have a legal personality* (…) *may be seized by all creditors of that entity"*.[22]

Although the court decided that in principle state entities with separate legal personality are not granted immunity protection, it may be concluded that there are some situations in which such entities may qualify as emanations of the state. A state entity with separate corporate status could be equated with the state as long as:

1. it does not have a separate estate,
2. it does not have the possibility to manage its estate on its own in accordance with its own accounting system,
3. it is not autonomous from the state,
4. it is subject to the state's significant interference.[23]

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19 FRANCOIS-PONCET, Sarah; HORRIGAN, Brenda; KARAM, Lara. Enforcement of Arbitral Awards Against Sovereign States or State Entities – France. In: BISHOP, R. Doak (ed.). *Enforcement of Arbitral Awards Against Sovereigns*. Huntington, New York: JurisNet, 2009, p. 359.

20 *Ibid*, p. 362.

21 *Ibid.*

22 Judgment of the Court of Cassation, France of 1 October 1985, Civ. 1, Société Nationale de Transport et de Commercialisation des Hydrocarbures (Sonatrach) v. Migeon. *International Law Reports*. Vol. 77, p. 525.

23 FRANCOIS-PONCET, Sarah; HORRIGAN, Brenda; KARAM, Lara. Enforcement of Arbitral Awards Against Sovereign States or State Entities – France. In: BISHOP, R. Doak (ed.). *Enforcement of Arbitral Awards Against Sovereigns*. Huntington, New York: JurisNet, 2009, p. 376.

Fox and *Webb* indicate that the following indicia may be offered as a guide in determining whether a particular state entity is a separate entity as opposed to an organ or a department of the government of a state or may be equated with a state's emanation. The authors mention:

1. close links with the structure of government and performance of core public functions,
2. active supervision of the entity; employees hired in accordance with public employment conditions,
3. the conferment of separate legal personality under the law of the foreign State,
4. entity's constitution, powers, duties, source of funding, its activities and relationship with the home State, particularly the capacity to sue and be sued, independence to make contracts and dispose of property.[24]

In each case, determination whether a particular entity can be qualified as an emanation of the state for the purpose of a particular enforcement proceeding, should, in the author's view, be made on the basis of the law of the forum.

For instance, some guidelines with this respect can be found in the US Foreign Sovereign Immunities Act of 1976[25] or the United Kingdom State Immunity Act of 1978.[26] The latter provides in its section 14 that references made to a state include references to – *"(a) the sovereign or other head of that State in his public capacity; (b) the government of that State; and (c) any department of that government, but not to any entity (…) which is distinct from the executive organs of the government of the State and capable of suing or being sued".*

Although, in the same section, it is stipulated that *"a separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if - (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and (b) the circumstances are such that a State (…) would have been so immune".*

24 FOX, Hazel; WEBB, Philippa, *The Law of State Immunity*. 3rd ed. Oxford: Oxford University Press, 2013, p. 353.

25 UNITED STATES. 90 STAT 2009. Foreign Sovereign Immunities Act of 1976 [online] [accessed on 2016-05-10].

26 UNITED KINGDOM. State Immunity Act of 1978 [online] [accessed on 2016-05-10].

As an example of a case in which an entity with separate legal personality was qualified as an emanation of a state – case of *Connecticut Bank of Commerce*, may be invoked.[27] In this case, Société Nationale des Pétroles du Congo ("SNPC") – a Congolese state entity – was deemed to be an emanation of the Republic of Congo because of the interference with its activities on the part of the state. For instance, the Paris Court of Appeal noted that SNPC lacked sufficient independence to take autonomous decisions and that the Congolese Ministry of Energy directed and controlled its activities as well as that it was under the financial and economic control of Congo.

The important finding of the court was that the SNPC did not seem to carry out any commercial activity separate from its public service activity and that SNPC's profits were used to pay off the State's debts. The Court found that the Congolese State not only controlled SNPC but also managed and interfered in the SNPC's activities. Accordingly, the Court held that SNPC constituted a fictitious legal person and thus should be considered as an emanation of Congo.

The above considerations lead to the conclusion that while states and their organs are in principle granted immunity protection, in case of state entities with separate legal personality, it is always necessary to first consider on the basis of applicable law, whether they may be equated with state's emanations. The preceding analysis demonstrated that a possibility to qualify a certain entity as an emanation of the state is crucial for the establishment, whether it is in principle granted immunity protection.

3 Exceptions to Immunity Protection

Determination that a particular State Entity – being a state itself, state organ or a state entity with separate legal personality which can be qualified as the state's emanation – is in principle granted immunity protection, implicates further analysis concerning exceptions to the immunity principle.

27 Judgment of the Paris Court of Appeal, France of 3 July 2003, Société Nationale des Pétroles du Congo v. Société Connecticut Bank of Commerce. *Revue de Droit Bancaire et Financier*, Vol. 5, p. 297 (only excerpts available).

3.1 Waiver of Enforcement Immunity

Since immunity is considered a privilege granted to sovereigns, it is generally accepted that a sovereign may waive such a privilege.[28] Immunity from execution may also generally be waived.[29]

The main question posed in this part of the paper is whether in the absence of an express waiver of immunity from execution, sole conclusion of an agreement to arbitrate should preclude the possibility to invoke immunity defence.

Some scholars claim that the agreement to arbitrate amounts to an implicit waiver of sovereign immunity[30]. The generally accepted view is that a state may not be allowed to claim immunity from jurisdiction of an arbitral tribunal after it has entered into an arbitration agreement, because the consent to arbitration is treated as a waiver of immunity from the jurisdiction of the arbitral tribunal.[31]

Although it is currently believed that conclusion of an arbitration agreement implies a waiver of immunity from jurisdiction, the question remains whether conclusion of an arbitration agreement implies also a waiver of immunity from execution.

Despite suggestions that submission to commercial arbitration constitutes an expression of consent to all the consequences of acceptance of the obligation to settle differences by the type of arbitration specified in the arbitration agreement,[32] it is not clear whether a waiver of immunity can be extended to enforcement proceedings.[33]

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28 Seventh Report on Jurisdictional Immunities of States and their Property. *Yearbook of the International Law Commission*. 1985, Vol. II, Part 1, pp. 39.

29 SHUKLA, Richa. Foreign State Immunity in International Commercial Arbitration. *The Vindobona Journal of International Commercial Law and Arbitration*. 2012, Vol. 16, No. 1, p. 119.

30 WETTER, Gillis J. Pleas of Sovereign Immunity and Act of Sovereignty before International Arbitral Tribunals. *Journal of International Arbitration*. 1985, Vol. 2, No. 1, pp. 19–20.

31 ZHENHUA, Li. International Commercial Arbitration and State Immunity, *AALCO Quarterly Bulletin*. 2005, Vol. 1, No. 1, p. 49.

32 *Ibid*, p. 29.

33 *Ibid*, p. 40.

In the author's view this question should be answered on the basis of the law of the forum which conducts the enforcement proceedings. Additionally, to applying its own procedural and substantive rules, while determining whether a State Entity has waived its sovereign immunity, parties' agreement as well as applicable arbitration rules, need to be taken into account.

3.1.1 Parties' Agreement as an Indication of a Waiver of Immunity

The parties may expressly stipulate in the arbitration agreement what their position towards waiver of immunity from execution is. Such solution is for instance proposed by the ICC which suggests in its report titled "States, state entities and ICC arbitration" that state entities and their private contractual counterparties may wish to include in their ICC arbitration clause a provision on the state's immunity from enforcement.[34]

3.1.2 Applicable Arbitration Rules as an Indication of a Waiver of Immunity

Moreover, the wording of arbitration rules chosen by the parties should be subject to analysis.

In the famous *Creighton v. Qatar* case[35] the French Court of Cassation considered that a party which decided in an arbitration agreement for application of binding at that time ICC arbitration rules, thereby agreed for the waiver of its enforcement immunity.

In 1982, an American company Creighton Ltd concluded a contract with the state of Qatar to build a hospital in Doha. In 1986, the state expelled Creighton from the building site, alleging unsatisfactory performance. Creighton challenged its expulsion and claimed compensation. Subsequently, Creighton initiated proceedings before an arbitral tribunal seated in Paris. The tribunal made three awards in 1989, 1991 and 1993 which ordered Qatar to make the appointments within 90 days and to pay Creighton damages, interest and attorney's fees totalling over $ 8 million.

Creighton attempted to enforce the awards by attaching Qatar's assets in France and in the United States. However, the Paris Court of First

34 *States, State Entities and ICC Arbitration* [online]. ICC [accessed on 2016-05-09].

35 Judgment of the Court of Cassation, France of 6 July 2000, Creighton Ltd. v. Qatar. *ASA Bulletin*. 2000, Vol. 18, No. 3.

Instance and Paris Court of Appeal found that these attachments violated Qatar's immunity from execution. The Court of Cassation overturned the Court of Appeal's decision and concluded that when a state enters into an ICC arbitration agreement, it undertakes to carry out the resulting award in accordance with Article 24(2) of the ICC Rules and accordingly waives its immunity from execution.

Current Article 34(6) of the 2012 ICC Rules, which was then applicable Article 24(2) and subsequently Article 28(6) states as follows:

"Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."

The author generally agrees with the Court of Cassation's finding that the analysis of a potential waiver of immunity from execution should be made with reference to applicable arbitration rules. However, the author also agrees with the commentators who claim that the interpretation of Article 24 of the ICC rules binding those days, was not necessarily accurate,[36] because the relevant provision of the ICC arbitration rules does not refer to the waiver of enforcement immunity.

In its previous jurisprudence, the French Court of Cassation stated that it could not be held that an arbitration clause implied a waiver of immunity from execution, because a manifestation of unequivocal intention of such effect was required.[37]

In the author's view a waiver of immunity from jurisdiction does not automatically amount to a waiver of immunity from execution.[38] Concurrently,

36 MEYER-FABRE, Nathalie. Enforcement of Arbitral Awards Against Sovereign States, A New Milestone: Signing ICC Arbitration Clause Entails Waiver of Immunity from Execution Held French Court of Cassation in Creighton v. Qatar, July 6, 2000. *Mealey's International Arbitration Report* [online]. 2000, Vol. 15, p. 3 [accessed on 2016-05-09].

37 Judgment of the Paris Court of Appeal, France of 21 April 1982, République Islamique d'Iran et al. v. Eurodif et Sofidif. *Revue de l'Arbitrage*. 1982.

38 See also for instance SAGAR, Samarth. 'Waiver of Sovereign Immunity' Clauses in Contracts: An Examination of their Legal Standing and Practical Value in Enforcement of International Arbitral Awards. *Journal of International Arbitration.* 2014, Vol. 31, pp. 616–617.

applicable arbitration rules, if they contain a clear-cut provision providing for a waiver of enforcement immunity, may constitute an indication of a party's will to waive its immunity from execution.

3.2 Seizure of Assets Used for Commercial Purposes

If the court finds that a particular State Entity is in principle granted immunity protection and that there is no indication in the arbitration agreement, in relevant arbitration rules and national law that this entity waived its immunity, the court may still hold that the assets of such entity are not immune, because they are used for commercial purposes. To the contrary, assets used for governmental non-commercial purposes in principle may not be seized. The expression "commercial purpose" is however underspecified.

The Jurisdictional Immunities Convention[39] enlists in its Article 21 properties which are not considered property specifically in use for commercial purposes. This list contains:

1. property of a diplomatic mission,
2. property of military character,
3. property of central banks,
4. cultural heritage,
5. property constituting a part of an exhibition of objects of scientific, cultural or historical interest.

In principle, the abovementioned property serves sovereign purposes and therefore cannot be qualified as a property used for commercial purposes.

However, this distinction is not so clear cut in case of monies held in state's or embassies' bank accounts. Nonetheless, the detailed analysis concerning delimitation between assets used for commercial purposes and assets used for sovereign purposes exceeds the scope of this paper.[40]

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39 United Nations Convention of 2 December 2004 on Jurisdictional Immunities of States and Their Property [online]. *United Nations Treaty Collection* [accessed on 2016-05-10].

40 For the detailed analysis of the issue see RIVKIN, David W.; TAHBAZ, Christopher K. Attachment and Execution on Commercial Assets. In: BISHOP, R. Doak (ed.). *Enforcement of Arbitral Awards Against Sovereigns*. Huntington, New York: JurisNet, 2009, pp. 139–158.

The general conclusion which can be drawn is that it could be difficult to prove that the assets of state entities with separate legal personality, even qualified as state's emanation, are not used for commercial purposes and therefore cannot be seized, because these entities are in most cases state companies, whose primary goal is to generate profit.

4 Conclusions

In case of enforcement proceedings concerning awards rendered in international commercial arbitration involving State Entities, it is first necessary to determine whether an entity in question can qualify as an emanation of a state and thus in principle can be granted immunity protection or whether it is an entity of a purely private character and in consequence may not invoke immunity defence.

It stems from the above analysis that a state itself and its organs are in principle granted immunity protection, and state entities with separate legal personality in principle cannot be granted immunity protection, unless they can be qualified as emanations of the state.

Qualification of a particular entity as an emanation of the state depends on several factors e.g. financial and factual independence of the entity, the capability of self-management etc. If a state entity with separate legal personality cannot be qualified as an emanation of the state, the question of the possibility to raise immunity defence does not arise.

Immunity protection is no longer absolute, which means that there are certain exceptions to the possibility to invoke immunity defence, such as a waiver or commercial purposes of assets which might be seized.

Therefore, a further step is to determine whether a particular State Entity may rely on its immunity or whether the waiver or commercial use exceptions apply.

In the author's opinion, conclusion of an arbitration agreement constitutes a waiver of jurisdictional immunity, but it does not automatically entail waiver of enforcement immunity.

Therefore, determination whether a State Entity has indeed waived its immunity protection requires proper construction of the arbitration agreement and analysis of the arbitration rules chosen by the parties. The forum will also usually take into account its national law, if it covers the issue.

Subsequently, if the court decides that the construction of an arbitration agreement does not justify the conclusion that a State Entity waived its immunity, it should consider whether the assets in question may be generally seized under customary international law. In this respect, the judgment of the ICJ rendered in *Villa Vigoni* case is of paramount importance. The conclusion of the ICJ was *inter alia* that state's assets could be seized, if they were used for commercial purposes.

Taking into account the above, the general conclusion of the author is that in some instances State Entities may invoke immunity defence during the enforcement proceedings concerning awards rendered in international commercial arbitration.

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EVIDENCE TAKING IN INTERNATIONAL COMMERCIAL ARBITRATION: A CLASH OF LEGAL CULTURES

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Abstract

Taking of evidence represents a crucial step in any legal proceeding. National laws on procedure commonly contain a detailed list of rules relating to evidence taking and their evaluation. However, if one considers international commercial arbitration such a list does not exist. Among various reasons, one is simple a different point of origin when the court or tribunal assesses evidence and the scope of its taking. This article focus on evidence gathering tool known in common law as "discovery", with a special focus on document production requests, and analyses whether such procedural tool has a place in international commercial arbitration.

Keywords

Discovery; Document Production; International Commercial Arbitration; Setting Aside of Arbitral Award.

1 Introduction

Facts gathering and their subsequent evaluation is inherently connected to any application of legal rule as one must obtain relevant facts (non)existence of which is anticipated by such a rule. This process is of course more regulated and may get more complex if we consider court or arbitral proceedings. However, evidence gathering and evaluation is an essential part of any proceedings, as a ruling not based on proved facts of life may serve justice only in a very limited and exceptional circumstances. This perspective is without much doubt shared across various legal cultures. However, what differs is how regulated the gathering and evaluation is, and to what degree various legal orders tend to seek what can be called "objective truth".

Of course, it is within the framework of international commercial arbitration where different law families meet, combine and oftentimes clash. In that regard, evidence gathering procedures are not different. Though arbitration tends to present itself as providing "the best of both worlds", many times this is not necessarily what parties expect. Such disillusions may in turn lead to a challenge of arbitral award, and subsequently its setting aside, or refusal to recognise and enforce.

This paper consists of two main parts where the first part describes where the civil law and the common law[1] principally clash when it comes to evidence gathering. Further, it describes special set of tools of common law civil procedure – so called pre-trial discovery process, with a specific focus on document production. Second part translates the issue of document production requests into international commercial arbitration. It analyses whether (if at all) a more common law approach to document production has its place in international commercial arbitration. The analysis also provides what negative consequences may be brought if common law style document production request is grated and vice versa.

2 Why Do the Legal Cultures Clash – Truth Seeking Process

2.1 Core Difference – A Jury Trial v. Career Judge Trial

Though most visible in criminal proceedings, jury of laymen represents a distinctive element of common law system, constitutionally granted in both criminal and civil matters.[2] In civil law systems, a career judge represents a single focal point for disputants, evaluating both questions of fact and the law. In common law, judge rules on questions of procedure and sets basic legal framework of a dispute through jury instructions;[3] however,

1 Distinctions described by this paper are based on the observations valid for the U.S. legal system.

2 For the United States, see Fifth (criminal procedure) and Seventh (civil procedure) Amendments to the United States Constitution.

3 *"The common law judge merely serves as the litigants' umpire, adjudicating discovery disputes and imposing sanctions for any non-compliance."* See BROWER, Charles N.; SHARPE, Jeremy K. Determining the Extent of Discovery and Dealing with Requests for Discovery: Perspective from the Common Law. In: NEWMAN, Lawrence; HILL, Richard (eds.). *Leading Arbitrators' Guide to International Arbitration.* Huntington: Jurisnet, 2014, p. 593.

it is the jury which evaluates "findings of fact" and basically decides the dispute.[4]

This common law bi-central system also creates a major ground for a different fundamental point of departure regarding procedural rules. Jury is an *ad hoc* body, constituted anew for each dispute.[5] Less some specific conditions, selected jury hears the complete dispute in a single block of pleadings which basically presents "trial".[6]

Though dispute officially starts before the trial, when claimant serves respondent with a notice of complaint and files it with a competent court,[7] it is still long before claimant and respondent may exercise their right for "a day in court".

Notice of complaint cannot be compared to what is generally recognised as a petition for legal action in civil law understanding.[8] A notice of complaint is minimalistic, and provides a very brief overview of basic facts alleged and action(s) requested.[9] It contains no evidence gathering proposal, and serves primarily to inform the counter-party of claims raised. Though defendant should provide answer to such complaint, it is similarly basic and narrow.

However, serving of complaint and providing answer to it, enables parties to prepare for the subsequent trial in front of jury. Contrary to civil law system, where a career judge presents a stable, continuous element, a jury

4 Seventh Amendment to the United States Constitution prohibits courts to re-examine facts tried by a jury. Of course, appellate courts still hold the power to examine whether all procedural conditions under which any fact was obtained, presented and evaluated (framework instructions by judge) were fulfilled. For further comments, see *CRS Annotated Constitution. Seventh Amendment to the United States Constitution* [online]. Legal Information Institute, pp. 1460–1462 [accessed on 2016-07-10].

5 JOLOWICZ, J. A. *On Civil Procedure.* Cambridge: Cambridge University Press, 2000, p. 206.

6 *CRS Annotated Constitution. Seventh Amendment to the United States Constitution* [online]. Legal Information Institute, pp. 1452–1454 [accessed on 2016-07-10].

7 See UNITED STATES. Federal Rules of Civil Procedure [online], Rule 3 [accessed on 2016-07-10] ("Federal Rules of Civil Procedure").

8 MACUR, Josef. *Kompenzace informačního deficitu procesní strany v civilním soudním sporu.* Brno: Masarykova univerzita, 2000, p. 199.

9 As an example, see suggested "Complaint for a Civil Case" form presented on governmental webpage for U.S. federal courts. *Complaint for a Civil Case. Pro Se Form No. 1* [online]. United States Courts [accessed on 2016-07-10].

as an *ad hoc* body has, as a matter of real life possibilities, a limited scope of operation. Therefore, common law system leads parties to present all evidence in a single "trial".[10] Thus, evidence gathering is carried out completely in a pre-trial stage and is fully commanded and organised by parties themselves, with limited assistance of the court.[11] Once final, the result is "served" for jury to decide.[12]

2.2 Level of Truth-seeking Desired

Second major point of difference, related to pre-trial scheme of evidence gathering on one end, and evaluation of the facts of the case by a jury or a judge on the other, rests in the desired level of establishing what the truth is. In other words, the parameters of product (factual playing field) which is "served" either to a jury or a judge on which they may decide a dispute.

While both systems provide framework for establishing what may be called a material truth, they differ in parties' duty to cooperate and level of court's intervention in establishing such truth.[13]

In common law, establishing of the facts of the case is exclusive, party controlled activity; court may only assist, but may not gather any evidence on its own motion. Though a judge finally decides questions of admissibility

10 Of course, in complicated cases, such trial may be executed within timeframe of few days, or even few weeks. Still this cannot be compared to a civil law view, where particular hearings of dispute are organised mainly around the schedule of a sitting judge, and reflect procedural steps of both court and parties.

11 During pre-trial phase, court may order co-operation of the other party or third persons, if requested. It may also evaluate various request for exceptions, based on e.g. complex system of privileges. However, it is generally for the trial stage to provide a final ruling on admissibility of all evidence introduced by the parties.

12 JOLOWICZ, J. A. *On Civil Procedure*. Cambridge: Cambridge University Press, 2000, p. 206.

13 Commentators often provide the basic difference lies in common law adversarial and civil law inquisitorial approach to civil litigation. This is of course a certain simplification of the matter. While it is true, that common law represents a standard adversarial model, a truly inquisitorial approach in civil law is restricted to a few types of cases. In: a standard litigation, civil law court will, as well, mostly rely on evidence provided by parties themselves. Author agrees with Macur that both systems are adversarial (or more precisely, contain mix of both), with a different standard and duty vested on parties with regards to mutual cooperation. See MACUR, Josef. *Kompenzace informačního deficitu procesní strany v civilním soudním sporu*. Brno: Masarykova univerzita, 2000, p. 193. Similarly see JOLOWICZ, J. A. *On Civil Procedure*. Cambridge: Cambridge University Press, 2000, pp. 175–176.

of any evidence provided by a party, he is not generally entitled to rule any evidence out because it does not seem to be material to the outcome of the case. Such evaluation rests upon a jury which is presented with all admissible evidence gathered.

Though, parties in civil law have major control over evidence gathering process as well, formally it is court which collects evidence. Additionally, under some circumstances, court is even empowered to seek evidence on its own motion, if it is necessary to further clarify facts of the case already established.[14] In the end, it is always a career judge who evaluates both admissibility and materiality of any evidence suggested by the parties and carried out by court.

This also provides for a major difference with regards to a sphere of control which litigants exercise of the sources of facts. Traditionally, civil law requires parties to present only evidence which support their claims or affirmative defences (*onus probandi incumbit actori*). Therefore, party is not required to disclose evidence which is adversarial to its position.[15] However,

14 Unless we speak of a highly specific cases like child custody or maintenance, civil law courts do not actively engage in seeking new evidence outside of factual framework alleged by the parties. A good example to illustrate the difference in standard cases may be an "expert witness" statement/opinion. It is a widespread tool for a civil law judge to have an independent, technical/specialist opinion to assess other evidence provided by the parties so far. In: common law, though experts are abundantly used as well, they always provide for expert opinions only for a party which appointed them, court have no power to appoint a neutral expert for the question in consideration. It is than for a jury to establish which (expert) witness provided "better" testimony (assessment of which is not limited only to own expertise, but to all factors by which a witness is to be assessed on, including personal appearance and even personal likeability). BERNINI, Giorgio. The Civil Law Approach to Discovery: A Comparative Overview of the Taking of Evidence in the Anglo-American and Continental Arbitration Systems. In: NEWMAN, Lawrence; HILL, Richard (eds.). *Leading Arbitrators' Guide to International Arbitration*. Huntington: Jurisnet, 2014, pp. 577–580.

15 "*This core principle is based on the idea that civil procedures serve the purpose of enforcing the private rights of the parties and that there is no public interest in determining facts ex officio which are the basis of a private dispute between the parties. The judge may therefore focus on his or her role as 'manager' of the proceedings and rely on the parties presenting to the court all facts which are favourable to them and their case.*" BERGER, Klaus Peter. The International Arbitrator's Dilemma: Transnational Procedure versus Home Jurisdiction: German Perspective. *Arbitration International* [online]. 2009, Vol. 25, No. 2, p. 226 [accessed on 2016-03-01].

unless a very limited circumstances exist,[16] on practical terms, party may rely only on such evidence which is in its sphere of control.

On the other hand, common law approach requires both parties to disclose evidence material to the outcome of the case, notwithstanding whether such evidence is favourable or adverse to legal position of the party holding such evidence. This is of course connected to a notion that party's right cannot be stripped of protection just because a material document is in possession of a counter-party. While civil law court might exercise its power to compel production of such document or alternatively try to obtain other relevant evidence on its own, in common law, such right is primarily vested with the parties themselves and courts only assist to enforce such right. However, common law does regulate the process of information seeking and exchange and provides parties with set of specific tools, commonly known as "discovery".

2.3 (Not so) Mighty Discovery

Dictionary provides for two basic definitions of discovery "the act or process of finding or learning something that was previously unknown", and "compulsory disclosure, at a party's request, of information that relates to the litigation".[17] The first one of course refers us to a basic, layman's understanding of the term; the second to a common law tool of pre-trial evidence gathering. This second meaning is closely connected to the abovementioned common law approach to the truth seeking. It allows parties to establish factually equal and well known playing field which tries to represent the truth in the full extent possible.

For fulfilling such objective, Sections 26 to 37 of the Federal Rules of Civil Procedure provide a specific list of procedural tools which are in turn

16 Even civil law countries recognise e.g. request for specific document production – but only if it is already established that such document exists, and where right of the requesting party cannot be substantiated otherwise. KAUFMANN-KOHLER, Gabrielle; BÄRTSCH, Philippe. Discovery in International Arbitration: How Much Is Too Much? *SchiedsVZ* [online]. 2004, No. 1, p. 16 [accessed on 2016-04-03].

17 GARNER, Bryan A.; BLACK, Henry Campbell. *Black's Law Dictionary*. 9th ed. St. Paul: West, 2009, p. 533.

summarised as pre-trial discovery requests. These consist of depositions, interrogatories, physical inspection of object, physical or mental examination of person, requests for admission and requests for document production.

For the next part of this paper, we will focus primarily on the document production requests which in contemporary electronic word represent the biggest threat for fast and expedient proceeding, notwithstanding whether at court or in arbitration.

2.3.1 Aim and Consequences of Document Production

The main aim of the document production request is mainly to secure necessary documents related to a claim raised.

However, as was shown above, a notice of complaint establishes a very little regarding the facts of the case and substantiation of the claim. It serves mainly as a notification to the other party that claimant deems its rights infringed. Though certainly a preliminary legal analysis to the cause and possibility of victory was carried out even at this stage, it is further specified through discovery requests.

By request for document production, requesting party may be seeking to obtain any and all documents which are related to the case at hand. Therefore, for a breach of a simple sales contract, hypothetical claimant may request: "any and all documents related to negotiations of such contract, including internal memoranda, any draft version of such a contract, any internal communication regarding the execution and performance of such contract […]". Upon receiving and processing of such documents, requesting claimant will provide a more substantiated claim, using newly acquired, and more specific information. On the other hand, the same right is vested with defendant, who shall also have access to claimant's documents in order to find evidence leading to building of a viable defences.

Through such mutual disclosure process, parties create a level playing field regarding information material to the outcome of the case. In theory, parties have advance access to fundamental documents on which claims and defences rely, and can prepare the best tactics how to confront them at the trial, i.e. in front of jury. Though jury may find many of these documents surprising, that is not the case for the parties, as they are very well

acquainted with the content of all exhibits used. This is one of the core elements of the common law system with regards to full opportunity to present one's case and right to a fair trial.

Consequently, a level playing field established by mutual document production creates additional element to the dispute – a higher chance of settlement. As all material facts are known, and each party can determine more easily the probability of its success (as there are no "smoking guns" in play), and consequently, out-of-court settlement may be a better commercial solution.

2.3.2 Related Problems – War of Attrition & Fishing Expeditions

Previous section described theoretical aims of document production request and related positive effects – to establish a level playing field. However, in real life, attainability of such a goal and sometimes even the purpose of discovery is questioned.

First, extensive production requests and extensive production replies oftentimes serve as "weapons" in the war of attrition. As a matter of general common law rule, each party pays its attorney-related litigation costs.[18] Therefore, even if successful, neither claimant nor respondent will recover attorney fees and other legal expanses it had to pay during the course of litigation.[19]

Therefore, when one party is more wealthy (consider a multinational company against a local one), this can be used as a tactical advantage. If the wealthy party is claimant, it may draw extensive production request which will overwhelm respondent, drawing away its finances at the very beginning of the dispute. If respondent is the wealthy one, it may as a response to even a modest production request, disclose intentionally an abundance of unrelated information to again overwhelm requesting party, and effectively hide the information sought, yet formally comply with the duty to cooperate and establish level playing field.

18 Rule 54(d)(1) of Federal Rules of Civil Procedure.

19 Of course, there are exemptions from the rule, e.g. if a claim is raised in bad faith like in the case of a clear abuse of right.

Secondly, discovery may be used as a bad faith tool to gain access to information which should otherwise remain private. A classic example lies within the sphere of intellectual property laws, where one may more easily frame an IP right infringement claim with purpose to discover the content of rights to be protected by such very laws. Similar method may be used just to survey document in order to merely look for any fact which may substantiated any claims against requested party, even completely unrelated to the original claim. In these cases, discovery is basically used as a Trojan horse, and evidence gathering is then often times compared to "fishing expeditions".

Though it must be said, that common law courts and legislators indeed reacted to possible abuse of discovery tools, it may be still turned into an efficient weapon in the hands of capable party and its counsel, especially to harass the other party, and unnecessarily prolong the pre-trial phase of the dispute.

3 Is There a Place for Common Law Style Document Production in International Commercial Arbitration?

3.1 Basic Principles of International Commercial Arbitration

International commercial arbitration is private, simple and informal system of dispute resolution which provides for a binding decision upon the parties. It is often proposed that arbitration proceedings generate less costs to similar case being tried in front of a state court. Although this proposition is sometimes disputed as well,[20] arbitration indeed has a potential to provide fast and efficient resolution of the dispute. This is mainly due to core principle of party autonomy, which also includes the autonomy to carve the rules of procedure to a large extent according to a wish of the parties. Such rule is contained in all modern arbitration statutes and rules of arbitral institutions, and is often referred to as "Magna Carta" of arbitration.[21]

20 "*Several authors and practitioners have bemoaned the excessive use of discovery in current international commercial arbitration practice. In: comparison to court litigation, international arbitration seems to be losing its cost-effectiveness and attractiveness.*" ELGUETA, Giacomo Rojas. Understanding Discovery in International Commercial Arbitration Through Behavioral Law and Economics: A Journey Inside the Minds of Parties and Arbitrators. *Harvard Negotiation Law Review* [online]. 2011, Vol. 16, p. 166 [accessed on 2016-04-01].

21 *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* [online]. UNCITRAL, 1985, p. 44 [accessed on 2016-05-01].

Therefore, if the parties wish and agree on any mean of discovery, including extended document production requests, arbitrators should follow such agreement. On the other hand, practical concerns would also come into the play, as the standards of contemporary arbitration practice do not take these extended practices into account. To the contrary, one of the current issues in international commercial arbitration is time and costs control which went adrift over past decade. Additionally, arbitral tribunal does not possess the same power of enforcement as does a national court, therefore, it may be difficult to enforce the order to disclose documents. Generally, in such a situation, tribunal would apply for assistance by local court. Thus, if parties wish for extended document production, they should contain basic rules and framework into the arbitration agreement itself in order to prevent some of the practical problems.

However, if parties remain silent about the document production, it is for the arbitrators to decide on admissibility of any such request in the proceedings. To that regard, arbitrators do have a large discretionary power,[22] which is guarded in principle only by a duty to provide a fair trial and equal treatment to both disputants, including equal opportunity to present one's case.[23] Generally, though a disclosure of a specific document or a group of documents is a not uncommon in arbitration,[24] it is agreed that extensive "US-discovery" production, sought only as a mean to gain facts

22 With regard to parties' agreement, UNCITRAL Analytical commentary explicitly mentions the right of arbitrators to conduct proceedings in order to meet the needs of particular case, and select the most suitable organisation. However, at the same time, commentary mentions that arbitrators should adopt procedural features familiar, or at least acceptable, to the parties – even use a pre-hearing discovery if both parties come from a common law background, or a more mixed procedure if both common and civil law expectations should be met. See *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* [online]. UNCITRAL, 1985, p. 45 [accessed on 2016-05-01].

23 Set explicitly throughout rules of all major arbitral institutions, e.g. Article 22(1), (2) and (4) of 2012 ICC Rules; Article 14(4)-(5) of 2014 London Court of International Arbitration Rules [online]. *London Court of International Arbitration* [accessed on 2016-05-01]; Article 16.1, 16.2 and 16.3 of 2013 Arbitration Rules of Singapore International Arbitral Centre [online]. *Singapore International Arbitral Centre* [accessed on 2016-05-01]; Article 20(1), (2) and (4) of 2014 International Arbitration Rules of International Centre for Dispute Resolution [online]. *International Centre of Dispute Resolution* [accessed on 2016-05-01].

24 See IBA Rules on the Taking of Evidence in International Commercial Arbitration 2010 [online]. *International Bar Association* [accessed on 2016-05-01].

substantiating claims raised, contradicts the principle of cost-effectiveness and efficiency and tribunal would not commonly allow it.[25]

Of course, there lies a dilemma for arbitrator. Arbitration is an alternative to national litigation, and as such provides for more flexible rules in order to achieve speedy result. Therefore, not all safeguards of national system may be observed – especially in international contexts where details may vary dramatically.[26] By choosing arbitration, parties trade some safeguards for other advantages. However, expectations of parties, especially when facing arbitration for the first time, do origin within their own cultural and legal background, and which consequently shapes their understanding of due process and right to be heard. Therefore, in such situation, arbitrator is stuck between to expectations, to provide speedy and efficient dispute resolution, and to provide it in a fair trial.

3.2 Is There a Threat of Award Being Set Aside Unless Party's Document Production Request Is Satisfied?

If a tribunal rejects request for extended "US-style" document production, it may oftentimes fall short of requesting party's expectations, and especially its visions of a fair trial. And vice versa, a party not familiar with broad disclosure requests may be equally frustrated if ordered to disclose documents in its possession. This may in turn lead to motion for setting aside of final award, or motion to reject enforcement.

If we do not consider cases when arbitrators breach explicit agreement of the parties,[27] we could identify two grounds which may be used by a party to challenge an award – infringement of due process (especially right to be heard, or opportunity to present one's case) and possible violation of public policy.

25 BORN, Gary B. *International Commercial Arbitration*. 2nd ed. Alphen aan den Rijn: Kluwer Law International, 2014, p. 2249; KAUFMANN-KOHLER, Gabrielle; BÄRTSCH, Philippe. Discovery in International Arbitration: How Much is Too Much? *SchiedsVZ* [online]. 2004, No. 1, p. 18 [accessed on 2016-04-03].

26 MARGHITOLA, Reto. *Document Production in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2015, p. 193.

27 See e.g. Article 34(2)(iv) of the UNCITRAL Model Law or Article V(1)(iv) of the New York Convention. However, some major arbitral jurisdictions do not provide such ground for annulment, e.g. Switzerland. Article 190(2) of SWITZRELAND. Federal Act on Private International Law of 18 December 1987.

First of all, it must be stated that global pro-arbitration attitude restricts national courts from deep re-evaluation of arbitral process. As stated by an English court "[courts] *do not approach [arbitral awards] with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it."*[28]

Secondly, if we consider "fair trial" or "right to be heard" ground, we will find that decisions for setting aside or refusing to enforce an award with regards to (not) allowing extended document production are simply not there.

If party claims its right to present the case was infringed by not obtaining all documents it requests, it should be stressed that basic framework of international arbitration requests party to file a substantiated claim, i.e. with sufficient description of facts and documents on which it relies.[29] Therefore, disallowing of a fishing expedition, commonly criticized even in a domestic setting, cannot be deemed as a refusal to present the case.[30]

What is more, it is globally recognized that arbitrators enjoy wide discretionary power when it comes to evidence gathering and evaluation, power which may be evaluated only very restrictively by a nation court. As one U.S. court stated: *"In handling evidence an arbitrator need not follow all the niceties observed by the federal courts. He need only grant the parties a fundamentally fair hearing."*[31] Thus, even courts in common law refuse to set aside awards where arbitrators did not comply with party requested document production.[32] Violation of due process rule are restricted only to such cases, where arbitrators

28 Reported in MAURER, Anton. *Public Policy Exception Under the New York Convention. History, Interpretation, and Application.* Revised ed. Huntington: Jurisnet, 2013, p. 162.

29 See Article 23 of UNCITRAL Model Law, and similarly, in the procedural rules of major arbitral institutions.

30 For a recent study on more than 20 U.S. cases which requested annulment or refusal of recognition due to "insufficient discovery" and consequently infringement of right to be heard see ROESSER, John; BROOKSHER-YEN, Anne; IGYARTO, Michael; ALI, Ehsan; CHOI, Christine. United States: Avoiding the "Discovery Bog" in US-seated Arbitrations. *GAR: International Journal of Commercial and Treaty Arbitration* [online]. 2015, Vol. 10, No. 5 [accessed on 2016-04-20].

31 Reported by Born. See BORN, Gary B. *International Commercial Arbitration.* 2nd ed. Alphen aan den Rijn: Kluwer Law International, 2014, p. 3322.

32 MARGHITOLA, Reto. *Document Production in International Arbitration.* Alphen aan den Rijn: Kluwer Law International, 2015, pp. 205–207.

refuse a request for production of a specific document which is material for the outcome of the case and there is no other suitable evidence on which the requesting party may substantiate its claim.[33]

On the other hand, one may found an extensive scholarly discussion in some civil law countries whether allowing extensive document production may violate basic principle of civil procedure – especially with regards to principle that no one is under obligation to produce evidence adverse to his interest.[34] However, upon closer inspection, though scholarly materials and even some rulings may suggest such approach, there is basically no reported court decision which would take such a step and annul an award. Additionally, civil law countries which are considered arbitration friendly, and which serve as a frequent seat to international tribunals seem to be more lenient when considering "alien" legal tools, and tend to focus mainly on an overall procedural fairness.[35]

Thirdly, if we consider violation of public policy, even though examined by court ex officio, it represents the most restrictive ground for annulment or enforcement.[36] Though, it is recognised that public policy may reach either material or procedural rules and policies, argument that procedural public policy creates a new and distinctive ground compared to one set in a more specific "fair trial" ground seems distant and unpersuasive.[37] With regard to document production, it is hard to imagine a completely different legal argument found in public policy which could not be envisaged in a more specific, yet a quite extensive category,[38] fair trial ground.

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33 MARGHITOLA, Reto. *Document Production in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2015, pp. 210–213.

34 BERGER, Klaus Peter. The International Arbitrator's Dilemma: Transnational Procedure versus Home Jurisdiction: German Perspective. *Arbitration International* [online]. 2009, Vol. 25, No. 2, p. 227 [accessed on 2016-03-01]; KAUFMANN-KOHLER, Gabrielle; BÄRTSCH, Philippe. Discovery in International Arbitration: How Much is Too Much? *SchiedsVZ* [online]. 2004, No. 1, p. 18 [accessed on 2016-04-03].

35 E.g. Switzerland or France. See MARGHITOLA, Reto. *Document Production in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2015, pp. 201–202.

36 BORN, Gary. *International Commercial Arbitration*. 2nd ed. Alphen aan den Rijn: Kluwer Law International, 2014, p. 3322.

37 *Ibid.*

38 See list of grounds commonly considered by courts when dealing with requests under "equitable treatment and fair trial" ground presented by Born. *Ibid.*, pp. 3322–3254.

4 Conclusion

This paper has analysed a basic differences civil law and common law place on evidence gathering process. Though both establish adversarial system of truth seeking, the level of cooperation required from parties to achieve the full possible knowledge of the case differs extensively. As a consequence of different organisation of the dispute resolution as a whole, common law provides parties with specific information seeking tools, which are basically unparalleled in civil law litigation, and may be seen by civil law systems as highly intrusive.

Though international commercial arbitration presents a global alternative, system beyond individual national law, it is also true that much of it basic characteristics is drawn from civil law tradition. On the other hand, arbitration is also a very flexible tool which may be shaped upon parties' wish, or specific needs of the case.

Even though, it is not common to allow extensive document production in international commercial arbitration, arbitrators should not be *ex ante* disregard expectation each party brings regarding fundamental fairness and the organisation of arbitral process. If managed properly, limited document production may definitely advance the case and provide a clearer ground for the decision of the dispute. However, at the same time, it is also true, that national courts would most probably not intervene if such request is not granted as it is generally held across jurisdictions that evidence gathering process is to the greatest possible extent within arbitrator's sphere of control.

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CASE LAW OF THE NATIONAL COURTS REGARDING THE "NON-SIGNATORIES"

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Abstract

The notion of "non-signatories" has been recently heavily discussed in the area of international commercial arbitration. The aim of this paper is to analyse selected case law of the national courts regarding this topic and to describe the approach these institutions took to it during the recognition and enforcement proceedings.

Keywords

Enforcement of Arbitral Award; Competence-Competence; New York Convention; Non-signatories.

1 Introduction

Almost every article dealing with the notion of consent in international arbitration begins with the widespread quotation of the U.S. Supreme Court decision: *"A party is never required to submit to arbitration any question which he has not agreed so to submit."*[1] Although this postulate is constantly reaffirmed, the existence of "non-signatories" (sometimes also called "less-than-obvious-parties") has created a wholly new challenge for the field of international commercial arbitration. In the globalized world of the 21st century, multi-national corporations often perform their transactions via various subsidiaries located in various states, without these subsidiaries being enlisted in the contract containing the arbitration clause. Does a mere performance of such a contract amount to consent? Can a mere performance of such a contract establish the arbitral tribunal's jurisdiction over this subsidiary?

1 Decision of the Supreme Court, United States of 20 June 1960, No. 363 U.S. 574, United Steelworkers of America v. Warrior & Gulf Navigation Co. [online]. *JUSTIA*. U.S. Supreme Court [accessed on 2016-02-27].

2 Kompetenz – Kompetenz – To What Degree Is This Principle Accepted?

Nowadays, nobody doubts that it is the arbitral tribunal itself which is entitled to rule about its jurisdiction. This principle (called *Kompetenz – Kompetenz* or competence – competence) is therefore embodied in national legal orders[2] as well as in the UNCITRAL Model Law.[3] With the regards to the aforementioned questions, arbitral tribunals do not hesitate to bind the subsidiaries performing the contract (or their mother companies) by the arbitration clause, although they are not enlisted in the principal contract.

Nevertheless, a question arises to which extent are the arbitral tribunal's results regarding its jurisdiction final. In other words, may a party that is in accordance with the tribunal's findings a party to the arbitration agreement, defend itself against these findings? Vast majority of the legal orders enables such a party to try to set the arbitral award aside, namely with regards to the material invalidity of the arbitration agreement. Can this party raise the same argument during the recognition and enforcement proceedings?

At the beginning, it must be emphasised that the available case law and literature do not provide an unequivocal answer. However, such an opportunity can be deduced from the plain reading of the Article V(1)(a) of the New York Convention. This article would most likely not refer to the material invalidity of the arbitration agreement, if its drafters have not intended to grant such a power to the national courts in the country of enforcement. Nevertheless, the key issue is that these national courts "may" (not must) refuse the recognition and enforcement of the arbitral award. Therefore, these courts have discretion whether they will re-examine the tribunal's findings or not.

On the other hand, some authors argue that the national courts should not re-examine the arbitral tribunal's jurisdictional findings as it leads

2 E.g. Section 1040 of the GERMANY. Code of Civil Procedure [online]. *JURIS. Das Rechtportal* [accessed on 2016-02-27], Article 30 of Arbitration Act 1996 or Section 15 of the Czech Arbitration Act.

3 Article 16 of the UNCITRAL Model Law.

to the forbidden *revision au fond*.[4] Same argument was used in one of the decisions of the *Oberlandesgericht* Hamburg.[5]

A slightly different reasoning was used in the *China Nanhai Oil Joint Service Corporation Shenzen Branch v. Gee Tai Holding Co. Ltd.* case. In this case, the first mentioned company sought to enforce (in Hong Kong) an arbitral award rendered under the auspices of China International Economic and Trade Arbitration Commission. During the enforcement proceedings, the second mentioned party objected that the Arbitral Tribunal was not properly constituted, without raising the same objection before the Arbitral Tribunal or a court in the seat of arbitration. The Supreme Court of Hong Kong found this objection unjustified, ruling that if a party fails to raise such an objection in the course of arbitral proceeding, its right to do so in the country of enforcement is precluded, namely on the basis of the doctrine of estoppel.[6] The court also ruled that the same approach can be applied in case of other grounds envisaged by the Article V(1) of the New York Convention. This reasoning was later accepted in the literature.[7]

Same reasoning was used by the *Oberlandesgericht München*.[8] In this case, companies with their seats of business in Germany and Ukraine concluded a contract, on the basis of which was the latter one obliged to deliver waste material containing precious metals to Germany. The principal contract contained an arbitration agreement in favour of *Zürcher Handelskammer*. Upon the request of the Ukrainian party, the contract was amended insofar, that the future disputes shall be resolved before the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry.

4 KRONKE, Herbert; NACIMIENTO, Patricia et al. *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*. The Hague: Kluwer Law International, 2010, pp. 222–223.

5 Decision of Oberlandesgericht Hamburg, Germany of 14 May 1999 [online]. *Deutsche Institution für Schiedsgerichtsbarkeit (DIS)* [accessed on 2016-03-01].

6 Decision of the Supreme Court, Hong Kong of 13 July 1994, No. 1992 No. MP 2411 [online]. *1958 New York Convention Guide*. UNCITRAL [accessed on 2016-03-02].

7 E.g. REDFERN, Alan; HUNTER, Martin et al. *Redfern and Hunter on International Arbitration*. 5th edition. Oxford: Oxford University Press, 2009, p. 677 or KRONKE, Herbert; NACIMIENTO, Patricia et. al. *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*. The Hague: Kluwer Law International, 2010, p. 332.

8 Decision of Oberlandesgericht München, Germany of 15 July 2011, No. 34 Sch 15/10 [online]. *Deutsche Institution für Schiedsgerichtsbarkeit (DIS)* [accessed on 2016-03-02].

A dispute had arisen and the Arbitral Tribunal has issued an arbitral award in favour of the Ukrainian party. This party later requested recognition and enforcement of this award in Germany.

The German party argued that amendment of the contract constitutes a void act as its purpose was only to feignedly satisfy the Ukrainian domestic laws. However, this argument was not accepted. The court referred to Article V(1) of the European Convention and ruled that a party must raise such an objection already within the arbitral proceedings.

Another court took a slightly different approach. In *Aloe Vera of America, In: v. Asianic Food (S) Pte Ltd and Another*, the High Court of Singapore considered, whether it is entitled to re-examine jurisdiction of the Arbitral Tribunal sitting under the flag of American Arbitration Association in Arizona.[9] The court held that:

"I am not the supervisory court and cannot review the Arbitrator's decision in the same way that an Arizona court could. For me to refuse to enforce the Award on this ground, I would need to be satisfied that, under the law of Arizona, the arbitration agreement was invalid vis-à-vis Mr Chiew and that the Arbitrator was not entitled to find that Mr Chiew was a party to the Agreement and the arbitration. No basis has been given to me for such a finding."

It is possible to interpret this paragraph in a way that the courts in the country of enforcement are basically permitted to re-examine the jurisdiction of the arbitral tribunal. However, they should be extremely reluctant when doing so on the basis on a foreign law.

3 Decisions Applying Full Re-examination of the Arbitral Tribunal's Jurisdiction

It is the recognition of a foreign arbitral award which grants effects to it in the country of (possible) enforcement. This may be the ground why the courts in the country do want to have some level of certainty that there were no major mistakes during the arbitral proceedings. Therefore, it is quite understandable that these courts will be willing to enforce a foreign arbitral

9 Decision of the High Court, Singapore of 10 May 2006, Aloe Vera of America, In: v. Asianic Food (S) Pte Ltd and Another [online]. *The Singapore Law Committee* [accessed on 2016-03-02].

award only if the fundamental requirement of the arbitral proceedings is satisfied – namely existence of both formally and materially valid arbitration agreement against all the parties, against which is the enforcement sought. For this reason, the courts in the country of enforcement often fully re-examine the arbitral tribunal's jurisdictional findings. Some of these decisions will be described in the following pages.

3.1 Javor v. Francoeur

One of these decisions is the *Javor v. Francoeur* case the Supreme Court of British Columbia dealt with in 2003.[10]

In this case, a contract was concluded between the company Fusion-Crete Inc. and Mr Eddie Javor on the one side, and company Fusion Crete Products Inc. on the other side. The contract contained an arbitration agreement in favour of American Arbitration Association. In the course of the arbitral proceedings, the sole arbitrator came to conclusion that Mr Luke Francoeur is a party to the arbitration agreement as well, namely as the *alter ego* of Fusion Crete Products Inc. As a consequence of this finding, the arbitrator ruled that Mr Francoeur *"…should be held personally liable for any debts of the corporation that might ultimately be imposed in these proceedings…"*. Later, Mr Francoeur was liable jointly with the corporation.

The counterparty then sought to enforce the arbitral award in British Columbia. With reference to the wording of the local Foreign Arbitral Awards Act and the International Commercial Arbitration Act, the court emphasized that Mr Francoeur never became a party to the arbitration agreement. In the reasoning, the court used a simple syllogism, ruling that: *"…party means party to an arbitration agreement…"* and that the arbitration agreement *"…must be in writing…"* and is deemed in writing *"…if it is contained in a document signed by the parties…"*. Therefore, the lack of Mr Francoeur's signature meant that the court could not consider him a party to the arbitration agreement.

With regards to the aforementioned, it comes as no surprise that the enforcement was refused.

10 Decision of the Supreme Court of British Columbia, Canada of 6 March 2003, Javor v. Francoeur [online]. *1958 New York Convention Guide*. UNCITRAL [accessed on 2016-03-02].

3.2 Sarhank Group v. Oracle Corporation

Another example of the full re-examination of the arbitral tribunal's jurisdiction is the Sarhank Group v. Oracle Corporation case.[11]

Sarhank Group ("Sarhank"), a company with its seat of business in Egypt and Oracle Systems Inc. ("Oracle"), with its seat of business in Cyprus, entered into a bilateral executory contract to be performed within Egypt. This agreement contained an arbitration clause in favour of Cairo Regional Centre for International Commercial Arbitration. Oracle Corporation, Oracle's mother company established under the laws of Delaware was a signatory neither to the principal contract nor to the arbitration agreement.

In 1997, Sarhank commenced arbitration proceedings against both Oracle and Oracle Corporation. The latter one argued that it does not fall within the personal scope of the arbitration agreement concluded between Sarhank and Oracle. The Arbitral Tribunal rejected this objection and bound Oracle Corporation by the arbitration agreement. In 1999, the final award was issued by virtue of which Oracle and Oracle Corporation were found liable. Sarhank was awarded 1,9 million USD.

After Oracle Corporation's unsuccessful motion to set arbitral award aside in Egypt, Sarhank sought to enforce it in the United States. District Court for the Southern District of New York granted enforcement. As to the allegations that Oracle Corporation never became a party to the arbitration agreement, the court remarked that *"…the arbitrators' conclusion that the Agreement was binding upon Oracle Corporation, by virtue of a partnership relationship between Oracle and Oracle Corporation, was a matter of contract interpretation that the Court would not review"*. Sarhank appealed against this decision.

The appellate court vacated the District court's decision. Firstly, the court noted that the courts in the country of enforcement are permitted to re-examine the jurisdiction of the arbitral tribunal. It further emphasized that it is the law of the country, where the enforcement is sought, which governs

11 Decision of the Court of Appeals for the 2nd Circuit, United States of 14 April 2005, No. 02-9383, Sarhank Group v. Oracle Corporation [online]. *1958 New York Convention Guide*. UNCITRAL [accessed on 2016-03-02].

the question, whether the party consented to arbitrate.[12] The ground for this approach is the fact, that in the conception of the American jurisprudence, the question, whether a party has consented to arbitrate, falls within the scope of Article V(2)(a) of the New York Convention.[13] Building on this, the appellate court ruled that *"there is no "clear and unmistakable evidence" that Oracle submitted the issue of arbitrability to the arbitrators"*.

3.3 Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs, Government of Pakistan

There are not many recent cases that caused that much controversy like the *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs, Government of Pakistan* case.[14] This case can be considered a textbook example of different approaches of different national courts to non – signatories.

Dallah Real Estate and Tourism Holding Company ("Dallah"), is a Saudi Arabian company providing services for the pilgrims heading to Mecca. In 1995, this company commenced negotiations with the government of Pakistan regarding these services. The result of these negotiations was a Memorandum of Understanding, on the basis of which was Dallah obliged to purchase suitable land, build houses on it and rent them to the Pakistani government for 99 years. In order to perform the Memorandum of Understanding, the Pakistani president established via his ordinance Awami Hajj Trust ("Trust"), whilst head of this trust was Mr Lutfullah Mufti, the Minister of Religious Affairs of Pakistan.

In September 1996, the Trust and Dallah signed the contract containing the exact terms of the future cooperation. This contract contained an arbitration clause in favour of the ICC Court. The parties chose Paris as the seat of arbitration.

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12 In particular, the court noted that: *"It is American federal arbitration law that controls. An American non-signatory cannot be bound to arbitrate in the absence of a full showing of facts supporting an articulable theory based on American contract law or American agency law."*

13 See e.g. Decision of the Supreme Court, United States of 22 May 1995, No. 94-560, First Options of Chicago, Inc. v. Kaplan [online]. *JUSTIA*. U.S. Supreme Court [accessed on 2016-03-03].

14 Decision of the Supreme Court, United Kingdom of 3 November 2010, Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan [online]. *The Supreme Court of the United Kingdom* [accessed on 2016-03-03].

Two months later, the Trust ceased to exist since the government failed to extend the duration of the Ordinance. The government also informed Dallah that it discharged the contract, mainly due to alleged breach of the contract by Dallah. In May 1998, Dallah started the arbitral proceedings, namely against the Pakistani government. The government – as expected – raised an objection that it does not fall within the personal scope of the arbitration agreement since it never signed the contract containing it.

The contract did not contain a particular provision dealing the law governing the validity of the arbitration clause. Therefore, the Arbitral Tribunal applied the French law. In line with the French jurisprudence, the Arbitral Tribunal ruled that *"the Tribunal believes that such Agreement is not to be assessed, as to its existence, validity and scope, neither under the laws of Saudi Arabia nor under those of Pakistan, nor under the rules of any other specific local law connected*, but *"by reference to those transnational general principles and usages reflecting the fundamental requirements of justice in international trade and the concept of good faith in business"*.

Analysing the government's involvement in the transaction, the Arbitral Tribunal issued an interim award, ruling that Pakistani government is a party to the arbitration agreement, although not signing it. In 2006, the final award was rendered and Dallah was awarded approximately 20.5 million USD.

Subsequently, Dallah applied for recognition and enforcement of the arbitral award in England. Both High Court of Justice[15] and Court of Appeal[16] refused to do so. Therefore, this case got to the newly constituted Supreme Court of the United Kingdom, being the first case regarding arbitration this court dealt with.[17]

With reference to Article 103(2)(b) of the Arbitration Act 1996, which is a verbatim adoption of the Article V(1)(a) of the New York Convention,

15 Decision of the High Court of Justice, United Kingdom of 1 August 2008, Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan [online]. *British and Irish Legal Information Institute* [accessed on 2016-03-04].

16 Decision of the Court of Appeal (Civil Division), United Kingdom of 20 July 2009, Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan [online]. *British and Irish Legal Information Institute* [accessed on 2016-03-04].

17 BAMFORTH Richard; AGLIONBY, Andrew. Case Comment: Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan [online]. *UK Supreme Court Blog* [accessed on 2016-03-04].

the Supreme Court firstly dealt with the question, whether it has the power to re-examine the jurisdictional findings of the tribunal. It asked this question positively. In relation to this question, Lord Saville's statement seems quite straightforward:

"The starting point in this case must be an independent investigation by the court of the question whether the person challenging the enforcement of the award can prove that he was not a party to the arbitration agreement under which the award was made. The findings of fact made by the arbitrators and their view of the law can in no sense bind the court, though of course the court may find it useful to see how the arbitrators dealt with the question. Whether the arbitrators had jurisdiction is a matter that in enforcement proceedings the court must consider for itself." [18]

The court did not contest that the question of the personal scope of the arbitration agreement must be determined in accordance with French law. In this context, the court analysed the French jurisprudence. However, it did not follow the most controversial decisions (e.g. *Cotunav case*), but reverted to ascertaining the parties' subjective intention expressed through their objective conduct. Therefore, it focused on the question, whether all the concerned parties have had *"the common intention (whether express or implied) to be bound by the agreement and, as a result, by the arbitration clause"*, whilst existence of this common intention must be assessed on the basis of the parties' conduct during the whole transaction.

The court most of all emphasized that although the Memorandum of Understanding was signed by the Pakistani government, the final contract was concluded only between Dallah and Trust, which was set up solely for the purpose of its performance. From the court's point of view, this fact demonstrates lack of the government's intention to be involved in the performance, and as a consequence, to be bound by the contract and the arbitration clause contained in it. Differently from the Arbitral Tribunal, the court also did not attach significant importance to the fact that the letter informing Dallah about dissolution of the Trust was sent on the government letterhead. Consequently, the Supreme Court upheld the Court of Appeal's decision and the recognition and enforcement of the arbitral award was refused.

18 Point 160 of the decision.

With regard to the aforementioned decisions *Javor v. Francoeur* and *Sarhank Group v. Oracle Corporation*, this result would not be unique. What makes this case a highly controversial one, is the fact that only 3 months after the Supreme Court's decision, French *Cour d'Appel Paris* found that the Pakistani government is a party to the arbitration agreement concluded between Dallah and Trust.

Unlike the Supreme Court, the *Cour d'Appel* attached greater importance to the actual behaviour of the parties,[19] giving different importance also to the evidence presented by Dallah and Trust (e. g. to the correspondence between Dallah and Trust, which was on the government letterhead).[20] *Cour d'Appel* therefore concluded that the Pakistani government *"behaved as if the Contract was its own… this involvement [of the Government], in the absence of evidence that the Trust took any actions, as well as [the Government's] behaviour during the pre-contractual negotiations, confirm that the creation of the Trust was purely formal and that [the Government] was in fact the true Pakistani party in the course of the economic transaction"*.[21]

It is not necessary to underline that existence of these two concurrent judgements is not desirable. According to *Born*, the problem lies in the fact that although Supreme Court applied French law, it still applied principles related to English law, e.g. very reserved approach to pre-contractual negotiations or strict adherence to the terms of the contract.[22] Furthermore, it is worth mentioning that the French jurisprudence was always willing to extend the personal scope of the arbitration agreement, whereas the English approach is rather opposite.[23] Even this fact contributed to the result that although both courts applied the same law on the same factual findings, they came to the different results.

19 BOUCHARDIE, Nicolas; BRUMPTON, Paul et. al. Insight: In: Dallah, the Paris Court of Appeal and UK Supreme Court Reach Contrary Decisions Applying Same Law to Same Facts [online]. *White & Case* [accessed on 2016-03-05].

20 KHAYAT, Dani; ABU-MANNEH, Raid; SIRHAN, Wisam. London Says "No" and Paris Says "Oui" on Enforcement: Contrasting the English and French Court Decisions in Dallah v. Pakistan [online]. *Mayer Brown* [accessed on 2016-03-05].

21 BORN, Gary. Dallah and the New York Convention. [online]. *Kluwer Arbitration Blog*. Kluwer Law International, [accessed on 2016-03-05].

22 *Ibid.*

23 MAYER, Pierre. The Extension of the Arbitration Clause to Non-Signatories – The Irreconcilable Positions of French and English Courts [online]. *Digital Commons*. American University Washington, College of Law, 2012 [accessed on 2016-03-05].

4 Final Remarks

The existence of non – signatories does not *per se* constitute undesirable phenomenon, it is rather a logical consequence of the dynamic conditions of the international trade in the 21st century. It is the arbitral tribunal's duty to firstly determine, whether a non - signatory falls within the scope of the arbitration agreement, although not signing it.

However, an arbitral award against a non – signatory is only a first step. As the non – signatory is often seated in a different country, such an award must be recognised and enforced in the country of the seat. Can the non – signatory raise an objection of the material invalidity of the arbitration agreement within the recognition and enforcement proceedings?

Whilst some courts do not allow such a possibility, some others do not hesitate to fully re-examine the jurisdictional findings of the arbitral tribunal. Personally, I am not of the opinion that the second approach goes hand in hand with the pro-enforcement bias of the New York Convention. In a vast minority of the cases, the party against which is the enforcement sought, will not raise any objections different from those it could reasonably raise during the setting aside procedure before the courts of the seat of arbitration.

Consequently, a question arises whether we can really consider arbitration fast and effective dispute resolution mechanism, if after years of efforts, the arbitral award will be a mere Pyrrhic victory only because the court in the country of enforcement assessed the circumstances of the case in a different way. In the *Dallah case*, this Pyrrhic victory became clear after 13 years.

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APPLICATION OF EUROPEAN INSOLVENCY LAW IN ARBITRATION PROCEEDINGS

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Abstract

Under Article 16 and 17 of the Council Regulation (EC) No 1346/2000, on Insolvency Proceedings, insolvency proceedings opened in territory of one Member State of the EU have universal effects within all other Member States. Pursuant to Article 4 of the Insolvency Regulation, law governing the proceedings shall be the law of the state in which the proceedings are opened. However, the Insolvency Regulation states few exemptions from this general rule. In compliance with Article 15 of the Insolvency Regulation, effects of the insolvency proceedings on a lawsuit pending in other member state are governed by the law of the state in which the lawsuit is pending. This conflict-of-law rule covers also pending arbitration. The equality of unsecured creditors of the debtor shall prevail over a reliance on any arbitration clause. The article deals with another side of the matter - application of the Insolvency Regulation before arbitral tribunals, especially with regard to recognition of the foreign insolvency proceedings before arbitral tribunals and consequences of its prospective non-recognition on the arbitral award.

Keywords

Insolvency Regulation; Arbitration; Insolvency Proceedings; Recognition; Cross-Border Element; Applicable Law.

1 Introduction

Arbitration and insolvency proceedings are legal instruments of completely different natures. Arbitration belongs to frequently used methods

of resolving disputes between parties.[1] On the other hand, the insolvency proceedings are primarily not meant to solve disputes between parties.[2] The nature of insolvency proceedings is collective and its main purpose is to maximize value of the assets of the debtor and to guarantee the impartial treatment of his creditors.[3]

Under national insolvency laws, judicial courts shall have exclusive competence to open insolvency proceedings.[4] Nevertheless, in spite of the fact that arbitration and insolvency proceedings are based on completely different principles, these fields of law may get into interaction. The problem may arise with regard to interaction of these two fields of law when they would have cross-border implications. Therefore, it is necessary to answer a question, whether the arbitrators have a duty to take the European insolvency law into consideration when conducting an arbitration concerning asset forming part of the insolvent estate and eventually what are the consequences of their failure to respect effects of insolvency opened in one of the Member States of the EU.

In this light, the aim of this article is to determine whether the arbitrators are obliged to take the European insolvency law into account during the process of the arbitral proceedings seating within one of the Member States of the EU and to determine potential legal consequences of non-respecting its provisions.

2 Effects of Insolvency Proceedings on Individual Legal Proceedings

The main purpose of the insolvency proceedings may be frustrated by enforcement of claims by individual creditors outside the insolvency proceedings. The insolvent estate may be dissipated, which would violate

1 For further analysis of the nature of arbitral proceedings see e.g. ROZEHNALOVÁ, Naděžda. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. Praha: ASPI, Wolters Kluwer, 2008, 386 p.

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3 SACHS, Klaus. Behind Closed Doors: The Impact of Arbitral Decisions and ADR/ Mediation Processes in the Insolvency Arena [online]. *International Bar Association Database*, p. 2 [accessed on 2016-02-25].

4 LAZIĆ, Vesna. *Insolvency Proceedings and Commercial Arbitration*. Austin: Wolters Kluwer, 1998, p. 37.

efficiency of the collective proceedings. It may also violate the impartial treatment of the debtor's creditors.[5]

In this light, national insolvency laws tend to set special rules on effects of insolvency of debtor on proceedings brought by individual creditors.[6] Most of national laws prescribe the principle of suspension or preclusion of any individual proceeding concerning assets forming part of the estate.[7]

2.1 Effects under the Czech Law

In the Czech law, all of the individual proceedings are, in principle, suspended when the debtor is being declared bankrupt.[8] These individual proceedings cover also the arbitral proceedings.[9] In many countries, the suspension applies at the moment of the commencement of the insolvency proceedings.[10] In the Czech Republic, only enforcement of judgments may be ordered, but cannot be performed when the insolvency proceedings were opened.[11]

The effect of suspension arises directly *ex lege*. The authority conducting the proceedings in question shall issue a decision which has only declaratory effects. Therefore, any of the parties has a possibility to appeal in case the proceedings should not have been suspended.[12] The rule on issuance of the procedural decision shall not be binding for arbitrators. Each arbi-

5 MCBRYDE, William; FLESSNER, Axel; KORTMANN, Sebastian C.J.J. *Principles of European Insolvency Law*. Deventer: Kluwer Legal Publishers, 2003, p. 34.

6 PFEIFFER, Thomas. Article 15 EIR: Effect of the Insolvency Proceedings on Individual Proceedings in Other Member States. In: HESS, Burkhard; OBERHAMMER, Paul; PFEIFFER, Thomas. *European Insolvency Law: The Heidelberg-Luxembourg-Vienna Report: On the Application of Regulation No. 1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4)*. München: C. H. Beck, 2014, p. 217.

7 BĚLOHLÁVEK, Alexander J. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů: komentář*. Praha: C. H. Beck, 2012, pp. 707 et seq.; LAZIĆ, Vesna. Cross-Border Insolvency and Arbitration: Which Consequences of Insolvency Proceedings Should Be Given Effect in Arbitration? In: KRÖLL, Stefan; MISTELIS, Loukas; PERALES, Viscasillas. *International Arbitration and International Commercial Law: Synergy Convergence and Evolution*. Alphen aan den Rijn: Kluwer Law International, 2011, pp. 350–351.

8 See Section 263(1) of the CZECH REPUBLIC. Act No. 182/2006 Coll., on Insolvency and Methods of its Resolution ("Insolvency Act").

9 KOZÁK, Jan. *Insolvenční zákon a předpisy související: Nařízení Rady (ES) o úpadkovém řízení: komentář*. Praha: Wolters Kluwer Česká republika, 2013, p. 606.

10 BĚLOHLÁVEK, Alexander J. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů: komentář*. Praha: C. H. Beck, 2012, p. 718.

11 See Section 109(1)(c) of the Insolvency Act.

12 KOZÁK, Jan. *Insolvenční zákon a předpisy související: Nařízení Rady (ES) o úpadkovém řízení: komentář*. Praha: Wolters Kluwer Česká republika, 2013, p. 606.

trator shall consider whether this procedure is useful and necessary within the concrete proceedings. In the Czech Republic, there is the practice that the arbitrators use to render a procedural decision, in which they inform the parties about the effects of insolvency opened against one of them.[13]

In light of aforementioned, the arbitration proceedings shall be suspended at the moment one of the parties to arbitration is being declared bankrupt. In case the bankruptcy is declared after termination of arbitration, i.e. at the moment the arbitral award becomes final and conclusive, the arbitral award shall not be enforced.[14]

2.2 Effects under European Insolvency Law

The main source of the European insolvency law is the Regulation No 1346/2000 on Insolvency Proceedings ("Insolvency Regulation").[15]

The Insolvency Regulation contains rules on international jurisdiction to open the insolvency proceedings,[16] recognition of the decisions in insolvency matters,[17] law applicable to the insolvency proceedings,[18] coordination of particular proceedings[19] and rules ensuring the impartial treatment of creditors.[20]

In accordance with Article 4 of the Insolvency Regulation, the insolvency proceeding shall be governed by the law of the state in which the insolvency was opened.[21] The jurisdiction to open insolvency, covered by the scope of application of Insolvency Regulation, shall have courts of the state in which the centre of main interests of debtor is located.[22]

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13 BĚLOHLÁVEK, Alexander J. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů: komentář*. Praha: C. H. Beck, 2012, p. 710.

14 Decision of the Supreme Court, Czech Republic of 17 June 1998, No. Cpjn 19/98 [online]. *Nejvyšší soud* [accessed on 2016-03-09].

15 Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings [online]. In: *EUR-lex* [accessed on 2016-03-11] ("Insolvency Regulation").

16 Article 3 of the Insolvency Regulation.

17 Articles 16 – 18, 21 – 23 and 26 of the Insolvency Regulation.

18 Articles 4, 5 – 15 of the Insolvency Regulation.

19 Articles 27 – 38 of the Insolvency Regulation.

20 Articles 39 – 42 of the Insolvency Regulation.

21 Article 4(1) of the Insolvency Regulation: *"Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the "State of the opening of proceedings."*

22 Article 3 of the Insolvency Regulation.

Article 4(2) of the Insolvency Regulation prescribes a demonstrative list of issues which are covered by the above cited conflict-of-law rule.[23] This list of issues includes also effects of insolvency with cross-border element on proceedings brought by the individual creditors concerning assets or rights of which the debtor was divested. The Insolvency Regulation establishes different rules on effects on lawsuits pending and individual enforcement actions.[24]

Article 4(2)(f) of the Insolvency Regulation establishes conflict-of-law rule on effects of the insolvency on proceedings brought by creditors in order to satisfy their claim, except for lawsuits pending. It subordinates these effects to the law of the member state in which the insolvency proceedings were opened.[25]

In contrast, Article 15 of the Insolvency Regulation establishes exception to this general rule with regard to effects of the insolvency proceedings with a cross-border element on lawsuits pending to which the debtor is a party. Pursuant to this article, the law governing these effects shall be the law of the member state in which the lawsuit is pending.[26]

The applicable law determines the concrete modification of such effects (the proceedings may be stayed, suspended or even part of it may be excluded to a separate proceedings).[27] International jurisdiction to initiate the action is to be determined by the rules on international jurisdiction contained in Insolvency Regulation itself or in Brussels Ibis Regulation.

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23 MOSS, Gabriel; FLETCHER, Ian; ISAACS, Stuart. *The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide*. Oxford: Oxford University Press, 2002, p. 179.

24 BĚLOHLÁVEK, Alexander J. *Evropské a mezinárodní insolvenční právo: komentář*. Praha: C. H. Beck, 2007, pp. 503–504.

25 Article 4(2)(f) of the Insolvency Regulation states: *"The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular: (…) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending."*

26 Article 15 of the Insolvency Regulation states: *"Effects of insolvency proceedings on lawsuits pending The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending."*

27 BĚLOHLÁVEK, Alexander J. *Evropské a mezinárodní insolvenční právo: komentář*. Praha: C. H. Beck, 2007, p. 228.

The Insolvency Regulation does not provide the express regulation or any interpretation guidelines with regard to arbitration. Many authors considered a question, whether the aforementioned conflict-of-law rule on effects on lawsuits pending covered the effects of the insolvency on pending arbitration. Due to absence of autonomous interpretation of the cited provision provided by the Court of Justice, they tended to refer to the case-law of national courts and arbitrators.[28]

Considering the opinions of national courts as well as arbitrators, the aforementioned question is to be answered affirmatively.[29]

In 2015, new Regulation (EU) No 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings was adopted ("the revised Insolvency Regulation").[30] This regulation shall repeal the Insolvency Regulation after 26 June 2017. Article 18 of the revised Insolvency Regulation extends the conflict-of-law rule on effects of insolvency on individual lawsuits also with regard to arbitration concerning any asset of the insolvent party.[31]

3 Application of the Insolvency Regulation Before Arbitral Tribunals

In light of aforementioned, it can be concluded the Insolvency Regulation shall be applied also with regard to the arbitral proceedings. There is another side of the problem – are the arbitrators obliged to take its provisions into consideration?

Insolvency proceedings opened under Article 3(1) of the Insolvency Regulation are provided with universal effects within all other Member States of the EU (except Denmark). In order to ensure achievement of the main

28 FERRARI, Franco; KRŐLL, Stefan. *Conflict of Laws in International Arbitration*. Walter de Gruyter, 2010, p. 236.

29 Primarily Decision of the Court of Appeal of England and Wales, United Kingdom of 9 July 2009, No. Civ 677 [online]. *The British and Irish Legal Information Institute* [accessed on 2016-03-12].

30 Regulation (EU) No 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings [online]. In: *EUR-lex* [accessed on 2016-03-05].

31 The new version of this rule is following: *"The effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat."*

purpose of the Insolvency Regulation, it is based on principle of automatic recognition of such insolvency proceedings.[32] The Insolvency Regulation does not lay down any formal act as a requirement of recognition of decision on opening of insolvency proceedings or other decision issued in relation to the insolvency proceedings.[33]

In order to ensure the main goals of European insolvency law, effects of insolvency proceedings opened in one of the member states under the Insolvency Regulation regime shall be automatically recognized also before arbitral tribunals seating in one of the Member States of the EU. In this situation, the arbitrator shall consider following questions:

1. Does the insolvency in question fall within the scope of application of the Insolvency Regulation?
2. Is there a secondary insolvency proceeding opened in the state in which the arbitration is pending?[34]
3. What is the law applicable to the effects of such insolvency with regard to the arbitration pursuant to Article 15 of the Insolvency Regulation?
4. What effects are prescribed by the governing law?

The same process was followed by the Arbitral Tribunal in the Czech Republic in case No. Rsp. 776/06.[35] In this case, the Tribunal considered the consequences of opening insolvency proceedings in Poland against a party to arbitration pending in the Czech Republic. The Tribunal considered that this insolvency falls within scope of application of the Insolvency Regulation and thus the insolvency takes effects also in the Czech Republic. The Tribunal applied Article 15 of the Insolvency Regulation which referred to the Polish Insolvency Act. Article 142 of the Polish Insolvency Act prescribed termination of the arbitration as a consequence of opening insolvency against one of the parties to the arbitration.

32 Article 16 of the Insolvency Regulation.
33 Article 17 of the Insolvency Regulation.
34 According the Article 28 (in connection with Article 4) of the Insolvency Regulation, the secondary (territorial) insolvency proceeding is governed by the law of the State in which the proceeding was opened.
35 Resolution of the Arbitral Tribunal in the Czech Republic of January 2008, No. Rsp. 776/06.

3.1 Conflict with the Public Policy

As the author mentioned above, the decision on opening insolvency proceedings shall have an automatic effect in all Member States of the EU (except Denmark). According to some authors, the principle of automatic recognition of insolvency proceedings shall be considered as a part of *legis arbitri*. Therefore, arbitrators shall take the effects of insolvency proceedings into account when conducting parallel arbitration. Otherwise, there is a risk the courts would set the award aside or refuse its enforcement based on violation of public policy.[36]

Moreover, insolvency laws contain mainly mandatory provisions which shall ensure to achieve fundamental objective of the insolvency proceedings.[37] In most jurisdictions, some provisions of insolvency laws constitute a part of public policy.[38] The provisions prescribing the principle of suspension of individual proceedings after commencement of insolvency are considered to be part of national or international public policy.[39]

With respect to applicability of the European public policy before arbitrators, the author refers to the important decision of the CJEU in case *Eco Swiss v. Benetton*. The Court of Justice declared that some provisions regulating European competition law shall be considered as a part of the European public policy because it *"constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market"*. The Court pointed to the risk that

36 BĚLOHLÁVEK, Alexander J. *Arbitration law of Czech Republic: Practice and Procedure*. Huntington: Juris, 2013, pp. 980–981.

37 LAZIĆ, Vesna. *Insolvency Proceedings and Commercial Arbitration*. Austin: Wolters Kluwer, 1998, p. 278.

38 SACHS, Klaus. Behind Closed Doors: The Impact of Arbitral Decisions and ADR/Mediation Processes in the Insolvency Arena. [online]. *International Bar Association Database* [accessed on 2016-02-29]; BĚLOHLÁVEK, Alexander. Impact of Insolvency of a Party on Pending Arbitration Proceedings in Czech Republic, England and Switzerland and Other Countries. In: ROTH, Marianne; GEISTLINGER, Michael. *Yearbook on International Arbitration. Vol. I* [online]. Antverpen/Berlin/Copenhagen/Wien/Graz: EAP, 2010, p. 150 [accessed on 2015-03-19].

39 LAZIĆ, Vesna. Cross-Border Insolvency and Arbitration: Which Consequences of Insolvency Proceedings Should Be Given Effect in Arbitration? In*:* KRŐLL, Stefan; MISTELIS, Loukas; PERALES, Viscasillas. *International Arbitration and International Commercial Law: Synergy Convergence and Evolution*. Alphen aan den Rijn: Kluwer Law International, 2011, p. 350.

enforcement of an arbitral award rendered in contrary to the public policy may be refused.[40]

In this light, the author is of the opinion that the European insolvency law shall be considered as a part of the European public policy as it aims to ensure proper functioning of the internal market.[41] The CJEU emphasized importance of the principle of automatic suspension of individual proceedings after commencement of insolvency when it declared that: *"It follows from the principles common to the procedural laws of the Member States, from which it is necessary to deduce the rules to be applied in the absence of Community provisions in the matter, that a creditor is not entitled to pursue his claims before the courts on an individual basis against a person who is the subject of insolvency proceedings but is required to observe the specific rules of the applicable procedure."*[42]

If we take into account the aforementioned purpose of this principle, there is obviously no reason not to respect the principle with regard to arbitral proceedings.[43] The equal treatment of unsecured creditors cannot be prevailed by the legitimate interest of the parties that their dispute will be resolved in the arbitration on the grounds of the arbitral agreement. Also the principle of equality of ordinary creditors of the debtors is being considered as a part of international public policy.[44] Furthermore, according to author, the parties shall take the risk of insolvency of one of the parties into account and be aware of its consequences.

Aforementioned conclusions were adopted also in some cases in arbitral or judicial proceedings. In France, the *Cour de Cassation* many times denied enforcement of arbitral award for violating French international public

40 Judgment of the Court of Justice of 1 June 1999. Eco Swiss China Time Ltd v. Benetton International NV. C-126/97 [online]. In: *EUR-Lex* [accessed on 2016-02-24].

41 Recitals 3 and 4 of the Preamble of the Insolvency Regulation.

42 Judgment of the Court of Justice of 17 May 2005. Commission of the European Communities v. AMI Semiconductor Belgium BVBA and Others. C-294/02 [online]. In: *EUR-Lex* [accessed on 2016-02-25].

43 FERRARI, Franco; KRŐLL, Stefan. *Conflict of Laws in International Arbitration*. Walter de Gruyter, 2010, p. 352.

44 BĚLOHLÁVEK, Alexander. Impact of Insolvency of a Party on Pending Arbitration Proceedings in Czech Republic, England and Switzerland and Other Countries. In: ROTH, Marianne; GEISTLINGER, Michael. *Yearbook on International Arbitration. Vol. I* [online]. Antverpen/Berlin/Copenhagen/Wien/Graz: EAP, 2010, p. 166 [accessed on 2016-02-25].

policy by not respecting the principle of suspension.[45] In aforementioned case No. Rsp 776/06, the Tribunal concluded that arbitrators shall be bound by the international private law rules of *legis arbitri*, including the Insolvency Regulation. Otherwise, purpose of its provisions could be frustrated. Non-respecting the effects of insolvency proceedings opened in Poland may cause refusal of enforcement of the arbitral award as being in contrary with the public policy.[46]

3.2 Lack of Subjective Arbitrability

After commencement of the insolvency proceedings, the debtor is deprived of disposal of his assets which are included in the insolvency estate. Most laws state this consequence with regard to liquidation proceedings. In this light, the debtor does not dispose of right to manage his assets and to be party to legal proceedings which would concern the assets.[47]

This conclusion was adopted by arbitral tribunal in Switzerland. The Tribunal terminated arbitral proceedings as a consequence of opening insolvency against one of the parties in Poland. The Tribunal applied Polish Insolvency Act pursuant to the conflict-of-law rule, contained in the Swiss Private International Law, determining law applicable to legal capacity of a person to participate on legal procedure. In compliance with the Polish Insolvency Act, the person shall not have a capacity to be a subject of arbitration if he or she was declared bankrupt. The decision of the Arbitral Tribunal was confirmed by the Swiss Supreme Court.[48]

The author does not agree that the pending arbitration can be automatically terminated due to incapacity of a bankrupt debtor to be a part of arbitration.

45 FERRARI, Franco; KRŐLL, Stefan. *Conflict of Laws in International Arbitration*. Walter de Gruyter, 2010, p. 353.

46 BĚLOHLÁVEK, Alexander J. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů: komentář*. Praha: C. H. Beck, 2012, pp. 877–878.

47 LAZIĆ, Vesna. *Insolvency proceedings and commercial arbitration*. Austin: Wolters Kluwer, 1998, p. 36.

48 Decision of the Supreme Court, Switzerland of 31 March 2009, No. 4A_428/2008 [online]. In: *Swiss Arbitration Decisions Case List* [accessed on 2016-03-15]; LAZIĆ, Vesna. Cross-Border Insolvency and Arbitration: Which Consequences of Insolvency Proceedings Should Be Given Effect in Arbitration? In*:* KRŐLL, Stefan; MISTELIS, Loukas; PERALES, Viscasillas. *International Arbitration and International Commercial Law: Synergy Convergence and Evolution.* Alphen aan den Rijn: Kluwer Law International, 2011, pp. 340–341.

In accordance with some insolvency laws, the right to stand in legal proceedings is vested in administrator/liquidator of the debtor.[49] In the Czech law, the individual proceedings may be continued under petition of the administrator, while the administrator becomes a party to the proceedings instead of the debtor.[50]

4 Conclusion

The aim of this article was to consider duty of arbitrators to take the European insolvency law into account during the pending arbitration seating within one of the Member States of the EU and potential legal consequences of failure to respect effects of insolvency opened against one of the parties.

In light of aforementioned, provisions and principles of the European insolvency law are frequently considered to be mandatory or as a part of national or international public policy. The author concludes that arbitrators shall respect rules of the European insolvency law regulating preclusion of individual lawsuits or impartial treatment of ordinary creditors in order to prevent the award from setting aside or refusal of its enforcement. On the other hand, the author does not agree that the arbitration shall be automatically terminated referring to incapacity of a bankrupt person to be a party to arbitration.

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49 LAZIĆ, Vesna. *Insolvency Proceedings and Commercial Arbitration*. Austin: Wolters Kluwer, 1998, p. 36.

50 See Section 264 of the Insolvency Act.

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NEW PHENOMENON OF EMERGENCY ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION AND POSITION AND POWERS OF EMERGENCY ARBITRATOR UNDER THE ICC ARBITRATION RULES 2012

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Abstract

In recent years, we have witnessed significant amendments to arbitration rules of well-known arbitration institutions such as ICC, SCC, London Court of International Arbitration and others with aim to reflect on new technical developments of this fast-growing area of law and to react on the actual needs of parties to a dispute. One of the most significant changes brought by these amendments is the introduction of a phenomenon of emergency arbitration proceedings that builds and definitely improves the previous concepts. This paper primarily focuses on the analysis of emergency arbitration procedure under the 2012 ICC Rules and will examine the nature of emergency arbitration, look closely on the position of emergency arbitrator, enforcement of orders rendered by the emergency arbitrators and relationship of emergency arbitration and "regular arbitration" that follows the emergency procedure.

Key words

International Commercial Arbitration; Emergency Arbitration; Arbitration Rule.

1 Introduction

The international commercial arbitration has grown significantly in last decades due to its undisputed advantages such as flexibility and ability to swiftly react to needs stemming from arbitration practice. Arbitral institutions are

constantly seeking improvements to the practical aspects of arbitration procedure and arbitration rules and carefully react to any feedback or criticism that might arise.

As we all know, one of the main motivations for parties to opt for the international commercial arbitration is to minimise the potential uncertainty of local litigation. This, however, did not apply in the past to the stage of arbitration proceedings before the constitution of the arbitral tribunal when the local courts had to be involved in order to secure an urgent interim relief. Such involvement was seen as a disadvantage and the need for addressing the issue was apparent. As a result, numerous arbitral institutions have now introduced provisions that contain some sort of emergency relief through the appointment of an emergency arbitrator as a reaction to the earlier introduction of similar provisions by competing arbitral institutions and as a reflection to the needs of arbitration practice.[1]

An institute of emergency arbitrator became the most discussed new feature of the recent amendments to arbitration rules worldwide.[2] Despite the small discrepancies between the emergency provisions in arbitration rules of different arbitral institutions, they follow the remarkably similar goal – to ensure that parties can obtain fast and effective interim relief without risk of losing the benefits of international commercial arbitration.

This new feature is welcomed by the arbitration practice and assessed in positive manner due to the fact that it allows much more flexibility and speed in providing legal protection in cases of urgency even before the commencement of arbitration proceeding or during the proceeding.[3] In practice, there may be times when the time period between initiation of arbitration

1 For example, the provisions on emergency arbitration were introduced into the International Centre for Dispute Resolution in 2006, Singapore International Arbitration Centre in 2010 and in 2013, Arbitration Institute of the SCC in 2010 and London Court of International Arbitration in 2014.

2 For further information on emergency arbitration under the 2010 Arbitration Rules of the Arbitration Institute of the SCC ("SCC Rules") please see: CHOVANCOVÁ, Katarína. *Medzinárodná obchodná arbitráž vo vybraných štátoch Európskej únie (Švédsko, Holandsko, Rakúsko)*. Bratislava: Veda, SAV, 2015, pp. 227–230.

3 93% of respondents favour the inclusion of emergency arbitrator provisions into institutional rules See for example *Queen Mary, University London and White & Case 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* [online]. Queen Mary, University of London [accessed on 2016-05-04].

proceeding and constitution of the arbitral tribunal can take a long time. Therefore, obtaining a relief in this initial phase of arbitration was a very sensitive and critical issue. Before the constitution of the arbitral tribunal, the parties to the dispute could rely only on interim measures issued by general national courts on the basis of generally accepted jurisdiction of courts and arbitrators to issue interim measures.[4]

In this paper, the author will focus on the 2012 ICC Rules as the ICC is acclaimed and most used arbitration institution in the world.[5] The author will examine the specific features of emergency arbitration under the 2012 ICC Rules and deals with the most controversial question of the enforceability of decisions rendered by an emergency arbitrator.

2 Emergency Arbitration as a Reflection on Needs of Arbitration Practice

2.1 Issues with Obtaining Preliminary Relief – Pre-Arbitral Referee and Interim Measures of National Courts

The former Secretary General of the ICC Court, *Carlevaris*, considered obtaining a preliminary relief from his experience to be a difficult and problematic exercise mainly for the following reasons:[6]

- the parties that had to apply to the general national courts with a request for interim measures lost the basic advantages of international commercial arbitration such as flexibility, confidentiality, neutrality and expertise of arbitrators on specific issues which are subject to arbitration,
- problems arose in relation to the recognition and enforcement of interim measures (for example, within the EU, the enforcement is ensured under the Brussels Ibis Regulation, however an equivalent legal measure worldwide does not exist),

4 BORN, Gary B. *International Commercial Arbitration*. The Hague: Kluwer Law International, 2014, p. 2456.

5 In this regard please see *Queen Mary, University London and White & Case 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* [online]. Queen Mary, University of London [accessed on 2016-05-04].

6 CARLEVARIS, Andrea; FERIS, José Ricardo. Running in the ICC Emergency Arbitrator Rules: The First Ten Cases. *The ICC International Court of Arbitration Bulletin*. 2014, Vol. 25, p. 27.

- another issue can be the very person of the judge in the general court and lack of experience and knowledge of complex cases that tend to be subject-matter of the international commercial arbitration.

The ICC was obviously aware of these problems and has long been trying to offer to parties to a dispute an alternative to the possibility of applying to the general courts for request to order interim measures. This option for the parties was to agree in advance on the similar option to emergency arbitrator – a "pre-arbitral referee" in accordance with the ICC Pre-arbitral Referee Rules.[7] This, sort of predecessor of the emergency arbitration rules, is an "opt-in" regime which means that parties have to expressly agree that the provisions on the pre-arbitral referee shall apply to their dispute. It has to be said that this form of dispute resolution has not become wide-spread and in total has been conducted only in 12 cases.[8] Some authors claim that one of the reasons for mistrust and omission of pre-arbitral referee regime can also be the factor that they are independent set of rules and they have never become a part of the ICC Rules.[9] Although these rules have not been tremendously popular, it is important to note that the 2012 ICC Rules do not repeal them and both regimes practically coexist side by side.[10]

In addition to the institute of pre-arbitral referee still in force and new provision on emergency arbitration, the parties are still allowed to recourse to the general national courts with application for the interim measures.[11] In fact, there may be some instances where application to general courts is more desirable than opting for emergency arbitration. According to *Grierson* and *Van Hooft*, the decision will depend on particular jurisdiction and comparison of costs. A more straight-forward enforcement of such interim procedural order is definitely an important factor.[12]

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7 1990 Rules for a Pre-Arbitral Referee Procedure [online]. *ICC* [accessed on 2016-05-04].

8 LAGO, Carlos de los Santos; BONNÍN, Victor. Emergency Proceedings Under the New ICC Rules. *Spain Arbitration Review*. 2012, Vol. 2012, No. 13, p. 6.

9 *Ibid.*

10 CARLEVARIS, Andrea; FERIS, José Ricardo. Running in the ICC Emergency Arbitrator Rules: The First Ten Cases. *The ICC International Court of Arbitration Bulletin*. 2014, Vol. 25, p. 27. Please also see *Pre-Arbitral Referee Procedure* [online]. *ICC* [accessed on 2016-05-04].

11 Article 28(2) of the 2012 ICC Rules.

12 GRIERSON Jacob; VAN HOOFT, Annet. *Arbitrating under the 2012 ICC Rules*. The Hague: Kluwer Law International, 2012, p. 26.

As can be seen from above, the 2012 ICC Rules introduce several different options for parties to obtain interim/emergency measures and it is left to the parties to make a decision which option is preferable in their case. All options mentioned above can be used in simultaneous manner.[13]

2.2 General Characteristics of Emergency Arbitration

The 2012 ICC Rules brought, as one of their most attractive new features, the institute of an emergency arbitrator setting out procedure for obtaining urgent interim relief prior to the constitution of an arbitral tribunal. The provisions are set forth in Article 29 supported by detailed procedure provided in Appendix V of the 2012 ICC Rules named Emergency Arbitrator Rules ("Appendix V"). As such, the emergency arbitration is considered a separate proceeding which is not an integral part of the arbitration proceeding. *Chovancová* names it as some kind of a "foreplay" of the arbitration proceeding.[14] According to *Baigel*,[15] the relationship between the pre-arbitral stage and the arbitration proceeding can be compared to the relationship between the stages of dispute resolution in escalation clause, as for example, in the *Channel Tunnel* case.[16] On the basis of the abovementioned, we can conclude that there is a certain level of superiority of "regular" arbitration proceeding over the emergency arbitration.

The following points summarize the main features of emergency arbitration proceeding which will be discussed further in more detail:

- emergency arbitration as an "opt-out" option,
- remaining parallel option of obtaining urgent interim decision of a competent judicial authority,
- requirement of genuine urgency,
- no third parties are able to take part in the emergency arbitration,
- securement of protection of respondent.

13 Article 29(7) of the 2012 ICC Rules.

14 CHOVANCOVÁ Katarína. Nové rozhodcovské pravidlá Medzinárodného arbitrážneho súdu ICC (Výhody a špecifiká). *Právny obzor*. 2015, Vol. 98, No. 2, p. 112.

15 BAIGEL, Baruch. The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis. *Journal of International Arbitration*. 2014, Vol. 31, No. 1, p. 2.

16 Decision of the House of Lords, United Kingdom of 21 January 1993, Channel Group v. Balfour Beatty Ltd. [online]. [accessed on 2016-05-04].

In accordance with Article 29(1) of the 2012 ICC Rules, the emergency arbitrator may issue interim or conservatory measures in the form of a procedural order until the constitution of the arbitral tribunal on the basis of an application made by a party lodged to the ICC Secretariat in accordance with requirements specified in Appendix V: a) the application is submitted prior to the transmission of the file to the arbitral tribunal, (b) the arbitration agreement was concluded after January 2012, and (c) there is no agreement between the parties in place to opt-out from the emergency arbitration rules, i.e. unlike the pre-arbitral referee, the emergency arbitration option is introduced as an "opt-out" option, which means that the regime applies to parties automatically, unless there is an express exclusion in the arbitration clause or agreement.

Second important feature is the so called "no bar on courts" option set forth in Article 29(7) of the 2012 ICC Rules. This provisions expressly provides that the emergency arbitration proceeding is not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority. This means, that if a party submits an application for interim measures to the general national courts, such action is not considered as a violation of the arbitration clause, because the purpose of such interim relief is to preserve the status quo, and not the decision on merits of the case, until the arbitral tribunal renders a final decision. This rules applies without restriction before an application has been made for emergency measure and may even apply afterwards "in appropriate circumstances".[17]

Another specific feature is that the application of emergency arbitration procedure is restricted under Article 29(5) of the 2012 ICC Rules only to parties to the arbitration agreement or their successors. *Baigel* considers this section as the most controversial provision in the emergency arbitration.[18] The purpose of this limitation is to prevent any damage to the interests or rights of third parties, who are not subjects to abovementioned agreements. At the same time, this provision opens up a number of questions about the applicability of emergency arbitration to the international investment arbitration disputes under the 2012 ICC Rules from the bilateral investment treaties.

17 BOSE, Raja; MEREDITH Ian. Emergency Arbitration Procedures: A Comparative Analysis. *International Arbitration Law Review*. 2012, No. 5, p. 187.

18 BAIGEL, Baruch. The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis. *Journal of International Arbitration*. 2014, Vol. 31, No. 1, p. 2.

The final key principle is certain degree of protection to a respondent party achieved by an opportunity to respond to the application, by a relatively high fee for emergency arbitration that must be paid upfront and a rule according to which a request for arbitration must be filed within 10 days from the application for emergency arbitration, otherwise the emergency arbitration proceeding is terminated.[19]

The use of emergency arbitration procedure is similar to "regular" interim procedure before national general courts. The current experience with the emergency arbitration orders demonstrates that the following types of requests are the most common in the respective applications for emergency arbitration:

- measures to ensure the future enforceability of the decision - for example on the basis of evidence that the defendant is trying to dispose of its property or because of imminent bankruptcy proceedings,
- measures to maintain the status quo - for example, preventing the sale of shares in the company,
- measures to refrain from initiating parallel proceedings on the same matter before the national courts (i.e. anti-suit injunction),
- decision to bind a party to pay an advance payment - which is, of course, to be repaid as long as altering decision is rendered by an arbitrator / arbitration panel.[20]

It also has to be noted that the emergency arbitration might not be possible in all cases. In some places of arbitration (e.g. Argentina, China, Greece, Italy and Quebec) the power to award interim relief is reserved only to national courts, meaning that parties do not have a desirable alternative to the national courts.

3 Emergency Arbitration Procedure

The process and details of the emergency arbitration procedure before the emergency arbitrator are in detail set out in Appendix V. The emergency arbitration is commenced by sending an application for a request for

19 In this regard, please see Article 2(3) and Article 1(6) of the Appendix V.

20 CARLEVARIS, Andrea; FERIS, José Ricardo. Running in the ICC Emergency Arbitrator Rules: The First Ten Cases. *The ICC International Court of Arbitration Bulletin*. 2014, Vol. 25, p. 34

interim measures to the emergency arbitrator. The application shall contain under Article 1(3) of the Appendix V strict requirements.[21] Needless to say, the application should also contain some persuasive advocacy as to why the emergency arbitrator should grant the emergency measures sought, including in particular an explanation of why more harm would be caused to the applicant than to any other party if the emergency measures were not to be granted.[22]

Once the ICC Secretariat receives an application, it first checks the admissibility of an application and compliance with pre-requisites of emergency arbitration proceedings under Article 29(5) of the 2012 ICC Rules. Within two days of filing of application, an emergency arbitrator from the choice of up to four potential candidates is selected.[23] In case the President of the ICC Court approves the request for emergency arbitration, the ICC Secretariat shall forward the request and its annexes to the defendant.[24] In case of rejection, the ICC Secretariat will inform the parties about refusal. Another reason for termination of the emergency procedure in its initial stage may be a situation where the proceeding properly begins, but the following arbitration proceeding itself is not initiated in accordance with Article 1(6) of the Appendix V within 10 days of receiving a request for the initiation of emergency arbitration by the ICC Secretariat.

A place of emergency arbitration is usually the official seat of arbitration agreed in the arbitration clause or agreement.[25] The result of the emergency arbitration is an emergency order in writing that has to contain reasoning

21 These requirements are: (a) the name in full, description, address and other contact details of each of the parties; (b) the name in full, address and other contact details of any person(s) representing an applicant, (c) a description of the circumstances giving rise to the application and of the underlying dispute referred or to be referred to arbitration; (d) a statement of emergency measures sought; (e) the reasons why the applicant needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal, (f) any relevant agreements and, in particular, the arbitration agreement, (g) any agreement as to the place of arbitration, the applicable rules of law or the language of arbitration, (h) proof of payment under Article 7(1) and (i) any Request for Arbitration and any other submission in connection with the underlying dispute filed with the Secretariat by any of the parties to the emergency arbitrator proceedings prior to making the application

22 GRIERSON Jacob; VAN HOOFT, Annet. *Arbitrating under the 2012 ICC Rules*. Tha Hauge: Kluwer Law International, 2012, p. 67.

23 Article 2(1) of the Appendix V.

24 Article 2(3) of the Appendix V.

25 Article 4(1) of the Appendix V.

and must be executed.[26] The emergency arbitrator shall issue the order within 15 days from the day on which he or she had received a relevant file form the ICC Secretariat. The period may be extended at the request by the President of the ICC at the discretion of the ICC Court or on the initiative of the emergency arbitrator.[27]

In terms of cost, it has to be noted that emergency arbitration is not a cheap procedure and the initiation of emergency arbitration significantly increases the overall total cost of the arbitration proceeding. The emergency arbitration under the 2012 ICC Rules can cost up to USD 40,000,[28] where USD 5,000[29] is irreversible in all cases. Moreover, in addition, to the duty of the applicant to pay the fees there is also another associated obligation to initiate the arbitration proceeding in the respective matter within 10 days from receipt of the request for the emergency arbitration by the ICC Secretariat discussed previously which creates a time stress on the side of the applicant.[30] It is evident that the object of this procedure as well as high fees for initiating of the emergency arbitration is justified by need of protection of the rights of defendant from the administration of unwarranted proposals by the applicant and, on the other hand, in case of reasonable applications, to quickly secure the applicant's interests.

4 The Status of the Emergency Arbitrator

The emergency arbitrator may be appointed only in cases before the arbitration file is sent to the arbitration panel. The same obligation as to the arbitrators in "regular" arbitration proceeding provided in Article 11(2) of the 2012 ICC Rules apply to the emergency arbitrator. Under the abovementioned Article, prior to being appointed, the arbitrators shall sign a declaration of independence, impartiality and availability. Any party to the dispute may challenge potential bias of the arbitrator within 3 days of receiving notification on appointment of the emergency arbitrator to the President of the ICC Court, which has jurisdiction to rule on such objections.[31]

26 Article 6(3) of the Appendix V.
27 Article 6(3) of the Appendix V.
28 Article 7(1) of the Appendix V.
29 Article 7(5) of the Appendix.
30 Article 1(6) of the Appendix V.
31 Article 3(1) and (2) of the Appendix V.

Similar to issues with enforcement discussed in part 5 below, there is also some uncertainty over the status of the emergency arbitrator under national arbitration laws. To take England as an example, the Arbitration Act 1996 makes no reference to the emergency arbitrator, which immediately begs the question whether the emergency arbitrator is, in fact, an arbitrator under the act.[32] Some arbitration-friendly jurisdictions ensured the certainty in this area and have provided useful examples of how the above-mentioned issue may be addressed in national law. In Singapore, for instance, the International Arbitration (Amendment) Act 2012, which came into force on 1 June 2012, provides that an emergency arbitrator enjoys the same status as a properly-constituted arbitral tribunal.[33]

As to the factors that the emergency arbitrator will take into account in reaching his or her decision, these are likely to be similar to those relating to interim measures rendered by arbitral tribunals. However, given the speed with which the decision must be taken, and the fact that the arbitral tribunal will be entitled to have a second look at the question, it seems likely that that the emergency arbitrator will spend less time considering the merits of the parties' respective cases than an arbitral tribunal would do.[34]

5 The Nature of Decision of Emergency Arbitrator and Its Enforcement

The decision of the emergency arbitrator is issued in the form of "procedural order" by which is ordered interim relief which also affects the question of enforceability. The character of procedural order of the emergency arbitrator is different to the interim measures issued by the arbitral tribunal under Article 28(1) of the 2012 ICC Rules, which has the form of an arbitral award with all of its prescribed elements. *Voser*, who was a member of a commission that was in charge of preparation of wording of the amendment to the ICC Rules noted that the name "procedural order" was not chosen by chance. The aim was to distinguish it from the arbitral award with view

32 LU, Jue Jun. The Emergency Arbitrator Procedure: Effective Tool or Enforcement Headache? [online]. *Berwin Leighton Paisner Expert Legal Insights* [accessed on 2016-05-04].

33 *Ibid.*

34 GRIERSON, Jacob; VAN HOOFT, Annet. *Arbitrating under the 2012 ICC Rules.* The Hague: Kluwer Law International, 2012, p. 67.

that the specific features of the 2012 ICC Rules, such as scrutiny of the arbitral awards[35] provided in Article 33,[36] do not apply to this institute.

Since the decision of the emergency arbitrator does not have the character of an arbitration award, the question arises whether such a decision is enforceable and, if yes, under what conditions are parties able to enforce it, or whether it should be the subject to the provisions governing the recognition and enforcement of arbitration awards under the New York Convention. The situation is quite complicated due to the fact that the New York Convention only allows for enforcement of final awards and therefore there is a controversy as to whether interim measures can be final and subsequently enforced.

Some experts[37] in the field of international commercial arbitration are of the opinion that even the interim measures do have sufficient level of finality in order to be enforceable, relying on the judgment of *Arrowhead Global Solutions v. Datapath Inc.*,[38] in which the court stated that "*the arbitration panels shall have the power to issue an interim decision and… courts shall have the power to confirm them*". There is also a group of experts that is not so optimistic with their view based on previous decision (relating to pre-arbitral referee decision and not emergency arbitration decision) in the case before the Paris Court of Appeal *Societe Nationale des Petroles du Congo and Republic of Congo v. TEP Congo,*[39] in which it was found that the origin of the decision rendered by the pre-arbitral referee is contractual and therefore it is not possible to annul it on the same grounds as an arbitral award (to some degree, same can be said about the procedural order of the emergency arbitrator).

35 FRY, Jason; GREENBERG, Simon. The New ICC Rules of Arbitration: How Have They Fared After the First 18 Months*? International Arbitration Law Review.* 2013, Vol. 16, No. 6, p. 303. The decisions of the emergency arbitrators are also subject to the "unofficial" scrutiny although they are not directly subject to Article 33 of the 2012 ICC Rules.

36 VOSER, Nathalie. Overview of the Most Important Changes in the Revised ICC Arbitration Rules. *ASA Bulletin.* 2011, Vol. 29, No. 4, p. 817.

37 See for example, BAIGEL, Baruch. The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis. *Journal of International Arbitration.* 2014, Vol. 31, No. 1, p. 16.

38 Decision of the United States Court of Appeals for the Fourth Circuit, United States of 3 February 2006, Arrowhead Global Solutions, Inc. v. Datapath, Inc. [online]. [accessed on 2016-05-04].

39 Decision of the Cour d'appel de Paris, France of 29 April 2003, Société nationale des pétroles du Congo et République du Congo v. Total Fina Elf E & P.

The US courts have dealt with the question of enforceability of procedural orders in the past and their approach has been to accept decisions of an emergency arbitrator in the same manner as an arbitral award, such as in case of the US Court of Appeals for the Seventh Circuit *Publicis Communication v. True North Communications Inc.*[40] As concluded by Lu, the "artificial" distinction between "orders" and "awards" was rejected and upheld the tribunal's interim measures as final for enforcement purposes.[41]

As stated by authors *Carlevaris* and *Faris*, recognition and enforceability of a decision of an emergency arbitrator in terms of legal certainty for parties to the dispute are as important as for the arbitral award.[42] The chance that the decision of emergency arbitrator will be treated by the courts in the same manner as the arbitration awards and that such decision will be recognized and enforceable under the New York Convention, according to them, is increased due to the fact that emergency arbitration provisions are an integral part of the 2012 ICC Rules, i.e. they are not a separate set of rules, are applied automatically unless they are excluded by parties and the "emergency arbitrator" is called an arbitrator.[43]

Regardless of the discussed question of enforcement, in accordance with Article 29(2) of the 2012 ICC Rules, the interim procedural order of the emergency arbitrator is binding on the parties, however not on the arbitration tribunal in the proceeding that follows the emergency proceeding. The arbitrators may modify, terminate or annul the order of the emergency arbitrator or any modification thereto.[44] Therefore, it is important to emphasise that the order of the emergency arbitrator does not have an effect of *res iudicata* as valid arbitral award issued in the arbitration proceeding. Despite discussed uncertainties, the great advantage of emergency arbitration is the speed of the issuance of emergency orders and potential specific knowledge and experience of emergency arbitrators.

40 Decision of the United States Court of Appeals for the Seventh Circuit, United States of 14 March of 2000, Publicis Communication v. True North Communications Inc. [online]. [accessed on 2016-05-04].

41 LU, Jue Jun. The Emergency Arbitrator Procedure: Effective Tool or Enforcement Headache? [online]. *Berwin Leighton Paisner Expert Legal Insights* [accessed on 2016-05-04].

42 CARLEVARIS, Andrea; FERIS, José Ricardo. Running in the ICC Emergency Arbitrator Rules: The First Ten Cases. *The ICC International Court of Arbitration Bulletin*. 2014, Vol. 25, p. 37.

43 *Ibid.*

44 Article 29(3) of the 2012 ICC Rules.

6 Conclusion

If we had to sum up the benefits of the emergency arbitrator institute, one could say that it is an important innovation to the international commercial arbitration practice, which can significantly improve the position of a party to the dispute and help to faster secure its interests compared to situations in the past.

On the other hand, there are couple of disadvantages too. It is obvious that the costs of emergency arbitration are so high that any unjustified applications by either party may cause a deterioration of its own position. Secondly, the question of enforcement of procedural order might by problematic in some less arbitration-friendly jurisdictions with continuing discussion whether procedural order of the arbitration can be qualified as an arbitral award and be enforced under the New York Convention. In research conducted in 2015 by the Queen Mary, University of London in co-operation with White & Case, this has been highlighted as a biggest concern.

"*Some expressed concerns about the enforceability of emergency arbitrator decisions. 46% of respondents would, at present, look to domestic courts for urgent relief before the constitution of the tribunal, versus 29% who would opt for an emergency arbitrator. Nonetheless, 93% favour the inclusion of emergency arbitrator provisions in institutional rules."* [45]

It is evident that there is still certain optimism about emergency arbitration and as can be seen from various statistics published worldwide, despite the fact that the number of users of emergency arbitration is not too high, emergency arbitration is finding its users and is becoming a vital part of arbitration proceedings. Despite issues, the parties' confidence in this institution grows and, for example, in case of the 2012 ICC Rules,[46] there were already more requests for emergency proceedings than requests for pre-arbitral proceedings in their relatively long years of existence.[47]

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45 *Queen Mary, University London and White & Case 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* [online]. Queen Mary, University of London [accessed on 2016-05-04].

46 For comparison see *SCC Statistics 2015* [online]. Arbitration Institute of the Stockholm Chamber of Commerce [accessed on 2016-05-04].

47 CARLEVARIS, Andrea; FERIS, José Ricardo. Running in the ICC Emergency Arbitrator Rules: The First Ten Cases. *The ICC International Court of Arbitration Bulletin*. 2014, Vol. 25, p. 27. Also see Emergency Arbitrators – Developments from the LCIA and ICC [online]. *ARBlog. International Arbitration News, Trends and Cases*. Hogan Lovells, 2014 [accessed on 2016-05-04].

One can say that the institute of emergency arbitration is also an important "weapon" for negotiation of the parties. At the same time, it has to be noted that the wording of the 2012 ICC Rules does not provide much space for manoeuvring and the emergency arbitration is not easily abused by the parties due to relatively high costs which make any speculative application a highly expensive exercise with uncertain results. Yet, in practice, the initiation of emergency arbitration proceeding leads to negotiation and, ultimately, to agreement between parties without needing to continue with the arbitration proceedings, which would increase the costs of the parties even more; and this is certainly another great benefit. [48]

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A FEW REMARKS ON ENFORCEABILITY OF UNILATERAL DISPUTE RESOLUTION CLAUSES INVOLVING ARBITRATION

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Abstract

Unilateral dispute resolution clauses, which are also known as "optional" or "asymmetrical" clauses, provide only one party with the right to refer a particular dispute to another dispute resolution forum than primarily agreed between the parties. Wording of such clauses vary a lot, thus one can distinguish between different types of unilateral clauses. There are unilateral jurisdictional clauses which offer one party the choice between various state courts. However, more often "optional clauses" involve arbitration as either the default dispute resolution mechanism, or an option reserved for one party only. The analysed clauses are commonly used in the practice of international business, especially in financial transactions. As they have their origins in common law jurisdictions, unilateral dispute resolution clauses are often introduced to contracts concluded with an American or English party. Their aim is to ensure flexibility of dispute resolution for the party which has a better bargaining position. In continental Europe, unilateral dispute resolution clauses raise many questions about their validity and enforceability. Therefore, this paper aims at explaining the main characteristics of unilateral dispute resolution clauses, considering, in particular, the business and legal rationale standing behind them as well as the procedural settings to which they can lead. Moreover, the author intends to compare the common law approach (England) and the civil law approach (Russian and Polish) in order to conclude what are legal effects of unilateral dispute resolution clauses.

Keywords

Unilateral Dispute Resolution Clause; Arbitration Agreement; Equality of the Parties.

1 Introduction

Traditionally, dispute resolution clauses were intended to ascertain in advance the forum in which each party may bring its claim arising out of the agreement in which the clause was included. The choice of forum or dispute resolution method affected the parties equally. It used to be generally assumed that every agreement will designate a single mechanism of adjudication of disputes which most commonly was either litigation before specific courts or arbitration.

However, following the development of more and more complicated international transactions, the dispute resolution clauses have been adjusted to the commercial needs of the parties. This way, the practice has created custom-made contractual mechanisms such as multi-step dispute resolution clauses which designate certain procedural steps (negotiation, mediation, dispute boards) to be followed before the dispute is brought to adjudication[1] and unilateral dispute resolution clauses which are to be analyzed in this paper.

The idea of unilateral dispute resolution clauses which are also known as "one-sided", "optional"[2] or "asymmetrical"[3] clauses consists in only one party's right to refer a particular dispute to another dispute resolution forum than primarily agreed between the parties. The choice of forum in favour of one of the parties is multi-layered: it may be agreed on the level of one and the same type of mechanism (i.e., more than one state court) or a combination of different types of mechanisms (i.e., both arbitration and state

1 See e.g. RANA, Rashda. The Rise in the Use of Multi-Tiered Dispute Resolution Clauses Culminating in Arbitration. In: GESSEL-KALINOWSKA, Beata (ed.). *The Challenges and the Future of Commercial and Investment Arbitration. Liber Amicorum Professor Jerzy Rajski*. Warsaw: Lewiatan Court of Arbitration, 2015, pp. 530–565; GARNUSZEK, Anita; ORZEŁ, Aleksandra. Enforceability of Multi-tiered Dispute Resolution Clauses under Polish Law. *Arbitration Bulletin "Young Arbitration"*. 2016, Vol. 2, pp. 166–180.

2 The optional clauses can be of bilateral character, if both parties are vested with the right to choose between two or more forums.

3 DRAGUIEV, Deyan. Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability. *Journal of International Arbitration*. 2014, Vol. 31, No. 1, p. 20.

court litigation).[4] However, in practice unilateral dispute resolution clauses more often are of a hybrid nature, as they envision both arbitration and litigation.[5] Therefore, this paper addresses only the problems arising out of dispute resolution clauses providing for arbitration as either the default dispute resolution mechanism, or an option reserved for one party only.

This paper aims at explaining the main characteristics of unilateral dispute resolution clauses, considering, in particular, the business and legal rationale standing behind them as well as the procedural settings to which they can lead. Moreover, the author intends to compare the common law approach (England) and the civil law approach (Russian and Polish) in order to conclude what are legal effects of unilateral dispute resolution clauses.

2 Main Characteristics of Unilateral Dispute Resolution Clauses Involving Arbitration and the Rationale Behind Them

There are two types of unilateral dispute resolution clauses involving arbitration. Firstly, a clause prorogating particular state courts as a default forum and providing only one party with the right to opt for arbitration (unilateral option to arbitrate).[6] Secondly, a clause providing for arbitration as the default dispute resolution mechanism, but giving one party only the right to bring the dispute to state courts instead (unilateral option to litigate).[7] The option in the later clause can be either exclusive, stipulating a particular court or courts of a chosen state, or non-exclusive, allowing one party to opt not only for litigation, but also for any state court it prefers. This choice is usually practically predetermined by the need to enforce against the respondent's assets located in a certain jurisdiction.[8]

4 DRAGUIEV, Deyan. Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability. *Journal of International Arbitration*. 2014, Vol. 31, No. 1, p. 22.

5 BERARD, Marie; DINGLEY, James, Unilateral Option Clauses in Arbitration: An International Overview [online]. *Practical Law* [accessed on 2016-05-08].

6 *"The courts of England shall have jurisdiction to settle any disputes which may arise out of or in connection with this Agreement but [Party A] shall have the option of bringing any dispute hereunder to arbitration in accordance with LCIA Arbitration Rules. The arbitration should be seated in Paris."*

7 *"All disputes relating to or arising out of this Agreement, or the subject matter of this Agreement, shall be finally resolved by arbitration in accordance with LCIA Arbitration Rules. The arbitration should be seated in London. Notwithstanding the foregoing, [Party A] shall be free at its sole option to seek redress before courts of England."*

8 DRAGUIEV, Deyan. Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability. *Journal of International Arbitration*. 2014, Vol. 31, No. 1, p. 22.

The asymmetrical distribution of rights and duties under unilateral dispute resolution clauses mirrors the asymmetrical position of the commercial parties to these agreements. A party holding a stronger bargaining power is able to compel the other party to accept its draft of a contract, although it may be less beneficial for the other party subscribing to it. Most often unilateral dispute resolution clauses are included in international financial agreements, tenancy agreements, charter parties, employment contracts, software solution agreements and license contracts.[9]

What significantly defines such clauses is that they are prepared for the benefit of the economically stronger party. They are designed to provide maximum flexibility of the dispute resolution mechanism and ensure that the stronger party (e.g. a bank) can effectively pursue assets from its debtor. This goal can be achieved, if a party can use either arbitration or litigation.

Comparative advantages and disadvantages of referring disputes to the courts or to arbitration are well-known. One of the advantages of litigation before state courts is usually the possibility to obtain a default or summary judgment, neither of which is generally available in arbitration. However, litigation can be procedurally complex to commence and may take really long. By contrast, referring disputes to arbitration is quick and more effective, especially in international context, since procedures can be tailored to fit a particular dispute.

Although enforcement of arbitral awards under the New York Convention regime is perceived to be the most significant advantage of arbitration, an option to litigate can be useful, if both parties are located in the EU jurisdictions so that court judgments can be automatically enforced under Brussels Ibis Regulation.

An important feature of unilateral dispute resolution clauses is that the election is made after the dispute has arisen, when both the nature of the dispute

9 HENRIQUES, Duarte G. Asymmetrical Arbitration Clauses Under the Portuguese Law [online]. *Young Arbitration Review*. 2013, Vol. 11, p. 44 [accessed on 2016-05-09]; NESBITT, Simon; QUINLAN, Henry. The Status and Operation of Unilateral or Optional Arbitration Clauses. *Arbitration International*. 2006, Vol. 22, No. 1, pp. 134; DRAGUIEV, Deyan. Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability. *Journal of International Arbitration*. 2014, Vol. 31, No. 1, p. 19.

and the identity[10] of the other party are known. This enables the party to choose the dispute resolution forum that will best assist it.[11]

3 Procedural Settings Resulting from the Use of Unilateral Dispute Resolution Clauses Involving Arbitration

A unilateral dispute resolution clause may result in different procedural settings, depending on the fact which party files its claim first.

If a beneficiary of a unilateral option files its claim first, the forum before it takes the case will become the exclusive place for settlement of all its claims. However, it is more complicated if the other party, compelled to appear before the chosen forum ("weaker party"), wants to file a counterclaim. Then, two stands may be considered. Firstly, *Dragyiuv* suggests that *"once the dispute is brought for settlement* [by the party which exercised the option], *the parties cannot exercise any further election"* which probably means that the respondent can file its counterclaim only in the forum chosen by the claimant.[12] Secondly, it can be argued that the "weaker party" can bring its claim only before the forum stipulated in the agreement, despite the proceedings commenced by the claimant. However, the later solution is connected with an important risk resulting from parallel proceedings and double costs. Furthermore, the practical (and common) step is that the "weaker party" applies to a state court which should be competent under the applicable rules of private international law in lieu of the chosen forums under the unilateral dispute resolution clause and plead that the unilateral clause is invalid on some grounds, which should entitle that particular court to hear the dispute.[13]

More interestingly, if the party with its choice limited to state courts brings its case first, then the party benefiting from the arbitration option

10 For example in multi-party contracts.

11 BERARD, Marie; DINGLEY, James. Unilateral Option Clauses in Arbitration: An International Overview [online]. *Practical Law* [accessed on 2016-05-08].

12 DRAGUIEV, Deyan. Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability. *Journal of International Arbitration*. 2014, Vol. 31, No. 1, p. 23.

13 DRAGUIEV, Deyan. Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability. *Journal of International Arbitration*. 2014, Vol. 31, No. 1, p. 23.

may, in certain jurisdictions,[14] request a stay or termination of the litigation proceedings for the purpose of transferring the dispute to an arbitral tribunal. It should be noted that accepting of such request would mean that the party granted the option would be in an advantageous position not only prior to commencement of its own action, but also after an action is brought by the other party.[15] Yet, the wording of a unilateral arbitration clause often does not suggest that the "stronger" party is also released from the obligation to appear in a particular forum, if the other party requested so in accordance with the agreement.[16]

4 Enforceability of Unilateral Dispute Resolution Clauses in England

It is said that unilateral dispute resolution clauses have originated in the common law legal culture. This may be influenced by the fact that common law courtiers have been financial hubs for a very long time and many financial institutions seated there tend to use these clauses to reinforce their contractual position. Certainly, unilateral dispute resolution clauses are present in the English legal system from the mid 1980 s. Since then the attitude of the English courts to "one-sided" dispute resolution clauses has been well settled – the English courts consider such clauses to be valid and binding, and will uphold the parties' agreement as to the dispute resolution regime.

The landmark case for this field is *Pittalis v. Sherefettin*[17] which redefined requirement of mutuality of an agreement on dispute resolution, upholding the agreement between two persons which conferred on one of them alone the right to refer to arbitration.

The same reasoning was applied to the arbitration agreement in famous case *NB Three Shipping Ltd.*[18] The claimant charterers initiated proceedings

14 In England, for instance, such request can be granted by virtue of Section 9 of the Arbitration Act 1996. See Decision of the Court of Appeal of England and Wales, United Kingdom of 13 October 2004, NB Three Shipping Ltd. v. Harebell Shipping Ltd [online]. [accessed on 2016-05-08].

15 See NESBITT, Simon; QUINLAN, Henry. The Status and Operation of Unilateral or Optional Arbitration Clauses. *Arbitration International*. 2006, Vol. 22, No. 1, pp. 133–150.

16 See *Ibid.*, p. 149.

17 Decision of the Court of Appeal of England and Wales, United Kingdom of 1986, Pittalis v. Sherefettin. *Law Reports, Queens Bench Division*. 1986, Vol. 1, p. 868.

18 Decision of the Court of Appeal, England and Wales of 13 October 2004, NB Three Shipping Ltd. v Harebell Shipping Ltd. [online]. [accessed on 2016-05-08].

in the English courts for breach of contract following a dispute with the defendant owner under two charterparties. The owner sought to stay the court proceedings under Section 9(1) of the Arbitration Act 1996[19] providing for a stay of court proceedings commenced in respect of a matter which by the parties' agreement was to be referred to arbitration. The dispute resolution clause of the charterparty gave jurisdiction to the courts of England, but it also grant the owner "the option of bringing any dispute hereunder to arbitration".[20]

Morison J upheld the application for a stay and confirmed that the disputed resolution clauses included in the charterparties satisfied the requirements of an arbitration agreement *"since a one sided choice of arbitration is sufficient"*. While the jurisdiction clause "limited" the charterers to commencing legal proceedings before the English courts, the owner's application to stay the court proceedings was consistent with the commercial sense of the clause. Thus, the owner's right to refer any dispute to arbitration remained even if the charterers tried to bypass this right by initiating proceedings without first consulting the owner on the desired forum.

According to *Nesbitt* and *Quinlan*, the decision in case *NB Three Shipping Ltd* clarified that unilateral dispute resolution clauses are intended to operate on such basis that the party without the option will, if it wishes to bring a claim, consult the party with the option before commencing proceedings. In other words, the party entitled to choose between the fora can exercise such right both as plaintiff and defendant.[21] This approach not only has the effect that commencing proceedings prior to consultation will be at the claiming party's risk, but it also means that such clauses should, if properly acted

19 Section 9(1) of the Arbitration Act 1996 provides: *"A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter."*

20 *"47.02 The courts of England shall have jurisdiction to settle any disputes which may arise out of or in connection with this Charterparty but the Owner shall have the option of bringing any dispute hereunder to arbitration…*
47.10 Any dispute arising from the provisions of this Charterparty or its performance which cannot be resolved by mutual agreement which the Owner determines to resolve by arbitration shall be referred to arbitration in London…"

21 SCHERER, Maxi. A Cross-Channel Divide Over Unilateral Dispute Resolution Clauses. *Jurisdictional Choices in Times of Trouble. Dossiers of the ICC Institute of World Business Law*. 2015, Vol. 12, p. 13.

upon, operate to remove any element of surprise in the commencement of proceedings against the party with the option.[22]

Most recently, the decision in *Law Debenture Trust Corporation plc v. Elektrim Finance BV and others*[23] confirmed the validity of a unilateral option to litigate which was built into a regular arbitration clause under English law and offered interesting considerations on the asymmetry of the parties' rights. The main conclusion of *Mann J* was that the fact that one party was granted an "additional advantage" did not mean that the clause was invalid, since many contractual provisions confer advantages to only one of the parties.

An analysis of the English courts' case law proves that the principle of party autonomy is the driving force behind the development of unilateral dispute resolution clauses. Providing that it is tolerably clear that the parties intended the dispute resolution clause to operate unilaterally, English courts are reluctant to interfere with the parties' agreement. From the perspective of English legal culture, there are also no persuasive public policy reasons why such clauses should not be upheld in commercial agreements.[24]

5 Enforceability of Unilateral Dispute Resolution Clauses in Civil Law Jurisdictions

The diversity between civil law systems makes it impossible to present a unified policy on unilateral dispute resolution clauses. However, it can be easily noticed that arguments which are raised against enforceability of unilateral dispute resolution clauses are similar in different jurisdiction. These arguments are presented below in the context of Russian and Polish law.

5.1 Russia – Unilateral Dispute Resolution Clauses Violate Procedural Equality of the Parties

The discussion on unilateral dispute resolution clauses in Russia is very fruitful, as there are relatively a lot of cases involving this issue which are considered

22 NESBITT, Simon; QUINLAN, Henry. The Status and Operation of Unilateral or Optional Arbitration Clauses. *Arbitration International*. 2006, Vol. 22, No. 1, p. 149.

23 Decision of the High Court of Justice, United Kingdom of 1 July 2005, Law Debenture Trust Corporation plc v. Elektrim Finance BV and others [online]. [accessed on 2016-05-08].

24 See NESBITT Simon; QUINLAN Henry. The Status and Operation of Unilateral or Optional Arbitration Clauses. *Arbitration International*. 2006, Vol. 22, No. 1, p. 149.

by Russian courts. It is especially interesting, since Russian jurisprudence reviews these clauses in the light of the principles of procedural equality, which is one of the most powerful arguments against unilateral dispute resolution clauses.

Asoskov notices that *"until the year 2012, the Russian court practice had been developing favorably also with respect to asymmetrical clauses"*.[25] In particular, in a series of cases considered by the Moscow District Federal Arbitration Court, the contracts providing for dispute resolution under London Court of International Arbitration Rules, but at the same time granting the party providing financing (lender or agent) the option to refer the dispute for settlement to English courts or any other competent courts were deemed enforceable. Claims were filed by creditors with Russian commercial courts based on the general rules of international jurisdiction, as defendants were domiciled in Russia. The Russian courts denied the defendants' plea of existence of an arbitration agreement, noting that the creditors had a unilateral option to bring a claim before any competent state court. The conclusion stemming from the reasoning of the Moscow District Federal Arbitration Court was that it is permissible for one party to file claims with Russian state courts based on the option exclusively granted to that party under the terms of the contract. [26]

This favourable trend towards unilateral dispute resolution clauses was reversed by the famous decision of the Presidium of the Supreme Arbitration Court in *CJSC Russian Telephone Company* case.[27] The case regarded a dispute which arose between CJSC Russian Telephone Company ("RTC") and OOO Sony Ericsson Mobile Communications Rus ("Sony Ericsson") in respect of allegedly defective goods supplied by Sony Ericsson. The contract between the parties contained a clause providing that disputes were

25 ASOSKOV Anton. Unilateral Optional Dispute Resolution Clauses – From Russia with Prejudice. *Jurisdictional Choices in Times of Trouble. Dossiers of the ICC Institute of World Business Law*. 2015, Vol. 12, p. 55.

26 *Ibid.,* p. 55.

27 Decision of the Supreme Arbitration Court, Russian Federation of 12 June 2012, No. 1831/12CJSC, Russian Telephone Company v. OOO Sony Ericsson Mobile Communications Rus. In: VAN DEN BERG, Albert Jan (ed.). *Yearbook Commercial Arbitration 2013 - Volume XXXVIII*. The Hague: Kluwer Law International, 2013, pp. 451–452.

to be referred to ICC arbitration in London, yet Sony Ericsson could also *"seek the collection of debt for the delivered goods through a competent state court"*.[28]

RTC commenced an action in the Arbitration Court Moscow, but, in response, Sony Ericsson raised the pleas of the existence of an arbitration agreement. Lower courts of two instances held that the case did not fall within the jurisdiction of the state court as the parties had entered into valid arbitration agreement. However, they failed to analyse the arbitration clause in conjunction with the extension part stipulating a unilateral right of Sony Ericsson to file a claim either in arbitration or with a competent state court.

The Presidium of the Supreme Arbitration Court reversed the decisions of the lower courts and remanded the case for revision, as it held that the part of the arbitration clause giving Sony Ericson a unilateral right to take the dispute before state court gave it an advantage over RTC and therefore created an imbalance in the parties' rights. The Presidium referred to the principle of the parties' procedural equality which is enshrined in the ECHR and upheld by the European Court of Human Rights. In: particular it stated: *"(…) a dispute resolution agreement cannot endow only one party with the right to apply to a competent court and deprive the other of that right. In the event such an agreement is concluded it shall be considered as void because it violates the balance of the parties' rights."* The Presidium also explained that a party whose rights were violated by such an agreement could also seek judicial protection on equal terms with the other party under the dispute resolution agreement.

It is important to note that the Presidium applied Russian law to the assessment of the validity of the dispute resolution clause without any specific discussion, notwithstanding the fact that the arbitration agreement in question provided for arbitration in London. This may suggest that Russian courts will tend to apply Russian law to all such types of clauses, if their validity

28 *"Any dispute arising out of this Contract which cannot be settled by negotiations will be finally resolved in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three (3) arbitrators appointed in accordance with the Rules. The place of arbitration is London; the language of arbitration is English. This arbitration clause remains in force after the termination of the Contract and does not preclude the parties from seeking interim measures of protection or injunctions in the competent courts in the events of violation or threat of violation of the sections of the contract "Sony Ericsson Trade Marks", "Software Licenses", "Export Control", "Fighting Counterfeit" or "Confidentiality". This arbitration clause shall not restrict Sony Ericsson to seek the collection of debt for the delivered goods through a competent state court."*

and enforceability are tested before Russian courts. Therefore, as *Asoskov* concludes: *"Making a dispute resolution agreement subject to foreign law, which ordinarily would give full legal effect to such clauses, will not remove the serious legal risk that Russian courts may come to the conclusion that the dispute resolution clause is invalid because it violates Russian public policy."*[29]

The evolution of the Russian approach towards unilateral dispute resolution clauses has been continued. Although there were no judgments overruling the decision in the *CJSC Russian Telephone Company* case, the Supreme Court of Russia[30] held that the above reasoning did not apply to all types of clauses which provided for an option to choose between litigation and arbitration.

On 21 May 2015, the Supreme Court of Russia issued a decision in *Piramida LLC* case[31] which concerned a dispute that arose between a supplier (Piramida LLC), a purchaser (BOT LLC) and a guarantor (Mr. Babkin) under a supply agreement and a guarantee agreement. Both contracts provided that all disputes should be resolved by a Russian commercial court or a domestic regional arbitral institution at the choice of the claimant.[32] *Piramida LLC* commenced an arbitration proceeding, and brought the contract claim against both BOT LLC and Mr. Babkin. The award was rendered in favor of the claimant and it sought enforcement before Russian courts. The courts of two instances denied enforcement holding that the clause was invalid as it violated the balance of interests between the parties.

The Supreme Court of Russia reversed these decisions and stated that the dispute resolution clause granting an option to choose between different

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29 ASOSKOV, Anton. Unilateral Optional Dispute Resolution Clauses – From Russia with Prejudice. *Jurisdictional Choices in Times of Trouble. Dossiers of the ICC Institute of World Business Law*. 2015, Vol. 12, pp. 57–58.

30 In 2014, the Supreme Arbitration Court was abolished and the matters which were under its authority were transferred to the Supreme Court of Russia.

31 Decision of the Supreme Court of Russia of 21 May 2015, No. A621635/2014 [online]. *Practical Law* [accessed on 2015-05-07].

32 The contracts contained the following arbitration agreements:
1) "Any dispute arising in connection with this contract is to be finally resolved by the Commercial Court of Ulanovsk region (a state court – note of author) *or by the arbitration court of the Chamber of Commerce of Ulanovsk region depending on the choice of a claimant."* (Section 10. 3. of the Supplier Contract);
2) "[…] the dispute should be finally resolved by the Dimitrovogradsky City Court (a state court – note of author) *or by the arbitration court of the Chamber of Commerce of Ulanovsk region depending on the choice of a claimant."* (Section 4. 2. of the Contract of Guarantee).

forums to any party which acts as claimant does not contravene the principle of equality. The Court differentiated this case from the *CJSC Russian Telephone Company* case, as in the later, the name of the party which had the right to choose between arbitration and litigation was indicated directly – Sony Ericsson. Instead, in the *Piramida LLC* case, a party which had the right to choose between arbitration and litigation was not mentioned by name, but there was just a reference to the procedural status of a claimant. According to the Supreme Court of Russia, when each of the parties has the right to start proceedings in court or in arbitration, the equality between them as regards their procedural rights is not impaired.

The conclusion stemming from the *Piramida LLC* case is twofold. Firstly, the judgment confirmed that the Supreme Court of Russia will follow the approach adopted in the *CJSC Russian Telephone Company* case regarding the validity of unilateral dispute resolution clauses. Secondly, it states that clauses which provide for option between different forums but maintain equality of the parties' procedural right should be enforced.

The above proves that Russian courts found that the procedural equality of the parties overrides their autonomy. However, this restrictive approach is taken only towards truly unilateral dispute resolution clauses providing for the option to choose the forum to one party only.[33]

5.2 Poland – Explicit Prohibition of Unilateral Dispute Resolution Clauses

It should be noted that Polish arbitration law is an exotic[34] example of an explicit regulation of unilateral dispute resolution clauses involving arbitration.

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33 BORN, Gary B. *International Commercial Arbitration*. 2nd ed. Alphen aan den Rijn: Kluwer Law International, 2014, p. 869.

34 As noted by *Wiśniewski* in WIŚNIEWSKI, Andrzej W. Zasada równości stron w umowie o arbitraż oraz w procesie powoływania zespołu orzekającego: art. 1161 § 2 oraz art. 1169 § 3 k.p.c. In: OKOLSKI, Józef (president); CAŁUS, Andrzej; PAZDAN, Maksymilian; SOŁTYSIŃSKI, Stanisław; WARDYŃSKI, Tomasz; WŁODYKA, Stanisław Włodyka (eds.). *Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie*. Warsaw: Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej w Warszawie, 2010, p. 336. See also SCHWARZ, Franz T. International Arbitration in Central and Eastern Europe: A Diversity of Approaches. *The International Comparative Legal Guide to: International Arbitration 2015*. 12th ed. [online]. [accessed on 2016-05-08].

Article 1161(2) of Polish Code of Civil Procedure[35] ("PCCP") states: *"Provisions of an arbitration agreement in breach of the principle of equality of the parties, in particular provisions entitling only one party to bring a case before the arbitral tribunal indicated in the arbitration agreement or before a court, shall be ineffective."* The *ratio* behind this rule is based on the principle of equality of the parties to arbitration agreement.

Article 1161(2) of PCCP is said to be one a few mandatory norms under Polish arbitration law which the parties must not derogate from.[36] Therefore, dispute resolution clauses granting only one party an option to arbitrate or litigate in addition to the default mechanism of dispute resolution agreed in a contract are not enforceable under Polish law.[37]

However, the exact scope of Article 1161(2) of the PCCP is unclear. The unfortunate wording of this norm refers to *"provisions of an arbitration agreement"*, although unilateral dispute resolution clauses which it concerns can be created on the basis of either prorogation or an arbitration agreement.[38] Nevertheless, the author believes that in case of such a clause, only the part providing for an additional option to arbitrate or to litigate is not given legal effects.[39] Thus, in case of an unilateral dispute resolution clause being drafted on the basis of an arbitration agreement, infectivity of a unilateral option to litigate results in a situation in which both parties have equal

35 POLAND. Act of 17 November 1964 – Code of Civil Procedure. Official Gazette 2014 No. 0 item 101 (uniform text).

36 ŁASZCZUK, Maciej; SZPARA, Justyna. Postępowania postarbitrażowe. In: SZUMAŃSKI, Andrzej (ed.). *System Prawa Handlowego. Arbitraż handlowy*. Vol. 8. Warsaw: CH Beck, 2015, p. 714.

37 See DRAGUIEV, Deyan. Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability. *Journal of International Arbitration*. 2014, Vol. 31, No. 1, p. 32 who is incorrect in analysis the case law of the Polish Supreme Court and concluding that *"the Supreme Court of Poland reviewed a unilateral clause and considered that it be void on grounds that the different options granted to the parties may impact their standing in the procedure"*. The cited cases did not involve unilateral arbitration clause but indeed analyzed the issue of inequality of the parties in the context of arbitration procedure.

38 TOMASZEWSKI, Maciej. Umowa o arbitraż. In: SZUMAŃSKI, Andrzej (ed.). *System Prawa Handlowego. Arbitraż handlowy*. Vol. 8. Warsaw: CH Beck, 2015, p. 320.

39 Likewise TOMASZEWSKI, Maciej. Umowa o arbitraż. In: SZUMAŃSKI, Andrzej (ed.). *System Prawa Handlowego. Arbitraż handlowy*. Vol. 8. Warsaw: CH Beck, 2015, p. 320 and WIŚNIEWSKI, Andrzej W; SZURSKI Tadeusz. National Report for Poland (2012). In: PAULSSON Jan; BOSMAN, Lise (eds.). *International Handbook on Commercial Arbitration, Supplement No. 72, December 2012*. The Hague: Kluwer Law International, 1984, p. 8.

right to arbitrate. The same principle should apply to unilateral dispute resolution clauses being drafted on the basis of prorogation – when an option to arbitrate is ineffective, both parties can resolve the dispute only before a public court stipulated in the agreement.

The opposite approach, according to which the whole unilateral dispute resolution clause is ineffective seems to be impractical, as it totally departs from the parties' agreement and takes their disputes back to the state court that has jurisdiction to hear them, according to the relevant laws. The only scenario which justifies finding that the whole dispute resolution clause is ineffective would be a conclusion, based on the circumstances of a particular case, that the parties would not have entered into any dispute resolution agreement without the part providing for an unilateral option to have disputes resolves in an additional forum.[40]

It should be also noted that there are further procedural consequences of infectivity of a unilateral option to have disputes resolved before another forum than primarily agreed by the parties. For example, Polish courts will not recognize the negative effect of an arbitration agreement in a dispute resolution clause providing for a unilateral option to arbitrate. Similarly, an arbitral tribunal's positive decision on its competence to hear the case can be successfully challenged before the national court[41].

It is not certain if an arbitral award rendered on the basis of an option to arbitrate which was reserved in a contract for one party only will be set aside by Polish courts. Article 1206 of the PCCP does not contain any reference to Article 1161(2) of the PCCP, however, it is likely that such award would found to be rendered in breach of the principle of equality which Article 1161(2) of the PCCP is to guarantee. Further, as the principle of equality

40 ERECIŃSKI, Tadeusz; WEITZ, Karol. *Sąd arbitrażowy*. Warsaw: Lexis Nexis, 2008, pp. 108–109 who propose to apply analogically Article 58(3) of Polish Civil Code which states: *"If only a part of a legal act is affected by invalidity, the remaining parts of the act continue to be effective unless it follows from the circumstances that without the invalid provisions, the act would not have been performed."* See also WIŚNIEWSKI, Andrzej W., Zasada równości stron w umowie o arbitraż oraz w procesie powoływania zespołu orzekającego: art. 1161 § 2 oraz art. 1169 § 3 k.p.c. In: OKOLSKI, Józef (president); CAŁUS, Andrzej; PAZDAN, Maksymilian; SOŁTYSIŃSKI, Stanisław; WARDYŃSKI, Tomasz; WŁODYKA, Stanisław Wlodyka (eds.). *Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie*. Warsaw: Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej w Warszawie, 2010, p. 339.

41 On the basis of Article 1180(3) or 1206(1)(1) of PCPC.

is rooted in the Polish Constitution,[42] it falls within the scope of the fundamental rules of the Polish public order (public policy clause) which is one of the grounds enabling the court to annul the arbitral award *ex officio*. Similarly, there is a significant risk that the same scenario could be followed in case of recognition or enforcement of a foreign arbitral award rendered upon a dispute resolution clause providing for a unilateral option to arbitrate. So far there has been no reported case law analysing the very same issue, but certain assumption can be made based on the analysis of the judicial interpretation of Article V(2)(b) of the New York Convention.[43]

Interestingly, Article 1161(2) of the PCCP has been subject to a severe critic in Polish doctrine.[44] *Wiśniewski* specifically states that the parties to an arbitration agreement should have similar freedom to agree on the mechanisms of dispute resolution, as they have in regard to substantive provisions of every agreement. Thus, business entities should not be protected against the consequences of its own consent on the unilateral dispute resolution clauses, but only of the consequences of exploitation, error, threat or abuse of rights on the part of the party.[45]

6 Conclusion

The above analysis proves that enforceability of unilateral dispute resolution clauses involving arbitration, as either default mechanism agreed by the parties or an option granted only to one of them, depends heavily on the perception of the two fundamental principles of private law: autonomy of the parties' will and their equality. English courts accept the dominance of the parties' will, whereas in Russian and Polish legal systems, symmetry of rights as to the procedural issues seems to be more important.

42 Article 32 of the Polish Constitution.

43 ŁASZCZUK, Maciej; SZPARA, Justyna. Postępowania postarbitrażowe. In: SZUMAŃSKI, Andrzej (ed.). *System Prawa Handlowego. Arbitraż handlowy*. Vol. 8. Warsaw: C. H Beck, 2015, p. 716.

44 *TOMASZEWSKI, Maciej. Skuteczność ochrony prawnej* przed sądami polubownymi. *Przegląd Sądowy*. 2006, No. 1, pp. 38–39.

45 WIŚNIEWSKI, Andrzej W., Zasada równości stron w umowie o arbitraż oraz w procesie powoływania zespołu orzekającego: art. 1161 § 2 oraz art. 1169 § 3 k.p.c. In: OKOLSKI, Józef (president); CAŁUS, Andrzej; PAZDAN, Maksymilian; SOŁTYSIŃSKI, Stanisław; WARDYŃSKI, Tomasz; WŁODYKA, Stanisław Włodyka (eds.). *Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie*. Warsaw: Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej w Warszawie, 2010, p. 337.

A diverse landscape has thus emerged and parties with existing unilateral jurisdiction clauses should be put on notice that judgments or arbitral awards rendered on the basis of a unilateral jurisdiction clause may face enforcement challenges in some jurisdictions.

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DETERMINING APPLICABLE LAW PURSUANT TO WIPO ARBITRATION RULES - DISPUTES CONCERNING LICENCE AGREEMENT

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Abstract

World Intellectual Property Organization ("WIPO") created rules for the arbitration proceedings in intellectual property disputes. The WIPO Arbitration Rules include important norms, e.g. how to determine applicable law. The aim of this paper is to examine the concept of determining applicable law according to the WIPO Arbitration Rules and especially in the disputes concerning licence agreement. Licence agreements can differ from each other based on the different approaches and this can influence also the applicable law for the dispute. WIPO Arbitration Rules offer several options how to decide the dispute, the rules of substantive law are only one of them. The contribution will connect the specifics of licence agreements and determining of the applicable law by WIPO Arbitration Rules.

Keywords

Applicable Law; Arbitration; Intellectual Property; Licence Agreement; WIPO Arbitration Rules.

1 Introduction

Both arbitration and intellectual property ("IP") rights have their legal particularities which could in their combination create an interesting system. This has not been unnoticed by academics and by World Intellectual Property Organization ("WIPO"), which created the WIPO Arbitration (among mediation and Uniform Domain Name Resolution) in 1990s.

The WIPO has created the possibility to arbitrate within its organization and as such constructed its own arbitration rules.[1] The WIPO Arbitration and Mediation Centre was established in 1994 and the arbitration rules have been amending since then, the latest version is from 2014.[2] The new WIPO Arbitration Rules had undergone many changes.[3] However, this paper focuses on the unchanged rule determining the substantive applicable law. The following text will analyse the use of several methods in WIPO Arbitration Rules. During the process, the specifics of IP rights and especially licensing agreements will be discussed. Furthermore, the focus will be aimed on licence agreement disputes and the determining the applicable law in those disputes according to WIPO Arbitration Rules.

2 WIPO Arbitration Rules

The purpose of WIPO is mainly to support the international protection of IP.[4] One way how to protect the IP rights was a creation of WIPO Arbitration and Mediation Centre.[5] Ever since the WIPO has started the process of its own arbitration, it was obvious it cannot be just another arbitration centre, but shall present advantages over other platforms and should understand the IP problems. Therefore, the rules were created with these thoughts in mind.[6] More detailed analyses of the WIPO Arbitration Rules for determining applicable substantive law will be made in further chapters. Firstly, we will present main ways of determining law in arbitration.

3 Determining Applicable Law in Arbitration in General

If we talk about the applicable law in this paper, we mean the applicable law for the merits of the case, the procedural law is not part of our analysis.

1 WIPO Arbitration Rules 2014 [online]. *WIPO* [accessed on 2016-03-15] ("WIPO Arbitration Rules").

2 *Ibid.*

3 WOLLGAST, Heike; DE CASTRO, Ignacio. WIPO Arbitration and Mediation Centre: New 2014 WIPO Rules; WIPO FRAND Arbitration. *ASA Bulletin* [online]. 2014, Vol. 32, No. 2, p. 287 [accessed on 2016-03-15].

4 *Inside WIPO. What We Do* [online]. WIPO [accessed on 2016-04-26].

5 *Guide to WIPO Arbitration* [online]. WIPO Arbitration and Mediation Centre, p. 2 [accessed on 2016-03-15].

6 PAGENBERG, Jochen. WIPO - Working Group on Arbitration for the Resolution of Intellectual Property Disputes. *International Review of Intellectual Property and Competition Law* [online]. 1993, Vol. 24, No. 3, p. 351 [accessed on 2016-03-15].

The question of applicable law depends on the doctrine chosen by the arbitrator. It can be connected with the seat of arbitration or can be even anational.[7] The most usual or actual approaches of determining the law, if there is no choice of law, include usage of territorial conflicts of law or letting the arbitrator determine applicable law by itself.[8] The territorial approach is using territorial conflicts of law. The contractual approach represents the freedom of choice and gives the arbitrator more freedom to choose e.g *lex mercatoria*.[9] This "delocalization" represents the basic idea, that international arbitration, different to national or interstate arbitration, should not be affected or depend on law of state where seat of arbitration is placed.[10] WIPO Arbitration Rules have chosen the way of international arbitration (although parties of purely national disputes can use it) with the independent (not connected to conflict of laws rules) approach.

4 WIPO Arbitration Rules for Applicable Law

The last version of arbitration rules from 2014 has similar rule for determining the applicable substantive law as its original version from 1994.[11] Hence, it can be presumed that the original rule was good enough, thereby, the revision was not needed, or the rule is flexible and wide enough for satisfying every subject of the arbitration proceeding.

Although the similar rule but not the same is implemented in other arbitration rules e.g. UNCITRAL Arbitration Rules,[12] WIPO has decided to use it for the IP disputes. However, question has risen, whether this rule can reflect the notion of IP?

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7 ROZEHNALOVÁ, Naděžda. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. 2nd ed. Praha: ASPI, 2008, p. 210.

8 BLACKABY, Nigel; PARTASIDES, Constantine; REDFERN, Alan; HUNTER, Martin. *Redfern and Hunter on International Arbitration*. 5th ed. Oxford: Oxford University Press, 2009, p. 236.

9 ROZEHNALOVÁ, Naděžda. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. 2nd ed. Praha: ASPI, 2008, pp. 221–223.

10 MOSES, Margaret L. *The Principles and Practice of International Commercial Arbitration*. Cambridge: Cambridge University Press, 2008, p. 56.

11 Article 61(a) of the WIPO Arbitration Rules; Art. 59(a) of the WIPO Arbitration Rules 1994 [online]. *Lex Mercatoria* [accessed on 2016-03-15].

12 Article 35 of the UNCITRAL Arbitration Rules (with new Article 1, paragraph 4, as adopted in 2013 [online]. *UNICITRAL* [accessed on 2016-03-15].

4.1 Autonomy of Parties

Firstly, WIPO Arbitration Rules prefer, typically in case of international arbitration, the free will of parties which is expressed in their ability to choose applicable law. Such a choice of law can determine only the substantive national law and not its conflict of laws rules.[13] This approach promotes advantage of arbitration which is the predictability of conclusion for the parties. Parties can choose the law they are acquainted with and consequently can anticipate the outcome of the dispute.[14] It is unusual for parties which incorporated arbitration agreement, not to choose their applicable law for the dispute.[15]

From the IP point of view, parties can choose applicable law not only for the contractual aspects of the dispute, but also for the non-contractual.[16] The non-contractual aspects which are related to the IP rights include the existence of the IP rights, the scope of what exactly is protected, its duration etc.[17]

From the private international law point of view, those contractual and non-contractual aspects would have different governing law which can lead to an undesirable solution.[18] Thus, having one applicable law can be a great advantage.

Understandably, party autonomy is not unlimited. One limitation is the arbitration agreement itself and its interpretation, especially interpretation of what exactly parties submitted to arbitration (contractual or non-contractual parts).[19] Another limitations are mandatory rules and the question of public policy. Mandatory rules in IP law are usually rules con-

13 Article 61(a) of WIPO Arbitration Rules.

14 WEI-HUA, Wu. International Arbitration of Patent Disputes. *The John Marshall Review Of Intellectual Property Law* [online]. 2011, Vol. 10, p. 403 [accessed on 2016-03-15].

15 ADAMO, Kenneth R. Overview of International Arbitration in the Intellectual Property Context. *Global Business Law Review* [online]. 2011, Vol. 2, No. 7, p. 10 [accessed on 2016-03-15].

16 COOK, Trevor M.; GARCIA, Alejandro I. *International Intellectual Property Arbitration.* Alphen aan den Rijn: Wolters Kluwer, 2010, p. 87.

17 FAWCETT, James; TORREMANS, Paul. *Intellectual Property and Private International Law*. 2nd ed. Oxford: Oxford University Press, 2011, pp. 696–697.

18 PETZ, Thomas. Austria. In: KONO, Toshiyuki (ed). *Intellectual Property and Private International Law: Comparative Perspectives.* Oxford: Hart publishing, 2012, pp. 222–230. For non-contractual aspects see VALDHANS, Jiří. *Právní úprava mimosmluvních závazků s mezinárodním prvkem.* Praha: C. H. Beck, 2012, pp. 200–202.

19 COOK, Trevor M.; GARCIA, Alejandro I. *International Intellectual Property Arbitration.* Alphen aan den Rijn: Wolters Kluwer, 2010, p. 88.

nected to competition law or to principle of territoriality. Still, it is difficult to determine what exactly would be mandatory rule, but it is safely said that mandatory rules in IP law are more common than in other areas of law.[20]

The parties can choose the national law or rules of law, as it is listed in WIPO Arbitration Rules, e.g. *lex mercatoria*. Despite the attraction of the idea, the *lex mercatoria* is not the best solution for IP disputes as it does not include important parts of the IP protection.[21] UNIDROIT Principles on International Commercial Contracts 2010[22] ("UNIDROIT Principles") and Principles of European Contract Law[23] are principles commonly recognized as *lex mercatoria*.[24] However, none of them has the rule about the specifics of licence agreements.[25] In case of no choice of law, the arbitrator must decide upon this matter by himself. As it is explicitly stated in WIPO Arbitration Rules, the arbitrator should primarily adjudicate the dispute according to the clauses in contract or commercial usage.[26] Only if the parties have not chosen the applicable law, the arbitrator can use *"law or rules of law that it determines to be appropriate*".[27] But which law is appropriate in IP disputes?

4.2 Parties Have Not Chosen the Applicable Law

There are several ways how to determine the applicable law, if there is no choice of law. The traditional approach would be to use conflicts of law, usually of seat of arbitration or newly the cumulative approach.[28] Nevertheless, the WIPO Arbitration Rules especially stated "law which

20 COOK, Trevor M.; GARCIA, Alejandro I. *International Intellectual Property Arbitration*. Alphen aan den Rijn: Wolters Kluwer, 2010, pp. 89–95; FAWCETT, James; TORREMANS, Paul. *Intellectual Property and Private International Law*. 2nd ed. Oxford: Oxford University Press, 2011, p. 793. For more about public policy in arbitration see BĚLOHLÁVEK, Alexander J. *Arbitration, Ordre Public and Criminal Law (Interaction of Private and Public International and Domestic Law). Volume I*. Kyiv: Taxon, 2009, pp. 1115–1175.

21 COOK, Trevor M.; GARCIA, Alejandro I. *International Intellectual Property Arbitration*. Alphen aan den Rijn: Wolters Kluwer, 2010, pp. 97–98.

22 UNIDROIT Principles on International Commercial Contracts 2010 [online]. *International Institute for the Unification of Private Law (UNIDROIT)* [accessed on 2016-03-15].

23 Principles of European Contract Law [online]. *Lex Mercatoria* [accessed on 2016-03-15].

24 ROZEHNALOVÁ, Naděžda. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. 2nd ed. Praha: ASPI, 2008, pp. 233–234.

25 COOK, Trevor M.; GARCIA, Alejandro I. *International Intellectual Property Arbitration*. Alphen aan den Rijn: Wolters Kluwer, 2010, p. 98.

26 Article 61(a) of the WIPO Arbitration Rules.

27 *Ibid*.

28 MOSES, Margaret L. *The Principles and Practice of International Commercial Arbitration*. Cambridge: Cambridge University Press, 2008, pp. 76–77.

is appropriate" which, from the view of international doctrine, have a broader meaning.[29] Thus, WIPO Arbitration Rules allow to directly apply the appropriate law without any reference to conflict of laws.[30]

The whole rule on applicable law is complemented by the regulation: *"The Tribunal may decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized it to do so."*[31] Again, in spite of the ambitious idea, its realization would not be without problems or hesitations. In practise, the *amiable compositeur* is not really used, because although parties are seeking the arbitration as less strict proceeding, the *amiable compositeur* does not contribute to the predictability of the outcome.[32] Moreover, it is disputable, if it would ever become trend in international arbitration.[33] The same can be said about the IP arbitration and may even be accompanied by the same argument as listed above, that non-contractual aspect of IP licence would need mooring in a national law.

However, it can be favourable for the contractual aspects of licence agreement.[34] Though, international licence agreements are complicated many-layered agreements.

5 Specifics of Licence Agreements

5.1 Contractual Specifics

The basic definition of licencing agreement states: *"An intellectual property licence is an agreement between the intellectual property owner ("licensor") and a person or entity that wishes to use that intellectual property ("licensee") under which the licensor grants the licensee the right to use the licensor's intellectual property."*[35]

29 CELLI, Alessandro L.; BENZ, Nicola. Arbitration and Intellectual Property. *European Business Organization Law Review* [online]. 2002, Vol. 3, No. 3. p. 607 [accessed on 2016-03-15].

30 COOK, Trevor M.; GARCIA, Alejandro I. *International Intellectual Property Arbitration.* Alphen aan den Rijn: Wolters Kluwer, 2010, p. 102.

31 Article 61(a) of the WIPO Arbitration Rules.

32 MOSES, Margaret L. *The Principles and Practice of International Commercial Arbitration.* Cambridge: Cambridge University Press, 2008, pp. 78–79.

33 ROZEHNALOVÁ, Naděžda. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku.* 2nd ed. Praha: ASPI, 2008, p. 242.

34 COOK Trevor M.; GARCIA, Alejandro I. *International Intellectual Property Arbitration.* Alphen aan den Rijn: Wolters Kluwer, 2010, pp. 97–98.

35 MIDDLETON, Gaye. Licensing of Intellectual Property. *International Company and Commercial Law Review* [online]. 2000, Vol. 11, No. 5, p. 155 [accessed on 2016-03-15].

There is not just one type of IP contract in which one particular contract represents the simple right and obligation of the two parties, but there can be plenty of different types of contracts concerning IP rights.[36] For the whole picture we have to mention that the contract can differ accordingly to the type of IP rights: industrial or copyright or even more specific.[37] Accordingly, the core of licence agreement is that one party enables another party to exercise its right and those rights can be exclusive or non-exclusive, territorially limited etc.[38] The owner of the IP rights can still use the IP rights, or for the time of contract, is excluded from using it. The national laws can prohibit some IP rights from the licencing e.g. designation of origin. [39]

Another factor is the multiparty on licensor side or on licensees' side when parties would probably be from different states. The contract may have form of one joint contract or several licences together.[40] The features aspects of such a contract include question of payment and sublicensing, time or territorial restrictions.[41] Other aspects are warranties, royalties, confidentiality, currency, mandatory registration etc.[42]

5.2 Conflict-of-law Specifics

Usually, the characteristic performance or connection with the state is the rule used in determining applicable law in Private International Law. However,

36 DE MIGUEL ASENSIO, Pedro. The Law Governing Intellectual Property Licensing Agreements (A Conflict of Law Analysis). In: DE WERRA, Jacques (ed.). *Research Handbook on Intellectual Property Licensing*. Cheltenham: Edward Elgar Publishing, 2013, p. 320.

37 TORREMANS, Paul. Choice-of-law Problems in International Industrial Property Licences. *International Review of Intellectual Property and Competition Law* [online]. 1994, Vol. 25, No. 3, p. 390 [accessed on 2016-03-15].

38 CHAO, Chin G. Conflict of Laws and the International Licensing of Industrial Property in the United States, the European Union, and Japan. *N.C.J. Int'l L. & Com. Reg.* [online]. 1996, Vol. 22, p. 147 [accessed on 2016-03-15].

39 VOJČÍK, Peter. *Právo duševného vlastníctva*. 2nd ed. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2014, p. 350.

40 MANKOWSKI, Peter. Contracts Relating to Intellectual or Industrial Property Rights under the Rome I regulation. In: LEIBLE, Stefan; OHLY, Asgar (eds.). *Intellectual property and Private International Law*. Tübingen: Mohr Siebeck, 2009, p. 58.

41 CHAO, Chin G. Conflict of Laws and the International Licensing of Industrial Property in the United States, the European Union, and Japan. *N.C.J. Int'l L. & Com. Reg.* [online]. 1996, Vol. 22, p. 147 [accessed on 2016-03-15].

42 MIDDLETON, Gaye. Licensing of Intellectual Property. *International Company and Commercial Law Review* [online]. 2000, Vol. 11, No. 5, pp. 155–164 [accessed on 2016-03-15].

licence agreements represent the relationships where it is hard to define who provides the characteristic performance.[43] For example, the basic presumption that the creditor provides the characteristic performance is disputable, if the licensor has no obligations, only allows licensee to exploit the right. And the situation, when it is not possible to choose only one party with characteristic performance is also possible e.g. publication of the work connected with distributing.[44]

6 Determining Applicable Law in Licensing Disputes

As we can see from the above chapters, determining the applicable law in general is not an easy task. The WIPO Arbitration Rules do not include special rule for licence agreements, thus the general rule is applicable for the disputes based on them. If we have a look at WIPO Arbitration Rules with the licence agreement in mind, the train of thoughts is same as was stated in the chapters above.

6.1 Choice of Law in Licensing Agreements

Firstly, the most proper scenario is the situation when parties choose applicable law before arbitration. That is the best solution for the dispute as such, although that does not mean that such a choice of law is without limits.[45]

The said problem with the licencing agreement could be, that the chosen law does not allow licencing some IP rights. We have to be aware that licencing agreement can include the contractual aspects and non-contractual aspects. Thus, mandatory rules and public policy can affect the non-contractual part of dispute, typically the connection with the competition law, validation of IP rights or its violation[46] and another form of these norms can be found

43 DE MIGUEL ASENSIO, Pedro. The Law Governing Intellectual Property Licensing Agreements (A Conflict of Law Analysis). In: DE WERRA, Jacques. (ed.) *Research Handbook on Intellectual Property Licensing.* Cheltenham: Edward Elgar Publishing, 2013, pp. 320–321.

44 *Comments on the European Commission's Proposal for a Regulation on the Law Applicable to Contractual Obligations („Rome I") of December 15, 2005 and the European Parliament Committee on Legal Affairs' Draft Report on the Proposal of August 22, 2006* [online]. European Max-Planck Group for Conflict of Laws in Intellectual Property, 2007, p. 4 [accessed on 2016-03-15].

45 BLACKABY, Nigel; PARTASIDES, Constantine; REDFERN, Alan; HUNTER, Martin. *Redfern and Hunter on International Arbitration.* 5th ed. Oxford: Oxford University Press, 2009, pp. 197–198.

46 COOK, Trevor M.; GARCIA, Alejandro I. *International Intellectual Property Arbitration.* Alphen aan den Rijn: Wolters Kluwer, 2010, p. 89.

in pharmaceutical marketing area.[47] Despite of it, the mandatory rules problem is not common for licence contracting disputes up to the questions of weaker party of the contract and its protection.[48] Still, it is likely to advise the parties to wisely choose their applicable law, not really for their contract matter, even thought that is very important from the point of view of limitation of damages, the transfer of risk, but if it is possible, they should consider the mandatory rules.

After all this said, we cannot forget that the international arbitrational award is usually made mainly with the *inter partes* effect, which means that the consequence would be important only for parties in dispute, which can save the parties from any public order effect.[49]

Finally, parties can choose not only national law, but also rules of law. As said before, the *lex mercatoria* is not the best option for IP disputes. Other interesting note is the implementation of general IP principles in *lex mercatoria*. International IP conventions represent the typical principles of IP rights which can be understood as a part of *lex mercatoria*.[50]

If the parties have not chosen the applicable substantive law, the arbitrator should decide according to the most appropriate law. But which law is more appropriate in licencing agreement dispute with such a big variation and great platform?

The arbitrator thoughts on choosing appropriate applicable law can be very complicated and could be influenced by many factors: the great quality of the rules concerning disputes, intent of parties, neutrality of rules or principles.[51] Therefore, it is impossible to present how the arbitrator should choose the appropriate applicable law, because it is contrary to the nature of the rules.

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47 DESSEMONTET, Francois. Party Autonomy and the Law Applicable to the Arbitrability of IP Rights and Licensing Transactions. *International Business Law Journal* [online]. 2013, Vol. 5, p. 429 [accessed on 2016-03-15].

48 *Ibid*., p. 431.

49 COOK, Trevor M.; GARCIA, Alejandro I. *International Intellectual Property Arbitration*. Alphen aan den Rijn: Wolters Kluwer, 2010, p. 93.

50 NUTZI, Patrick. Intellectual Property Arbitration. *European Intellectual Property Review* [online]. 2002, Vol. 19, No. 4. p. 193 [accessed on 2016-03-15].

51 MOSES, Margaret L. *The Principles and Practice of International Commercial Arbitration*. Cambridge: Cambridge University Press, 2008, pp. 77–78.

If we talk about the rules of law in IP area Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes[52] ("ALI Principles") and Principles on Conflict of Laws in Intellectual Property ("CLIP Principles")[53] can be interesting for the licencing agreements as a way of choosing the applicable law. Those instruments use several rules how to determine the applicable law for transfer. The connecting factor is habitual residence of one of the parties. The ALI Principles use the habitual residence of licensor when the contract was completed.[54] The interesting fact is that CLIP Principles include the clues to determine which party provides characteristic performance: the state of exploitation, single use licence, the state of exercise of the right, way of paying for licence etc. All those factors inclined to the licensee or licensor habitual residence, as they provide the characteristic performance.[55]

We agree with the position of CLIP Principles that it should not be just a licensee or just a licensor to be considered important for the determining applicable law in arbitration. As we are talking about the arbitration, the applicable law does not have to be connected with the habitual residence of parties, which is more tight position. More factors are relevant than just the rights and the obligation, e.g. the territoriality or exclusivity.

6.2 Case Law

Although the best way how to examine the applicable rule would be to analyze relevant awards issued within the WIPO arbitration, it is not possible. WIPO itself presents the confidentiality of awards as its great advantage.[56] Therefore, the WIPO have not created the database of the awards,

52 American Law Institute, Intellectual Property. Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes. Version from 2008. In: BASEDOW, Jürgen; KONO, Toshiyuki; METZGER, Alex (eds.). *Intellectual Property in the Global Arena: Jurisdiction, Applicable Law, and the Recognition of Judgments in Europe, Japan and the US - Annex I*. Tübingen: Mohr Siebeck, 2010, pp. 347–364 ("ALI Principles").

53 European Max Planck Group on Conflict of Laws in Intellectual Property. *Principles on Conflict of Laws in Intellectual Property* [online]. 1. 12. 2011 [accessed on 2016-03-21] ("CLIP Principles").

54 Article 315 (2) of ALI Principles.

55 Article 3.502 of CLIP Principles.

56 *Guide to WIPO Arbitration* [online]. WIPO Arbitration and Mediation Centre, pp. 29–30 [accessed on 2016-03-15].

except of the database for the Uniform Domain Name Dispute exists.[57] At least, we can mentioned important ICC Court and its awards concerning the license agreements. From the Final Report on Intellectual Property Disputes and Arbitration from 1996 it is obvious that most of the IP disputes in general had choice of law clauses. Also the license agreements are quite common before ICC arbitration tribunals.[58] The first point made from the ICC awards is the relevance of the competition rules (mandatory rules) in argumentation of tribunals.[59] Second interesting point is use of *lex mercatoria* and UNIDROIT Principles as a form of applicable law in license dispute with the reference to national laws if the IP rights are considered.[60] Finally, one case with the available arguments on determining applicable law is ICC case No. 5314.[61] However, this case is not up to date because Tribunal used the determination of appropriate law with the connection of appropriate conflict-of-law rules. The Tribunal decided for the cumulative approach. It is interesting which states the tribunal considered to be related to the dispute: states of the incorporation of parties and seat of arbitration. Also, state where the license should be used is more relevant because that is the place of a contract performance and is more connected with the dispute than the habitual residence of licensor.[62] Those cases are however the cases under ICC arbitration, thus can be just a nice inspiration of how can the disputes before the WIPO tribunals be conducted.

6.3 Summary

After all written above, it would be adequate to at least try to list the important factors for choosing appropriate law in licensing disputes. The first

57 *Search WIPO Cases and WIPO Panel Decisions* [online]. WIPO [accessed on 2016-07-29].

58 Final Report on Intellectual Property Disputes and Arbitration from 1997 [online]. In: *Dispute Resolution Library*. ICC, p.41 [accessed on 2016-07-29].

59 ICC Arbitration Case of 1992, No. 6709 [online]. In: *Dispute Resolution Library*. ICC [accessed on 2016-07-29]; ICC Arbitration Case of December 1996, No. 8626 [online]. In: *Dispute Resolution Library*. ICC [accessed on 2016-07-29]; ICC Arbitration Case of April 1998, No. 9240 [online]. In: *Dispute Resolution Library*. ICC [accessed on 2016-07-29].

60 ICC Arbitration Case of March 2000, No. 9875 [online]. In: *Dispute Resolution Library*. ICC [accessed on 2016-07-29].

61 ICC Arbitration Case of 1988, No. 5314 [online]. In: *Dispute Resolution Library*. ICC [accessed on 2016-07-29].

62 ICC Arbitration Case of 1988, No. 5314 [online]. In: *Dispute Resolution Library*. ICC [accessed on 2016-07-29].

thought would lead to the law of seat of arbitration and its conflict of law but the WIPO Arbitration Rules free the IP arbitration from its influence. Other aspects related to the licensing disputes would be habitual residence of parties and place of characteristic performance. The next approach can be finding the law mostly connected to the dispute. However, it is narrower concept than the appropriate law. After all, it will be upon arbitrator, to consider what is the most disputable in the case and choose the law.[63]

The WIPO Arbitration Rules on applicable law is the rule loyal to its fundamentals: arbitration and international disputes. It represents the typical position which prefers the choice of law made by parties and also doesn't restrict the tribunal in determining appropriate law in too narrow ways.

In the end, WIPO Arbitration Rules are especially designated for IP disputes, thus in spite of the problem of determining the applicable law, the professional and expertly educated arbitrator should be guaranty for the best solution for the parties.

7 Conclusion

WIPO Arbitration Rules have ambition to be a great help in the area of IP disputes. Among other interesting provision, the provision about the determining the applicable substantive law has a great importance. The provision has similar wording as other important arbitration rules. It follows the international arbitration trend supporting the party autonomy, denationalization, exemption from using conflict of laws rules and gives great power and responsibility to arbitrator to choose appropriate law. However, the rule does not include anything specially focused on licencing agreements. That is understandable although it could contain at least some clues how to determine appropriate law. If not in rules, which have to be a platform for the arbitration as a less formal way or at least in the form of some guide rules.

63 CELLI, Alessandro L.; BENZ, Nicola. Arbitration and Intellectual Property. *European Business Organization Law Review* [online]. 2002, Vol. 3, No. 3, pp. 605–607 [accessed on 2016-03-15]. For interesting analyse of connecting factor and characteristic performance in IP and private international law see TORREMANS, Paul. Choice-of-law Problems in International Industrial Property Licences. *International Review of Intellectual Property and Competition Law* [online]. 1994, Vol. 25, No. 3, pp. 390–409 [accessed on 2016-03-15].

As licence agreement can be connected with the different laws according to different measures, the predictability is lost in the process of determining appropriate substantive law. Other trendy international arbitrational applicable law such as *lex mercatoria* can be used only partly, and only to contractual things and not really to IP rights itself or some technical features of dispute. However, if the parties knowingly of all these above mentioned facts would submit dispute to arbitration, they can solve the typical problem of licence agreement as *depeçage*, mandatory rules, same law for all aspects of dispute etc.

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QUESTIONS ABOUT THE DIFFERENCES BETWEEN PROTECTION OF CONSUMER AND WORKER FROM THE PERSPECTIVE OF INTERNATIONAL AND CZECH ARBITRATION

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Abstract

Paper deals with different approaches to consumers and employees in terms of the protection granted to them in domestic and international arbitration. Czech Arbitration Act applies to both domestic and international arbitration and assumes standards of consumer protection of the EU law into the consumer arbitration. However, this act provides no protection for the employees. In the paper on the last year of this conference I addressed the issue of arbitrability of individual employment disputes and I concluded that employment disputes of property nature only are arbitrable. This follow paper discusses the differences between protection of consumer and employee and addresses the question of the reasons why the same level of protection as consumers is not granted to the employees. The aim of this paper is the comparison of the regulation of consumer arbitration and arbitration in employment relationships in terms of the scope of protection afforded by the Czech Arbitration Act to consumers or employees and finding reasons why employees do not obtain similar protection as consumers in the arbitration.

Keywords

Czech Arbitration Act; Arbitration in Employment Relationship; Consumer Arbitration; Employment Disputes of Property Nature; Protection of Employee.

1 Introduction

An employee is as well as consumer traditionally considered the contractual weaker party and thus deserves enhanced legal protection. National labour law and consumer law tries to balance the socio-economically weaker position of the employee and consumer, the protection is also provided by the EU law which lays down special conflict rules for individual contracts of employment and consumer contracts and special rules on jurisdiction over individual contracts of employment and consumer contracts. New elements of consumer protection under the standards of the EU law were introduced also into Czech and international arbitration through the amendment to the Czech Arbitration Act.

The Czech Arbitration Act applies to both domestic and international arbitration under Section 117 of the Act No. 91/2012 Coll., on Private International Law[1] ("PILA") containing conflict rules regulating arbitration with an international element, according to which the admissibility of an arbitration agreement is assessed according to the Czech law, precisely according to the Czech Arbitration Act, if the arbitration is held in the Czech Republic. The Czech Arbitration Act thus makes no differences between domestic and international arbitration.

The question remains why the Czech Arbitration Act provides no protection for the employee as weaker party while for arbitration proceedings abroad the employee typically receives the similar level of protection as consumer. In the paper "Arbitrability of Individual Employment Disputes" on the last year of this conference I concluded that employment disputes of property nature only are arbitrable. This follow paper discusses the elements of consumer protection under the Czech Arbitration Act and addresses the question why the same level of protection is not afforded to the employee. The aim of this paper is to analyse the regulation of consumer arbitration, to compare it to the employment arbitration in terms of the scope of protection afforded to the consumer or employee by the Czech Arbitration Act and to find reasons why the employee does not obtain similar protection as consumer in the arbitration.

1 CZECH REPUBLIC. Act No. 91/2012 Coll., on Private International Law ("PILA").

2 Position of an Employee and a Consumer

Employment relationships as well as consumer relationships are characterized by unequal position of their parties. An employee or consumer is generally considered the weaker party and thus he deserves special legal protection. Under the EU law, the employee is therefore protected by special conflict rules for individual employment contracts under Article 8 of the Rome I Regulation.[2] The conflict rules for individual employment contracts ensure the application of the law of the country that is closely connected with the employment contract. Conflict rules providing comparable protection to consumers are contained in Article 6 of the Rome I Regulation.

An employee is also protected by special jurisdictional rules over individual contracts of employment under Articles 20–23 of the Brussels Ibis Regulation. Brussels Ibis Regulation offers the employee as the weaker party a wide choice of forums in which to sue an employer as the stronger party, while limiting the forums in which the employer can sue the employee, and states special requirements for the conclusion of agreements of jurisdiction.[3] A consumer is protected equally under the special rules on jurisdiction over consumer contracts regulating in Articles 17–19 of the Brussels Ibis Regulation.

The aim of these provisions is to protect the employee or consumer as "*a party who is expected to be economically weaker and less experienced in legal matters than the other party to the contract*".[4] The conflict rules for individual employment contracts (or consumer contracts) and special rules on jurisdiction over individual contracts of employment (or consumer contracts) are complementary and refer generally to the law and courts of one country. This ensures a high level of protection for employee or consumer as weaker party from a socio-economic point of view. The question is why the Czech Arbitration Act does not provide an employee the same level of protection as consumer, even though the employee as well as consumer is generally regarded as the weaker party, deserving of protection.

2 Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the Law Applicable to Contractual Obligations [online]. In: *EUR-Lex* [accessed on 2016-03-08] ("Rome I Regulation").

3 STONE, Peter. *EU Private International Law: Harmonization of Laws*. Cheltenham: Edward Elgar Publishing Limited, 2006, p. 113.

4 *Ibid.*, p. 113.

3 Protection of a Consumer under the Czech Arbitration Act

Amendment to the Czech Arbitration Act effective after 1 April 2012 were introduced new elements of consumer protection under the standards of the EU law, precisely under the Council Directive on Unfair Terms in Consumer Contracts.[5] Arbitrability of dispute is regulated by the law of the Member States. EU law provides only certain basic conditions relating to arbitration agreements concluded in relation to consumer contracts and conditions for their conclusion. Conception of special consumer protection regarding the conclusion and terms of an arbitration agreement is in Section 3(3)-(6) of the Czech Arbitration Act.[6]

According to Section 3(3) of the Czech Arbitration Act an arbitration agreement for the resolution of disputes arising out from consumer contracts must be negotiated separately, not integrated in the terms and conditions governing the main contract; otherwise the arbitration agreement is invalid. That does not mean that the arbitration agreement must be contained in a separate document. It may be a part of the same instrument, but it must represent a separate contractual act and must be signed independently.[7] The professional must provide the consumer *"information regarding the differences between arbitration and litigation; the provision of this information must reasonably precede the conclusion of the arbitration agreement"*[8] under Section 3(4) of the Czech Arbitration Act.

Section 3(5) of the Czech Arbitration Act expands the scope of the mandatory requirements of the arbitration agreements for the resolution of disputes arising out from consumer contracts. Under Section 3(6), these requirements are also fulfilled by a reference to the statutes and rules of permanent arbitral

5 Council Directive No 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts [online]. In: *EUR-Lex* [accessed on 2016-03-09].

6 On the admissibility of the arbitration agreement see Decision of the Constitutional Court, Czech Republic of 5 October 2011, No. II. ÚS 3057/10; Decision of the Constitutional Court, Czech Republic of 1 November 2011, No. II. ÚS 2164/10; Decision of the Supreme Court, Czech Republic of 29 June 2010, No. 23 Cdo 1201/2009; Decision of the Supreme Court, Czech Republic of 30 May 2007, No. 32 Odo 229/2006. See also OLIK, Miloš; MAISNER, Martin; POKORNÝ, Radek; MÁLEK, Petr; JANOUŠEK, Martin. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů. Komentář.* Praha: Wolters Kluwer, 2015, pp. 20–24.

7 BĚLOHLÁVEK, Alexander J. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů. Komentář.* 2nd ed. Praha: C. H. Beck, 2012, pp. 251–252.

8 BĚLOHLÁVEK, Alexander J. *Arbitration Law of Czech Republic: Practice and Procedure.* Huntington: Juris, 2013, p. 340.

institutions (which must be published in the Business Journal),[9] if the arbitration clause vests the jurisdiction to resolve the dispute in a permanent arbitral institution. Section 4(3) of the Czech Arbitration Act stipulates that an arbitrator designated by an arbitration clause to resolve disputes arising from consumer contracts must be registered in the list of arbitrators administered by the Ministry of Justice.[10] Persons meeting the statutory requirements for registration can be enrolled into this list at their request.[11]

According to Section 8(3) of the Czech Arbitration Act in case of a dispute arising from consumer contract an arbitrator is obliged to inform the parties before opening the case whether he has made or participated in the making of an arbitral award in the past 3 years or whether he has been an arbitrator in a pending arbitration regarding a dispute to which any of the parties is or was a party. This time limit is calculated from the day when the arbitration covered by the reporting obligation terminated to the day of commencement of the arbitration in which the arbitrator is bound by the reporting obligation. *"The intention is to identify, in particular, those situations where it could be said that the arbitrator has a certain economic dependence on disputes initiated by one and the same claimant or by a certain group of the same claimants and where it would be possible to conclude the existence of bias."*[12]

In consumer arbitration the plea of lack of jurisdiction, based on the non-existence, invalidity, or expiration of the arbitration agreement, can be raised by a party anytime during the proceedings under Section 15(2) of the Czech Arbitration Act and also in the proceedings for annulment of the arbitral award under Section 33 of the Czech Arbitration Act.[13] But Section 15(2)

9 BĚLOHLÁVEK, Alexander J. *Arbitration Law of Czech Republic: Practice and Procedure.* Huntington: Juris, 2013, p. 347.

10 See Section 40 b of the Czech Arbitration Act.

11 BĚLOHLÁVEK, Alexander J. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů. Komentář.* 2nd ed. Praha: C. H. Beck, 2012, p. 320.

12 BĚLOHLÁVEK, Alexander J. *Arbitration Law of Czech Republic: Practice and Procedure.* Huntington: Juris, 2013, p. 566.

13 BĚLOHLÁVEK, Alexander J. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů. Komentář.* 2nd ed. Praha: C. H. Beck, 2012, p. 549. See Decision of the Supreme Court, Czech Republic of 10 January 2014, No. 23 Cdo 3892/2012; Judgment of the Court of Justice of 27 June 2000. Océano Grupo Editorial SA v. Roció Murciano Quintero (C-240/98) and Salvat Editores SA v. José M. Sánchez Alcón Prades (C-241/98), José Luis Copano Badillo (C-242/98), Mohammed Berroane (C-243/98) and Emilio Viñas Feliú (C-244/98). Joined cases C-240/98 to C-244/98; Judgment of the Court of Justice of 26 October 2006. Elisa María Mostaza Claro v. Centro Móvil Milenium SL. Case C-168/05; Judgment of the Court of Justice of 4 June 2009. Pannon GSM Zrt. V. Erzsébet Sustikné Győrfi. Case C-243/08.

of the Czech Arbitration Act *"is somewhat questionable in that it provides this possibility to both parties to a consumer dispute, i.e. both the professional and the consumer. However, this conclusion would be somewhat illogical, if we realize that the provision is aimed at affording special protection to the consumer. The right to raise an objection anytime during the proceedings, i.e. even after stating one's defence on the merits, must be considered as granted only to the consumer".*[14]

An arbitral award rendered in a dispute arising from a consumer contract must always contain, in addition to other requirements, the reasons and instructions regarding the right to file a motion with the court to annul the arbitral award under Section 25(2) of the Czech Arbitration Act. Fully sufficient information is that exists the institute of annulment an arbitral award and the reference to Section 31 of the Czech Arbitration Act. It is appropriate if this information is separated as a relatively autonomous part of the arbitration award.[15] According to Section 25(3) of the Czech Arbitration Act in disputes arising from consumer contracts, the arbitrators must always abide by consumer protection laws and regulations.[16]

Section 25 of the Czech Arbitration Act must be connected to Section 119 of the PILA which allows resolve a dispute with an international element according to the rules of equity if the parties have explicitly authorized the arbitrators to do so. If the arbitrators resolve the dispute arising from consumer contracts *ex aequo et bono* must also apply provisions of the applicable law on consumer protection. In arbitration also applies Section 87(2) of the PILA which protects the consumers also if the law applicable to a consumer contract is law of non-Member State of the EU.[17]

The Czech Arbitration Act defines exhaustively the reasons for annulment of arbitral award by court in Section 31. Section 31(g)[18] and (h) of the Czech

14 BĚLOHLÁVEK, Alexander J. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Juris, 2013, p. 754.

15 BĚLOHLÁVEK, Alexander J. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů. Komentář.* 2nd ed. Praha: C. H. Beck, 2012, p. 927.

16 In details see OLÍK, Miloš; MAISNER, Martin; POKORNÝ, Radek; MÁLEK, Petr; JANOUŠEK, Martin. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů. Komentář.* Praha: Wolters Kluwer, 2015, p. 148. See also Decision of the Constitutional Court, Czech Republic of 10 January 2012, No. I. ÚS 193/11.

17 Under EU law, applicable law to a consumer contract is determined pursuant to Article 6 of the Rome I Regulation reflecting protection of consumers.

18 See Decision of the Supreme Court, Czech Republic of 24 October 2013, No. 23 Cdo 1793/2013.

Arbitration Act contains special reasons for annulment of arbitral award rendered in a dispute arising from a consumer contract. At the request of any party thus the court annuls the arbitral award if the arbitrator or permanent arbitral institution resolved this dispute contrary to consumer protection laws, or clearly in violation of good morals,[19] or contrary to public policy.[20] Review of compliance with good morals and public order must be directed precisely to the ambit of special consumer protection.[21] The court annuls the arbitral award also if an arbitration agreement lacks the information required under Section 3(5) of the Czech Arbitration Act or such information is intentionally or to a non-negligible extent incomplete, inaccurate, or false.

If the motion to annul an arbitral award is lodged by the consumer, the court always examines under Section 32(1) whether there are grounds to annul the arbitral award pursuant to Section 31(a) through (d) or (h) of the Czech Arbitration Act. *"The potential existence of reasons for annulment of the arbitral awards is examined by the court ex officio, i.e. the consumer is not obliged to adduce the relevant statements of fact or to propose evidence."*[22] According to Section 32(3) of the Czech Arbitration Act if the motion to annul is lodged by the consumer, the court establishes whether there are grounds to suspend the enforceability of the arbitral award without the consumer's request. The court must rule on the suspension of enforceability within 7 days of receiving the motion; the arbitral award cannot be enforced within said time limit.

If the court annuls an arbitral award made in a dispute arising from a consumer contract, the court under Section 34(3) of the Czech Arbitration Act must submit a counterpart of the final and conclusive decision to the Ministry of Justice administering the list of arbitrators. If the court annuls the arbitral award on the grounds specified in Section 31(a), (b), (g) and (h), the court

19 The term "good morals" is not defined by the laws. It was defined by case law. See e.g. Decision of the Constitutional Court, Czech Republic of 26 February 1998, No. II. ÚS 249/97; Decision of the Supreme Court, Czech Republic of 29 May 1997, No. 2 Cdon 473/96.

20 It is thus allowed to examine the merits, thereby the arbitration loses main advantages and becomes more complicated than litigation. See OLÍK, Miloš; MAISNER, Martin; POKORNÝ, Radek; MÁLEK, Petr; JANOUŠEK, Martin. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů. Komentář.* Praha: Wolters Kluwer, 2015, p. 199.

21 BĚLOHLÁVEK, Alexander J. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů. Komentář.* 2nd ed. Praha: C. H. Beck, 2012, p. 1105.

22 BĚLOHLÁVEK, Alexander J. *Arbitration Law of Czech Republic: Practice and Procedure.* Huntington: Juris, 2013, p. 1465.

proceeds, at the request of any of the parties and after the judgment becomes final and conclusive, to hear the merits and resolves the case; the case can no longer be submitted to arbitration under Section 34(1) of the Czech Arbitration Act. Even if the party against whom the enforcement of the arbitral award is sought failed to lodge a motion to annul the arbitral award by the court, the party may still, request termination of the pending enforcement proceedings also if there are grounds for annulment of the arbitral award issued in a dispute arising from a consumer contract pursuant to Section 31(a) through (f), (h), or there are grounds under Section 31(g) and the arbitral award lacks the information on the right to lodge a motion to annul the arbitral award in court under Section 35(1)(b) of the Czech Arbitration Act.

The provisions relating to the list of arbitrators administered by the Ministry of Justice are regulated in Part 6 of the Czech Arbitration Act. Section 40a lays down the information regarding the arbitrators registered in the list which the Ministry must publish. Section 40 b stipulates stricter requirements of qualification of the arbitrators in consumer disputes.[23] Beside general requirements stipulated in Section 4(1) of the Czech Arbitration Act, Section 40b of the Czech Arbitration Act involves that a person requiring the registration in the list of arbitrators completed a university or college education in the field of law, has not been struck off the list of arbitrators in the past 5 years based on a decision of the Ministry and has paid an administrative fee of 5,000 CZK to the Ministry. Qualifying condition should be indicated in Section 4(3) of the Czech Arbitration Act which regulates requirements on the arbitrators in the consumer disputes.[24] Section 40c of the Czech Arbitration Act defines the reasons for striking off the list of arbitrators and Section 40d stipulates obligations of arbitrators to provide information to the Ministry of Justice.[25]

23 See Decision of the Constitutional Court, Czech Republic of 7 March 2013, No. I. ÚS 110/14.

24 BĚLOHLÁVEK, Alexander J. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů. Komentář.* 2nd ed. Praha: C. H. Beck, 2012, p. 1225.

25 For more details on consumer protection under the Arbitration Act see BĚLOHLÁVEK, Alexander J. *Ochrana spotřebitelů v rozhodčím řízení*. Praha: C. H. Beck, 2012; BĚLOHLÁVEK, Alexander J. *B2C Arbitration: Consumer Protection in Arbitration*. Huntington: Juris, 2012; BĚLOHLÁVEK, Alexander J. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů. Komentář.* 2nd ed. Praha: C. H. Beck, 2012; BĚLOHLÁVEK, Alexander J. *Arbitration Law of Czech Republic: Practice and Procedure.* Huntington: Juris, 2013; LISSE, Luděk. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů s komentářem*. Praha: Linde, 2012; LISSE, Luděk et al. *Euronovela zákona o rozhodčím řízení s judikaturou.* Praha: Ústav práva a právní vědy, 2012.

4 Protection of an Employee under the Czech Arbitration Act

4.1 Arbitrability of Individual Employment Disputes

Employment arbitration is common abroad and position of employees is comparable with the position of consumers in the arbitration in terms of legal protection provided to them. For example,[26] under the Austrian Code of Civil Procedure *(Zivilprozessordnung)*, the general conditions of arbitrability are identical to the Czech law, but the provisions regulating arbitration in consumer disputes are applied similarly to employment disputes defined in the Section 50(1) of the *Arbeits- und Sozialgerichtsgesetz* (for instance, disputes between employer and employee regarding contract of employment, disputes between employer or employee and employment authorities, etc.).[27] Moreover, the arbitration agreement must be concluded as post-dispute arbitration agreement.[28]

Employment arbitration was enabled to the year 1991 in the Czech Republic. For a purpose protect of employees was excluded the hearing of the individual employment disputes in arbitration by adoption of the amendment to the Labour Code[29] with effect from 1 February 1991. Since the adoption of the new Labour Code[30] in 2006, is again allowed employment arbitration.[31] Issue of arbitrability of individual employment disputes under the Czech Arbitration Act is currently questionable. The Czech Arbitration Act does not contain special provisions for disputes arising out from individual contracts of employment and these are thus subjected to the general

26 This example was chosen due the geographical and cultural proximity of both countries.

27 BĚLOHLÁVEK, Alexander J. *Rozhodčí řízení v zemích Evropy*. Praha: C. H. Beck, 2012, pp. 35, 46. See also TARASEWICZ, Yasmine; BOROFSKY, Niki. International Labor and Employment Arbitration: A French and European Perspective. *ABA Journal of Labor & Employment Law* [online]. 2013, Vol. 28, pp. 349–366 [accessed on 2016-07-19].

28 ŠTEFKO, Martin. Rozhodčí smlouvy v pracovněprávních vztazích dle německého a rakouského práva. *Časopis pro právní vědu a praxi*. 2014, No. 2, p. 104.

29 CZECH REPUBLIC. Act No. 65/1965 Coll., Labour Code, as subsequently amended.

30 CZECH REPUBLIC. Act No. 262/2006 Coll., Labour Code, as subsequently amended.

31 See PICHRT, Jan. Alternativní způsoby řešení sporů v pracovněprávních vztazích – minulost, současnost a budoucnost. *Právní rozhledy*. 2013, Vol. 21, No. 21, pp. 726–728; ROZEHNALOVÁ, Naděžda. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. 2nd ed. Praha: ASPI, Wolters Kluwer, 2008, p. 122.

provisions intended to arbitration in commercial relationships. Employment relationships arising out from collective agreements are arbitrable *ex lege* under the Act on Collective Bargaining.[32]

According to the prevailing opinions, individual employment disputes of property nature[33] only may be settled in the arbitration.[34] Disputes arising out from individual contracts of employment concerning a particular property performance, especially pecuniary performance are thus generally regarded to be arbitrable. Individual employment disputes over the status of the employment relationships (their existence, validity and scope) are not considered to be arbitrable because they do not fulfil the general conditions of arbitrability under Section 2 of the Czech Arbitration Act.[35] The current wording of the Czech Arbitration Act but does not provide adequate protection for an employee as the weaker party in disputes of property nature arising out from individual employment contracts.

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32 CZECH REPUBLIC. Act No. 2/1991 Coll., on Collective Bargaining, as subsequently amended.

33 The term "property disputes" is not defined by the laws. It can be defined such as disputes concerning a particular property performance evaluated in financial terms, i.e. disputes the subject matter of which can be expressed in property values, for example, claims for redundancy payment, claims for compensation for damages or losses sustained at work or other property performances from an employment relationship, etc. See BĚLOHLÁVEK, Alexander J. *Rozhodčí řízení, ordre public a trestní právo. Komentář.* Praha: C. H. Beck, 2008, p. 298. See also Decision of the Vrchní soud Praha, Czech Republic of 15 November 1995, No. 10 Cmo 414/95; Decision of the Supreme Court, Czech Republic of 23 September 2010, No. 20 Cdo 476/2009. The term "property disputes" can also be defined such as *"disputes discussed in adversary proceedings initiated by lawsuit whereby the claimant demands that the respondent be ordered to provide a property performance, especially pecuniary performance, surrender a thing, or provide any other specific performance"*. See BĚLOHLÁVEK, Alexander J. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Juris, 2013, p. 152.

34 Conversely see LISSE, Luděk. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů s komentářem*. Praha: Linde, a. s., 2012, pp. 91–97; LISSE, Luděk. Arbitrabilita v pracovněprávních sporech. *Obchodní právo*. 2008, Vol. 17, No. 2, pp. 5–6.

35 See BĚLOHLÁVEK, Alexander J. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů. Komentář.* 2nd ed. Praha: C. H. Beck, 2012, pp. 130–131; BĚLOHLÁVEK, Alexander J. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Juris, 2013, pp. 171–172; BĚLOHLÁVEK, Alexander J. *Rozhodčí řízení, ordre public a trestní právo. Komentář.* Praha: C. H. Beck, 2008, pp. 287–298; BĚLOHLÁVEK, Alexander J. Arbitrabilita pracovněprávních sporů. *Bulletin advokacie*. 2007, No. 9, pp. 23–31; REMSOVÁ, Kateřina. Arbitrability of Individual Employment Disputes. In: DRLIČKOVÁ, Klára (ed.). *Cofola International 2015* [online]. Brno: Masarykova univerzita, 2015, pp. 140–153 [accessed on 2016-03-08].

4.2 Possibilities of the Protective Elements in the Employment Arbitration

Consumer relationships as well as employment relationships are characterized by unequal positions of the parties. Inasmuch as that the Czech Arbitration Act enables the consumer arbitration and stipulates therefore the special provisions protecting consumers, a different approach to the employment arbitration is difficult to justify. Given that the EU law provides conditions relating to arbitration agreements concluded in relation to consumer contracts and conditions for their conclusion, the question is why does not protect similarly also the employees. Above that, settlement of disputes in the arbitration brings speedy and effective resolution of disputes and many other advantages compared with the litigation, especially lower costs of the arbitration and broad autonomy given parties and arbitrators.[36] The current arbitration law does not reflect the fact that the employee is economically weaker party in a completely different position than the employer and provides no protection such contracting party. It should therefore be adopted amendment to the Czech Arbitration Act taking into account the weaker position of employee.

Due to the similar nature of individual employment relations compared to consumer relations would be appropriate to introduce the elements of employee protection into the Czech Arbitration Act. Especially, an arbitration agreement for the resolution of disputes arising out from individual contracts of employment should be negotiated separately, not integrated in the terms and conditions governing the main contract, under pain of nullity; an arbitrator designated by an arbitration clause to resolve disputes arising from individual employment contracts should be registered in the list of arbitrators administered by the Ministry of Justice; an arbitrator would have to always abide by employee protection laws and regulations; one of the grounds for annulment of the arbitral award by court should be the fact that the arbitrator resolved dispute arising from individual contract of employment contrary to employee protection laws and

36 See ROZEHNALOVÁ, Naděžda. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku.* 2nd ed. Praha: ASPI, Wolters Kluwer, 2008, pp. 59–62.

the fact that an arbitration agreement lacked the information required under Section 3(5) of the Czech Arbitration Act or such information was intentionally or to a non-negligible extent incomplete, inaccurate, or false.

In addition to these basic principles the Czech Arbitration Act should introduce other elements of consumer protection also into the employment arbitration. Conception of special consumer protection regarding the conclusion and terms of an arbitration agreement under Section 3(4)-(6) of the Czech Arbitration Act should also apply to the employment arbitration. The employer thus would have to provide the employee with a proper explanation reasonably preceding the conclusion of the arbitration clause so that the employee could assess the potential consequences of the conclusion of the arbitration clause for the employee. The employer would have to propose the conclusion of the arbitration agreement at first contact with the employee. Proper explanation should include especially the information, that arbitration means private-law proceedings which are not conducted by public authorities, that the parties waive the right to present the merits of the case to courts, that the merits of the dispute cannot be reviewed by the court and that arbitrators are not endowed with the power to enforce obligations (they cannot compel any witness, expert witness, or any third party to provide any assistance) and that the arbitration has the confidential nature, etc.[37]

The arbitration clause should contain truthful, accurate and complete information on the arbitrator or the fact that the arbitral award will be delivered by a permanent arbitral institution, the manner in which the arbitral proceedings are to be commenced and conducted, the fee paid to the arbitrator and the anticipated types of costs the employee may incur in the arbitral proceedings, and the rules for successfully claiming compensation for such costs, the seat of arbitration, the method of service of the arbitral award on the employee, and the fact that a final and conclusive arbitral award is enforceable. An arbitrator designated by an arbitration clause to resolve disputes arising from an individual employment contract would have to inform the parties as well as in consumer arbitration pursuant

37 BĚLOHLÁVEK, Alexander J. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Juris, 2013, pp. 340–342.

to Section 8(3) of the Czech Arbitration Act. In the employment arbitration also the plea of lack of jurisdiction would be raised by a party anytime during the proceedings analogously to Section 15(2) of the Czech Arbitration Act and also in the proceedings for annulment of the arbitral award under Section 33 of the Czech Arbitration Act.

An arbitral award rendered in a dispute arising from an individual contract of employment would have to always contain, in addition to other requirements, the reasons and instructions regarding the right to file a motion with the court to annul the arbitral award analogously to Section 25(2) of the Czech Arbitration Act. The question is whether the Czech Arbitration Act should allow to resolve such dispute *ex aequo et bono* according to Section 119 of the PILA also in the employment arbitration, namely whether the protection afforded by the employee protection laws would be adequate protection for employees. The court would have to examine *ex officio* some grounds to annul the arbitral award and grounds to suspend the enforceability of the arbitral award in the employment arbitration analogously to Section 32(1) and (3) of the Czech Arbitration Act, if the motion to annul an arbitral award would be lodged by the employee.

Finally, if the court annulled the arbitral award on some special specified grounds, it should proceed to hear the merits and resolve the case analogously to Section 34(1) of the Czech Arbitration Act; the court should submit a counterpart of the final and conclusive decision to the Ministry of Justice, if annulled an arbitral award rendered in a dispute arising from an individual contract of employment analogously to Section 34(3) of the Czech Arbitration Act. Likewise, in order to the employment arbitration should apply the provisions of Section 35(1)(b) of the Czech Arbitration Act. The provisions relating to the list of arbitrators administered by the Ministry of Justice regulated in part six of the Czech Arbitration Act should also apply analogously to the employment arbitration.

Disputes arising from individual contract of employment are decided by chambers before courts under the Code of Civil Procedure.[38] Under Section 30 of the Czech Arbitration Act, the arbitral proceedings shall

38 CZECH REPUBLIC. Act No. 99/1963 Coll., Code of Civil Procedure, as subsequently amended.

be reasonably governed by the provisions of the Code of Civil Procedure. This can cause problems in the international arbitration, but that is only the possibility of an application, not a necessity.[39] But the disputes arising from individual contract of employment should be resolved by more arbitrators, not a sole arbitrator, as well as in the proceedings under the Code of Civil Procedure. To protect employees may also serve an obligation to always prescribe an oral hearing before the arbitral tribunal.

5 Conclusion

Due to the similar nature of individual employment relations compared to consumer relations the different approach to the employment arbitration is inappropriate. The employment disputes of property nature are arbitrable under the Czech Arbitration Act and thus the elements of employee protection should be introduced into the act. The employee as the weaker party of dispute should be granted the similar degree of protection as consumer in arbitration in particular by introducing the basic principles of consumer protection, especially the arbitration agreement for the resolution of disputes arising from individual contract of employment should be thus concluded as separate procedural contract and independently of the main contract under sanction of nullity; the arbitrator designated by the arbitration clause to resolve these disputes would have to be registered in the list of arbitrators administered by the Ministry of Justice; the arbitrator would have to always abide by employee protection laws and the ground for annulment of the arbitral award by court should be the fact that the arbitrator resolved such dispute contrary to employee protection laws and the fact that the arbitration agreement lacked required information.

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39 BĚLOHLÁVEK, Alexander J. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů. Komentář.* 2nd ed. Praha: C. H. Beck, 2012, p. 1046.

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EUROPEAN PUBLIC POLICY AND INTERNATIONAL COMMERCIAL ARBITRATION

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Abstract

European public policy could be described as a summary of core values of EU law. It is a legal category derived mostly from case law of the Court of Justice. The exact determination of European public policy still remains an open question. According to CJEU case law European public policy creates a part of national public policies of Member States and needs to be considered while annulling and refusing recognition of arbitral awards. Public policy constitutes one of a ground of refusal of recognition according to the New York Convention. Although the New York Convention refers to the public policy of the country of enforcement, this paper will analyse whether European public policy falls within the scheme of the New York Convention or not.

Keywords

Arbitration; European Public Policy; New York Convention.

1 Introduction

Public policy in general serves to balance the freedom of the parties to settle disputes in arbitration on one hand and the intention of the state to ensure the most fundamental rights and values to be respected. Public policy exception is hence a safeguard against infringement of the core values of a certain community.[1] One needs to however be moderate as *"public policy is a very unruly horse and when once you get astride it you never know where it will carry you"*.[2]

1 ŠKERL, Jerca Kramberger. European Public Policy (With an Emphasis on Exequatur Proceedings). *Journal of Private International Law*. 2011, Vol. 7, No. 3, p. 461.

2 HAEGEN, Olivier Van Der. European Public Policy in Commercial Arbitration: Bridge Over Troubled Water. *Maastricht Journal of European and Comparative Law*. 2009, Vol. 16, No. 4, p. 450.

Since 1 June 1999 new category of public policy and its influence on arbitration has been discussed. On that day the CJEU rendered *Eco Swiss v. Benetton* decision[3] which introduced the concept of European public policy while stating that Article 81 of the TEC (nowadays Article 101 of the TFEU) is part of it and therefore it needs to be applied in the arbitration. Until today the concept of European public policy belongs to the most controversial and most discussed topic in the area of public policy theory.[4]

The following article aims to firstly review the concept and the content of European public policy and secondly to analyze whether inconsistency with European public policy shall be regarded as a ground for refusal of enforcement under the New York Convention.

2 Different Types of Public Policy

Public policy refers to a set of rules which implement the most fundamental and essential interests and principles of society (for example of certain state). Public policy is sometimes referred to as a chameleon concept meaning that it changes depending on the circumstances it is relied upon.[5] The theory distinguishes different types of public policy.

Domestic public policy represents the most necessary moral, social and economic values of a country. It is evaluated while enforcing domestic arbitral awards and its breaching may lead to setting aside and refusal of enforcement. International public policy applies in international situation. In arbitration it is considered in relation with foreign arbitral awards and its content is narrower than the one of domestic public policy. It is because what causes contradiction with public policy in purely domestic situations does not necessarily mean contradiction in international situations.[6] The international

3 Judgment of the Court of Justice of 1 June 1999. Eco Swiss China Time Ltd v. Benetton International NV. Case C-126/97 [online]. In: *EUR-Lex* [accessed on 2016-03-20] ("Eco Swiss v. Benetton").

4 KAPITÁN, Zdeněk. *Nutně použitelné normy v mezinárodním prostředí. Dissertation thesis* [online]. Masarykova univerzita, 2004, p. 31 [accessed on 2016-07-07].

5 PRECHAL, Sacha; SHELKOPLYAS, Natalya. National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and Beyond. *European Review of Private Law*. 2014, Vol. 12, No. 5, p. 600.

6 GAILARD, Emmanuel. *Enforcement of Arbitration Agreements and International Arbitral Awards, The New York Convention in Practice*. London: Cameron May, 2008, p. 790.

public policy is a notion defined at national level (i.e. it reflects the national core values) and is not recognised in all jurisdictions.[7]

Some commentators recognize so called transnational public policy (sometimes also called truly international public policy). This rather controversial concept refers to universal principles and values shared by the world community and is more and more discussed in international commercial arbitration as *"it reflects the need for arbitrators to find a way to recognise public interests […] in a way that does not compromise the private (non-state) character of the system of arbitration."*[8]

The topic of this article, European public policy, can be defined as being somewhere on the crossroad between those three types of public policy. CJEU in *Eco Swiss v. Benetton* stated that Article 81 of the TEC (i.e. basically European public policy rule) constitutes the fundamental rule of Member States' national law. CJEU at the same time held that Article 81 of the TEC may be regarded as a public policy for the purposes of the New York Convention[9] which leads to the conclusion that Member States distinguishing between domestic and international public policy shall also consider it as part of the latter one.

This CJEU statement is however troublesome as will be showed later. Both domestic and international public policy has their origin and sources in national law. That does not however apply to European public policy which is associated with supranational community and not a specific state.[10]

European public policy shall hence be perceived as kind of hybrid of national, international and transnational public policy. Such approach corresponds with the nature of the sole EU which is in the end also kind of a hybrid legal construction – an autonomous legal system.[11]

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7 HAEGEN, Olivier Van Der. European Public Policy in Commercial Arbitration: Bridge Over Troubled Water. *Maastricht Journal of European and Comparative Law*. 2009, Vol. 16, No. 4, p. 459.

8 MILLS, Alex. The Dimensions of Public Policy in Private International Law. *Journal of Private International Law*. 2008**,** Vol. 4, No. 2, pp. 214–215.

9 Eco Swiss v. Benetton.

10 HAEGEN, Olivier Van Der. European Public Policy in Commercial Arbitration: Bridge Over Troubled Water. *Maastricht Journal of European and Comparative Law*. 2009, Vol. 16, No. 4, p. 459.

11 *Ibid.*

3 The Content of European Public Policy

Public policy is a traditional national legal category. It is influenced by culture, history and religion of each individual state. Therefore, its content diverse from one country to another and even in Europe each national public policy may concern various issues differently.

On the other hand, thanks to EU the legal orders of many European countries are being harmonized and getting closer to each other. It is however an uneasy task to determine the content of European public policy. The reason for it lays within the fact that European public policy is not defined anywhere in primary EU law and therefore one needs to derive its content from the legal theory and from the CJEU case law.

Although in *Eco Swiss v. Benetton* two criteria to recognize what rule is part of European public policy were given, they are generally not very helpful.[12] First criterion following from *Eco Swiss v. Benetton* for determining that Article 81 of the TEC is of a public policy nature being that by virtue of Article 3(1)(g) of the TEC it is a fundamental provision essential for the achieving of Community tasks. If, however we accepted the criterion that European public policy is created by rules executing Article 3 of the TEC than almost every rule of European law would have to be regarded as part of it. That is because Article 3 is a list of tasks entrusted to EU and almost any act of secondary legislation can be traced back to Article 3. This criterion is hence too wide and the argument is not convincing.[13]

Second argument on which *Eco Swiss v. Benetton* bases the public policy nature of Article 81 is the fact that Article 81(2) causes any agreement or decision prohibited by Article 81 being automatically void. This criterion is again not very helpful while defining the general criteria for determining European public policy rules.

What can however be followed from *Eco Swiss v. Benetton* is that a rule has to contain an element of fundamentality in order to be regarded as part

12 HAEGEN, Olivier Van Der. European Public Policy in Commercial Arbitration: Bridge Over Troubled Water. *Maastricht Journal of European and Comparative Law*. 2009, Vol. 16, No. 4, p. 459.

13 LIEBSCHER, Christoph. European Public Policy: A Black Box? *Journal of International Arbitration*. 2000, Vol. 17, No. 3, p. 81.

of European public policy.[14] Based on that commentators derive that anti-discrimination provision and the four freedoms constitute the core of European public policy.[15]

That nonetheless does not mean that any time primary EU law containing public policy rule is misapplied the public policy exception shall apply. CJEU in *Renault v. Maxicar* judgement[16] stated that a court cannot refuse recognition of a decision solely on the ground that EU law was misapplied. It can only do so when such misapplication causes a manifest breach of a rule of law regarded as fundamental in the legal order of the State in which enforcement is sought.[17]

The compensation of the agent according to Article 19 of the Directive 86/653/EEC[18] is also part of European public policy because the provision is so called mandatory rule.

Some commentators argue that while talking about European public policy one should not only consider the EU law rules but also ECHR.[19] It is on one hand true that ECHR represents a compromise on the minimum standards of the protection of human rights in Europe. But on the other hand, ECHR as such is part of national legal orders of the Member States of the Council of Europe and therefore according to author's view it constitutes the national public policy of each Member State.[20] Therefore European public policy in this article refers only to the rules of EU law.

14 *Ibid*, p. 82.

15 See e.g. LIEBSCHER, Christoph. European Public Policy: A Black Box? *Journal of International Arbitration*. 2000, Vol. 17, No. 3, p. 82; ŠKERL, Jerca Kramberger. European Public Policy (With an Emphasis on Exequator Proceedings). *Journal of Private International Law*. 2011, Vol. 7, No. 3, p. 464.

16 Judgment of the Court of Justice of 11 May 2000. Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento. Case C-38/98. [online]. In: *EUR-Lex* [accessed on 2016-03-19].

17 Renault case was dealing with recognition and enforcement of court decision however its conclusions are applicable to the recognition and enforcement of arbitral awards as well.

18 Council Directive 86/653/EEC of 18 December 1986 on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents [online]. In: *EUR-lex* [accessed on 2016-03-19].

19 See e. g. ŠKERL, Jerca Kramberger. European Public Policy (With an Emphasis on Exequator Proceedings). *Journal of Private International Law*. 2011, Vol. 7, No. 3, pp. 461–490.

20 Interesting is also the matter of applicability of European Convention on Human Rights to arbitration, see e.g. ŠIMKOVÁ, Iva. Is or Is Not Article 6(1) of European Convention on Human Rights Directly Applicable to Arbitration Proceedings? In: DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza; SEHNÁLEK, David (eds.). *Cofola International*. Brno: Masarykova univerzita, 2014, pp. 120–133.

To sum up, the content of European public policy is still an object of legal discussion. It is generally accepted that anti-discrimination provisions and the four freedoms are part of it as same as anti-trust provisions and a compensation of the agent according to Article 19 of the Directive 86/653/EEC. Even though some commentators consider such enumeration as too wide,[21] it is author's opinion that there are even more EU rules that could be considered as being part of European public policy, e.g. consumers' protection or values protected by EU Charter of Fundamental Rights.[22]

4 European Public Policy and the New York Convention

It is safe to write that the New York Convention is one of the most successful uniform law instruments so far – 156 states have adhered to it until today (among which all EU Member States).[23] It promotes and regulates worldwide simple recognition and enforcement of foreign arbitral awards.[24] At the same time it sets certain grounds for refusing recognition and enforce.

Public policy is by Article V(2)(b) of the New York Convention established as one ground for refusal of recognition and enforcement. The provision reads as follows:

"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 […] it would be contrary to the public policy of that country."

Court has to apply this provision ex officio, meaning even without parties relying on it. The purpose of this scheme is to enable the court of secondary jurisdiction to ensure that the arbitral award complies with basic justice requirement of the country.[25]

21 ROZEHNALOVÁ, Naděžda; TÝČ, Vladimír. *Evropský justiční prostor ve věcech civilních*. Brno: Masarykova univerzita, 2003, p. 129.

22 Charter of Fundamental Rights of the European Union of 7 December 2000 [online]. In: *EUR-Lex* [accessed on 2016-05-01].

23 *Status. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* [online]. UNCITRAL [accessed on 2016-09-04].

24 SMITH, Erika. Vacated Arbitral Awards: Recognition and Enforcement Outside the Country of Origin. *Boston University International Law Journal*. 2002, Vol. 20, No. 355, p. 356.

25 TWEEDDALE, Andrew; TWEEDDALE, Keren. *Arbitration of Commercial Disputes: International and English Law and Practice*. Oxford: Oxford University Press, 2005, p. 423.

It is widely accepted that public policy according to the New York Convention refers to so called international public policy rather than the domestic one.[26] The reason for this is the fact that the New York Convention deals with foreign arbitral awards, i.e. with legal relationships with an international element. Relationships with international element have different purpose than those purely domestic and therefore different approach to public policy needs to be taken.[27]

As stated above CJEU held in *Eco Swiss v. Benetton* that Article 81 of the TEC may be regarded as a public policy for the purposes of the New York Convention.[28] Such statement is however not being accepted by commentators without certain doubts.[29]

First doubt arises from the fact that *Eco Swiss v. Benetton* concerned a domestic arbitral award. Giving the fact that the New York Convention deals only with foreign arbitral awards, i.e. with international public policy, some argue that it was therefore not applicable.

What is however more, it is clear from the wording of Article V that it regards only public policy of the country where recognition and enforcement is sought. It means that the court of the secondary jurisdiction may decline the enforcement only in case where its domestic (or international given that the country recognizes it) is breached. [30] Such interpretation of Article V was also supported by a broad case law.[31] The public policy

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26 DRLIČKOVÁ, Klára. *Vliv legis arbitri na uznání a výkon cizího rozhodčího nálezu*. Brno: Masarykova univerzita, 2013, p. 157.

27 VAN DEN BERG, Albert Jan. *The New York Arbitration Convention of 1958*. The Hague: T.M.C. Asser Institute, 198, p. 360.

28 Eco Swiss v. Benetton.

29 HAEGEN, Olivier Van Der. European Public Policy in Commercial Arbitration: Bridge Over Troubled Water. *Maastricht Journal of European and Comparative Law*. 2009, Vol. 16, No. 4, p. 460.

30 REED, Lucy. Narrow Exceptions: A Review of Recent U.S. Precedent Regarding Due Process and Public Policy Defenses of the New York Convention. *Journal of International Arbitration*. 2008, Vol. 25, No. 6, p. 653.

31 See e.g. Decision of Federal Court, Australia of 23 March 2012, Traxys Europe SA v. Balaji Coke Industry Pvt Ltd [online]. *1958 New York Convention Guide* [accessed on 2016-09-04]; Decision of High Court of Justice, United Kingdom of 27 April 2005, IPCO v. Nigeria [online]. *1958 New York Convention Guide* [accessed on 2016-09-04] or Decision of Court of Appeal, Hong Kong of 2 December 2011, Gao Haiyan and another v. Keeneye Holdings Ltd and another [online]. *1958 New York Convention Guide* [accessed on 2016-09-04].

exception under the New York Convention hence refers to set of rules which qualify as public policy in domestic context.[32]

Therefore, question needs to be asked whether European public policy fulfills the criterion of applicable public policy under the New York Convention. As mentioned earlier European public policy is kind of a hybrid nature because it has no national source and is associated with supranational community. Unless implemented to national law of Member States (directives), it is not part of national legal system *per se*– it "only" has so called "primary application".

On the other hand, the EU is a supranational organization to which its Member States entrusted part of their sovereignty. One can also argue that EU core values and goals are shared by all Member States. Hence the question arises whether European public policy is of an autonomous nature or if it in fact is a part of the public policies of the Member States. Opinions on this matter diverse.

The first view is that European public policy as such does not exist. It is merely constituted by permeation of national (international) public policies with EU law,[33] and by "enrichment with European elements".[34] Supporters of such view argue that national public policy of each Member State also has a "European part".[35]

The second view perceives European public policy as separate system which is independent on legal systems of Member States. They support this opinion argue by example of CJEU which does not apply any national law. As it does not belong to any state it can only enact and protect European public policy.[36] This may serve as a proof of independency of concept of European public policy on Member States.

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32 GROOT, Diederik. The Impact of the Benetton Decision on International Commercial Arbitration. *Journal of Private International Law*. 2003, Vol. 20, No. 4, p. 371.

33 ŠKERL, Jerca Kramberger. European Public Policy (With an Emphasis on Exequatur Proceedings). *Journal of Private International Law*. 2011, Vol. 7, No. 3, p. 464.

34 *Ibid.*

35 MAYR, Peter. *Europäisches Zivilprozessrecht*. Wien: Facultas.vuw, 2011, p. 240 cited by ŠKERL, Jerca Kramberger. European Public Policy (With an Emphasis on Exequatur Proceedings). *Journal of Private International Law*. 2011, Vol. 7, No. 3, p. 464.

36 ŠKERL, Jerca Kramberger. European Public Policy (With an Emphasis on Exequatur Proceedings). *Journal of Private International Law*. 2011, Vol. 7, No. 3, p. 465.

The case law and practice of Member States are however inclined to the first view and while considering in fact European public policy they refer to national public policy (e.g. in fact to its "European part").[37] Author of this article also shares the first view and submits that rather than with independent European public policy we deal with process of europeanization of national public policies of Member States. Such view also corresponds with for example *Bělohlávek*'s opinion that category of public policy is a continuous interaction with domestic and European public orders.[38]

Getting back to the New York Convention, what is called European public policy shall be regarded as falling within the concept of public policy under Art. V(2)(b). This means that in case that enforcement of foreign arbitral award is sought in EU Member State, court has to evaluate such award not only in the light of its "pure" national public policy but also in the light of the fundamentals rules and values of EU.

5 Conclusion

European public policy refers to a summary of core values of EU law. It shall be perceived as kind of hybrid of national, international and transnational public policy. Due to the insufficient specification in EU legislation and jurisdiction, it still remains an open question what its content is. It is generally accepted that anti-discrimination provisions and the four freedoms are part of it as same as anti-trust provisions and a compensation of the agent according to Article 19 of the Directive 86/653/EEC. According to the author also for example consumers' protection or values protected by the EU Charter of Fundamental Rights shall be considered as part of European public policy.

This article was seeking an answer to whether European public policy shall be applied in the scope of Article V(2)(b) of the New York Convention. i.e. whether incompliance with European public policy leads to refusal of recognition of foreign arbitral awards.

Article V regards only public policy of the country where recognition and enforcement is sought. European public policy is hence of an interest only

37 See e.g. Decision of Higher Regional Court Thüringen, Germany of 8 August 2007, No. 4 Sch 03/06 [online]. *1958 New York Convention Guide* [accessed on 2016-09-04].

38 BĚLOHLÁVEK, Alexandr. *Arbitration, Ordre Public and Criminal Law: Interaction of Private and Public International and Domestic Law). Volume I.* Kyiv: Taxon, 2009, p. 1251.

in case that the recognition and enforcement are sought in EU Member State. The public policy exception under the New York Convention refers to the set of rules which qualify as public policy in domestic context of the secondary jurisdiction country.

It is an author's opinion that European public policy needs to be in EU Member States qualified as public policy in domestic context. Such opinion is based on the view that European public policy as such does not exist independently and it is merely constituted by permeation of national (international) public policies with EU law. In other words, national public policy of each Member State also has a "European part".

Such perception of European public policy concept is at the same time confirmed by the case-law and practice of Member States while considering in fact European public policy refer to their own national public policy.

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EVIDENCE IN ARBITRATION PROCEEDINGS

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Abstract

The taking of evidence constitutes a crucial part of arbitration proceedings. National courts generally follow elaborate rules governing the evidence taking. However, there are no strict rules of evidence in arbitration. Most modern arbitration statutes and arbitration rules now include a provision giving the parties freedom to lay down the rules for the taking of evidence. Failing such agreement, the provision grants the arbitral tribunal a wide discretion to determine all procedural matters. The aim of this paper is to analyse relevant provisions of the Czech Arbitration Act and provisions of the Rules of the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic. The IBA Rules on the Taking of Evidence in International Arbitration will also be scrutinized. The paper will especially examine how videoconferencing is admitted and used in the evidence taking in international arbitration whose seat is in the Czech Republic.

Keywords

Arbitration Proceedings; IBA Rules of Evidence; Procedural Rules; Taking of evidence, Videoconferencing.

1 Introduction

The taking of evidence plays a crucial role in arbitration proceedings, as fact-finding is one of the key functions of the arbitral tribunal.[1] Because the arbitrators *"are obliged to decide the parties' dispute impartially and objectively, based upon*

1 BLACKABY, Nigel; PARTASIDES, Constantine; REDFERN, Alan; HUNTER, Martin. *Redfern and Hunter on the International Arbitration*. 6th ed. Oxford: Oxford University Press, 2015, p. 376.

law and the evidence presented by the parties".[2] While national courts generally follow elaborate rules governing the taking of evidence and its introduction in court proceedings,[3] there are no fixed rules of evidence in arbitration.[4] Arbitration is based on the fundamental principle of party autonomy which means that the parties are given the freedom to negotiate the rules governing the proceedings.[5] *"Parties may also adopt procedural rules drawn up by permanent arbitral institutions, professional, industry or other associations or unions, or specialized organizations."*[6] If the parties do not agree on procedure, the arbitrators are entrusted with the discretion to set the procedural rules. This procedural autonomy also includes the evidence taking.[7]

The flexibility to shape the procedural rules according to the specifics of each relationship is one of the reasons parties choose arbitration over judicial proceedings.[8] Since *"the arbitrator's proactive management of evidence with the assistance of parties is a feature unavailable to judges in litigation".*[9] In arbitration it is also possible to use modern means of communication such as videoconference or teleconference. This is considered to be one of the crucial developments in the taking of evidence. Videoconferencing constitutes an alternative to physical presence of parties, witnesses, experts or arbitrators. It shall especially be used if the amounts at stake are low in comparison to the costs of the physical appearance.[10] Even it obviously also has limitations compared

2 BORN, Gary. The Principle of Judicial Non-Interference in International Arbitral Proceedings. *University of Pennsylvania Journal of International Law* [online]. 2009, Vol. 30, No. 4, pp. 1001, 1002 [accessed on 2016-07-15].

3 SALOMON, Claudia T.; FRIEDRICH, Sandra. Obtaining and Submitting Evidence in International Arbitration in the United States. *The American Review of International Arbitration* [online]. 2013, Vol. 24, No. 4, p. 549 [accessed on 2016-03-01].

4 KAUFMANN-KOHLER, Gabrielle; SCHULTZ, Thomas. *Online Dispute Resolution: Challenges for Contemporary Justice*. The Hague: Kluwer Law International, 2004, p. 184.

5 FERRITER, Cian. E-Commerce and International Arbitration. *University College Dublin Law Review* [online]. 2001, Vol. 1, p. 57 [accessed on 2016-03-01].

6 BĚLOHLÁVEK, Alexander J. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Iuris, 2013, p. 907.

7 KAUFMANN-KOHLER, Gabrielle; SCHULTZ, Thomas. *Online Dispute Resolution: Challenges for Contemporary Justice*. The Hague: Kluwer Law International, 2004, p. 184.

8 BLACKABY, Nigel; PARTASIDES, Constantine; REDFERN, Alan; HUNTER, Martin. *Redfern and Hunter on the International Arbitration*. 6th ed. Oxford: Oxford University Press, 2015, p. 353.

9 KHAN, L. Ali. Arbitral Autonomy. *Louisiana Law Review* [online]. 2013, Vol. 74, No. 1, p. 36 [accessed on 2016-03-14].

10 FERRITER, Cian. E-Commerce and International Arbitration. *University College Dublin Law Review* [online]. 2001, Vol. 1, p. 65 [accessed on 2016-03-08].

to traditional ways of communication (e. g. the absence of face-to-face meetings), communications technology still provide opportunities that were not available before.[11] Using videoconferencing is efficient, swift and cost-effective way how to obtain evidence. It is even more significant in international arbitration because modern means of communication mitigate distance and reduce both overall time and costs of the arbitration process.[12]

The aim of this paper is to analyse the procedural rules including the rules of evidence in international arbitration proceedings whose seat is in the Czech Republic. Special attention will also be paid to the IBA Rules on the Taking of Evidence in International Arbitration[13] ("IBA Rules of Evidence") as a set of rules which is universally applicable in international arbitration.[14] Having due regard to the fundamental principles of arbitration,[15] the paper will especially examine how the modern means of communication – in particular videoconferencing – are admitted and used in the evidence taking in arbitration.

2 Taking of Evidence – The Czech Perspective

2.1 Czech Arbitration Act

As has already been stated, there are no strict procedural rules including the rules of evidence in international arbitration. It should, moreover, be reminded that many arbitration statutes which govern international arbitration *"were drafted in the pre-digital era"*.[16] The same holds true for the Czech

11 KAUFMANN-KOHLER, Gabrielle; SCHULTZ, Thomas. *Online Dispute Resolution: Challenges for Contemporary Justice*. The Hague: Kluwer Law International, 2004, p. 236.

12 NOBLES, Kimberley Ch. Emerging Issues and Trends in International Arbitration. *California Western International Law Journal* [online]. 2012, Vol. 43, No. 1, p. 107 [accessed on 2016-03-08].

13 IBA Rules on the Taking of Evidence in International Arbitration: Adopted by a resolution of the IBA Council [online]. *International Bar Association*. 29 May 2010 [accessed on 2016-03-05] ("IBA Rules of Evidence").

14 BĚLOHLÁVEK, Alexander J. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Iuris, 2013, p. 1438.

15 Arbitration in the Czech Republic is in particular based on the principles of party autonomy, equality of the parties, efficiency and procedural economy, flexibility and the principle of informality. See ROZEHNALOVÁ, Naděžda. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. 3rd ed. Praha: Wolters Kluwer, 2013, pp. 296–300.

16 FERRITER, Cian. E-Commerce and International Arbitration. *University College Dublin Law Review* [online]. 2001, Vol. 1, p. 63 [accessed on 2016-03-08].

Arbitration Act.[17] The Czech Arbitration Act does not explicitly deal with the use of videoconferencing. On the other hand, this does not necessarily imply that its use is not possible in practice.

2.1.1 Determination of Procedural Rules

According to the Czech Arbitration Act the parties are allowed to agree on the procedure to be followed by the arbitrators in conducting the proceedings.[18] It may, *inter alia,* include their agreement as regards the evidence taking.[19] The parties may, for example, choose formal or informal methods of conducting arbitration, documentary or oral methods of presenting evidence.[20] The agreement may also cover issues such as the production of documents, witness evidence or experts.[21] Even the choice of the procedural rules in international arbitration is rather exceptional in practice; it is not prohibited by most *lex arbitri* regulations.[22]

Besides, the parties are allowed to establish the procedure in the rules on arbitration, provided these rules are annexed to the arbitration agreement.[23] The procedural issues may also be determined by the presiding arbitrator.[24] If, however, there is no parties' procedural agreement, the arbitrators shall conduct the proceedings in such manner as they consider appropriate.[25] This discretion is to be exercised with regard to the parties'

17 It does not distinguish between domestic and international arbitration proceedings. This means that the act is very flexible and responsive to international arbitration. See BĚLOHLÁVEK, Alexander J. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Iuris, 2013, p. 965.

18 Section 19(1) of the Czech Arbitration Act.

19 BĚLOHLÁVEK, Alexander J. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Iuris, 2013, pp. 908, 940, 941.

20 BLACKABY, Nigel; PARTASIDES, Constantine; REDFERN, Alan; HUNTER, Martin. *Redfern and Hunter on the International Arbitration*. 6th ed. Oxford: Oxford University Press, 2015, p. 356.

21 REDFERN, Alan; HUNTER, Martin et al. *Law and Practice of International Commercial Arbitration*. 4th ed. London: Sweet & Maxwell, 2004, pp. 317, 353, 354.

22 BĚLOHLÁVEK, Alexander J. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Iuris, 2013, pp. 966, 967.

23 Section 19(4) of the Czech Arbitration Act.

24 Provided he has been empowered to do so by the parties or by all the other arbitrators. See Section 19(1) of the Czech Arbitration Act.

25 Section 19(2) of the Czech Arbitration Act.

expectations, the arbitral tribunal's own experience with the taking of evidence and the nature of the dispute.[26]

It should be noted that the arbitrators' procedural autonomy is not unlimited. On the contrary, the balance shall be achieved between the principles of lesser formality and equality of the parties (more specifically equal opportunity to exercise their rights), so that the arbitrators can establish the facts of the case necessary for the resolution of the dispute.[27] The autonomy of the parties and the arbitrators to establish the procedural rules is also restricted by the mandatory rules and public policy requirements of the law of the state in whose territory arbitration takes place (i.e. *lex arbitri*).[28] In this respect, the procedural autonomy is especially limited by the fundamental principle of fair process.[29] A breach of these rules may result in the challenge of the arbitral award and lead to a potential refusal of recognition and enforcement under Article V(1)(b) or (d) of the New York Convention.[30]

2.1.2 Taking of Evidence

The evidence taking by the arbitrators may only take place if it can be performed on a voluntary basis without the need for coercive measures.[31] As a rule, the taking of evidence is based on the oral presentation of evidence. Only if the parties agree that the proceedings will take place without an oral hearing, the case may be decided on the basis of documentary

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26 TRITTMANN, Rolf; KASOLOWSKY, Boris. Taking Evidence in Arbitration Proceedings between Common Law and Civil Law Traditions – The Development of a European Hybrid Standard for Arbitration Proceedings. *UNSW Law Journal* [online]. 2008, Vol. 31, No. 1, pp. 331, 332 [accessed on 2016-03-02].

27 Section 19(2) of the Czech Arbitration Act. See BĚLOHLÁVEK, Alexander J. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Iuris, 2013, p. 912.

28 BLACKABY, Nigel; PARTASIDES, Constantine; REDFERN, Alan; HUNTER, Martin. *Redfern and Hunter on the International Arbitration*. 6th ed. Oxford: Oxford University Press, 2015, pp. 356, 357. The Czech legal theory generally accepts so called territorial approach (or seat theory) which means that arbitration is governed by the law of the place in which it is situated. See ROZEHNALOVÁ, Naděžda. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. 3rd ed. Praha: Wolters Kluwer, 2013, pp. 243, 245.

29 BĚLOHLÁVEK, Alexander J. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Iuris, 2013, p. 906.

30 EMANUELE, Ferdinando; MOLFA, Milo. Evidence in International Arbitration: Italian Perspective. *The European, Middle Eastern and African Arbitration Review* [online]. 2014, p. 81 [accessed on 2016-03-01].

31 Section 20(1) of the Czech Arbitration Act.

evidence.[32] In compliance with the abovementioned principle of lesser formality the arbitrators have broader discretion as regards the evidence taking than the ordinary courts. They are also free to determine when and what evidence will be taken and in what form, provided the principle of due process is secured.[33]

It should also be noted that in the evidence taking it is usually appropriate to apply the Code of Civil Procedure[34] by the analogy, which is explicitly permitted under Section 30 of the Czech Arbitration Act. Nevertheless, this does not mean the automatic use of the rules of civil procedure. The Czech Arbitration Act only presumes "reasonable" application.[35] In practice, the relevant provisions of the Code of Civil Procedure should serve as a guide for the arbitrators, while they take into consideration the fundamental principles of arbitration.[36]

To sum up, in author's opinion nothing in the Czech Arbitration Act precludes the use of videoconferencing in the evidence taking in arbitration proceedings. It follows from the principle of lesser formality which allows the parties and the arbitrators to agree on the use of modern means of communication in the taking of evidence.[37] Besides, the right to an oral hearing may comparably be satisfied by the use of videoconferencing.[38] It should also be emphasized that the Czech Arbitration Act does not require all the arbitrators to be physically

32 Section 19(3) of the Czech Arbitration Act.

33 BĚLOHLÁVEK, Alexander J. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Iuris, 2013, pp. 948, 1068–1070. More to the principle of due process and equality of the parties see Decision of the Supreme Court, Czech Republic of 11 June 2008, No. 32 Cdo 1201/2007 [online]. *Nejvyšší soud* [accessed on 2016-07-15]; Decision of the Supreme Court, Czech Republic of 25 January 2012, No. 23 Cdo 4386/2011 [online]. *Nejvyšší soud* [accessed on 2016-07-15].

34 CZECH REPUBLIC. Act No. 99/1963 Coll., Code of Civil Procedure, as subsequently amended.

35 Decision of the Supreme Court, Czech Republic of 25 April 2005, No. 32 Odo 1528/2005 [online]. *Nejvyšší soud* [accessed on 2016-03-07]. Similarly Decision of the Supreme Court, Czech Republic of 26 April 2007, No. 20 Cdo 1612/2006 [online]. *Nejvyšší soud* [accessed on 2016-03-07].

36 The fundamental principles are particularly formulated in Sections 18 and 19(2) of the Czech Arbitration Act. See BĚLOHLÁVEK, Alexander J. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Iuris, 2013, pp. 1065, 1066, 1430.

37 POKORNÝ, Radek. Postup v rozhodčím řízení. In: OLÍK, Miloš; MAISNER, Martin et al. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů: komentář*. Praha: Wolters Kluwer, 2015, p. 97.

38 KAUFMANN-KOHLER, Gabrielle; SCHULTZ, Thomas. *Online Dispute Resolution: Challenges for Contemporary Justice*. The Hague: Kluwer Law International, 2004, p. 207.

present at one place, i.e. they can communicate via email, chat or videoconference.[39] Moreover, the use of videoconferencing contributes to the efficient, fast and cost-effective taking of evidence, which is in line with the fundamental principles of arbitration in the Czech Republic. It should, however, be borne in mind that equal treatment of the parties needs to be secured.[40]

2.1.3 Supportive Function of the Ordinary Courts

Due to the fact that the arbitrators cannot apply coercive measures with respect to the evidence taking, they are allowed to seek the assistance of the ordinary courts to perform procedural acts which the arbitrators cannot execute themselves[41] (e.g. to compel the attendance of the witness).[42] The court shall *ex lege* comply with the request.[43] Where a procedural act needs to be performed abroad, the arbitrators may address a foreign court (or other competent authority) directly. Provided this is admissible under the law of the foreign state concerned. If this is not possible, the arbitrators shall follow the procedure under Section 20(2) of the Czech Arbitration Act and request a domestic court for assistance. This court is afterwards obliged to submit the request to the foreign court (or other competent authority) in the state concerned.[44]

The Czech courts may use videoconferencing according to Section 122(2) of the Code of Civil Procedure, respectively in cross-border cases pursuant

39 Section 25(1) of the Czech Arbitration Act only requires that an arbitral award is signed by at least a majority of the arbitrators. See LISSE, Luděk. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů s komentářem*. Praha: Linde, 2012, p. 502.

40 More to the equal treatment and due process in videoconferencing see KAUFMANN-KOHLER, Gabrielle; SCHULTZ, Thomas. *Online Dispute Resolution: Challenges for Contemporary Justice*. The Hague: Kluwer Law International, 2004, pp. 208, 209.

41 Section 20(2) of the Czech Arbitration Act. Under this provision only the arbitrators (and not the parties) are empowered to seek the court assistance. See LISSE, Luděk. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů s komentářem*. 1st ed. Praha: Linde, 2012, p. 445.

42 EMANUELE, Ferdinando; MOLFA, Milo. Evidence in International Arbitration: Italian Perspective. *The European, Middle Eastern and African Arbitration Review* [online]. 2014, p. 81 [accessed on 2016-03-08].

43 The request shall be processed by analogy to Sections 39 and 122(2) of the Code of Civil Procedure. See BĚLOHLÁVEK, Alexander J. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Iuris, 2013, p. 1071.

44 BĚLOHLÁVEK, Alexander J. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Iuris, 2013, pp. 1073, 1076.

to Articles 10(4) or 17(4) of the Evidence Regulation.[45] Therefore, *"if national courts at the place of arbitration may use videoconferences, it should not be improper for an arbitral tribunal to do likewise, given that international arbitration proceedings are generally subject to a more flexible regime than judicial proceedings"*.[46]

2.2 Rules of the Arbitration Court

2.2.1 Determination of Procedural Rules

If the parties agree on the jurisdiction of a permanent arbitral institution and do not agree otherwise in the arbitration agreement, they are supposed to have submitted to the arbitral institution's own statutes and rules. These rules (statutes) may, *inter alia*, determine how the arbitrators shall conduct the proceedings.[47] They may, to some extent, modify the Czech Arbitration Act with respect to particular procedural issues.[48]

The Rules of the Arbitration Court[49] attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic[50] ("Rules

45 Council Regulation (EC) No 1206/2001 of 28 May 2001 on Cooperation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters [online]. In: *EUR-Lex* [accessed on 2016-03-11] ("Evidence Regulation"). This regulation is not applicable on the evidence taking before the arbitral tribunal. But it may be applied by the ordinary court which executes the request rendered by the arbitral tribunal. See RŮŽIČKA, Květoslav. *Rozhodčí řízení před Rozhodčím soudem při Hospodářské komoře České republiky a Agrární komoře České republiky*. 2nd ed. Plzeň: Aleš Čeněk, 2005, p. 119.

46 SCHÄFER, Erik. Videoconferencing in Arbitration. *ICC International Court of Arbitration Bulletin* [online]. 2003, Vol. 15, No. 1, p. 41 [accessed on 2016-03-10].

47 Section 13(2) and (3) of the Czech Arbitration Act. See BĚLOHLÁVEK, Alexander J. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Iuris, 2013, pp. 613, 622, 623.

48 BĚLOHLÁVEK, Alexander J. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Iuris, 2013, p. 616.

49 Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic ("Arbitration Court") is a permanent arbitral tribunal with the maximum possible jurisdiction in the Czech Republic. See *Arbitration Court* [online]. Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic [accessed on 2016-03-06].

50 Rules of the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic [online]. *Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic* [accessed on 2016-03-07] ("Rules of the Arbitration Court"). These are applicable to both domestic and international arbitration proceedings. See BĚLOHLÁVEK, Alexander J. Nový Řád Rozhodčího soudu při Hospodářské komoře ČR a Agrární komoře ČR. *Právní rozhledy*. 2012, Vol. 20, No. 20, p. 703.

of the Arbitration Court") also allow the parties to agree on the procedure. Failing such agreement, the arbitrators are authorized to proceed in such a manner which they consider appropriate. It should, however, be noted that both the parties' autonomy and the discretion of the arbitrators have to comply with the principle of equal treatment of the parties.[51]

2.2.2 Taking of Evidence

The Rules of the Arbitration Court oblige the parties to provide the arbitrators with evidence to prove their case.[52] The taking of evidence itself shall be performed in the manner established by the arbitral tribunal[53] which *"shall be free to assess the evidence in its discretion"*.[54] The presentation of evidence usually takes place in oral hearing and may also be performed with the use of communications technology, e. g. teleconference or videoconference.[55] Even the Rules of the Arbitration Court do not reflect the use of modern means of communication in satisfactory manner and are considered to be rather unfriendly to international arbitration in this respect;[56] videoconferencing is possible in the Arbitration Court.[57] Moreover, the Arbitration Court offers so called online arbitration which means that arbitration proceeding is conducted and dispute resolved via the Internet.[58]

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51 Section 6 of the Rules of the Arbitration Court.

52 Section 34(1) of the Rules of the Arbitration Court.

53 Sections 34(3) and 59 of the Rules of the Arbitration Court. It should be noted that the relevant provisions of the Czech Arbitration Act or the Code of Civil Procedure do not apply, as regulation in the Rules of the Arbitration Court is exhaustive. See MAISNER, Martin; TRAPL, Vojtěch. *Řád Rozhodčího soudu při Hospodářské komoře České republiky a Agrární komoře České republiky: komentář*. Praha: Wolters Kluwer, 2015, pp. 111, 112.

54 Section 35 of the Rules of the Arbitration Court.

55 MAISNER, Martin; TRAPL, Vojtěch. *Řád Rozhodčího soudu při Hospodářské komoře České republiky a Agrární komoře České republiky: komentář*. Praha: Wolters Kluwer, 2015, p. 110.

56 BĚLOHLÁVEK, Alexander J. Nový Řád Rozhodčího soudu při Hospodářské komoře ČR a Agrární komoře ČR. *Právní rozhledy*. 2012, Vol. 20, No. 20, p. 709.

57 CHODĚRA, Oldřich. Rozhodčí řízení [online]. In: *epravo.cz digital*, 2015 [accessed on 2016-03-08].

58 Online arbitration is outside the scope of this paper. More to this topic see *Additional Procedure for On-line Arbitration (on-line Rules)* [online]. Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic [accessed on 2016-03-07].

2.3 IBA Rules of Evidence

The IBA Rules of Evidence are considered to be *"the most advanced codification of existing international arbitration practice"*.[59] They are intended to provide an efficient, economical and fair process for the evidence taking in international arbitration proceedings. The IBA Rules of Evidence *"are designed to supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration"*.[60] It means that they only fill in gaps left in the overall procedural framework for arbitration.[61] Also their application is limited by the mandatory rules of the *lex arbitri*.[62] The parties or the arbitrators may incorporate the IBA Rules of Evidence by express agreement or adopt them as guidance. It should be noted that these rules do not constitute a rigid framework; instead they are intended to provide support for the flexibility of the arbitral process.[63] Because of this, the IBA Rules of Evidence have become a commonly accepted standard in international arbitration.[64]

The IBA Rules of Evidence aim to keep up with new developments and challenges. As a result, Article 2 of the IBA Rules of Evidence provides for mandatory consultation on evidentiary matters. The arbitral tribunal is encouraged to get involved in procedural matters at an early stage of proceedings. It shall consult the parties on process for the evidence taking, having due

59 BAGNER, Hans. Need for Rules of Evidence in International Arbitration. *International Business Lawyer* [online]. 1997, Vol. 25, No. 4, p. 178 [accessed on 2016-03-12].

60 Preamble to the IBA Rules of Evidence.

61 *Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration* [online]. International Bar Association, p. 3 [accessed on 2016-03-10].

62 Article 1(1) of the IBA Rules of Evidence.

63 ASHFORD, Peter. *The IBA Rules on the Taking of Evidence in International Arbitration: A Guide*. Cambridge: Cambridge University Press, 2013, p. 12.

64 KÜHNER, Detlev. The Revised IBA Rules on the Taking of Evidence in International Arbitration. *Journal of International Arbitration* [online]. 2010, Vol. 27, No. 6, p. 667 [accessed on 2016-03-10]. *"(…) standardization meets the needs of the parties who use arbitration as it enhances the predictability of outcome; a facet of any dispute resolution process which is highly desirable to parties."* See O'MALLEY, Nathan D. Procedural Rules Governing the Production of Documentary Evidence in International Arbitration – As Applied in Practice. *Law and Practice in International Courts and Tribunals* [online]. 2009, Vol. 8, No. 1, p. 90 [accessed on 2016-03-14].

regard to the promotion of efficiency, economy and fair process.[65] Moreover, the IBA Rules of Evidence simplify and modernize the oral testimony procedures.[66] Under Article 8 of the IBA Rules of Evidence, which deals with the evidentiary hearing, the witnesses and experts *"shall appear in person unless the arbitral tribunal allows the use of videoconferencing or similar technology (…)"*.[67] This means that videoconferencing is compatible with the IBA Rules of Evidence. Nevertheless, it is advisable to obtain the parties' explicit consent with the use of this technology.[68]

It should, however, be noted that *Bělohlávek* is very cautious about the applicability of the IBA Rules of Evidence to arbitration proceedings which are conducted in compliance with the Czech Arbitration Act. In his opinion, *"those rules are significantly influenced by common law and in some respects may even contradict the basic pillars of civil procedure not only in the Czech Republic but also in other countries of continental law"*.[69]

3 Conclusion

The purpose of this paper was to analyse the procedural rules in international arbitration proceedings whose seat is in the Czech Republic. The absence of the detailed procedural rules including the rules of evidence in arbitration provides the parties and the arbitrators with the opportunity

65 KÜHNER, Detlev. The Revised IBA Rules on the Taking of Evidence in International Arbitration. *Journal of International Arbitration* [online]. 2010, Vol. 27, No. 6, pp. 667, 670 [accessed on 2016-03-10].

66 NOBLES, Kimberley Ch. Emerging Issues and Trends in International Arbitration. *California Western International Law Journal* [online]. 2012, Vol. 43, No. 1, p. 91 [accessed on 2016-03-08].

67 Article 8(1) of the IBA Rules of Evidence. The arbitrators shall take into account the reasons because of which the witness or expert is unable to appear in person. They shall also consider the ability to maintain the principles of fairness and equality of the parties, and the possibility to approximate videoconferencing to physical appearance. See *Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration* [online]. International Bar Association, pp. 17, 18 [accessed on 2016-03-15].

68 SCHÄFER, Erik. Videoconferencing in Arbitration. *ICC International Court of Arbitration Bulletin* [online]. 2003, Vol. 15, No. 1, p. 40 [accessed on 2016-03-10].

69 BĚLOHLÁVEK, Alexander J. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Iuris, 2013, p. 1438.

to determine the procedural framework for their specific dispute resolution process. In this respect, party autonomy, flexibility and informality are among the most significant advantages of international arbitration.

Over the past few years, the arbitration statutes and arbitration rules aim to deal with the increasing time and costs of international arbitration. Personal appearance constitutes one of the most expensive aspects of any dispute resolution process.[70] Nevertheless, arbitration proceedings may benefit from technological developments and use the modern means of communication. Using videoconferencing in the taking of evidence contributes to efficient, speed and cost-effective arbitration. Moreover, it can not only be used for a distant party, witness or expert, but also for a distant arbitrator.

To sum up, both the Czech Arbitration Act and the Rules of the Arbitration Court are based on party autonomy and flexibility in the evidence taking. Even none of them addresses the use of videoconferencing explicitly, author of this article considers that its use is admissible. The same holds true for the IBA Rules of Evidence which were also found to be favourable to videoconferencing. In author's opinion, the use of videoconferencing will likely continue to grow in international arbitration proceedings. Because it is capable of overcoming problems with the taking of evidence as it mitigates distance.

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INVESTMENT ARBITRATION

PROVISION ON APPLICATION OF OTHER RULES IN BILATERAL INVESTMENT TREATIES

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Abstract

The content of bilateral investment treaties is to the great extend standardized. One of the provisions that are regularly included into the bilateral investment treaties concerns "application of other rules". Although, the provision itself is raised by investors or host states in investment arbitration sparsely, it has been raised by the investors to overcome negative decisions on more standard provisions under the bilateral investment treaties. The aim of this paper is to analyse the provision on application of other rules and determine whether it may be employed to grant additional rights to the foreign investors under the bilateral investment treaties.

Keywords

Bilateral Investment Treaties; Application of Other Rules.

1 Introduction

Network of bilateral investment treaties ("BIT") is composed of approximately 3000 individual treaties applicable on relations between foreign investors and host states.[1] Content of the BITs is to great extent standardized and provided for nearly uniform level of protection to the foreign investors. Most of the BITs grant standards of fair and equitable treatment

* I would like to present my thanks to the anonymous reviewers who took their time and provided insightful comments to the previous drafts of this paper. It goes without saying that all the mistakes and omissions that remained are solely mine.

1 United Nations Conference on Trade and Development (UNCTAD) lists 2932 concluded BITs among which 2286 are effective. See International Investment Agreement Navigator [online]. *Investment Policy Hub*. UNCTAD [accessed on 2016-09-14].

and full protection and security to the foreign investors. Also, they provide guarantees in connection with expropriation of the investments. To level the standards granted to nationals and standards granted to the investors form other nations the BITs grant regularly national treatment and treatment of most-favoured nations to the investors. However, the greatest innovation of the BITs is not in substantive protection but in procedural rights bestowed to the foreign investors. Under the BITs the foreign investors are able to raise claims for compensation directly against the host states for alleged violations of the provided standards. The foreign investors can directly address their claims to international arbitral tribunals.[2]

Another regularly appearing provision in the BITs provides for application of other rules besides the standards granted by the BITs themselves. For example, nearly every BIT of the 80 BITs concluded by the Czech Republic contains such provision.

This paper provides analysis of this provision in the light of examples of its application by the investment tribunals. Aim of this paper is to determine content of this provision and answer question whether this provision can provide broader protection to the foreign investors.

2 See e.g. Award on Jurisdiction of 22 October 2012, European American Investment Bank AG (EURAM) v. Slovak Republic [online]. In: *italaw*, para. 443 [accessed on 2016-09-06] ("EURAM v. Slovak Republic"): "*The provisions on substantive standards of treatment (such as a provision requiring fair and equitable treatment) confer rights upon investors, but do so entirely through the medium of agreement between the States Parties. By contrast, a clause which provides for the investor of one State Party to arbitrate with the other States Party, although it derives its legal force from the agreement between the two States Parties, operates (as explained in paragraph 441, above) not only as an undertaking between the States Parties but also as an offer by each State Party to qualifying investors of the other State Party. If such an investor opts to accept that offer by commencing arbitration proceedings, the result is the creation of an entirely new, direct, relationship between that investor and the State Party concerned. The resulting dual character of the investor-State arbitration provision was the (very substantial) innovation introduced into international law by the network of BITs and similar treaties and one which many States had difficulty accepting (as the records of negotiations concerning the present BIT and numerous other BITs demonstrate).*"; or Dissenting opinion of Antonia Crivellara in Decision of the Tribunal on Objections to Jurisdiction of 29 January 2004, ICSID Case, No. ARB/02/6, SGS Société Générale de Surveillance S.A. v. Republic of the Philippines [online]. In: *italaw*, para 6 [accessed on 2016-09-06] ("SGS v. Philippines"): "*Whilst the substantive provisions of the BITs (duty of fair treatment; prohibition of discriminatory measures; duty to provide for prompt and adequate compensation in case of expropriation or equivalent measures) impose on the host Sates obligations which are already in force under general international law, the really innovating contribution of a BIT is given by the investor's privilege to choose a preferential forum amongst those offered by the host State after that the dispute has arisen (together with, when stipulated, the s.c. „umbrella clause").*"

2 Content of the Provision on Application of Other Rules

2.1 Text of the Provision on Application of Other Rules

The examples in the BITs concluded by the Czech Republic will be used as the basis for textual analysis of the content of such provisions.

First ever BIT concluded by the Czech Republic (at the time of conclusion by the Czechoslovak Socialist Republic) was the BIT with the Economic Union Belgium – Luxembourg of 24 April 1989.[3] Under Article 6:

1. *Le présent Accord ne peut empêcher les investisseurs de se prévaloir de dispositions plus favorables contenues dans la législation la Partie contractante sur le territoire de laquelle les investissements ont été effectués ou dans les accords internationaux qui engagent les deux Parties contractantes.*
2. *Les investisseurs d'une Partie contractante peuvent conclure avec l'autre Partie contractante des accords particuliers dont les dispositions ne peuvent toutefois pas être contraires au présent Accord. Les investissements effectués en vertu de ces accords particuliers sont régis par les dispositions de ceux-ci et subsidiairement, par celles du présent Accord.*

BIT concluded so far as the last one, the BIT with Azerbaijan of 17 May 2011,[4] contains slightly modified wording of this kind of provision in its Article 12:

1. Where a matter is governed simultaneously both by this Agreement and by another international agreement to which both Contracting Parties are parties, nothing in this Agreement shall prevent either Contracting Party or any of its investors who own investments in the territory of the other Contracting Party from taking advantages of whichever rules are more favourable to his case.
2. If the treatment to be accorded by one Contracting Party to investors of the other Contracting Party in accordance with its national

[3] CZECH REPUBLIC. Notice of Federal Ministry of Foreign Affairs on Conclusion of the Agreement Between Czechoslovak Socialistic Republic and Economic Union Belgium – Luxemburg on Mutual Promotion and Protection of Investments, published under No. 574/1992 Coll.

[4] CZECH REPUBLIC. Notice of the Ministry of Foreign Affairs on Conclusion of the Agreement Between the Czech Republic and Republic of Azerbaijan on Mutual Promotion and Protection of Investments, published under No. 14/2012 Coll. of International Agreements.

legislation or other specific provisions of contracts is more favourable than that accorded by the Agreement, the more favourable shall be accorded.

Completely different wording is provided by the BIT concluded with the United States of America of 22 October 1991[5] in its Article IX:

This Treaty shall not derogate from:

a) laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of either Party;
b) international legal obligations; or
c) obligations assumed by either Party, including those contained in an investment agreement or an investment authorization,

that entitle investments or associated activities to treatment more favourable that that accorded by this Treaty in like situations.

Textual analysis of the ordinary meaning of the text in its context of the quoted examples discloses several commonalities in the various BITs. These examples allow us to summarize that these provisions contain provisions regulating conflict between BIT and three different sources of law:

- contract concluded between the foreign investor and the host state;
- national law of the host state;
- international obligations (which can be more specified into more concrete category of other international agreements and treaties).

The biggest group of the Czech BITs, 45 of them, contains provisions including all three possibilities.[6] Second largest group of 23 BITs[7] refers only

5 CZECH REPUBLIC. Notice of the Ministry of Foreign Affairs on Conclusion of the Agreement Between the United States and Czech and Slovak Federative Republic on Mutual Promotion and Protection of Investments, published under No. 187/1993 Coll.

6 Such provision is included in the BITs concluded with Albania, Argentine, Azerbaijan, Bahrain, Economic union Belgium-Luxembourg, Bosnia and Herzegovina, Egypt, Philippine, Georgia, Guatemala, Chile, Yemen, South African Republic, Jordan, Cambodia, Kazakhstan, South Korea, North Korea, Costa Rica, Cyprus, Latvia, Lithuania, Hungary, FYROM, Malaysia, Mauritius, Moldavia, Mongolian, Nicaragua, Panama, Paraguay, Peru, Romania, El Salvador, Saudi Arabia, UAE, USA, Syria, Tajikistan, Tunis, Ukraine, Uruguay and Uzbekistan.

7 BITs concluded with Belarus, Bulgaria, Montenegro, Finland, Croatia, India, Indonesia, Israel, Kosovo, Kuwait, Lebanon, Morocco, Germany, Poland, Portugal, Austria, Russia, Greece, Singapore, Serbia, Sweden, United Kingdom and Venezuela.

to national law and international agreements concluded between the contracting parties. Two BITs refer only to the national law,[8] two refer only to the special contract concluded with the foreign investor,[9] and two refer only to the international law applicable between the contracting parties.[10] In four examples, no such provision is included in the BIT.[11]

It can be summarized, this type of provision attempts to refer to all possible sources of rules that may regulate the foreign investors and their investments. This may indicate understating that the BITs are not sole source of standards on treatment afforded to the foreign investors and their investments.

It is necessary to add that the provision on the application of other rules is relevant solely in the context of the protection of foreign direct investments under the respective BIT. It is relevant as a mean to solve potential conflict issues stemming from simultaneously applicable competing instruments. Elimination or omission of one or more potential sources of rights from their wording *per se* does not render them inapplicable. First, such elimination or omission does not preclude their applicability under other relevant forums depending on the scope of the rules (i.e. national courts applying domestic law and, depending on constitutional relation to the international obligations, also international law). Second, omission from the text of the provision on application of other rules does not preclude arbitration tribunal to consider application of other rules, as noted further, albeit with potentially different effects.

2.2 Reference to Special Contract Concluded Between the Investor and the Host State

This part of the analysed provision underlines the importance of the mutual agreement between parties of dispute (i.e. foreign investor and the host state). Such agreement cannot by itself change the international agreement concluded between the states. Such contract is based on the national law

8 BIT concluded with Australia and Switzerland.
9 BIT concluded with France and Spain
10 BIT concluded with Canada and Mexico.
11 BIT concluded with the Netherlands, Norway, Turkey and Thailand.

which does not take precedence over the international law.[12] Therefore, to allow the application of individually negotiated terms between investor and the host state, such exemption is included in the BIT.[13]

2.3 Reference to Host State Law

The public international law does not provide for hierarchy among the sources of public international law.[14] The generally accepted position assimilates national law to factual circumstances under the international law. Therefore, potential breach of the internationally provided standards of the investment protection is assessed by taking primacy of the international law. Additionally, the international law, and in the context of this paper the BITs, may warrant in limited extent the application of the national law as law in determining specific issues, especially the determination of the conditions to be considered investor or creation of investment.[15]

The provision on the application of the other rules allows in limited extend to give primacy to the national law. The BITs therefore do not negate the national law regulation which is then applicable in case it provides more favourable treatment to the foreign investor or its investment.[16]

12 Judgement of the Permanent Court of Justice of 12 July 1929, No. 14, Case concerning the payment of various Serbian loans issued in France [online]. *International Court of Justice*. Publications of the Permanent Court of Justice (1922 – 1946), Series A, No. 20, p. 41 [accessed on 2016-09-06]: *"Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country. The question as to which this law is forms the subject of that branch of law which is at the present day usually described as private international law or the doctrine of the conflict of laws. The rules thereof may be common to several States and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between States. But apart from this, it has to be considered that these rules form part of municipal law."* Possibility to subject such contract to some kind of international regulation has been raised but it is not generally accepted. See VOSS, Jan Ole. *The Impact of Investment Treaties on Contracts Between Host States and Foreign Investors*. Boston: Martinus Nijhoff Publishers, 2011, pp. 25–50.

13 Decision on Respondent's Objection under Arbitration Rule 41(5) of 16 January 2013, ICSID Case No. ARB/12/3, Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary [online]. In: *italaw,* para 74 [accessed on 2016-09-06] ("Accession Mezzanine v. Hungary"); GALLAGHER, Norah; SHAN, Wenhua. *Chinese Investment Treaties: Policies and Practice*. New York: Oxford University Press, 2009, pp. 230–231.

14 *Vienna Convention on the Law of Treaties: A Commentary. Berlin:* Springer, 2012, p. 506.

15 See e.g. below mentioned case: Final Award of 9 September 2003, SCC Case No. 049/2002, William Nagel v. The Czech Republic [online]. In: *italaw*, para. 300 [accessed on 2016-09-06] ("William Nagel v. Czech Republic").

16 BROWN, Chester. *Commentaries on Selected Model Investment Treaties*. Oxford: Oxford University Press, 2013, pp. 313–314.

2.4 Reference to International Obligation

As was already stated, the national law does not take precedence over the international law. Therefore relations among various documents cannot be assessed based on their legal force. Moreover, the international obligation of similar or same content can be assumed by various ways and be applicable among various number of states. These can be unilateral declaration applicable to one state, bilateral agreement applicable between two states, multilateral agreement or customary rule applicable among bigger group of states or even whole international community.[17]

Basic regulation on the conflict of norms is provided in the Vienna Convention on the Law of Treaties of 1969.[18] The simplest way to solve conflict of rules is express regulation, e.g. by express stipulation in international agreement. In case no such stipulation is provided, decisive factors are the contracting parties and the subject-matter of the regulations in conflict. In case the regulation is applicable only between the same contracting parties, the rule of *lex posterior* is applicable. In case the subject-matter (e.g. regulation provided by the BIT compared with the regulation provided by the multilateral treaty) is not verbatim same, it is necessary to further analyse which of obligations are applicable between the contracting parties in question (i.e. the host state and the state of the foreign investor). Only the most-favoured-nation clause overcomes rule that regulations not applicable between the contracting parties can be applicable. Under this provision also the regulations only binding one of the contracting parties can be applied.[19] And the provision on the application of the other rules provides exception for the regulation that is not newer (exception form the *lex posterior* rule) but provides for more favourable treatment.[20]

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17 Sole example of hierarchy among international law resources can be deduced from Article 103 of the Charter of the United Nations under which the obligations under the Charter take precedence over any other obligations of the Member States.

18 Vienna Convention on the Law of Treaties of 23 May 1969 [online]. *United Nations Treaty Collection* [accessed on 2016-09-06].

19 NEWCOMBE, Andrew Paul; PARADELL, Lluís. *Law and Practice of Investment Treaties: Standards of Treatment*. Austin: Wolters Kluwer, 2009, p. 317.

20 BROWN, Chester. *Commentaries on Selected Model Investment Treaties*. Oxford: Oxford University Press, 2013, p. 36.

3 Provision on the Application in the Decisions of the Investment Tribunals

Sole case when the provision on the application other rules was invoked in case of investment dispute against the Czech Republic was *William Nagel v. Czech Republic* case. Mr. Nagel raised this provision to eliminate application of the Czech national law on its alleged investment – contract with state radio communications entity.[21] He claimed that as the national law could be raised only in case it provided more favourable treatment it could not be raised to invalidate his investment.[22] Arbitral Tribunal did not accept that national law could be applied only in case it provided more favourable treatment but it was the national law which determined the value of investment.[23] As the Tribunal determined that there was no investment of Mr. Nagel, Tribunal did not engage in any further argumentation concerning the provision on the application of the other rules.

First case ever to analyse the provision on the application of the other rules was *Yang Chi Oo Trading v. Myanmar* case.[24] Investor attempted to use such

21 William Nagel v. Czech Republic, paras. 182–185.

22 *Ibid.,* para. 77: "*The Treaty's terms show that it guarantees a high level of investment protection. International law, and not domestic law, is the residual source of governing law. According to Article 11 of the Treaty, domestic law may become applicable only if and to the extent that it offers more favourable treatment than the Treaty. The reference to the host State law in Article 1(a) is irrelevant here because it permits only the exclusion of categories of investment which the host State regards as illegal. It does not permit Czech law to define „asset" or „investment". The issue in the present case is quite different form the question as to whether a private contract as been breached under domestic law. It follows that in this case Czech law may become applicable only if and to the extent that it is more favourable to Mr Nagel than the Treaty's provisions.*" and para. 127: "*The controlling instrument is a treaty, not a contract between private parties, and the Treaty permits an application of domestic law only in the narrow and specific circumstances set forth in Article 11. The Treaty's obligations must therefore be applied in accordance with public international law, and not by a domestic legal system selected through conflict of laws principles.*"

23 *Ibid.*, para. 300: *"It follows that, when read in their context, the terms „asset" and „investment" in Article 1 shall be considered to refer to rights and claims which have a financial value for the holder. This creates a link with domestic law, since it is to a large extent the rules of domestic law that determines whether or not there is a financial value. In: other words, value is not a quality deriving from natural causes but the effect of legal rules which create rights and give protection to them."*

24 Award of 31 March 2003, ASEAN I.D. Case No. ARB/01/1, Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar [online]. In: *italaw* [accessed on 2016-09-06] ("Yaung Chi Oo Trading v. Myanmar").

provision[25] to incorporate provisions of parallel treaty which allegedly provided better treatment for the investor. In this case the investor attempted to invoke the dispute settlement clause from this parallel treaty. Tribunal rejected such attempt and declared that such provision cannot be used to create new rights and claims.[26]

In case *Accession Mezzanine v. Hungary* claimants tried to enlarge jurisdiction of Arbitral Tribunal by application of the provision on the application of the other rules to eliminate effects of limited dispute settlement clause under the applicable BIT and invoke also alleged breached of customary international law. Tribunal analysed this provision together with most-favoured-nation clause. It concluded that neither of these provisions could be used to establish new basis for investors' claim additional to the causes provided by the BIT.[27] Consequently, the claimants were not entitled to claim breach of alleged guarantees provided by the customary international law.

Another time when Arbitral Tribunal could declare its position on the provision on the application of the other rules was case *SGS v. Philippines*. This provision was not in the heart of the dispute and the Tribunal only commented on it as *obiter*. The Tribunal provided in its characteristics of such provision that: *"[i]t deals with the relation between commitments under the BIT and*

25 Framework Agreement on the ASEAN Investment Area, 7 October 1998, Article 12: *"Other Agreements – 1. Member States affirm their existing rights and obligations under the 1987 ASEAN Agreement for the Promotion and Protection of Investments and its 1996 Protocol. In: the event that this Agreement provides for better or enhanced provisions over the said Agreement and its Protocol, then such provisions of this Agreement shall prevail. 2. This Agreement or any action taken under it shall not affect the rights and obligations of the Member States under existing agreements to which they are parties. 3. Nothing in this Agreement shall affect the rights of the Member States to enter into other agreements not contrary to the principles, objections and terms of this Agreement."*

26 Yaung Chi Oo Trading v. Myanmar, para. 82: *"On this basis, Article 12(1) should not be interpreted as applying de novo the provisions of the 1987 AEAN Agreement, including Article X, to ASEAN investments. It simply makes it clear that in relation to any investment which is covered by both Agreements, the investor is entitled to the benefit of both and thus of the most beneficial treatment afforded by either. The Tribunal accordingly concludes that Article 12(1) of the Framework Agreement does not give the Claimant any new rights in relation to the present claim."*

27 Accession Mezzanine v. Hungary, para. 73: *"MFN clauses are not and should not be interpreted or applied to create new causes of action beyond those to which consent to arbitrate has been given by the Parties. In: view of the relied sought at pages 31-32 of the Revised Amendment Request for Arbitration, it is the Tribunal's understanding that Claimants are not now claiming that the MFN provisions allow more than Articles 3 and 11 would properly permit, that is, the Tribunal jurisdiction over customary international law insofar as that law is relevant to the Parties' rights and obligations pursuant to Articles 6 of the BIT."*

distinct commitments under host State law or under other rules of international law. It does not appear to impose any additional obligation on the host State in the framework of the BIT."[28]

In *Salini v. Jordan* case claimant attempted to interpret the provision as umbrella clause.[29] Such kind of interpretation can be found also in legal literature.[30] However, such interpretation is rare and other authors opined otherwise.[31] The Tribunal in *Salini v. Jordan* rejected such argumentation with references to the previous cases and stated: *"This Article is […] „a kind of without prejudice clause" […] and in the opinion of the Tribunal, it could not have the effect of incorporating the commitments it mentions into the BIT […]."*[32]

Further, in case *M.C.I. Power v. Ecuador*[33] claimant attempted to incorporate such provision form other BIT to broaden the time scope of the applicable BIT. Tribunal specifically interpreted the provision on the other applicable rules as referring solely to international obligations assumed between both contracting parties and not referring to the obligations assumed by one of them towards third state.[34] As such, the Tribunal distinguished clearly effect of the provision on application of other rules form the effects of the most-favoured-nation clause.

In *Nordzucker v. Poland* case[35] claimant attempted to invoke dispute settlement clause form additional protocol to applicable BIT on basis of effects of the provision on application of other rules. Such application would

28 SGS v. Philippines, para. 114.

29 Decision on Jurisdiction of 9 November 2004, ICSID Case No. ARB/02/13, Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan [online]. In: *italaw*, para. 120 [accessed on 2016-09-06] ("Salini v. Jordan").

30 GALLAGHER, Norah; SHAN, Wenhua. *Chinese Investment Treaties: Policies and Practice*. New York: Oxford University Press, 2009, pp. 230–231.

31 BROWN, Chester. *Commentaries on Selected Model Investment Treaties*. Oxford: Oxford University Press, 2013, pp. 749–750; PAPAEFSTRATIOU FOUCHARD, Athina. *Bilateral Investment Treaty Overview - Greece: IC-OV 021 GR(2010)* [online]. [accessed on 2015-10-18].

32 Salini v. Jordan, para. 130.

33 Award of 26 July 2007, ICSID Case No. ARB/03/6, M.C.I. Power Group LC and New Turbine Incorporated v. Ecuador [online]. In: *italaw* [accessed on 2016-09-06].

34 *Ibid.*, para. 127.

35 Partial Award (Jurisdiction) of 10 December 2008, Nordzucker v. Poland [online]. In: *italaw* [accessed on 2016-09-06].

change the time of effect of the protocol to cover also disputes dating before its effective date. Such attempt to alter the scope (ratione temporis) of the BIT was rejected by the Tribunal.[36]

At the same time also Tribunal in *TSA Spectrum v. Argentine Republic* case[37] was placed before the application of the provision on the application of the other rules as part of general argument over controversial issue of application of the most-favoured-nation clause on dispute settlement mechanism, specifically in context of cooling-off period. The host state raised its interpretation of the provision on the application of the other rules as preventive defence to preclude investor to apply it on the issue of the cooling-off period.[38] However, the Tribunal based its decision on different argumentation and therefore there was no need to respond to this argument.

In *Spyridon Rousalis v. Romania*[39] case claimant invoked Additional Protocol No. 1 to the ECHR as such international obligation which provides more favourable treatment. It can be said that in this case the investor came the closest to application of this provision. The Tribunal did not decline such effect of the provision. However, it declared that it was not necessary to discuss it further as the applicable BIT provided more specific regulation and treatment than the ECHR.[40]

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36 *Ibid.,* para. 113(iii): *"The Tribunal notes Poland's reference to Dolzer and Stevens' description of the clause as a "clause on preservation of rights" which "does not regulate the application of any change to the BIT but provides that if any other obligation under international law which is "apart from this Treaty" or "irrespective of this Treaty exists or will be established in the future, such obligation will supersede the relevant Treaty provision". The Tribunal agrees with this statement and cannot agree that article 8 (1) shows the Parties' intention to give all future amendments of the BIT retroactive effect. This does not mean, however, that the new article 11 (2) does not have immediate effect, as the Tribunal has preliminary concluded above."*

37 Award of 19 December 2008, ICSID Case No. ARB/05/5, TSA Spectrum de Argentina S.A. v. Argentine Republic [online]. In: *italaw* [accessed on 2016-09-06].

38 *Ibid.,* para. 72.

39 Award of 7 December 2011, ICSID Case No. ARB/06/1, Spyridon Roussalis v. Romania [online]. In: *italaw* [accessed on 2016-09-06] ("Spyridon Roussalis v. Romania").

40 *Ibid.,* para. 312: *"The Tribunal does not exclude the possibility that the international obligations of the Contracting States mentions at Article 10 of the BIT could include obligations deriving from multilateral instruments to which those states are parties, including, possibly, the European Convention of Human Rights and its Additional Protocol No. 1. But the issue is moot in the present case and does not require decision by the Tribunal, given the higher and more specific level of protection offered by the BIT to the investors compared to the more general protections offered to them by the human rights instruments referred above. Consequently Article 10 of the BIT cannot, in its own terms and in the instant case, serve as a useful instrument for enlarging the protections available to the Claimant from the Romanian State under the BIT."*

Rare example of the provision on the application of the other rules was analysed in *Arif v. Moldova*[41] as invoked provision refers solely to the specific commitments of the host state towards the foreign investors. Investor invoked the provision as variation on umbrella clause. However, the Tribunal rejected such conclusion and declared that *"the investor may benefit from more favourable treatment, but does not add a new, specific or distinct, treaty obligation to respect commitments made"*.[42]

So far the latest Tribunal deciding also on the application of such provision was in case *İckale İnşaat v. Turkmenistan*.[43] Investor attempted to incorporate various substantive standards into basic BIT which lacks those. According to the investor this provision served as the most-favoured nation clause. Again the Tribunal repeated that the specific provision in the relevant BIT, which was formulated negatively as the BIT did not derogate from the more favourable treatment provisions in other legal instruments, did not entitle investor to invoke their application in the investment arbitration.[44]

4 Treatment Afforded by the Provision on Application of Other Rules

The analysed conflict rules refer to "treatment" as crucial differentiating factor. It is crucial to determine what can be considered as the "treatment". The broadest interpretation will include both substantive protection and procedural rights into the notion of the "treatment". More sober interpretation will conclude that the "treatment" refers solely to the substantive guarantees but does not concern procedures to their enforcement.[45] As the notion of the "treatment" is used in various provisions of the BITs,

41 Award of 8 April 2013, ICSID Case No. ARB/11/23, Mr. Franck Charles Arif v. Republic of Moldova [online]. In: *italaw* [accessed on 2016-09-06].

42 *Ibid.*, para. 389.

43 Award of 8 March 2016, ICSID Case No. ARB/10/24, İçkale İnşaat Limited Şirketi v. Turkmenistan [online]. In: *italaw* [accessed on 2016-09-06].

44 *Ibid.*, para. 331.

45 EURAM v. Slovak Republic, para. 451: *"The Tribunal is well aware that different tribunals have reached different conclusions regarding the meaning of the term "treatment" and, in particular, whether that term should be read as confined to "substantive" standards of treatment (such as those addressed in Articles 2 and 4 of the present BIT) or as including also access to investor-State arbitration. While the Tribunal agrees that either interpretation is plausible, it considers that the term "treatment" is more apposite to cover substantive standards of treatment than to apply to the provision for investor-State arbitration, given what has already been said above regarding the special character of that provision."*

most of the decisions of the investment tribunals concern interpretation of the "treatment" notion in the context of the most-favoured nation clauses. However, the same notions used in the same instrument should have the same meaning. Consequently, the case law concerning most-favoured nation clause is relevant also to determinate notion of the "treatment" under the provision on the application of the other rules

Specific differentiation between substantive treatment provided to investor and its investment and with the procedural means granted to investor to pursue its claims was provided in *Plama Consortium v. Bulgaria*[46]: *"It is one thing to add to the treatment provided in one treaty more favourable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism."*[47] Less strict determination was made by tribunal in *Austrian Airlines v. Slovak Republic*[48]: *"The distinction made by the Respondent between the words "treatment" and "right", may provide an indication that the MFN clause was not meant for procedural "rights", but only for substantive "treatment". Yet this distinction is not in and of itself sufficient to clear that ambiguity."*[49]

Broad determination was applied by *Maffezini v. Spain*[50] Tribunal when determined that the most-favoured-nation clause allows lessening the requirements of procedural provisions under the applicable BIT.[51]

Strict conclusion that "treatment" concerns solely substantive regulation was provided by the tribunals in *Wintershall v. Argentine Republic*[52] and *ST-AD*

46 Award of 27 August 2008, ICSID Case No. ARB/03/24, Plama Consortium Limited v. Republic of Bulgaria [online]. In: *italaw* [accessed on 2016-09-06].

47 Ibid., para. 209. See also Award of 2 July 2013, ICSID Case No. ARB/10/1, Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan, [online]. In: *italaw*, para. 7.8.1 – 7.8.10. [accessed on 2016-09-06].

48 Final Award, 9 October 2009, Austrian Airlines v. The Slovak Republic [online]. In: *italaw* [accessed on 2016-09-06].

49 *Ibid.,* para. 126.

50 Decision of the Tribunal on Objections to Jurisdiction of 25 January 2000, ICSID Case No. ARB/97/7, Emilio Agustín Maffezini v. The Kingdom of Spain [online]. In: *italaw* [accessed on 2016-09-06].

51 *Ibid.*, para. 54.

52 Award of 8 December 2008, ICSID Case No. ARB/04/14, Wintershall Aktiengesellschaft v. Argentine Republic [online]. In: *italaw,* para. 168 [accessed on 2016-09-06]. "*In the absence of language or context to suggest the contrary, the ordinary meaning of 'investments shall be accorded treatment no less favourable than that accorded to investments made by investors of any third State' is that the investor's substantive rights in respect to the investments are to be treated no less favourable than the under BIT between the host State and a third State."*

v. Bulgaria.[53] The Tribunal in further case determined that before it could decide on the more favourable treatment, it had to determine the existence of the investor and the investment under the BIT. Therefore, as part of the more favourable treatment it could not be considered more than what was considered as the investor and the investment under BIT. Moreover, the BIT had to be applicable *ratione temporis, ratione materiae* and what is most important, Tribunal had to have jurisdiction to determine the alleged breach (*ratione voluntatis*). Neither of these conditions could be broaden by the application of the more favourable treatment.[54] No more favourable procedural rights under national law could be incorporated under the procedural rights under BITs.[55]

These statements on general theme of "treatment" under the BITs are in accordance with the decisions that had to deal with the provision on the application of the other rules. Neither of cases referred in part 3 allowed disregarding specific limitations of the applicable BITs. Only in *Spyridon Rousalis v. Romania* case the Tribunal had to deal with the situation which concerned potential application of the substantive regulation

53 Award on Jurisdiction of 18 July 2013, PCA Case No. 2011-06, ST-AD GmbH v. Republic of Bulgaria [online]. In: *italaw* [accessed on 2016-09-06].

54 *Ibid.*, para. 397: *"The object and purpose of the BIT's MFN clause is to grant protected investors the most favourable treatment found in other BITs. But before being able to ask for a "more favourable" treatment, an investor has to already be subjected to what it considers to be a less favourable treatment and the conditions for access to a more favourable treatment through the MFN clause have to be satisfied. More specifically, before a tribunal can apply the MFN clause, (i) there must be a foreign investor (and the conditions for being considered as a foreign investor under the BIT cannot be modified by the MFN clause), (ii) there must be an investment (and the conditions for finding that an investment exists under the BIT cannot be modified by the MFN clause), (iii) the BIT must be applicable ratione temporis to the situation (and the conditions of application ratione temporis under the BIT cannot be modified by the MFN clause), and (iv) above all, the tribunal must have jurisdiction ratione voluntatis(and the conditions for access to jurisdiction ratione voluntatis under the BIT cannot be modified by the MFN clause). As expressed by the Respondent, "(l)ike the three other jurisdictional conditions – ratione personae, ratione materiae, and ratione temporis – this condition, jurisdiction ratione voluntatis, cannot be altered or removed by virtue of the MFN provision."*

55 Award of 14 February 2012, Les Laboratoires Servier, S.A.A., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland [online]. In: *italaw*, para. 519 [accessed on 2016-09-06]: *"The Tribunal held [in the Interim award of 3 December 2010] that the notion of "treatment" in Article 4(1) of the France-Poland BIT does not encompass international arbitration, which remained subject to the limitation of Article 8. Article 8 provides for arbitration only for divestment measures referred to in Article 5(2) of the BIT."* and para. 529: *"In the context of the current dispute, the Tribunal finds no justification for allowing choice-of-law rules to serve as a back door through which to import forum selection provisions contrary to treaty terms."*

that explicitly falls under the scope of the provision on the application of the other rules. However, in this case due to application of more specific provisions in the BIT the Tribunal did not have to apply invoked treatment.

5 Conclusion

The cases in which the provisions on the application of the other rules were applied confirm that its aim is to solve potential conflict between potentially applicable sources of the foreign investment regulations. Such provision consequently does not exclude possibility of the foreign investor to claim the more favourable treatment. However, such treatment is not eligible to be determined by the procedural mechanism provided by the BITs in case it does not fall under limited scope of the arbitral tribunal jurisdiction. Such conclusion is confirmed by the other jurisprudence of the investment tribunals. No other provisions included in the BITs can be utilized to provide jurisdiction of the arbitral tribunal except of the express disputes settlement clauses.[56] In case such favourable treatment provides for new claims, these can be claimed only by the procedural means regulated by the document granted them, i.e. national procedural laws (which in the Europe could also contain specific protection of human rights granted under the auspice of the European Court of Human Rights) or elected courts in the specific contracts. As the last resort the public international law provides for the diplomatic protection.[57]

56 Accession Mezzanine v. Hungary, para. 73.

57 Award of 13 September 2006, ICSID Case No. ARB/04/15, Telenor Mobile Communications A.S. v. The Republic of Hungary [online]. In: *italaw*, para. 81 [accessed on 2016-09-06]: *"Subject to the argument analysed below that the Tribunal's jurisdiction is extended by the MFN clause in Article IV to cover claims under Article III, such claims are outside the Tribunal's jurisdiction, which is limited by Article XI to expropriation claims. That does not mean that Telenor is without remedy if Hungary has failed to fulfil its obligations of fair and equitable treatment. On the contrary, Telenor has two avenues of recourse. One is to invoke diplomatic protection and request Norway to seek a remedy on its behalf under Article III; the other is to bring proceedings before the Hungarian courts under Hungarian law for breach of the same obligations under the concession agreement."* See also Award on Jurisdiction of 17 July 2003, ICSID Case No. ARB/01/8, CMS Gas Transmission Company v. Republic of Argentina [online]. In: *italaw*, para. 45 [accessed on 2016-09-06]. The diplomatic protection in investment case under BITs was invoked in Final Award of 1 January 2008, Italian Republic v. Republic of Cuba [online]. In: *italaw* [accessed on 2015-10-11].

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THE NEW EU PROPOSAL TO ISDS SYSTEM – OPPORTUNITY OR BLIND ALLEY?

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Abstract

The public and NGO's have been strongly criticizing current system of ISDS in the last few months. They reproach ISDS for non-transparency and discrimination in favour of investors. The European Commission responded to this criticism by proposing new approach to ISDS system. This new approach has established few revolutionary changes whose influence to ISDS system is not quite clear. The aim of this paper is introduce these changes and describe their potential problems connected to the new EU proposal.

Keywords

ISDS; Investment Court System; New Eu Approach; Right to Regulate.

1 Introduction

If someone had opened the newspapers in Europe in the last few months one of the most controversial topic was the question of Investor-State-Dispute-Settlement ("ISDS") and possible approach to this topic from the side of governments of the EU Member States. Broader public has become aware of the ISDS because of negotiations of Transatlantic Trade and Investment Partnership ("TTIP").[1] A huge number of EU citizens and non-governmental organizations ("NGOs") started to protest against TTIP inter alia because of a possibility of existence of ISDS in Investment

1 WIECK, Oliver. New Criticism of ISDS Obscures its Actual History [online]. *ATLANTIC-COMMUNITY.org. The Open Think Tank on Foreign Policy* [accessed on 2015-10-07].

Agreements and Free Trade Agreements ("FTAs") between EU Member States and third countries and EU and third countries.[2] Among others things, they have following reservations about ISDS:

1. The system of ISDS is non-transparent. The public does not have any opportunity to control decision process in ISDS.
2. ISDS was created and works in favour of investors. Investors always win their dispute against state.
3. The system of ISDS creates parallel system of dispute settlement to national court system. The access to this system is exclusively created for one small group of investors. It is discriminatory to citizens who have not access to this special dispute settlement system.[3]
4. Existence of ISDS results in "Regulatory Chill Effect" – governments do not adopt new regulatory rules because they are scared from the possibility of arbitration.[4]

Resistance to ISDS was so intense that European Commission started to work on new dispute settlement system. As a first step Commission organized a public consultation in which the public could send its proposals and ideas about ISDS and other things connected to investment protection to Commission. Based on this public consultation Commission identified a few key areas that were considered as important. The basic areas were:

1. The protection of the right to regulate.
2. The establishment and functioning of arbitral tribunals.
3. The relationship between domestic judicial systems and ISDS.
4. The review of ISDS decisions for legal correctness through an appellate mechanism.[5]

Based on the results of this public consultation Commission prepared its own new proposal about functioning of ISDS and introduced it in autumn

2 Thousands Across Europe Protest Against TTIP [online]. *Euractiv.com* [accessed on 2016-04-20]

3 A Response to the Criticism of ISDS [online]. *European Federation for Investment Law and Arbitration* [accessed on 2016-05-15].

4 Investor-State Dispute Settlement (ISDS): State of Play and Prospects for Reform [online]. *European Parliamentary Research Service Blog*. European Parliament [accessed on 2015-01-21].

5 Report Presented Today: Consultation on Investment Protection in EU-US Trade Talks [online]. *News Archive*. European Commission [accessed on 2015-01-16].

2015 in its draft text of TTIP.[6] After consultation with EU Member States, revised proposal of new dispute settlement system is a part of negotiation proposals of EU to its partners in future FTAs. However, this new EU approach to ISDS is still criticized due to the same reasons as its predecessor. How is that possible? Is this new dispute settlement system so questionable? Which problems are connected with it?

The aim of this paper is to introduce the main parts of this new proposal of dispute settlement system,[7] described some of the problems connected with it and try to evaluate, if this new approach has a chance to be a new direction of development in the area of ISDS or just a mistake.

2 New EU Approach to ISDS

As it was said before, the new EU approach to ISDS contained in EU draft text of TTIP was created based on public consultation and it is based on the 4 basic requirements that were identified by this public consultation.

All these main components of the proposal will be described in particular sections.

2.1 Right to Regulate

Right to regulate has never been disputed,[8] however, TTIP brings the provision about right to regulate which clearly declares that states has the right to regulate within their territories to achieve legitimate policy objectives. The TTIP draft contains a list of legitimate policy objectives. These are:

1. Protection of public health;
2. Protection of safety;
3. Protection of environment;

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6 Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations [online]. *Press Release Database*. European Commission [accessed on 2015-09-16].

7 For bigger clarity it will be described the proposal of dispute settlement system in TTIP agreement, because it was created as a model proposal for all future agreements. It will not be taking in account the differences of dispute settlement system contained in agreements between EU and Canada and EU and Vietnam.

8 HINDELANG, Steffen; SASSENRATH, Carl-Phillip. *The Investment Chapter of the EU's International Trade and Investment Agreement in Comparative Perspective*. Belgium: European Parliament's Committee on International Trade, 2015, p. 18.

4. Protection of public morals;
5. Social or consumer protection;
6. Protection and promotion of cultural diversity.[9]

In the same time the principle of right to regulate guarantees that investor cannot use any change of legal or regulatory framework against state in dispute settlement. This means that anything from investment protection section of TTIP draft cannot be interpreted as a commitment from the state that it will not change the legal or regulatory framework, even if investor would suffer loss because of such a change.[10]

Right to change legal and regulatory framework applies also to subsidy. Subsidy can be not issued, renewed or maintained without breaking any commitment under agreement, but only in case of absence of any specific commitment under law or contract to issue, renew or maintain subsidy or in accordance with any terms or conditions attached to the issuance, renewal or maintenance of subsidy.[11]

States even can discontinue the granting of a subsidy or requesting its reimbursement.[12]

2.2 Permanent Investment Court System

The most important change, which brings the new EU approach to TTIP, is abandoning the *ad hoc* arbitrate system and establishment of permanent investment court system.

The permanent investment court system shall have in first instance 15 members appointed by Committee established under the agreement. The number of members can be increased or decreased by multiples of three depending on the situation and number of submitted claims. The tribunal shall have president and vice-president. All members of tribunal shall receive monthly retainer fee and parties will pay members another expenses connected to their work as members of tribunal.

9 Section 2 Article 2(1) of the Transatlantic Trade and Investment Partnership [online]. *European Commission* [accessed on 2015-11-12] ("TTIP").
10 Section 2 Article 2(2) of the TTIP.
11 Section 2 Article 2(3) of the TTIP.
12 Section 2 Article 2(4) of the TTIP.

The tribunal will hear cases in divisions. All divisions will be composed of 3 members. Composition of every single division shall be unpredictable and shall be established on rotation basis. The members of divisions will be appointed by the president of the tribunal.[13]

All members of tribunal will be appointed for 6 year term renewable once[14] and must fulfil criteria of their qualification and ethic.[15] They must have the same qualification as the highest judicial officers in their respective countries, or be jurist recognized competence. An expertise in international public law is necessary, however, an expertise in international investment law, international trade law or the resolution of disputes arising under international investment or international trade law is surprisingly not necessary and member of tribunal can work without it.[16]

From ethical point of view members of tribunal shall be people whose independence is unquestionable without any connection to any government. Members must not decide disputes between disputing parties based on instructions from any government or organisation with regard to matters related to the dispute. They must be without any direct or indirect conflict of interest, cannot act as a counsel or as party-appointed expert or witness in any pending or new investment claim under TTIP or any other agreement or domestic law.[17]

2.3 Appellate Mechanism

Another sustainable element of new EU dispute settlement system is establishment of appellate mechanism. Appellate tribunal shall work on the same principles as a tribunal in first instance with some modifications. The requirements on qualification and ethics of members of appellate tribunal are the same as in case of members of tribunal[18]. The principle of appointment of members of appellate tribunal will be the same as in case of tribunal but the number of members shall be decreased to number 6.[19] All members

13 Section 3 Article 9(9) of the TTIP.
14 Section 3 Article 9(5) of the TTIP.
15 Section 3 Article 9(7) and Article 11 of the TTIP.
16 Section 3 Article 9(7) of the TTIP.
17 Section 3 Article 11(1) of the TTIP.
18 Section 3 Article 10(7) and Article 11(1) of the TTIP.
19 Section 3 Article 10(2), (3) and (4) of the TTIP.

of appellate tribunal will be entitled to retainer fee and payment of another cost connected to their work as a members of appellate tribunal.[20]

The basis for appellate shall be:

1. Incorrect interpretation or application of the applicable law by tribunal;
2. Manifestly incorrect application of the facts, including appreciation of relevant domestic law;
3. Grounds contain in Article 52 of ICSID Convention, in so far they are not covered by previously grounds.[21]

Appellate tribunal can dismiss, modify or reverse an appeal of award.[22] In case of reversing or modifying of an award by appeal tribunal the first instance tribunal shall revise its award in order to reflect the conclusions of appellate tribunal.[23]

2.4 Relationship between Dispute Settlement System in TTIP and Domestic Courts

Relationship between investment court system in TTIP and domestic courts is established on the no u-turn principle i.e. investors can submit their claim at the domestic court or any international court or tribunal, but in the case when investors change their mind and want to use investment court system in TTIP, they must withdraw such pending claim.[24] This does not apply when domestic court give in its decision to claimant interim injunctive or declaratory relief[25] or if the claimant failed by the domestic court because of failure to meet nationally requirements to bring and action under TTIP.[26]

2.5 Multilateral Investment Court System

European Commission realized that proposed investment court system has one important disadvantage – it is established only on bilateral base.

20 Section 3 Article 10(12) and (14) of the TTIP.
21 Section 3 Article 29(1) of the TTIP.
22 Section 3 Article 28(7) and Article 29(2) of the TTIP.
23 Section 3 Article 28(7) of the TTIP.
24 Reading Guide Draft text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP) [online]. *Press Release Database*. European Commission [accessed on 2015-09-16].
25 Section 3 Article 14 of the TTIP.
26 Section 3 Article 14(5) of the TTIP.

Due to that reason the Commission set up greater target – establishment of a whole new multilateral investment court. The TTIP proposal contains a plan of establishing of this multilateral dispute settlement system. In case when a multilateral investment tribunal and/or multilateral appellate mechanism comes into force between parties of TTIP, the relevant parts of the TTIP dispute settlements mechanism shall cease to apply.[27]

This target is unfortunately a distant dream in present days and only time can show, if the EU is capable of convincing the world community about vitality of its plans in the area of investment dispute settlement.

3 Reservation to New EU Approach to ISDS

The new EU approach to ISDS was created in order to end the criticism addressed to ISDS, but it has not solved all problems reproached to ISDS and according to some opinions it created new problems. These several reservations to new EU approach to ISDS will be introduces here:

1. Right to regulate is not enough protected as should be and the risk of "regulatory chill" still remain.[28]
2. Proposal of permanent investment court is in conflict with EU law. There is no legal base for its establishing.[29]
3. Without multilateralization of permanent investment court system, the system of bilateral investment courts is too complicated and expensive.

3.1 Week Protection of Right to Regulate

Explicitly mentioned right to regulate and detailed provision on how it shall work is one of the biggest success of the European Commission. However, the critics state that concept of right to regulate in TTIP cannot protect national government. The "regulatory chill" still remains i.e. national governments will not adopt new regulation in area of protection of environment

27 Section 3 Article 12 of the TTIP.

28 Investment Court System, ISDS in Disguise: 10 Reasons Why the EU's Proposal Doesn't Fix a Flawed System [online]. *Publication Friends of Earth of Europe*. Friends of Earth of Europe [accessed on 2016-02-17].

29 Stellungnahme zur Errichtung eines Investitionsgerichts für TTIP – Vorschlag der Europäischen Kommission vom 16. 09. 2015 und 12. 11. 2015 [online]. *Stelungnahme*. Deutsche Richterbund [accessed on 2016-02-04].

or social protection because they will be afraid of potential claims of international investors.[30]

Previous statement can be challenged. The fact is that the right to regulate in TTIP has opposite problem – it is too broad. The TTIP concept of right to regulate is acceptable with one exception – the provision about subsidies. Possibility of discontinuing or requesting reimbursement is dangerous without any detailed conditions. TTIP contain only one condition - discontinuing and/or requesting reimbursement of subsidy is possible, if it has been ordered by competent authorities of respective state[31].

Such a provision is acceptable in agreement with country with high level of rule of law e.g. with United States, Canada or Japan. Acceptance of this provision in agreement with e.g. Vietnam may lead to discriminatory treatment with EU investors. If ISDS system in TTIP is a model for another agreement, this provision shall be used only in relation with a limited number of countries.

3.2 Non-existence of Legal Base for Establishment of Investment Court

Another strong argument against the new EU approach to ISDS is questioning of legal base for establishment of permanent investment court. The existence of investment court represents the end of *ad hoc* arbitrate tribunal, which was accused of lack of transparency and independence. The new permanent investment court, where members are appointed by states, shall ensure transparent and independent decision process.

The powerful German Magistrates Association ("GMA") rejected the concept of permanent investment court on February 2016. According their statement, the EU proposal enables investment court to decide disputes in the areas of civil law as intellectual property, moveable property shares in companies etc. It disturbs a judicial competence in these areas. According to GMA establishment of investment court system would alter established court system in EU and there is no legal base for this.[32]

30 Investment Court System, ISDS in Disguise: 10 Reasons Why the EU's Proposal Doesn't Fix a Flawed System [online]. *Publication Friends of Earth of Europe*. Friends of Earth of Europe [accessed on 2016-02-17].

31 Section 2 Article 2(4) of the TTIP.

32 Stellungnahme zur Errichtung eines Investitionsgerichts für TTIP – Vorschlag der Europäischen Kommission vom 16. 09. 2015 und 12. 11. 2015 [online]. *Stelungnahme*. Deutsche Richterbund [accessed on 2016-02-04].

On defence of EU proposal it must be said, that investment court shall decide disputes arising only from international agreement.[33] Court shall apply only provisions of agreement and international law. Court shall not apply or use domestic law and in cases where is needed, court must treat the domestic law as a matter of fact and follow prevailing domestic interpretation.[34] The GMAs interpretation of investment court provision in TTIP is too broad and it is inconsistent with explicit provisions of TTIP.

3.3 Complicated and Expensive System

This reservation to new EU approach belongs to the author of this paper. The idea of permanent investment court is not necessarily wrong, but realization only on bilateral level is a bit tricky. How many courts will be established? 20? 30? There are FTAs with Vietnam and Canada, where this permanent investment court shall be too,[35] but this is not the end. There are more potential agreements which can establish another bilateral permanent investment courts, for example FTA EU-Japan.

The system of a large number of bilateral permanent court systems creates a questions. Who will pay it? Is it possible to find so many qualified people with demanded skills and experiences?

The requirements regarding position of member of investment court system are quite extensive, but the salary will not be as good as in private sphere. Proper salaries can provoke criticism of the public and any politic does not risk that. It is almost impossible to convince the satisfactory number of specialist under these circumstances.

If the EU will continue with establishing of new investment courts, it can happen that there will be lack of qualified people for positions of member of investment court. Solution shall be establishment of multilateral permanent investment court but this is long term target and this idea is connected with another problem. How will members of multilateral investment

33 Section 3 Article 13(2) of the TTIP.
34 Section 3 Article 13(3) of the TTIP.
35 Section D Article 8.27 and 8.28 of Comprehensive Economic and Trade Agreement [online]. *European Commission* [accessed on 2016-02-29] and Section 3(4) Article 12 and 13 of EU-Vietnam Free Trade Agreement [online]. *European Commission* [accessed on 2016-02-01].

court be appointed? In bilateral court system is the number of members of court from both countries and from a third state the same.[36] But is it possible in multilateral system? It can work only in case when legal disputes will be solved by divisions composed of 3 members – one from country of a claimant, one from country of a respondent and one from a third state. This would be a solution but is it possible to find enough qualified members of court from every state in the world?

The new EU approach can work only with large difficulties without establishment of multilateral permanent investment court and even after that difficulties still can arise.

4 Conclusion

The new EU approach to ISDS is an extensive topic and it is possible to discuss it for a long time. It was not possible and it was not an intention to analyse it completely in this paper. The aim was to introduce the main changes and some of reservation to it.

From the previous parts of this paper results that European Commission accepts a large number of changes with intention to satisfy restless public. Criticism has not stopped and the question is, if it is possible to satisfy all critics of ISDS when the first and main reservation to this system is its existence. But the call for change was too strong, it could not be ignored and the EU and its Member States had to react. Still, as it was stated, reservations remain. Some of these reservations to new EU approach (e.g. weak protection to Right to regulate) are not legitimate and we can prove them wrong with the text of TTIP. Some of them (e.g. complication connected with establishment of non-specific number of bilateral investment courts) have foundations in reality and only practice will show if is needed to accept changes in the new EU approach.

The biggest obstacle for accepting this approach by world society is its reliance on establishment of its multilateral version. A concept of large number of bilateral permanent investment courts is not vital, but the rest of the states will not accept the concept of multilateral investment court, if they will not see that it can work. That is not possible without establishment of a specific

36 Section 3 Article 9(2) and Section 3 Article 10(2) of the TTIP.

number of bilateral permanent investment courts. This situation looks like a trap from which it will be very hard to escape.

On the other hand, establishment of some kind of investment court looks inevitable because of the strong opposition of EU public against an *ad hoc* arbitration. Due to this, multilateral version of this court would be the most suitable solution.

The new EU approach has a chance to change ISDS system in the future but its failure can happen with the same probability.

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EUROPEAN UNION LAW AND THE INTERNATIONAL INVESTMENT ARBITRATION

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Abstract

This article analyses if and in which direction investment tribunal in intra-EU investment arbitration would apply EU law and if it could at least take it into account by decision making process. It considers three approaches in which EU law and its rules could be relevant. First, EU law is a system based on international treaties, and is therefore a part of international law. Second, in consequence of the doctrine of direct effect, rules of the EU law automatically become a part of legal orders of member states, and from the point of view of investment tribunal these rules are part of the legal order of host state. Third, EU law can be in international investment arbitration relevant as a fact.

Keywords

EU Investment Law; Investment Arbitration; Intra-EU BITs.

1 Introduction

Investment arbitration under intra-EU investment treaties has been a controversial topic for years. The European Commission has repeatedly expressed the view that arbitration clauses in bilateral investment treaties between EU member states are in conflict with EU law and therefore inoperative, while arbitral tribunals have, on several occasions, assumed jurisdiction on the basis of such treaties.

The problem of applicable law in investor-state investment dispute based on bilateral investment treaty ("BIT") belongs to more difficult questions of international investment law. This question has been developed historically and is still a subject of relatively great controversy. In this paper

we explore if and in which direction investment tribunal in intra-union investment arbitration would apply EU law and if it could at least take it into account by decision making process in merits of a dispute.

It is important to analyse whether the arbitration rules generally used, as a general proposition, would accept EU law as applicable law to the arbitration. In line with Article 42.1 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States[1] ("ICSID Convention")[2] an arbitral tribunal shall apply the law agreed by the parties or, in the alternative, the law of the Contracting State party to the investment dispute and such rules of international law as may be applicable. This provision establishes neither an explicit hierarchy between internal and international law nor an independent treaty obligation on behalf of the host State towards the foreign investor, notwithstanding that in those cases where a conflict between international and internal law arises the former shall prevail. In the absence of the parties' explicit agreement, an ICSID tribunal is entitled to apply simultaneously both internal and international law when dealing with the merits of an investment dispute. From the different sets of procedural rules available to conduct investment arbitration, we can find sufficient grounds to advocate for the consideration of EU law as part of the applicable law.[3]

EU law and its rules could be relevant from three views. First, EU law is a system based on international treaties, and therefore is a part of international law. Second, in consequence of doctrine of direct effect, rules of the EU law are automatically becoming a part of legal orders of member states and from the point of view of investment tribunal these rules are part of the legal order of host state. Third, EU law can be in international investment arbitration relevant as a fact.

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1 Convention on the Settlement of Investment Disputes between States and Nationals of Other States [online]. *ICSID* [accessed on 2016-09-14].

2 *"The Tribunal shall decide a dispute in accordance with such rules of Law as may be agreed by the parties. In: the absence of such agreement, the Tribunal shall apply the Law of the Contracting State party to the dispute (including its rules on the conflict of Laws) and such rules of international Law as may be applicable."*

3 VIVES, Francisco J. Pascual. Shaping the EU Investment Regime: Choice of Forum and Applicable Law in International Investment Agreements. *Cuadernos de Derecho Transnacional*. 2014, Vol. 6, No. 1, pp. 269–293.

2 EU Law as a Part of International Law

If we consider the international legal nature of EU law, this was questioned by some authors in connection with its applicability in intra-EU investment arbitration.[4] On the grounds that EU law is *sui generis* legal order, it was argued that it cannot be considered as a part of international law for the purpose of determination of applicable law by investment tribunal, but in international law context it should be treated only as a part of the national legal order of a member state. Although case law of the CJEU may lead to similar conclusions,[5] we need to take into account that neither proclamation of "new legal order" nor unconditional incorporation of EU law into legal orders of member states related to doctrines of direct effect and primacy of EU law release founding treaties of the EU their nature of sources of international law. It is necessary to apprehend primary EU law as a subsystem of international law, although in many respects very specific and highly developed.[6]

In order to analyse the founding treaties of the EU from an international law perspective as constituent instruments of an international organization, we need to define the term rules of the organization. This term means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization. This definition was taken by Article 2(j) of the Vienna Convention on the Law of Treaties.[7] Since the time of the League of Nations attempts have been made to characterize the legal nature of the constituent instruments of international organizations by distinguishing them from other bilateral and multilateral treaties. Nowadays it is widely recognized that the constituent instruments of international organizations do not only have a contractual but also a constitutional character. Considering the dual nature in the constituent instruments,

4 ROE, Thomas; HAPPOLD, Matthew; DINGEMANS, James. *Settlement of Investment Disputes under Energy Charter Treaty*. New York: Cambridge University Press, 2011, pp. 95–97.

5 For example, well known judgment of the Court of Justice of 5 February 1963. NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration. Case 26-62 [online]. In: *EUR-Lex* [accessed on 2016-07-31]

6 BURGSTALLER, Markus. European Law and Investment Treaties. *Journal of International Arbitration*. 2009, Vol. 26, No. 2, p. 192.

7 Vienna Convention on the Law of Treaties of 23 May 1969 [online]. *United Nations Treaty Collection* [accessed on 2016-09-14].

it is submitted that neither the contractual law of treaties nor international institutional law can satisfactorily address the phenomenon of international organizations: they will have to be employed in combination. From the perspective of the law of treaties, the constituent instruments are primarily contracts between sovereign states, creating substantive rights and obligations as in a horizontal and international dimension. On the other hand, an institutional or constitutional law perspective will clarify the extent to which this contract can equally be seen as functioning as a constitution: it establishes a new legal person with its own internal legal order, which binds the organization and its members in their vertical relations.[8]

Whereas the identification of founding treaties as a source of international law for the purposes of investment arbitration could be considered relatively clear, more problematic is the categorisation of secondary sources of EU law. They are from an international law perspective acts of international organizations, which also fall within the term secondary law of the international organization because they emanate from the constituent instruments as the primary source of rights and obligations within the legal order of the organization. The secondary law of international organizations may be comprised of acts with diverse denominations – ranging from resolutions, decisions, recommendations, declarations, guidelines, regulations, directives, or standards – made by different organs and addressed to member states, organs or individuals. Opinions on the legal nature of acts of international organisations are in the doctrine of international law not unified and are even more controversial than that of their constituent instruments.

On this fact the International Law Commission pointed to Draft Articles on the Responsibility of International Organizations, where it identified 4 theories, which ascribe to acts of international organizations more or less different international law effects.[9] The first theory considers acts of organizations as a part of international law, due to their contractual origins and the fact that they often regulate relations between states. Conversely, the sec-

8 AHLBORN, Christiane. *The Rules of International Organizations and the Law of International Responsibility. ACIL Research Paper No 2011-03 (SHARES Series)* [online]. p. 8 [accessed on 2016-09-14].

9 Draft Articles on the Responsibility of International Organizations 2011 [online]. *International Law Commission*, p. 32 [accessed on 2016-09-14].

ond theory does not consider them as a part of international law, because although international organizations are established by treaties or other instruments governed by international law, the internal law of the organization, once it has come into existence, does not form part of international law. The third approach, flowing from case law of the CJEU, considers acts of some integration organizations as a special case of legal order different from international law. The last theory distinguishes acts of international organizations in accordance to their source and subject matter and exclude, for instance, certain administrative regulations from the domain of international law. The ICJ granted international legal nature to acts of permanent and also ad hoc organs established in the framework of UN. The typical reasoning is that these acts derive their binding and legal force from international treaties establishing certain international organizations and giving their organs the right to issue these acts. Open questions still remain, if all of these acts or other rules of international organizations and all of the obligations which result from them create obligations in international law. Because of diversity of acts of international organizations was neither International Law Commission able to provide a clear answer.

The most complex answer to the applicability of EU law in investment arbitration brought arbitration tribunal in *Electrabel v. Hungary*,[10] an intra-EU investment dispute pursuant to the Energy Charter Treaty. The Tribunal stated that EU law is a system based on international treaties and that it is necessary to consider EU law as a part of international law as a whole. The Tribunal expressly refused to distinguish between founding treaties and other sources of EU law (*droit derivé*) and stated that all of rules of EU law are part of regional system of international law and therefore have international legal character. In this case under advisement was consideration of possible international legal effects of the Commission's decision issued in proceedings in accordance with Article 88(2) of the TEC (nowadays Article 108(2) of the TFEU). Commission decided that certain obligations defined in long-term treaties on sale of electricity concluded between Hungary and some electricity producers were not permitted state assistance under Article 87(1)

10 Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, ICSID Case No. ARB/07/19, Electrabel S.A. v. Republic of Hungary [online]. In: *italaw* [accessed on 2016-09-14] ("Electrabel v. Hungary").

of the TEC (nowadays Article 107(1) of the TFEU). In the Tribunal's view, it would be artificial to categorise, as an international legal rule, Article 87 of the TEC (precluding "any aid granted by a Member State or through State resources…incompatible with the internal market"), and refuse that same status to the necessary implementation of that international rule by the non-national organ created by the same EU treaty. For this international rule to be translated into legal obligations binding on EU Member States, decisions have to be taken by the European Commission.[11] However, this award relatively clearly indicates that between rules of primary and secondary EU law from the point of view of their applicability in investment arbitration would not be a difference; it is a question if this reasoning would be applicable on other rules of EU.

3 EU Law as a Part of National Legal Order

Besides its nature as a source of international law, EU law and its rules are also a part of the legal order of host state. The real effects of EU law in investment arbitration remain relatively unclear - in this approach. It is important to mention that in many of the arbitral awards EU law is not treated uniformly. Some of tribunals apply the law of host states as a part of applicable law, others consider it as a fact, and in some awards it is completely disregarded. Another uncertainty is connected with the question of whether EU law is part of the law of the host state at the same time excludes possibility to see it as part of international law. It was obviously the position of the tribunal in *AES Summit v. Hungary*.[12] The Tribunal stated that EU competition law regime has a dual nature: on the one hand, it is an international law regime. On the other hand, once introduced in the national legal orders, it is part of these legal orders. After that, without closer explanation, the tribunal alleged that these rules will be considered as a fact, taking into account that a state may not invoke its domestic law as an excuse for alleged breaches of its international obligations.[13] The Tribunal came to a different

11 Electrabel v. Hungary, para. 4.123.

12 Award of 23 September 2010, ICSID Case No. ARB/07/22, AES Summit Generation Limited and AES-Tisza Erömü v. The Republic of Hungary [online]. In: *italaw* [accessed on 2016-09-14] ("AES Summit v. Hungary").

13 AES Summit v. Hungary, para. 7. 6. 6.

conclusion in *Electrabel v. Hungary.* According to this award, the fact that EU law is also applied within the national legal order of an EU Member State does not deprive it of its international legal nature. EU law remains international law; EU law is not limited to a treaty but includes a body of law flowing from the EU Treaties.[14]

4 EU Law as a Fact

Requirements of the EU law can have in investment arbitration relevance also as a fact, which tribunal considers at appraisal of member state's acting. For example, if the actions of a member state following fulfilment of requirements of EU law could be considered as rational and appropriate in the light of fair and equitable treatment standard, or if could arise at the side of investor certain legitimate expectations, which are included in protection of bilateral investment treaty. In this way, investment tribunals approached EU law by considering acting of candidate states in the context of their preparations to join the EU. In partial award in *Saluka v. Czech Republic*[15] the Tribunal shortly discussed the influence of the expected entry of the Czech Republic into EU on legitimacy of tightening the banking regulatory regime from the side of Czech National Bank ("CNB"). The Tribunal stated that it was the CNB's declared intention to bring its regulatory regime into line with the norms in the EU. Therefore, this development was foreseeable from the investor's point of view.

In *Micula v. Romania*[16] the circumstances regarding the entry to the EU by the host state were crucial considerations. The dispute arose from Romania's introduction and subsequent revocation of certain economic incentives for claimants, where it was claimed to be in breach of BIT between Romania and Sweden. However, revocation of these incentives was one of the conditions for Romania's entry into the EU. In this case EU law was also in a role of relevant fact. The Tribunal found that, factually, the general context of EU accession must be taken into account when

14 Electrabel v. Hungary, para. 4.124.

15 Partial Award of 17 March 2006, Saluka Investments B.V. v. The Czech Republic [online]. In: *italaw* [accessed on 2016-09-14].

16 Final Award of 11 December 2013, ICSID Case No. ARB/05/20, Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmil S.R. L. and S.C. Multipack S.R. L. v. Romania [online]. In*: italaw* [accessed on 2016-09-14] ("Micula v. Romania").

interpreting the BIT. According to the tribunal, the overall circumstances of EU accession may play a role in determining whether Romania has breached some of its obligations under the BIT.[17] It means that the overall context of EU accession in general and the pertinent provisions of EU law in particular may be relevant to the determination of whether, *inter alia*, Romania's actions were reasonable in light of all the circumstances, or whether claimants' expectations were legitimate.[18] It is necessary to mention that although in the framework of consideration of merits in a dispute tribunal stated that revocation of incentives by Romania was in the light of accession negotiations with EU from relevant part adequate to acting following rational political goals, it did not change the tribunal's decision that Romania breached the rights of claimants for fair and equitable treatment in according to BIT.

5 Conclusion

If the actions of a member state will be claimed in investment arbitration to be the result of implementing EU law, neither theory nor practice give a completely clear answer as to whether the tribunal will consider EU law as part of the applicable law. It is not clear whether the tribunal will consider EU law in its entirety as a source of international legal character or in which way the tribunal will apply EU law. Furthermore, it is not clear in cases of conflict whether the tribunal will prefer the obligations of member states under BIT or EU law.

Theoretically, obligations under EU law would on the level of applicable law outbalance provisions of BITs. However, if we take into consideration different perspective of investment tribunal on the one side and CJEU on the other side, in practice it is highly probable that the approach of the investment tribunal to the application of EU law and way of its application will be different from the approach of the CJEU. Arbitral tribunal may refuse full effect of EU law rules by not considering EU law as a relevant source of law, by denying the existence of collision between EU law and BIT, or simply by preferring BIT in a case of collision. In practice

17 Micula v. Romania, para. 327.
18 Micula v. Romania, para. 328.

of investment tribunals comprising questions of EU law we can identify signs of all three approaches, which lead in result to preferring of BITs provisions before obligations of member states arising from EU law. Member states could in this case face a real conflict of their obligations, when they have to decide whether to respect obligations under BIT or under EU law, which could be in conflict with arbitral award.

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THE ENERGY CHARTER TREATY: RENEWABLE ENERGY DISPUTES IN LIGHT OF THE CHARANNE CASE

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Abstract

In order to reach Energy targets set by the EU and to attract foreign investments in energy sector, Member States of the EU adopted various measures such as direct or indirect support lowering the costs of capital. Since new technologies significantly reduced the costs of development, Member States adopted legal reforms of their renewable legislations. The Energy Charter Treaty provides a multilateral framework for energy cooperation, which is unique under international law. It is designed to promote energy security through the operation of more open and competitive energy markets. In 2015 renewable disputes under the Energy Charter Treaty reached 32 cases. This paper focuses on investment protection provisions of the Energy Charter Treaty in light of the Charanne case, the first published award regarding investment in the sector of renewable energy under the Energy Charter Treaty rendered on 21 January 2016.

Keywords

Renewables; Energy Law; Energy Charter Treaty; Dispute Settlement; Investment Law; EU.

1 Introduction

While international community at the 2015 UN Climate Change Conference in Paris launched a new era of a global transition to low-carbon economy and sustainable energy model, the EU has been heading this direction for years.

Directive 2001/77/EC on the Promotion of Electricity Produced From Renewable Energy Sources in the Internal Electricity Market[1] and Directive 2003/30/EC on the Promotion of the Use of Biofuels or Other Renewable Fuels for Transport[2] set the legal bases for the increasing role of renewable energy sources. In 2007 the European Council adopted ambitious energy and climate change objectives for 2020 – to reduce greenhouse gas emissions by 20 %, to increase the share of renewable energy to 20 % and to make 20 % improvement in energy efficiency.[3] Subsequently these objectives have been included in Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the Promotion of the Use of Energy From Renewable Sources.[4]

Increase in the share of renewable energy has its environmental reasons as it directly leads to reduction of greenhouse gas emissions and also improves European energy security. However, achievement of the above mentioned goals required a significant deployment of private investments. Furthermore, renewable energy was, at that time, characterised by lower operating costs, but proportionately higher capital costs. In order to make renewable energy more attractive, EU Member States adopted various measures such as direct or indirect support lowering the costs of capital.[5]

Since new technologies significantly reduced the costs of development, support schemes set by Member States became very attractive.

As a result of this development, solar energy framework in many European countries including Spain became unsustainable and led to rising of electricity

1 Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the Promotion of Electricity Produced from Renewable Energy Sources in the Internal Electricity Market [online]. In: *EUR-Lex* [accessed on 2016-09-14].

2 Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the Promotion of the Use of Biofuels or Other Renewable Fuels for Transport Market [online]. In: *EUR-Lex* [accessed on 2016-09-14].

3 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Energy 2020 A Strategy For Competitive, Sustainable and Secure Energy, COM(2010) 639 final, 10. 11. 2010 [online]. In: *EUR-Lex* [accessed on 2016-09-14].

4 Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC Market [online]. In: *EUR-Lex* [accessed on 2016-09-14].

5 HEFFRON, Raphael. *Energy Law: An Introduction.* London: Springer, 2015, p. 51.

prices. In 2010 Spain adopted Royal Decree 1565/2010 and Royal Decree Law 12/2010, which modified its regulatory framework for electricity from solar photovoltaic energy.[6]

This paper is focused on the Energy Charter Treaty[7] (hereinafter referred to as "ECT"), as an instrument of international law that provides investors with investment protection, in the current renewable energy disputes. A special attention is devoted to the first published award regarding investment in the sector of renewable energy under the ECT rendered on 21 January 2016, *Charanne v. Spain*[8] and its consequences.

2 Energy Charter Treaty

2.1 Object and Purpose

The ECT is a multilateral sector-specific international treaty signed in 1994, which entered into force in 1998, acceded by fifty-two states and two international organizations (EU, EURATOM).[9]

The ECT provides a unique legal framework covering the following areas: protection and promotion of foreign investments, trade, transit and energy efficiency. The ECT provides resolution of disputes between Contracting States, and - in the case of investments - between investors and host states.[10]

The fundamental added value of the ECT is to strengthen the rule of law in the energy sector by promoting regulatory stability and predictable legal environment. Energy investments are usually of a long-term character and require high capital costs.

The ECT provides both substantial rights and remedy for compensation in case those are unlawfully breached, represented by an investor-state

6 LOSANA, Ana Isabel Mendoza. Cuts to Renewable Energies under RD 1565/2010, RD 1614/2010 and RDL 14/2010 [online]. *Gomez-Acebo & Pombo Legal Analysis* [accessed on 2016-09-14].

7 Energy Charter Treaty of 17 December 1994 [online]. *International Energy Charter* [accessed on 2016-09-14].

8 Award of 21 January 2016, SCC Case No. No. 062/2012, Charanne and Construction Investments v. Spain [online]. *International Energy Charter* [accessed on 2016-09-14] ("Charanne v. Spain").

9 The Energy Charter Treaty [online]. *International Energy Charter* [accessed on 2016-09-14].

10 *The Energy Charter Treaty: A Reader's Guide* [online]. Brussels: Energy Charter Secretariat, 2002 [accessed on 2016-09-14].

dispute settlement mechanism. Instead of relying on their home states to espouse their claims through diplomatic protection, the investors are provided with a direct and effective dispute settlement mechanism.[11]

It shall be emphasised that this paper assesses only renewable disputes under the ECT.

All ECT renewable disputes are of intra-EU character, in other words, disputes between investor established in a Member State of the EU against another Member State of the EU.[12]

2.2 Substantive Protection

Part III of the ECT provides investors with substantive investment protection of their investments. The ECT follows WTO principles of national treatment and most favoured nation, and this is accompanied by fair and equitable treatment guarantee ("FET") and most constant protection and security.[13] Moreover, the ECT provides investors with protection against unreasonable or discriminatory measures impairing management, maintenance, use, enjoyment or disposal of their investment. According to Article 13 of the ECT, direct or indirect expropriation of an investment shall only take place against prompt, effective and adequate compensation, shall be carried out on a non-discriminatory basis, under due process and in public interest.[14]

2.3 Renewable Energy Disputes under the ECT

Only in 2015 renewable disputes under the ECT reached 32 cases that all follow the same pattern. Investors challenge legal reforms adopted by Member States of the EU affecting the renewable energy sector. However, every State applied different policy in order to attract private investments and afterwards different policy in order to limit the tariff deficit and to lower the rising prices of electricity. This chapter brings an overview of the measures imposed by the most frequently sued Member States.

11 SORNARAJAH, M. *The International Law on Foreign Investment*. 3rd ed. New York: Cambridge University Press, 2010, p. 36.

12 List of all Investment Dispute Settlement Cases [online]. *International Energy Charter* [accessed on 2016-09-14].

13 SCHREUER, Christoph H. Selected Standards of Treatment Available under the Energy Charter Treaty. In: *Investment Protection and Energy Charter Treaty* [online]. JurisNet, 2008 [accessed on 2016-09-14].

14 *Expropriation Regime under the Energy Charter Treaty* [online]. Brussels: Energy Charter Secretariat, 2012 [accessed on 2016-09-14].

2.3.1 Spain

In 2010 Spain enacted Royal Decree 1565/2010 and Royal decree Law 14/2010, legislation having *inter alia* following consequences: it removed incentives for PV installations operating under classification made under the previous regulation, limited eligible operating hours or established a toll for the use of transport and distribution networks.[15] In April 2016 the Energy Charter Secretariat registered 26 investment arbitrations against Spain.[16]

2.3.2 Czech Republic

Investors have targeted the amendments to the Act No. 180/2005 Coll., on Subventions of Producing Energy of Renewable Resources. The amendment to the Act. No. 180/2005 retroactively imposed a tax/levy on solar PV plants producing over 30 kW and put into operation in 2009 - 2010. The amendment introduced a 26% tax on feed-in tariff support and a 28% levy for green bonuses.[17] In 2013, the Czech Republic adopted additional measures, including *inter alia* the end of feed-in tariff support for all types of renewable energy effective January 2014.[18] In April 2016 the Energy Charter Secretariat registered 7 investment arbitrations against the Czech Republic.[19]

2.3.3 Italy

Italian legal reform in 2011 included *inter alia* reductions of feed-in-tariffs and the end of incentives granted to photovoltaic plants located on agricultural land.[20] In April 2016 the Energy Charter Secretariat registered 6 investment arbitrations against Italy.[21]

15 Charanne v. Spain; International Remedies for Foreign Investors in Europe's Renewable Energy Sector [online]. *Jones Day Publications* [accessed on 2016-09-14]; LOSANA, Ana Isabel Mendoza. Cuts to Renewable Energies Under RD 1565/2010, RD 1614/2010 and RDL 14/2010 [online]. *Gomez-Acebo & Pombo Legal Analysis* [accessed on 2016-09-14].

16 List of all Investment Dispute Settlement Cases [online]. *International Energy Charter* [accessed on 2016-09-14].

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19 List of all Investment Dispute Settlement Cases [online]. *International Energy Charter* [accessed on 2016-09-14].

20 International Remedies for Foreign Investors in Europe's Renewable Energy Sector [online]. *Jones Day Publications* [accessed on 2016-09-14].

21 List of all Investment Dispute Settlement Cases [online]. *International Energy Charter* [accessed on 2016-09-14].

2.4 Intra-EU Disputes under the ECT

The Energy Charter Secretariat has registered 48 intra-EU disputes. In seven cases the final awards have been rendered.

As to April 2016 tribunals found that they had jurisdiction in every intra-EU dispute. Tribunals dismissed claimant's claims in four proceedings: *Electrabel v. Hungary*,[22] *AES v. Hungary*,[23] *Mercuria Energy Group v. Poland*[24] and *Charanne v. Spain*.[25] Only in the *EDF v. Hungary* the Tribunal found violation of the ECT.[26] Two disputes were settled by settlements embodied in the awards: *Vattenfall v. Germany*[27] and *Slovak Gas v. Slovakia*.[28]

The Table reveals growing number of intra-EU disputes:

Arbitral intra-EU proceedings under the ECT:	
2001–2012	6 disputes
2013	15 disputes
2014	6 disputes
2015	19 disputes

3 Charanne v. Spain

3.1 Facts of the Case

Charanne, a company registered in the Netherlands and Construction Investments, a company registered in Luxembourg ("Claimants") hold an interest in the Grupo T-Solar Global S.A. through an entity called Grupo

22 Award of 25 November 2015, ICSID Case No. ARB/07/19, Electrabel S.A. v. Republic of Hungary [online]. *International Energy Charter* [accessed on 2016-09-14].

23 Award of 23 September 2010, ICSID Case No. ARB/07/22, AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary [online]. *International Energy Charter* [accessed on 2016-09-14].

24 Award of December 2011, SCC Case, Mercuria Energy Group Ltd. v. Republic of Poland [online]. *International Energy Charter* [accessed on 2016-09-14].

25 Charanne v. Spain.

26 Award of 4 December 2012, EDF International S.A. v. Republic of Hungary [online]. *International Energy Charter* [accessed on 2016-09-14].

27 Award of 11 March 2011, ICSID Case No. ARB/09/6, Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG v. Federal Republic of Germany [online]. *International Energy Charter* [accessed on 2016-09-14].

28 Award of 19 March 2013, ICSID Case No. ARB/12/7, Slovak Gas Holding BV et al. v. Slovak Republic [online]. *International Energy Charter* [accessed on 2016-09-14].

Isolux Corsan Concesiones S.L. Grupo T-Solar generates and commercializes electric power through 34 PV installations.[29]

In order to attract foreign investments in solar photovoltaic energy production, Spain set a regulatory framework for electricity produced by photovoltaic installations, encompassing incentive payments and a system of bonuses and tariffs, introduced by the *Real Decreto* 661/2007 and *Real Decreto* 1578/2008.[30]

In reaction to above-mentioned development in the photovoltaic sector Spain enacted the *Real Decreto* 1565/2010 followed by the *Real Decreto Ley* 14/2010.[31] This reform challenged by the Claimants removed all incentives payments for PV installations from the 26th year of operation (later increased to 29th year and in 2011 increased to 31st year), added technical requirements, set a limit on the number of operational hours eligible for remuneration and established a toll of 0,5 €/MWh for the use of the transport and distribution networks.[32]

The Claimants challenged the above-mentioned legal reform in 2012 by filling their request for arbitration with the Arbitration Institute of the SCC, pursuant to Article 26 of the ECT.

3.2 Jurisdiction: Intra-EU Character of the Dispute

The Tribunal faced the question whether intra-EU nature of the dispute can affect its jurisdiction.

First, Spain claimed that both states where Claimants were registered and state where the investment was made were all parties to the Regional Organization for Economic Integration – the EU. Moreover, EU itself

29 PILGRIM, Tammi; TORTEROLA, Ignacio. Charanne B.V. and Construction investments S.A.R. L. v. The Kingdom of Spain (SCC Case No. 062/2012) Award – Case Report [online]. *International Arbitration Case Law*. School of International Arbitration, Queen Mary, University of London [accessed on 2016-09-14].

30 Charanne v. Spain, para. 113, paras. 129–130.

31 LOSANA, Ana Isabel Mendoza. Cuts to Renewable Energies under RD 1565/2010, RD 1614/2010 and RDL 14/2010 [online]. *Gomez-Acebo & Pombo Legal Analysis* [accessed on 2016-09-14].

32 PILGRIM, Tammi; TORTEROLA, Ignacio. Charanne B.V. and Construction investments S.A.R. L. v. The Kingdom of Spain (SCC Case No. 062/2012) Award – Case Report [online]. *International Arbitration Case Law*. School of International Arbitration, Queen Mary, University of London [accessed on 2016-09-14]; Charanne v. Spain, paras. 150–153, 159–164.

is a member of the ECT. Spain argued that the requirement of plurality territories, set by Article 26 of the ECT, was not met when the EU investor made the investment in the territory of the EU.

Second, Spain submitted that Articles 7 and 27 of the ECT read in conjunction with Article 267 of the TFEU create an implied disconnection clause.

Third, Spain argued that Article 344 of the TFEU prohibited Member States from resolving conflicts involving EU law in international arbitration.[33]

All Spain's objections were dismissed and the Tribunal found that it had jurisdiction. The Tribunal noted that Member States of the EU did not loose their character as states. Moreover, in the present case, the Claimants neither file a claim against the EU, nor claimed any wrongful act committed by the EU.[34] With respect to the implied disconnection clause, the Tribunal found that there was no provision of the EU law that would prevent investors from resolution of an investment disputes between EU investors and another Member States of the EU via arbitration.[35] With regard to the incompatibility of the ISDS with the EU law, the Tribunal found that Article 344 of the TFEU was intended to ensure uniform and proper interpretation of the EU law by the Court of Justice. Referring to the *Electrabel v. Hungary*[36] Tribunal pointed out that the EU by its accession to the ECT accepted the possibility of the investor-state dispute settlement mechanism under Article 26 of the ECT.[37]

3.3 Merits: Existence of Legitimate Expectations Pursuant to Article 10(1) of the ECT

First, the Tribunal confirmed that the obligation to accord fair and equitable treatment under the ECT includes the protection of legitimate expectations.[38] However, it is necessary to distinguish between expectations deriving from

33 Charanne v. Spain, paras. 217, 405–408.
34 *Ibid.,* paras. 429–431.
35 Charanne v. Spain, paras. 436–439; FEIRA-TINTA, Monica. First Investor-State Arbitration Award in the Spanish Renewables Cases Handed Down in Favour of Spain. *20 Essex Street Bulletin* [online]. [accessed on 2016-09-14].
36 FECÁK, Tomáš. *Mezinárodní dohody o ochraně investic a právo Evropské unie.* Praha: Wolters Kluwer, 2015, p. 441.
37 Charanne v. Spain, paras. 444–445.
38 *Ibid.,* para. 486.

specific commitments and from the host State's legal system.[39] The Tribunal concluded that neither the *Real Decreto* 661/2007, nor *Real Decreto* 1578/2008 can be seen as specific commitments from the host State due to their general character. A specific commitment needs to be given specifically to a particular investor.[40] An example of a specific commitment to the Claimants could have taken the form of a stabilization clause or a declaration for the benefit of the investors that the regulatory framework would not be modified.[41]

According to the Tribunal, in the absence of a specific commitment on the part of the State an investor cannot have legitimate expectations that existing legislation will not be modified in order to respond to changing circumstances.[42]

However, it does not mean that the legislation can be modified arbitrarily, irrationally or disproportionately.[43] The Tribunal found that the *Real Decreto* 1565/2010 and the *Real Decreto Ley* 14/2010 were based on objective criteria, were not arbitrary and their occurrence was not unforeseeable and did not alter the essence of the previous norms. In addition, the new legislation was enacted in the public interest intended to limit the tariff deficit and to control the rising cost of electricity to the Spanish consumers.[44]

4 Conclusion

4.1 Impact of the Charanne v. Spain Case on Renewable Energy Disputes

The author is of the opinion that from a broader perspective the *Charanne v. Spain* case has only limited effect on the on-going arbitral proceedings regarding renewable energy disputes for the following reasons.

39 Charanne v. Spain, para. 494.
40 *Ibid.,* paras. 491–499.
41 Charanne v. Spain, para. 490; PILGRIM, Tammi; TORTEROLA, Ignacio. Charanne B.V. and Construction investments S.A.R. L. v. The Kingdom of Spain (SCC Case No. 062/2012) Award – Case Report [online]. *International Arbitration Case Law*. School of International Arbitration, Queen Mary, University of London [accessed on 2016-09-14].
42 Charanne v. Spain, paras. 499–510; LOSANA, Ana Isabel Mendoza. Cuts to Renewable Energies Under RD 1565/2010, RD 1614/2010 and RDL 14/2010 [online]. *Gomez-Acebo & Pombo Legal Analysis* [accessed on 2016-09-14].
43 Charanne v. Spain, para. 514.
44 *Ibid.,* para. 535.

Disputes against the Czech Republic and other central/east European Member States of the EU have a dual nature. Due to the (still) existing BITs between most of the western EU countries and the Czech Republic (or other central/east European Member States), investors invoke both ECT and particular bilateral investment treaties. In other words, the conclusions reached by the tribunal in *Charanne v. Spain* case have only a partial effect on the disputes against the Czech Republic because the extent of guarantees provided in the ECT differs from the extent of guarantees provided in the BITs.

Investors targeted only the first wave of the Spain's legal reform of the renewable energy sector in the *Charanne v. Spain* case. Following legal acts enacted since 2013, such as Royal Decree Law No. 9/2013 have not been challenged and the Tribunal's findings in the *Charanne v. Spain* case do not pretend to prejudice in any way the findings of another tribunals analysing these following legal acts, as has been explicitly declared by the Tribunal in the award.[45]

Reforms of renewable energy sector differ in each and every Member State of the EU. Thus, their compatibility with the ECT or particular BITs has to be necessarily assessed on the case-by-case basis.

4.2 Lesson Learned

4.2.1 Message to the Commission

There is a constant legal debate (reopened with every Commission's *amicus curiae* submitted in connection with renewable energy disputes) regarding the applicability of the ECT on the intra-EU disputes. The EU argues that the intra-EU disputes shall be subject to the EU law and thus, investment tribunals do not have jurisdiction and even if they have jurisdiction the claims shall be inadmissible. The Tribunal strongly dismissed this jurisdictional objection and declared its jurisdiction.

4.2.2 Message to Investors

The important message to investors relates to the applicability of the ECT on intra-EU disputes. The paper reveals the significant number of initiated arbitrations based on the ECT between the investors established in a Member State of the EU against another Member State of the EU. There

45 Charanne v. Spain, para. 542.

is no bilateral investment agreement between the investor's state and the host state in the most of the renewable energy disputes. As a result of the lack of investment protection based on BITs, the ECT is the only available treaty providing investors with both substantive and procedural guarantees.

4.2.3 Message to States

In light of the rising criticism of the current system of investment law[46] the *Charanne v. Spain* case affirms that the investment law does not necessarily excessively limits state's regulatory powers. The Tribunal concluded that states might proportionately exercise their right to regulate and to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances and the public interest.[47]

Appendix

Renewable disputes against Spain under the ECT (April 2016):[48]

Alten Renewable Energy Developments BV v. Spain

Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Spain (ICSID Case No. ARB/16/4)

Landesbank Baden-Württemberg and others v. Spain (ICSID Case No. ARB/15/45)

Watkins Holdings S.à r. l. and others v. Spain (ICSID Case No. ARB/15/44)

Hydro Energy 1 S.à r. l. and Hydroxana Sweden AB v. Spain (ICSID Case No. ARB/15/42)

OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Spain (ICSID Case No ARB/15/36)

SolEs Badajoz GmbH v. Spain (ICSID Case No. ARB/15/38)

E.ON SE, E.ON Finanzanlagen GmbH and E.ON Iberia Holding GmbH v. Spain (ICSID Case No. ARB/15/35)

46 Via negotiations of the Transatlantic Trade and Investment Partnership.

47 PILGRIM, Tammi; TORTEROLA, Ignacio. Charanne B.V. and Construction investments S.A.R. L. v. The Kingdom of Spain (SCC Case No. 062/2012) Award – Case Report [online]. *International Arbitration Case Law*. School of International Arbitration, Queen Mary, University of London [accessed on 2016-09-14]; Charanne v. Spain, para. 500.

48 List of all Investment Dispute Settlement Cases [online]. *International Energy Charter* [accessed on 2016-09-14].

Cavalum SGPS, S.A. v. Spain (ICSID Case No. ARB/15/34)

JGC Corporation v. Spain (ICSID Case No. ARB/15/25)

KS Invest GmbH and TLS Invest GmbH v. Spain (ICSID Case No. ARB/15/25)

Matthias Kruck and others v. Spain (ICSID Case No. ARB/15/23)

Cube Infrastructure Fund SICAV and others v. Spain (ICSID Case No. ARB/15/20)

BayWa r. e. Renewable Energy GmbH and BayWa r. e. Asset Holding GmbH v. Spain (ICSID Case No. ARB/15/16)

9REN Holding S.a.r. l v. Spain (ICSID Case No. ARB/15/15)

STEAG GmbH v. Spain (ICSID Case No. ABR/15/4)

Stadtwerke München GmbH, RWE Innogy GmbH et al. v. Spain (ICSID Case No. ARB/15/1)

RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Spain (ICSID Case No. ARB/14/34)

RENERGY S.à.r. l. v. Spain (ICSID Case No. ABR/14/18)

InfraRed Environmental Infrastructure GP ltd. et al v. Spain (ICSID Case No. ABR/14/12)

NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Spain (ICSID Case No. ABR/14/11)

Masdar Solar & Wind Cooperatief UA v. Spain (ICSID Case No. ABR/14/01)

Eiser Infrastructure Limited and Energia Solar Luxembourg S.à.r. l. v. Spain (ICSID Case No. ARB/13/36)

Antin Infrastructure Services Luxembourg S.à.r. l. and Antin Energia, Termosolar B.V. v. Spain (ICSID Case No. ARB/13/31)

RREEF Infrastructure Limited and RREEF Pan-European Infrastructure Two Lux S.à.r. l. v. Spain (ICSID Case No. ARB/13/30)

CSP Equity Investment S.à.r. l. v. Spain

Charanne (the Netherlands) and Construction v. Spain

The PV Investors v. Spain, Isolux Infrastructure Netherlands B.V. v. Spain

Renewable disputes against Czech Republic under the ECT (April 2016):[49]

Antaris Solar and Dr. Michael Göde v. Czech Republic

Natland Investment Group NV, Natland Group Limited, G.I.H.G. Limited, and RadianceEnergy Holding S.A.R. L. v. Czech Republic

Voltaic Network GmbH v. Czech Republic

Mr. Jürgen Wirtgen, Mr. Stefan Wirtgen, and JSW Solar (zwei) v. Czech Republic

ICW Europe Investments Limited v. Czech Republic

Photovoltaik Knopf Betriebs-GmbH v. Czech Republic

WA Investments-Europa Nova Limited v. Czech Republic

Renewable disputes against Italy under the ECT (April 2016):[50]

Eskosol S.p.A. in liquidazione v. Italian Republic (ICSID Case No. ARB/15/50)

Belenergia S.A. v. Italian Republic (ICSID Case No. ARB/15/40)

Blusun SA, Jean-Pierre Lecorcier and Nichael Stein v. Italy (ICSID Case No. ABR/14/03)

Silver Ridge Power BV v. Italian Republic (ICSID Case No. ARB/15/37)

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ONLINE DISPUTE RESOLUTION

PRACTICAL IMPACTS OF THE EU REGULATION ON ONLINE DISPUTE RESOLUTION FOR CONSUMER DISPUTES

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Abstract

Only 18% of consumers in the EU have used the Internet to purchase a product abroad in 2014. The main reason is that they do not feel confident in online shopping. One of the key factors is lack of dispute resolution mechanisms which would be efficient and which would offer consumers proper mechanisms to deal with their dispute online in a fast way. The European Commission understood the potential of Online Dispute Resolution (ODR) which is able to offer consumers an efficient solution to solve their dispute and it is trying to foster cross-border e-commerce by adopting the Regulation on Online Dispute Resolution for Consumer Disputes (which establishes ODR platform) and the Directive on Alternative Dispute Resolution for Consumer Disputes. The main aim of the article is to present aspects arising from using an ODR platform, which builds on a previous theoretical work of the author. The purpose of the article is to analyse impacts which arise from such dispute resolution and to discuss particular phases connected with the utilization of the ODR platform. The ODR platform is fully operational and accessible to consumers from 15 February 2016.

Keywords

Online Dispute Resolution; Consumer; ODR Platform; Alternative Dispute Resolution; ADR Entity.

1 Introduction

It was repeatedly stated that the fragmentation of an internal market within the EU prevents it from further boost of cross-border electronic commerce especially in the field of consumer transactions. The heterogeneous availability of efficient, quick, uncomplicated and cheap possibilities of resolving the disputes concerning the sale of goods and providing the services across the Member States has constituted fundamental obstacles to electronic commerce growth which further limits the quality of services offered to consumers by trades throughout the EU.[1]

"Consumers' determination to seek redress depends largely on the value of the claim."[2] Thus, if the disputed value of the goods or service is within hundreds of euros, it is not probable that a consumer would use judicial redress to solve the dispute because of the complexity of court litigation, cost and time inefficiency.[3] The overall loss reported by consumers in case of low-value cross-border disputes is estimated at 0.4% of EU GDP.[4]

To eliminate such phenomenon, the EU understood the potential of Alternative Dispute Resolution ("ADR") and especially the potential of Online Dispute Resolution ("ODR") in consumer disputes. A Directive on Consumer ADR[5]

1 Recital 4 of the Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on Consumer ODR) [online]. In: *EUR-Lex* [accessed on 2016-02-25] ("Regulation on ODR").

2 Impact Assessment on Proposal for a Directive of the European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes (Directive on Consumer ADR) and Proposal for a Regulation of the European Parliament and of the Council on Online Dispute Resolution for Consumer Disputes (Regulation on Consumer ODR) [online]. SEC(2011) 1408 final, p. 5 [accessed on 2016-02-21] ("Impact Assessment").

3 That means that only 2% of consumers were willing to bring such complaint to their national court. Such a low number is also supported by the fact that in some states (e.g. Italy or Portugal) the first instance judicial decision can be issued in more than 900 days. See Impact Assessment, p. 13. It is also necessary to state that 46% of consumers do not act when something goes wrong with the purchase, because they were not motivated anyhow by accessible solutions (before the ODR platform was designed) to solve their disputes. See Impact Assessment, p. 93.

4 Impact Assessment, p. 5.

5 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR) [online]. In: *EUR-Lex* [accessed on 2016-02-25] ("Directive on Consumer ADR").

was by most of the states implemented in mid-2015.[6] It was expanded by the Regulation on ODR to create a pan-European ODR platform as the main point to be accessed by consumers dealing with electronic commerce (e-commerce) low-value high-volume disputes. The main aim of such legal regime is to offer an accessible and efficient way to consumers to deal with their e-commerce disputes and by such dispute settlement to support further growth of such field of transactions. The general idea *"of this EU harmonisation measure is plausible and fills an access to justice gap"*.[7]

However, the purpose of this article is not to evaluate the entire European legislation in the area of out-of-court dispute settlement in general, but to offer information on ADR/ODR regime and to analyse the specifics of the procedure which the consumer must go through to reach the settlement of the dispute through the ODR platform. A step-by-step explanation on which the author will try to demonstrate the particularities of resolving the disputes through the ODR platform.

2 Legal Regime of ADR and ODR

Both Directive on Consumer ADR and Regulation on ODR offer a legal regime to solve disputes out-of-court. It is however necessary to outline the main purpose of mentioned legislation and to divide the mechanisms they offer in connection to the ODR platform.

2.1 Directive on Consumer ADR

The main purpose of Directive on Consumer ADR is offering the consumers the possibility to have an *"an access to simple, efficient, fast and low-cost ways of resolving domestic and cross-border disputes which arise from sales or service contracts should benefit consumers and therefore boost their confidence in the market. That access should apply to online as well as to offline transactions…"*[8] Such framework was

6 In Czech Republic the Directive on Consumer on ADR was however implemented by Amendment No. 378/2015 Coll. to the Act No. 634/1992 Coll., on the Protection of Consumer as late as 28 December 2015.

7 CREUTZFELDT, Naomi J. Implementation of the Consumer ADR Directive. *Journal of European Consumer and Market Law* [online]. 2016, No. 1 [accessed on 2016-02-24].

8 Recital 4 of Directive on Consumer ADR.

built on previous recommendations[9] and experience from offering a mediation framework[10] or other mechanisms focused on solving consumer disputes.[11] Previous ADR schemes were frequently limited only to cover particular regions and as a consequence, there were many gaps in coverage not only in geographical meaning, but also in the meaning of insufficient coverage of the different types (areas) of the disputes.[12] Thus, one of the main aims of Directive on Consumer ADR is to offer a general legal framework to establish proper and working pan-European ADR by setting out main legal principles to be implemented by the Member States[13] and not to propose a draft set of procedural rules to be utilized by ADR/ODR providers. The second aim of the Directive on Consumer ADR is to guarantee of consumer trust in ADR providers, thus in out-of-court dispute resolution offered by EU as a whole. Member States have to ensure that some of already existing ADR schemes are amended to comply with due process standards, respectively, that some ADR providers are offering dispute resolution which is in accordance with principles of Directive on Consumer ADR.

9 Commission Recommendation of 30 March 1998 on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes (Text with EEA Relevance) (98/257/EC) [online]. In: *EUR-Lex* [accessed on 2016-02-26]; Commission Recommendation of 4 April 2001 on the Principles for Out-of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes (Text with EEA Relevance) (Notified under Document Number C(2001) 1016) [online]. In: *EUR-Lex* [accessed on 2016-02-26].

10 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters [online]. In: *EUR-Lex* [accessed on 2016-02-26].

11 European Consumer Dispute Resolution serves as one of the best examples. It is supported by EU and it offered ODR settlement which was launched in 2001 as an experimental project to evaluate advantages of solving the dispute online and out-of-court. *ECODIR* [online]. [accessed on 2016-02-27]. ECC–Net (as another example established by European Commission) informs consumers of their rights, gives them advice on possible ways of dealing with consumer complaint, provides direct assistance to resolve complaints, when purchasing abroad, and redirects consumer to an appropriate body if the ECC-Net cannot help. *European Consumers Centres Network* [online]. [accessed on 2016-02-27].

12 HÖRNLE, Julia. Encouraging Online Dispute Resolution in the EU and Beyond-Keeping Costs Low or Standards High? *European Law Review*. 2013, Vol. 38, p. 195.

13 The main principles of the Directive on Consumer ADR are particularly expertise - independence and impartiality, transparency of dispute resolution, effectiveness, fairness, liberty and legality. See Articles 6 – 11 of the Directive on Consumer ADR.

Such approved provider of ADR scheme is then described by the directive as ADR entity.[14]

The purpose of the Directive on Consumer ADR is to offer legal framework to resolve consumer contractual disputes with traders. *"Access to ADR is ensured no matter what product or service they purchased (only disputes regarding health and higher education are excluded), whether the product or service was purchased online or offline and whether the trader is established in the consumer's Member State or in another Member State."* [15]

2.2 Regulation on ODR

The Directive on Consumer ADR and Regulation on ODR are two interlinked and complementary legislative instruments. Regulation on ODR has basically the only role - to provide *"the ODR platform which offers consumers and traders a single point of entry for the out-of-court resolution of online disputes, through ADR entities which are linked to the platform and offer ADR through quality ADR procedures. The availability of quality ADR entities across the Union is thus a precondition for the proper functioning of the ODR platform."*[16] The establishment of the ODR platform itself is regulated by Article 5 of the Regulation on ODR.[17]

The ODR platform[18] was launched for consumers on 15 February 2016[19] and it offers an interactive website with a form to fill in all necessary information

14 *"ADR entity means any entity, however named or referred to, which is established on a durable basis and offers the resolution of a dispute through an ADR procedure and that is listed in accordance with Article 20(2).*" See Article 4(1)(h) of Directive on Consumer ADR. ADR entity has to offer above all the information about the identification, fees, language of the proceedings, types of disputes covered, the need of physical presence or the binding or non-binding nature of the outcome of the dispute resolution. See Article 20(2) of Directive on Consumer ADR.

15 *Alternative and Online Dispute Resolution* (ADR/ODR) [online]. [accessed on 2016-02-27].

16 Recital 12 of the Directive on Consumer ADR.

17 "*The ODR platform shall be a single point of entry for consumers and traders seeking the out-of-court resolution of disputes covered by this Regulation. It shall be an interactive website which can be accessed electronically and free of charge in all the official languages of the institutions of the Union.*" See Article 5(2) of Regulation on ODR.

18 *Online Dispute Resolution. European Commission Official Website* [online]. [accessed on 2016-02-27].

19 Although the Regulation on ODR provided that the ODR platform will be available to consumers on 9 January the date of the launch of the platform has been postponed with the justification that the solution was consulted and modified with traders and ADR entities.

established on the basis of Commission implementation of the Regulation on ODR.[20] By wording Regulation on ODR the ODR platform should offer *"a simple, efficient, fast and low-cost out-of-court solution to disputes arising from online transactions"*.[21]

The ODR platform links together ADR entities that are authorized under the Directive on a Consumer ADR to deal with consumer disputes. The main function of the ODR platform is to provide a working online complaint form and *"to inform the respondent, to identify the competent ADR entities and transmit complaint to the agreed entity; to offer free-of-charge electronic case management tool; to provide translations; to provide an electronic form to the ADR entity to submit information ant the result of the ADR"*[22] and to provide statistics of using ADR/ODR scheme.[23] The Regulation on ODR also sets out control mechanisms in order to provide a possibility to contact national contact points. The main duty of those bodies is to assist with the submission, provide the parties with general information on consumer rights, provide the information on functioning of the ODR platform, explain procedural rules applied by ADR entities or inform the parties about other types of redress.[24]

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20 Commission Implementing Regulation (EU) 2015/1051 of 1 July 2015 on the Modalities for the Exercise of the Functions of the Online Dispute Resolution Platform, on the Modalities of the Electronic Complaint Form and on the Modalities of the Cooperation Between Contact Points Provided for in Regulation (EU) No 524/2013 of the European Parliament and of the Council on Online Dispute Resolution for Consumer Disputes [online]. In: *EUR-Lex* [accessed on 2016-02-27].

21 Recital 8 of the Regulation on ODR.

22 KRAMER, Xandra E. *A European Perspective on E-Justice and New Procedural Models: Transforming the Face of Cross-Border Civil Litigation and Adjudication in the EU* [online]. Published on 1 November 2015 [accessed on 2016-02-28].

23 The problem of the ODR platform (lack of information and non-working environment in full width) in general is underlined also by the fact, that the statistics are not available although there is explicit link to it at the page. The visitor searching for the information will thus be unsuccessful which creates the atmosphere of distrust. The author even experienced the unavailability of whole page due to technical issues on 28 February 2016. To see more about missing information on statistical data: Page available soon [online]. [accessed on 2016-02-28].

24 The list of contact points is available at the website of ODR with the disclaimer: "*There are currently no available national contact points in the following countries: France, Germany, Luxembourg, Poland, Romania.*" This is supporting the fact that offered solution is incomplete. To see the list of contact points: *Contact National Contact Point* [online]. [accessed on 2016-02-28]. See Article 7 of Regulation on ODR.

However, it is still possible to see that the website of the ODR platform is incomplete.[25] It arouses general mistrust of consumers to use such tool and condemns it partially to the failure – one of the foundations of the working scheme of ODR is the motivation of the parties to use such out-of-court dispute settlement and their trust in such solution and e-commerce in whole.[26] Current state of the platform is however completely contradictory to those two basic principles of working ODR scheme.

3 Procedure in Resolving Consumer Disputes Through the ODR Platform

As proposed ODR solution is completely free and the launch of the ODR platform is very recent, the author feels the necessity to describe the procedure step-by-step to offer a better view on the functionality of such out-of-court dispute settlement. Subsequent text will describe functioning of the ODR platform for consumers as complainants, however it is necessary to keep in mind, that the ODR platform can serve under certain conditions also as a place where the trader can rise a complaint against a consumer.[27]

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25 Statistical data are missing for better overview of the ODR process and there is no contact point in some states as was stated above. ADR entities are also not available on the ODR platform site for some sectors in general and they are completely missing in Croatia, Germany, Lithuania, Luxembourg, Malta, Poland, Romania, Slovenia and Spain. Thus the consumer from such state won't be able to solve the dispute using the ODR platform for now. See *Online Dispute Resolution Platform. Disclaimer* [online]. [accessed on 2016-02-28].

26 To see more about motivation and trust of the parties using ODR: RULE, Colin; FRIEDBERG, Larry. The Appropriate Role of Dispute Resolution in Building Trust Online. *Artificial Intelligence and Law.* 2005, No. 13, pp. 193–205; SCHMITZ, Amy. Building Trust in E-commerce Through Online Dispute Resolution. In: ROTHCHILD, John A. (ed.). Research Handbook on Electronic Commerce Law [online]. Edward Elgar, 2016 [accessed on 2016-02-28]; RULE, Colin. *Online Dispute Resolution for Business: B2B, E – Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts.* San Francisco: Jossey – Bass, 2002, pp. 97–121.

27 The Regulation on ODR "*shall apply to the out-of-court resolution of disputes referred to in paragraph 1 (resolution of disputes concerning contractual obligations stemming from online sales or service contracts between a consumer resident in the Union and a trader established in the Union through the intervention of an ADR entity), which are initiated by a trader against a consumer, in so far as the legislation of the Member State where the consumer is habitually resident allows for such disputes to be resolved through the intervention of an ADR entity*". See Article 2(1)(2) of the Regulation on ODR.

3.1 The Phase Before a Dispute Is Commenced

One of the most important necessities in a pre-complaint submission phase emerging from the Regulation on ODR itself is to inform a consumer that there is an online dispute settlement regime which can assist a consumer and trader to settle their dispute. It is explicitly said that a trader "shall provide on their websites an electronic link to the ODR platform. That link shall be easily accessible for consumers".[28] This however does not mean that if a consumer decides to get the information on ODR solution and to use a platform that the same will be agreed by the trader. ADR/ODR process as whole is based on contractual freedom of the parties and no one can be forced to use such a solution. Provided information about ODR tools can then partly confuse a consumer[29] about further solution of their dispute if it is not agreed also by the trader.

3.2 Commencement of the Dispute (Submission of the Complaint)

The whole dispute settlement process commences with filing the complaint to the ODR platform under Article 8 of Regulation on ODR.[30] A consumer has to fill in important information about themselves and describe a dispute. Firstly, it has to be stated whether the consumer is an EU citizen and whether the dispute concerns online purchase of goods or service.[31] Then consumers are asked to fill in all the necessary information about themselves, about the trader and describe what went wrong during the purchase. After all the information is filled in the online form and then the consumer sends it to the ODR platform (and the validity of information is verified via email).

3.3 The Main Role of the ODR Platform (Processing and Transmission of a Complaint)

The main role and the purpose of the ODR platform is represented by Article 9 of the Regulation on ODR. When a complaint is submitted by the consumer to the platform it shall be processed, translated and sent

28 Article 14(1) of the Regulation on ODR.

29 Because the trader has to offer basic information about ODR solution.

30 ODR contact point shall however assist consumer with his submission if there is such need under Article 7 of Regulation on ODR.

31 If not the dispute settlement cannot continue further, because whole ODR regime is dealing only with disputes of EU citizens from online purchase of good or services.

"without delay"[32] to the respondent party. Such information are also supposed to be accompanied with a list of possible ADR entities[33] which are entitled to decide the case and contact details of the ODR contact point in a respective Member State. A respondent (trader) has ten days to state whether they are willing to use specific ADR entity to resolve the dispute with a consumer. It is necessary to keep in mind that whole solution is offered voluntarily. It means that *"if no agreement is reached by the parties or no competent ADR entity is identified, the complaint will not be processed further"*.[34]

It is possible to conclude from stated above that the main purpose of the ODR platform is "only" to transmit the information, to assist the parties with choosing a proper ADR entity, which will deal with the dispute and to translate the complaint if the parties speak different languages. The ODR platform is not thus using the possibility to negotiate (or to arrange negotiation of) the dispute of the parties and it directly offers (after filling in the complaint) the settlement through an ADR entity.[35]

3.4 Dispute Resolution and the Role of the ODR Platform During It

In this very moment the connection between Regulation on ODR and Directive on Consumer ADR is the closest, because the ODR platform redirects the whole dispute to the ADR entity (if agreed by the parties and ADR entity)[36] and the process is dealt strictly by the rules of ADR entity.[37]

32 Article 9(3) of the Regulation on ODR.

33 The information about ADR entity are including contact details and website address, the fees, the language or languages in which the ADR procedure can be conducted, the average length of the ADR procedure or the binding non-binding nature of the outcome. See Article 9(5) of the Regulation on ODR.

34 Article 9(3)(a) of the Regulation on ODR.

35 This is partly kept to the regime of ADR entity which can refuse to deal with the dispute in the moment it realizes that the consumer and the trader were not trying to settle their dispute by previous mutual direct communication. See Article 5 (4)(a) of the Directive on Consumer ADR.

36 Article 10 of the Regulation on ODR.

37 The role of the ODR platform as the intermediary has just ended and ADR entity is dealing with the dispute primarily by its procedural rules and secondarily on the basis of principles incorporated under Directive on Consumer ADR and under national law. Neither the Regulation on ODR nor Directive on Consumer ADR should however be without prejudice to provisions on confidentiality in national legislation relating to ADR (on the basis of Recital 29 of the Regulation on ODR), which apply for mediators or arbitrators in coherence with performing their professional activities.

ADR entity then has to decide the dispute under its offered procedural rules within the period of *"90 calendar days from the date on which the ADR entity has received the complete complaint file. In the case of highly complex disputes, the ADR entity in charge may, at its own discretion, extend the 90 calendar days' time period"*.[38] It is necessary to inform the parties about such extension and provide them with expected length of time needed for drawing up final conclusion.[39] The main principle of ODR regime is not to force the parties to be physically present while the ADR entity is dealing with the dispute[40] unless the parties have agreed to do so.

ADR entity is obliged to inform the ODR platform about receiving the dispute (to confirm that it will deal with it) and at the end of the dispute to offer the result of the ADR procedure.[41] ADR entity is however not entitled to use the ODR platform to conduct the dispute settlement through it.[42] Thus, in this phase the ODR platform serves again only as a tool to transfer the information and does not anyhow participate at dispute settlement.

3.5 Enforcement of the Dispute (Dispute Settlement)

Firstly, it is necessary to clearly state that ADR/ODR regime is purely voluntary and the parties are not obliged to use such a scheme. If they are forced to use such out-of-court dispute settlement (as it is often in e.g.

38 Article 10 of the Regulation on ODR.

39 *Ibid.*

40 Respectively to avoid such physical presence because the core and main advantage of the ODR process is to communicate online and to avoid face-to-face meeting, which slows down whole dispute settlement. To see more about further advantages of online communication in dispute settlement: LOUTOCKÝ, Pavel. Visualization in Out-of-Court Decision-Making Process: Synergy or Discord? In: KLUSOŇOVÁ, Markéta; MALANÍK, Michal; STACHOŇOVÁ, Monika; ŠKOP, Martin (eds.). *Argumentation 2015*. Brno: Masaryk University, 2015, pp. 121–136.

41 ADR entity has to transmit to the ODR platform the information concerning "*(i) the date of receipt of the complaint file; (ii) the subject-matter of the dispute; (iii) the date of conclusion of the ADR procedure; (iv) the result of the ADR procedure*" without delay. See Article 10(c) of the Regulation on ODR.

42 It is however highly recommended to use the ODR platform also during the process under ADR entity as the platform offers "*an electronic case management tool free of charge, which enables the parties and the ADR entity to conduct the dispute resolution procedure online through the ODR platform*". See Article 5(3)(d) of the Regulation on ODR.

the United States) it would be in contradiction to main EU legal principles, whole European understanding of ADR/ODR regime and contrary to unfair contract terms legislation.[43]

Enforcement itself is not expressly anyhow mentioned by the scheme of Directive on Consumer ADR or Regulation on ODR. ADR/ODR regime based on the mentioned legislative framework itself does not preclude that the final decision can be issued only as non-binding (mediation, negotiation) or binding (arbitration). Both types of a final out-of-court dispute settlement are however foreseen by Directive on Consumer ADR[44] and Regulation on ODR.[45] Especially in the case of a binding decision it is necessary to bear in mind increased protection of consumers (which is different in different Member States)[46] in all stages of decision-making from the conclusion of an arbitration clause to the final binding decision, including its enforceability. In the case of non-binding methods of dispute resolution (negotiation, mediation) the motivation is then crucial for the parties to respect the non-binding decision. They however have to follow their mutual contractual liability if the parties confirm final recommendation of a neutral party by a mutual agreement. The process of enforcement is however always influenced by the specifics of the rules which are offered by ADR entity.

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43 HODGES, Christopher J.; BENÖHR, Iris; CREUTZFELDT-BANDA, Naomi. *Consumer ADR in Europe: Civil Justice Systems*. Oxford: Hart Publishing, 2012, p. 416. Unfair contract terms under the Directive 93/13/EEC of 5 April 1993 are in the area of ADR and arbitration award explicitly dealt in the Judgement of the Court of Justice of 26 October 2006. Elisa María Mostaza Claro v. Centro Móvil Milenium SL. Case C-168/05 [online]. *CURIA* [accessed on 2016-09-14] and Judgement of the Court of Justice of 6 October 2009. Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira. Case C-40/08 [online]. *CURIA* [accessed on 2016-09-14].

44 Directive on the Consumer ADR "*may also cover, if Member States so decide, dispute resolution entities which impose solutions which are binding on the parties. However, an out-of-court procedure which is created on an ad hoc basis for a single dispute between a consumer and a trader should not be considered as an ADR procedure*". See Recital 20 of the Directive on Consumer ADR.

45 Article 9(5)(e) of the Regulation on ODR.

46 Each Member State has different legal rules and tradition of ADR solution. Comparison of legal rule concerning ADR in general are offered here: *Legal Instruments and Practice of Arbitration in the EU. Study* [online]. Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs [accessed on 2016-03-06]. Comparison of consumer protection in ADR for some EU Member States: HODGES, Christopher J.; BENÖHR, Iris; CREUTZFELDT-BANDA, Naomi. *Consumer ADR in Europe: Civil Justice Systems*. Oxford: Hart Publishing, 2012.

4 Conclusion

This paper has introduced a statutory regime for the functionality of an Online Dispute Resolution in the EU (based on Directive on Consumer ADR and Regulation on ODR) in its opening. In the next part it has characterized the ODR platform and subsequently analysed the regime of deciding the dispute from a consumer perspective through various phases. The paper was thus trying to offer uncluttered information on the process which is necessary to undertake if a consumer (trader) wants to have the dispute decided through the ODR platform.

It is necessary to emphasize that the ODR platform serves only as an intermediary of information and plays a major role particularly in the initial phase of the conflict, when the information about the dispute are gathered through it. It does not itself decide the dispute (it only processes the information concerning decision of the dispute) and thus it does not serve as a provider of ODR solution[47], but only serves as the platform to exchange the information between the parties (and eventually translates it). Actual deciding of the case itself is always kept to the selected ADR entity under the regime of Directive on Consumer ADR, under related national law and under the procedural rules of the ADR entity itself.

47 The author is however of the opinion that there is no limitation to the possibility that the ODR platform would not be capable to decide the cases, respectively that it would use the fact, that it already has the information from and about the parties and in the initial phase of negotiations it would recommend the parties how to settle their dispute amicably. Procedural complicatedness is evident from offered out-of-court dispute settlement regime in EU. It could be however eliminated at least in the initial stage by offering the parties the possibility to negotiate under the ODR platform (thus the consumer and trader would be offered the possibility to settle their dispute in the initial phase of the out-of-court settlement). This would mean that ADR entity would not be contacted immediately (procedural prolongation would be partly eliminated) thus the parties would be able to terminate their dispute without any intervention of the third party. It is not that legal regime does not offer the possibility to settle the dispute between consumer and trader by their direct communication however it does not force them to do so, which is seen as the major problem by the author and if the possibility to settle dispute directly through the ODR platform would be offered it could eliminate many cases, which, for further resolution, would have to be intervened by the third party. ADR entity then would enter into the dispute in the moment when any previous negotiation between the parties would fail.

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PUBLIC LAW IN THE CONTEXT OF IMMIGRATION CRISIS

IS EDUCATION THE KEY ELEMENT OF INTEGRATION?

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Abstract

Pursuant to the Convention on the Rights of the Child every child has the right to education. Nevertheless, 58 million children are dropped out of primary education and 500 000 Syrian refugee children do not attend any schools based on the data of UNICEF. In addition to the infringement of the law, the lack of education has an impact on the society, in particular the economy, the social care system and internal peace of the country concerned. As declared in Article 13 of the International Covenant on Economic, Social and Cultural Rights *"…education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace"*. The purpose of the paper is to point out that education may be the key element of integration. Therefore, the paper provides an academic analysis firstly regarding international and European law background of the right to education, migration and their connection. Furthermore, the paper presents the inevitable role of education in integration via the decisions of European Courts of Human Rights. Finally, it offers some good practices concerning educational integration to prove it is possible without the infringement of fundamental rights.

Keywords

Children; Education; Integration; Refugee.

1 Introduction[1]

There is a weird relationship between war and education. Both of them have that capability to influence radically the children's life. However, the impact is not same. Wars have negative impact because they destroy people's life and dreams which have been built up, it could force people to leave their home. Contrarily, education builds something new, including several opportunities to give a chance for a better life with (more) quality in it. As one could say, schools build new life and dreams, and they have a positive effect on children.

However, these two factors are interrelated. On one hand, education provides comprehensive knowledge and it enables the growing up generation to comprehend the consequences and the degree of destruction caused by the wars. On the other hand, during a war children's right to education may be restricted due to the closing or destruction of schools, because schools and teachers are deliberate targets.[2] Furthermore, if children are forced to flee, they will not obtain suitable education and it could take several years before they can learn again.

Based on the data of UNICEF, 58 million 6-11-year-old children are dropped out of primary education and half of them are not in school because there is war in their home country. Therefore, they fled with their family or alone to neighbouring countries or forward, especially to Europe. Approximately 500 000 Syrian refugee children do not attend any school.[3]

Lebanon alone has registered nearly 1.2 million Syrian refugees as of May 2015 and it has been estimated that nearly 90% of the refugee children of primary and lower secondary school age in Lebanon were not enrolled in school in 2013.[4]

Migration has several dimensions but the paper focuses on forced migration when people/children have to make a decision about leaving their home(country)

1 This paper only reflects the views of the author.

2 TAVASSOLI-NAINI, Manuchehr. Education Right of Children During War and Armed Conflicts. *Procedia - Social and Behavioral Sciences* [online]. 2010, Vol. 2, No. 2, pp. 1249–1952 [accessed on 2016-03-14].

3 *UNICEF National Committee Hungary. Oktatás* [online]. [accessed on 2016-03-14].

4 *A Growing Number of Children and Adolescents are out of School as Aid Fails to Meet the Mark. Policy Paper 22 / Fact Sheet 31* [online]. UNESCO, 2015 [accessed on 2016-03-14].

to flee from a war, political, religious, ethnic, linguistic, etc. persecution[5], and on refugee children who have been granted asylum in a host country.

The first goal of the paper is to emphasise the significance of education in terms of reacting to the migration wave. It gives a general overview about the regulation of the right to education and its connection with refugee children. Moreover, I would like to point out how education could create unity and in this way peace via integration.

2 Right to Education – International Law and European Law

2.1 Right to Education for All

Over the years, numerous international treaties and legal documents have been created regarding the protection of children's rights including the right to education. The first and most important document is the Universal Declaration of Human Rights[6] ("UDHR") adopted by the UN General Assembly in 1948. It ensures that everyone has the right to education and the elementary education shall be free and compulsory, as well as technical and professional education shall be made generally available.[7]

As declared in the International Covenant on Economic, Social and Cultural Rights[8] ("ICESCRI"), the State Parties recognize the right of everyone to education[9] and it is compulsory and free at the level of primary education.[10] Moreover, the ICESCRI states that *"fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education"*.[11] It also disposes about available and accessible secondary education and in particular by the progressive introduction of free education.[12]

5 KAROLINY Eszter; MOHAY Ágoston. *A nemzetközi migráció jogi keretei.* [online]. [accessed on 2016-03-14].
6 Universal Declaration of Human Rights of 10 December 1948 [online]. *UN* [accessed on 2016-03-14] ("UDHR").
7 Article 26(1) of UDHR.
8 International Covenant on Economic, Social and Cultural Rights of 16 December 1966 [online]. *UN Human Rights Office of the High Commissioner* [accessed on 2016-03-14] ("ICESCRI").
9 Article 13(1) of ICESCRI.
10 Article 13(2)(a) of ICESCRI.
11 Article 13(2)(d) of ICESCRI.
12 Article 13(2)(b) of ICESCRI.

Pursuant to the Convention on the Rights of the Child[13] ("CRC") every child has the right to education and the State Parties make the primary education compulsory and free for all[14] and they encourage the development of different forms of secondary education, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need.[15] Furthermore, the right to education is reaffirmed in the Convention against Discrimination in Education,[16] the Convention on the Elimination of All Forms of Discrimination Against Women,[17] the Convention on the Rights of Persons with Disabilities[18] and the African Charter on Human and Peoples' Rights.[19]

The Protocol to the ECHR declares that *"no person shall be denied the right to education".*[20]

In addition, the European Social Charter also strengthens the significance of compulsory education in its Article 7.[21]

In additional, the EU has a supporting competence to contribute to the development of quality education while fully respecting the responsibility of the Member States for the content of teaching and the organisation

13 Convention on the Rights of the Child of 20 November 1989 [online]. *UN Human Rights Office of the High Commissioner* [accessed on 2016-03-14] ("CRC").

14 Article 28(1)(a) of CRC.

15 Article 28(1)(b) of CRC.

16 Convention against Discrimination in Education of 14 December 1960 [online]. *UNESCO* [accessed on 2016-09-15]. *"Recalling that the Universal Declaration of Human Rights asserts the principle of non-discrimination and proclaims that every person has the right to education."*

17 Convention on the Elimination of All Forms of Discrimination Against Women of 18 December 1979 [online]. *UN Women* [accessed on 2016-09-15]. *"The Convention provides the basis for realizing equality between women and men through ensuring women's equal access to, and equal opportunities in, political and public life — including the right to vote and to stand for election — as well as education, health and employment."*

18 Convention on the Rights of Persons with Disabilities of 16 December 2006 [online]. *UN* [accessed on 2016-09-15]. Article 24 states: *"States Parties recognize the right of persons with disabilities to education."*

19 African Charter on Human and Peoples' Rights of 27 June 1981 [online]. *African Commission on Human and Peoples' Rights* [accessed on 2016-09-15]. Article 17 states: *"Every individual shall have the right to education."*

20 Article 2 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of 20 March 1952 [online]. *European Court of Human Rights* [accessed on 2016-03-14].

21 Article 7(3) of the European Social Charter (revised) of 3 May 1996 [online]. *Council of Europe* [accessed on 2016-03-14].

of education systems and their cultural and linguistic diversity.[22] However, the Charter of Fundamental Rights of the EU declares the right to education[23] and it provides the possibility to receive free compulsory education.[24]

2.2 Right to Education for Refugee Children

The right to education appears in the sources of law regarding refugees, too. The most important document of international refugee protection, the Refugee Convention,[25] declares that refugees are entitled to the same treatment as nationals with respect to elementary education.[26] It is necessary to mention the general obligation of refugees. It means that they have duties to the country in which they find themselves, which require in particular that they conform to its laws and regulations[27] and it could involve the compulsory education, as well.

The CRC also regulates that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights[28] thus the right to education.

2.3 Relationship Between Education and Refugees

Refugee children are the most vulnerable groups in the world.[29] They had to leave their home, gained numerous traumatic experiences, and they could also have lost their families. Furthermore, they encountered the challenges of red tape and if that was not enough, they could face subsequent obstacles in their (new) school due to their race, ethnic or cultural background and to linguistic diversity.

22 Article 165(1) of TFEU.
23 Article 14(1) of the Charter of Fundamental Rights of the European Union [online]. In: *Eur-Lex* [accessed on 2016-09-12] ("Charter").
24 Article 14(2) of the Charter.
25 Convention Relating to the Status of Refugees of 1951 [online]. *UNHCR The UN Refugee Agency* [accessed on 2016-03-14] ("Refugee Convention").
26 Article 22(1) of the Refugee Convention.
27 Article 2 of the Refugee Convention.
28 Article 22(1) of CRC.
29 *Implementation Handbook for the Convention on the Rights of the Child* [online]. UNICEF, 2007, p. 313 [accessed on 2016-03-14].

Equality and non-discrimination are essential elements of education. These requirements first appeared in the Charter of the United Nations,[30] reaffirmed in the UDHR.[31] These rights are declared in the ICESCRI, too.[32]

There is a special rule in the Refugee Convention regarding non-discrimination under its Article 3, granting that the provisions of this convention are applied to refugees without discrimination as to race, religion or country of origin.

Nevertheless, the Committee on the Rights of the Child has expressed concern that certain groups of children – inter alia refugees - are discriminated against in education.[33] It could be manifested both in denial of education and providing of a lower level education.[34] Pursuant to the implementation handbook *"equality of educational opportunity can only be achieved if education is recognized as a right for all children, irrespective of their background"*.[35] However, immigrant, asylum-seeking and refugee children do not have the same access to education as other children have.[36] Firstly, they have to learn a new language in order to acquire the curriculum. Secondly, they have to get acquainted with another culture and religion while they should stay faithful to their own identity, culture and religion. Xenophobia among teachers and students can have a negative impact on the process of integration.[37] To avoid and stop the occurring of these phenomena, host countries should emphasise the importance of integration. Education also involves integration and it is declared in different legal documents.

2.3.1 Impact of Education

Pursuant to Article 26 of UDHR, education shall be directed to the full development of the human personality and to strengthening of respect for human rights and fundamental freedoms. Furthermore, it shall promote

30 Article 1(3), 13(1)(b), 55(c), 76(c) of the Charter of the United Nations of 26 June 1945 [online]. *UN* [accessed on 2016-03-14]
31 Article 2 of UDHR.
32 Article 2(2) of ICESCRI.
33 *Implementation Handbook for the Convention on the Rights of the Child* [online]. UNICEF, 2007, p. 413 [accessed on 2016-03-14].
34 *Ibid.,* p. 413.
35 *Ibid.,* p. 417.
36 *Ibid.,* p. 417.
37 *Ibid.,* p. 417.

understanding, tolerance and friendship among all nations, racial or religious groups and it and shall further the activities of the United Nations for the maintenance of peace.[38]

In the ICESCRI, Article 13 repeats the provision of UDHR and completes it that education shall enable all persons to participate effectively in a free society.

The CRC also determines the goal of education and it gives a comprehensive meaning of education. Pursuant to the Article 29 the education of the child shall be directed to the development of children including – inter alia – personality, talents, mental and physical abilities, respect for fundamental rights and freedoms, their own cultural identity, national values of the county in which they live, and civilizations different from their own. Furthermore, education shall prepare children for responsible life in a free society, in the spirit of understanding, peace, tolerance, gender equality, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.[39]

The implementation handbook for the CRC provides an excellent explanation concerning education including its significance and impact: *"The Recommendation concerning Education for International Understanding, Cooperation and Peace and Education relating to Human Rights and Fundamental Freedoms, adopted by the General Conference of UNESCO at its 18th session (November 1974) states:*

38 Article 26(2) of UDHR.

39 Article 29(1) of CRC:
"1. States Parties agree that the education of the child shall be directed to:
a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
e) The development of respect for the natural environment.
2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State."

"The word 'education' implies the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capacities, attitudes, aptitudes and knowledge. This process is not limited to any specific activities." (Article 1(a))."[40]

2.3.2 Case Law

Despite the fact that everybody has a right to education and discrimination is prohibited on the grounds of – inter alia – race, ethnic origin and membership of national minorities, these rights could not prevail all the time, as demonstrated in the practice of European Court of Human Rights. It is declared that under Council of Europe law, the ECHR guarantees the enjoyment of rights to all those living within the jurisdiction of a member state, whether they are citizens or not, including those living beyond the national territory, in areas under the effective control of a member state. Regarding education, the European Court of Human Rights therefore holds that differential treatment on grounds of nationality and immigration status could amount to discrimination.[41]

The case of *Timishev v. Russia*[42] concerned Chechen migrants who, though not technically foreigners, lacked the required local migration registration to enable their children to attend school. The European Court of Human Rights found that the right for children to be educated was one of *"the most fundamental values of democratic societies making up the Council of Europe"* and held that Russia had violated Article 2 of Protocol No. 1.

The case of *Ponomaryovi v. Bulgaria*[43] the European Court of Human Rights found that a requirement to pay secondary school fees that were predi-

40 *Implementation Handbook for the Convention on the Rights of the Child* [online]. UNICEF, 2007, p. 412 [accessed on 2016-03-14].

41 FRA-ECtHR-COE. *Handbook on European Law Relating to the Rights of Children*. Luxembourg: Publications Office of the European Union, 2015, p. 55.

42 Judgement of the European Court of Human Rights of 13 December 2005. Timishev v. Russia. Application No. 55762/00 and 55974/00, para. 64. In: FRA-ECtHR-COE. *Handbook on European Law Relating to Asylum, Borders and Immigration – Edition 2014*. Luxembourg: Publications Office of the European Union, 2016, p. 196.

43 Judgement of the European Court of Human Rights of 21 June 2011. Ponomaryovi v. Bulgaria. Application No. 5335/05, paras. 59–63. In: FRA-ECtHR-COE. *Handbook on European Law Relating to Asylum, Borders and Immigration – Edition 2014*. Luxembourg: Publications Office of the European Union, 2016, p. 196.

cated on the immigration status and nationality of the applicants was not justified. The court noted that the applicants were not unlawfully arriving in the country and then laying claim to the use of its public services, including free schooling. Even when the applicants fell, somewhat inadvertently, into the situation of being aliens that lack permanent residence permits, the authorities had no substantive objection to their remaining in Bulgaria, and apparently never had serious intentions of deporting them. Considerations relating to the need to stem or reverse the flow of irregular immigration clearly did not apply to the applicants.

The case of *Karus v. Italy*[44] the former European Commission of Human Rights found that charging higher fees to foreign university students did not violate their right to education as the differential treatment was reasonably justified by the Italian government's wish to have the positive effects of tertiary education staying within the Italian economy.

Apart from the European Court of Human Rights and ECHR, the European Committee of Social Rights has made an excellent statement of interpretation relating to Article 17(2) of the European Social Charter and it declares some principles about the right to education. It means that access to education is crucial for every child's life and development. The denial of access to education will exacerbate the vulnerability of an unlawfully present child. Therefore, children, whatever their residence status, come within the personal scope of Article 17(2). Furthermore, the committee considers that a child's life would be adversely affected by the denial of access to education.[45]

2.4 Significance of Integration/Inclusion

The World Declaration on Education for All, adopted in Jomtien, Thailand (1990) sets out an overall vision: universalizing access to education for all

44 Decision of European Commission of Human Rights of 20 May 1998. Karus v. Italy. Application No. 29043/95. In: FRA-ECtHR-COE. *Handbook on European Law Relating to Asylum, Borders and Immigration – Edition 2014*. Luxembourg: Publications Office of the European Union, 2016, p. 196.

45 European Committee of Social Rights (ECSR). Conclusions 2011, General Introduction, January 2012. In: FRA-ECtHR-COE. *Handbook on European Law Relating to Asylum, Borders and Immigration - Edition 2014*. Luxembourg: Publications Office of the European Union, 2016, p. 197.

children, youth and adults, and promoting equity.[46] Inclusive education is a process of strengthening the capacity of the education system to reach out to all learners and can thus be understood as a key strategy to achieve education for all. As an overall principle, it should guide all education policies and practices, starting from the fact that education is a basic human right and the foundation for a more just and equal society.[47]

The UN High Commissioner for Refugees ("UNHCR") works hard in order to facilitate the integration of refugees. Therefore, they embrace that actors of the states – such as ministries, local governments, different authorities, NGOs, schools, etc. – who could contribute to integration policy including the development of educational, healthcare, social and employment policies. To help this process, UNHCR worked out two comprehensive documents in 2009: UNHCR Agenda for the Integration of Refugees in Central Europe and UNHCR Note on Refugee Integration in Central Europe. These documents give a general overview on what integration means in practice and they provide some practical solutions.[48] Seven years have been passed since the development of the documents but they still cope with the current situation.

The 2005 UNHCR Executive Committee Conclusion created a working definition for integration and it declares that "*local integration - in the refugee context - is a dynamic and multifaceted two-way process, which requires efforts by all parties concerned, including a preparedness on the part of refugees to adapt to the host society without having to forego their own cultural identity, and a corresponding readiness on the part of host communities and public "institutions to welcome refugees and to meet the needs of a diverse population (…).*[49] Moreover, *acknowledges that the process of local integration is complex and gradual, comprising three distinct but inter-related legal, economic, and social and cultural dimensions, all of which are important for refugees' ability to integrate successfully as fully included members of society; and notes that refugees' understanding of these dimensions may need to be facilitated through proper counselling and advice".*[50]

46 *Policy Guidelines on Inclusion in Education* [online]. UNESCO, 2009, p. 9 [accessed on 2016-03-14].

47 *Ibid.,* p. 9.

48 Az integráció támogatása [online]. *UNHCR The UN Refugee Agency Hungary* [accessed on 2016-03-14].

49 Conclusion on Local Integration No. 104 (LVI) – 2005 of 7 October 2005 by UNHCR Executive Committee of the High Commissioner's Programme [online]. *UNHCR The UN Refugee Agency Hungary* [accessed on 2016-03-14]

50 *Ibid.*

However, refugee children could face lot of problems regarding education. As they change their residences often, they could drop out of schools, cut off the curriculum, lose their friends and it could generate uncertainty and obstruct the active participation in education. Furthermore, refugee children could lose their documents that certify the level of schooling they have completed earlier or sometimes accepting such certificates can be too complicated. Moreover, they could experience discrimination from their teachers or classmates. There is lack of teachers who are prepared to teach ethnically mixed groups, or they may not know the native language of refugee children.[51]

UNHCR Conclusion points out that host countries should encourage refugees to take part in employment and the economic life of the host country via education and skills development.[52]

Furthermore, states should examine their regulations and create new laws or modify the existing ones in order to provide refugees with an opportunity to have access to their fundamental rights and freedoms they are entitled to exercise, including education. Furthermore, the host country should pay attention to the principles of equality and non-discrimination.[53]

According to UNHCR, education, especially quality education contributes to the development of important content knowledge and participation in education programmes can also foster social cohesion, provide access to life-saving information and address psychosocial needs. Furthermore, participation in full-cycle quality educational programmes can provide long-term, dependable, safe environment for some of the most vulnerable groups within refugee populations. Participation and accomplishment in education increase opportunities for self-determination and provides a sense of purpose, normality and continuity in otherwise unsettled environments.

51 UNHCR Note on Refugee Integration in Central Europe [online]. *UNHCR The UN Refugee Agency Regional Representation for Central Europe,* p. 19 [accessed on 2016-03-14].

52 Conclusion on Local Integration No. 104 (LVI) – 2005 of 7 October 2005 by UNHCR Executive Committee of the High Commissioner's Programme [online]. *UNHCR The UN Refugee Agency Hungary* [accessed on 2016-03-14].

53 UNHCR Note on Refugee Integration in Central Europe [online]. *UNHCR The UN Refugee Agency Regional Representation for Central Europe,* p. 10 [accessed on 2016-03-14].

The knowledge, skills and experience acquired in educational programmes are the key to building resilience for all possible durable solutions. Educated children and youth stand a greater chance of becoming adults who can participate effectively in civil society in all contexts.[54]

2.4.1 Good Practices

To facilitate the integration of refugee children, each state and NGO worked out inclusion policies. In the following I would like to introduce some inclusion policies and good practices to prove the opportunity of positive impact of integration.

There are some international instruments:

1. The UNHCR started a project in 2009 to ensure the access to education for refugee children to access quality education in Central Europe. The experts examine the lack of educational programmes and the good practices, organise regional conferences and work out guideline for national authorities and other participants of education.[55]
2. The Council of Europe has the Intercultural Cities Programme (ICC) to support cities in reviewing their policies through an intercultural lens and developing comprehensive intercultural strategies to help them manage diversity positively and realise the diversity advantage.[56]
3. There is the Sustainable Development Goals under the aegis of the United Nations. On 1 January 2016, the 17 Sustainable Development Goals ("SDGs") of the 2030 Agenda for Sustainable Development — adopted by world leaders in September 2015 — officially came into force. Over the next fifteen years, with these new Goals that universally apply to all, countries will mobilize efforts to end all forms of poverty, fight inequalities and tackle climate change, while ensuring that no one is left behind. Goal 4 is to ensure inclusive and quality education for all and promote lifelong learning.[57]

54 Education and Protection [online]. *UNHCR The UN Refugee Agency,* 2015 [accessed on 2016-03-15].

55 Menekült gyermekek oktatása [online]. *UNHCR The UN Refugee Agency Hungary* [accessed on 2016-03-15].

56 Intercultural Cities Programme (ICC) [online]. *Council of Europe* [accessed on 2016-03-15].

57 Sustainable Development Goals. 17 Goals to Transform Our World [online]. *UN* [accessed on 2016-03-15].

4. Incheon Declaration. Education 2030: Towards Inclusive and Equitable Quality Education and Lifelong Learning for All. It is connected to the 17 SDGs. UNESCO together with UNICEF, the World Bank, United Nations Population Fund, United Nations Development Programme, United Nations Women and UNHCR organized the World Education Forum 2015 in Incheon, Republic of Korea, from 19 – 22 May 2015, hosted by the Republic of Korea. Over 1,600 participants from 160 countries, including over 120 Ministers, heads and members of delegations, heads of agencies and officials of multilateral and bilateral organizations, and representatives of civil society, the teaching profession, youth and the private sector, adopted the Incheon Declaration for Education 2030, which sets out a new vision for education for the next fifteen years. Their vision is to transform lives through education, recognizing the important role of education as a main driver of development and in achieving the other proposed SDGs.[58]
5. UNHCR has the Education Strategy 2012–2016. This education strategy is anchored in a renewed focus on ensuring the provision of refugee education, not as a peripheral stand-alone service but as a core component of UNHCR's protection and durable solutions mandate. Quality education that builds relevant skills and knowledge enables refugees to live healthy, productive lives and builds skills for self-reliance.[59]

There are some good examples from different states:

1. Belgium: Pupil Guidance Centres in the Flemish part of Belgium offer support through a multidisciplinary approach, considering different part of the students' development such as learning and study, the overall academic career, preventive health care, psychological and social functioning. Centre staff offers services free of charge, collaborate with families in drawing up guidance directions for students, and offer translation and other services for migrant families.[60]

58 Incheon Declaration [online]. *UNESCO* [accessed on 2016-03-15].
59 2012–2016 Education Strategy [online]. *UNHCR The UN Refugee Agency* [accessed on 2016-03-15].
60 SACRAMENTO, Rafael Berger. Migrant Education and Community Inclusion – Examples of Good Practice. *Sirius Network Policy Brief Series* [online]. 2015, No. 5, p. 3 [accessed on 2016-03-15].

2. The United Kingdom: Local authorities in Birmingham provide funding, training and material to schools in order to collaborate with parents through the Inspire Workshop. During one class, each child brings an appointed adult to participate in activities related to a subject with the teacher. It is a successful program and they can collaborate with ethnic minority parents who had been previously hard to contact. Schools reported an increase in parental understanding of children's learning process and it also raised achievement in literacy and numeracy.[61]
3. Portugal: The *Echolas* Programme is part of national Portuguese strategy for promoting social cohesion, equity and inclusion of national groups and those from a vulnerable socioeconomic backgrounds. The programme is based on the community facilitator, a trained worker from a migrant or a vulnerable background. This facilitator acts as a bridge between the community and school, meditating in conflicts and offering support to students and families.[62]
4. Norway: The Larvik municipality promotes a two-year course called the Flexible Identity for local students. It encourages the construction of balanced, flexible identity within a multicultural context. The course aims to prevent potential conflict between generations and manage the challenges that follow culture shifts. During the first classes they focus on groups and the second class is focuses on the individual. Subjects discussed include dilemmas and choices, roles and expectations relating to parents and building bridges.[63]
5. Germany: In Berlin's district, in Neukölln, there is an obligation for children to go to school, including the newly arrived. In order to integrate the high number of young refugees as soon as possible into the German school system, the schools of Neukölln have established special classes in primary schools. These so called "welcome classes" offer opportunities for children to learn the German language, emphasizing a quick acquisition of German in order to make sure that the children can be integrated as soon as possible

61 SACRAMENTO, Rafael Berger. Migrant Education and Community Inclusion – Examples of Good Practice. *Sirius Network Policy Brief Series* [online]. 2015, No. 5, p. 3 [accessed on 2016-03-15].

62 *Ibid.,* p. 5.

63 *Ibid.,* p. 6.

> into the regular school system. Depending on their educational background and capacities, the children stay for six months to one year in the welcome classes. In parallel, they join the other children in the school's regular classes, starting with subjects in which German language is not the main focus, such as sports, math, music and arts. Once the children are accustomed to the school system, German knowledge and the way of teaching, they enter regular classes. The district of Neukölln also offers intensive German classes for young children during school holidays. In a playful manner, children aged from 6 to 12 are mentored to improve their German skills while singing together and playing games.[64]

The common point in these examples is that they embrace more elements which are inevitable to achieve integration, such as refugee children and their parents, teachers, children and their parents at schools and NGOs, social workers in host countries, etc.

3 Conclusion

The paper focuses on the question whether education is the key element of integration. In my opinion, the answer is yes.

The right to education is a fundamental right of everyone without making any choice or differentiation because a child is child where he or she is, without regard to what his or her status is and a child has to attend a school since it is his or her right, and primary education is compulsory. Therefore, host countries should pay an active role in providing this right to children and help them fulfil their obligation.

Moreover, it is prohibited to discriminate against ethnic origin hence schools should pursue the diversity in their classrooms. Children with different background spend their whole day together so they have opportunity to get to know each other, they could accept each other via playing games or learning new materials and in this way there will be a special relationship among them. They learn together the things that appear in the international treaties such as tolerance, friendship, and respect for each other, and thanks

64 Intercultural Cities, Building a Future on Diversity. "Refugees welcome" – Refugee Integration Policies in Berlin Neukölln [online]. *Council of Europe*, p. 4 [accessed on 2016-03-15].

to multicultural classes they could understand and practice these principles immediately. However, to achieve an integrated (school) society not only the children but also their parents should be involved in the integration process. Firstly, they influence their children. Secondly, a host community could facilitate their integration into the mainstream society.

In order to achieve integration, each party should collaborate – according to the definition. The host country and society should be able to accept people with different colour, culture, language and habits. Refugees should get to know and accept the rules of their new home and become useful members of the society. However, this collaboration works only with common will. If it is unilateral the other party will experience it as violence and this could lead to conflicts.

Integration may first appear as big challenge, because education policies and strategies should step out of their comfort zone and create new methods. It requires more financial support and well-prepared experts, including teachers. Society, in particular students, parents and teachers should be prepared to accept and teach refugees, as well as refugees should be prepared to accommodate to a new community including language, treating their traumas and disadvantageous situation.

Nevertheless, it is worth doing so – as seen in the examples – and it will become easier, because if refugees feel that they belong to somewhere, it will reassure their sense of safety. And if there is safety in the society, peace will be generated as well, which is the ultimate goal of education.

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THE ELECTORAL RIGHTS OF NON-NATIONALS IN EUROPE

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Abstract

The migration, refugee crisis that has reached Europe in 2015 has created new challenges and has raised many questions about the migration policy of the European states and the EU itself. The crisis has not only posed policy questions about the immediate answers of border control, the mechanisms of the Schengen area and the Dublin regulations, but has also led to questions about long-term policies such as integration. One of the most important political rights of the citizens of the democracies of Europe is to participate in elections in order to decide the political directions of their states and local communities. Exercising electoral rights has gone through a rather long history on the European continent, which led to a continuous democratization. Being able to exercise electoral rights is a clear message to the citizen: you are a full and equal part of our political system. The purpose of this paper is to present the electoral rights of persons with different legal status in Europe with a special focus on the European Parliamentary elections and with the case study of France and the United Kingdom.

Keywords

Electoral Rights; Political Rights; Migrants; Refugees; European Parliament.

1 Introduction

Migration is not a new phenomenon globally and definitely not a new phenomenon on the European continent, however 2015 has brought a new dimension in the migration trends towards the European continent and more precisely the EU. In fact in 2015 according to the International

Organization on Migration ("IOM") more than one million migrants have reached the EU,[1] which is widely considered as the worst migration crisis since the World War II. The EU as a whole has struggled and is struggling to find optimal solutions to handling the flow of migrants towards its Member States. The Member States of the EU have also chosen different approaches to handling these new challenges. Ironically one the greatest challenges that the EU has to face is compared to the migration scenario after World War II, which is also the time of the creation of the predecessors of the EU.[2] Whatever the common European solution may be for the challenges to come it is now a *de facto* situation that European states have to face the challenge of living together with hundreds of thousands of newcomers within their societies.

In the evolution of human rights, the first generation is considered to be the basic political rights of the individual. The most basic political rights include the freedom of speech, freedom of religion, freedom of assembly and also voting rights. These rights were first declared at the end of the eighteenth century in the United States in the Bill of Rights and in France in the Declaration of the Rights of Man and of the Citizen. These rights serve a double purpose by giving guarantees to the citizens their protection from the state, from the government, however these rights also mean that those entitled to practice them are a part of the political society of a state.[3]

Voting rights in particular can be considered a benchmark in entering the polity. In the struggle for political rights voting rights have been the central issue for several groups of the society left out of the polity, most infamously one could mention the voting rights of women. Another reason for considering voting rights a benchmark in the integration into the political community of a state is the regulation of democracy in international law. As democracy is widely accepted as the most favourable form of government

1 Over a Million Migrants and Refugees Have Reached Europe This Year, Says IOM [online]. *The Guardian* [accessed on 2016-09-17].

2 The European Coal and Steel Community (ECSC) was established in 1951 by the Treaty of Paris, the Council of Europe was founded in 1949 by the Treaty of London.

3 The earliest precedents of political rights are in Roman law, which made a distinction between citizens of the Roman empire and other subjects within the state. Later notable examples such as the Magna Charta of England (1215) and the Golden Bull of Hungary (1222) have also given certain political rights to the nobility, who were at the time the only members of the political society.

it has appeared in international legal standards and is most widely defined by the characteristics of its leaders being chosen through periodic elections.[4] Thus not being able to exercise the right to vote or to be elected means to be left out of the basic democratic processes of a state.

As the migration crisis will have long standing effects on large groups of people living within the EU it is important to examine, if they can participate in the basic democratic process of exercising voting rights in Europe, if they can become members of the European policy. Based on the above it is the assumption of this paper that voting rights are key to integration into a society and thus the regulation of voting rights in countries heavily affected by migration reflect this notion. This paper introduces the legislation on the voting rights to the European Parliament on the level of the EU, as well as giving an introduction to the voting rights in the United Kingdom and France.

2 Regulation of European Parliamentary Elections on EU Level

The European Communities have introduced universal suffrage in the election of the members of the European Parliament in 1979. The elections of the European Parliament have created a new category of voting rights for the citizens of the member states of the European Communities, this was a consequence of the creation of the EU and the EU citizenship by the Treaty of Maastricht.[5] The EU citizenship is practically a new layer of citizenship giving extra rights to those, who are citizens of the members states of the EU.

The right to political participation has been traditionally connected to the concept of nationality. The European Parliamentary elections wider that scope and though connect the right to vote to nationality, since those, who are entitled to practice the right to vote must be nationals of one of the Member States,[6] however it also introduces the concept of supranational voting rights basing it on the right to residency.

4 International Covenant on Civil and Political Rights of 16 December 1966 of New York [online]. *United Nations Treaty Collection* [accessed on 2016-09-17].

5 Treaty on European Union of 7 February 1992 [online]. In: *EUR-Lex* [accessed on 2016-09-18].

6 Article 9 of TEU: *"In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."*

The European Parliamentary elections and most importantly the concept of the right to vote of non-nationals in a Member State are regulated on three elementary levels: EU constitutional level of the Treaties, on the EU level of directives and on national level of implementing legal documents.[7]

On the EU constitutional level, the TEU has introduced the citizenship of the EU with the Treaty of Maastricht. In the current TEU rights of the citizens of the EU are regulated under the title Provisions on Democratic Principles, in which Article 10(2) states that the European Parliament shall represent the citizens of the EU directly.[8] This is repeated in a very general manner in Article 14(3) among the provisions on the institutions.

The TFEU is more detailed in the description of the additional rights that are attributed to the citizens of the EU. In Part Two of the TFEU on Non-Discrimination and Citizenship of the EU there are clear provisions on the right to vote of non-nationals of a Member State, in regards to both the European Parliamentary elections and local elections.[9] The right to vote is important for the citizens of the EU, which has also the precondition of another important right of EU citizens the right to free movement

7 This paper will introduce the national legislation of the United Kingdom and France.

8 Citizens are directly represented at EU level in the European Parliament.

9 Article 20 of TFEU (ex Article 17 of TEC):
"1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
[…]
(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State."
Article 22of TFEU (ex Article 19 of TEC):
"1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.
2. Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State."

within the EU. According *Shaw*: *"The rationale for this legal framework focuses to a considerable extent on the fostering of integration of migrant EU citizens into society and polity of the host Member State."*[10] Thus the right to vote of EU citizens on the level of the EU and at local elections creates the precedent for non-nationals in the EU to become members of the polity of states other than their own.

States based on the regulations of the TFEU may decide on the exact format of organizing European Parliamentary elections and also (more naturally) their own local elections, however the EU Council has regulated the participation of EU citizens of both on the level of secondary EU legislation in Council directives. In the Council Directive 93/109/EC[11] the provisions lay down the regulations that create equality between the nationals and non-nationals of the host country, where the EU citizens exercise their right to vote. The reason for focusing on clauses of non-discrimination is the existing differences between the electoral systems of the Member States, the general rule is that the conditions to exercise the right to vote and to stand as a candidate the rules of the host state have to be applied. An interesting example in this regard is the voting age in Austria,[12] where citizens can vote from the age of 16 and as a consequence a EU citizen, who is 16 or older and resides in Austria can also practice the right to vote.

Council Directive 93/109/EC in its preamble clauses gives an insight into the creation of the right to vote of the EU citizens in other Member States, which thoughts can serve also as a basis for further thinking about third country migrants. The preamble states: *"Whereas citizenship of the Union is intended to enable citizens of the Union to integrate better in their host country and that in this context, it is in accordance with the intentions of the authors of the Treaty to avoid any polarization between lists of national and non-national candidates."* Two elements must be highlighted: one is the notion of integration into the host country; the other being the polarization between nationals and non-nationals

10 SHAW, Jo. Political Rights and Multilevel Citizenship. In: CARRERA, S.; GUILD, E. (ed.). *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* [online]. Ashgate: University of Edinburgh School of Law, 2009, p. 3 [accessed on 2016-09-18].

11 Council Directive 93/109/EC of 6 December 1993 Laying Down Detailed Arrangements for the Exercise of the Right to Vote and Stand as a Candidate in Elections to the European Parliament for Citizens of the Union Residing in a Member State of Which They are not Nationals [online]. In: *Eur-Lex* [accessed on 2016-09-18].

12 Wahlrecht [online]. *HELP.gv.at* [accessed on 2016-09-18].

in their political choices.[13] These two elements are the keys to the whole question of migration, they hold within them both the wish for integration and the inclusion into the polity of a nation, however also the fear of non-nationals, migrants changing the political society appears. This desire for integration and the fear of change and polarization are what we can also experience in the contemporary views about third country nationals, who migrate towards the EU.

In the following this paper will present the right to vote and stand as candidates in the United Kingdom and in France, which were chosen for the purpose of this paper due to the fact that their immigrant population is very significant.[14]

3 United Kingdom Election Regulation

The United Kingdom in many ways holds a special status within the EU due to its opt out policies and more recently because of the negotiation leading up to the British referendum on exiting the EU. As with all Member states of the EU history is also an important factor in shaping the countries legislative processes and the constitutional rules of a country. The United Kingdom was the world's largest colonial power, which has shaped its legal development. Most notably the Commonwealth of Nations was founded in 1949 by the London Declaration creating a special group of countries, which were mostly former colonies of the United Kingdom. This history has also shaped the electoral law of the United Kingdom.

In the United Kingdom the right to vote is regulated by the Representation of the People Act[15] which is a piece of legislation that has replaced several legal acts and has created and overall regulation of the right to vote.

13 For the second thought the Council Directive aims to introduce guarantees that help to avoid such situations: *"Whereas this risk of polarization concerns in particular a Member State in which the proportion of non-national citizens of the Union of voting age exceeds 20 % of the total number of citizens of the Union of voting age who reside there and that, therefore, it is important that this Member State may lay down, in compliance with Article 8 b of the Treaty, specific provisions concerning the composition of lists of candidates."*

14 According to Eurostat in 2013 the total number of immigrants arriving to the United Kingdom was 526.046, to France 332.640. They were only surpassed by Germany, where the number was 692.713. Immigration Statistics [online]. *Eurostat* [accessed on 2016-09-18].

15 UNITED KINGDOM. Representation of People Act 1983 [online]. *Legislation.gov.uk* [accessed on 2016-09-18] ("Representation of People Act").

In the United Kingdom in order to be able to practice the right to vote, those eligible to vote have to register themselves. Thus the Representation of People Act determines not only, who is eligible to exercise the right to vote, but also the qualifications needed to be able to register as well as the process of registration. Registration is done according to the places of residency and residence is also defined within the act.

In the United Kingdom at both national elections and local elections not only citizens of the United Kingdom have the right to vote, but also Commonwealth citizens and the citizens of the Republic of Ireland.[16] Granting the right to vote to Commonwealth citizens is in many ways similar to the legislation of the EU regarding local and European Parliamentary elections with some significant differences. One of these significant differences is that this is a unilateral act, it is not the common practice of all Commonwealth Member States and it is not the common rule within the Commonwealth of Nations.[17]

Deciding who is eligible to vote as a Commonwealth citizen has two main criteria. First of all, one must be a citizen of one of the 53 member states of the Commonwealth of Nations, which includes such countries as India, Pakistan, Nigeria, Bangladesh and South Africa, altogether more than 2.1 billion people, almost a third of the world's population. The other criterion is based on the Immigration Act of 1971, making it necessary to have leave to enter and to remain in the United Kingdom.[18] Similarly to the United Kingdom Portugal also grants some voting rights to non-nationals of an international association of states, namely the Community of Portuguese-language countries. This can also be traced back to the colonial roots and is also a way to emphasize the special bonds between the countries, however it is much stricter than the United Kingdom's regulation,

16 Articles 1(1)(c) and 2(1)(c) of the Representation of People Act.

17 In fact, Australia has introduced Australian citizenship as an eligibility requirement on 26 January 1984, precluding new enrolments of British subjects to vote. British Subjects Eligibility [online]. *Australian Electoral Commission* [accessed on 2016-09-18].

18 Article 4(6) of the Representation of People Act. In: this section — "qualifying Commonwealth citizen" means a Commonwealth citizen who either — (a) is not a person who requires leave under the Immigration Act 1971 to enter or remain in the United Kingdom, or (b) is such a person but for the time being has (or is, by virtue of any enactment, to be treated as having) any description of such leave.

since it is based on reciprocity, as a consequence it is only applied in relation to Brazil and Cape Verde.[19]

This wide approach to granting the right to vote even widens by granting the right to vote to EU citizens in accordance with EU law. However one must note that due to the special situation of the people eligible to exercise the right to vote in the United Kingdom, the United Kingdom has attached a declaration to the TEU, which aims to clarify that the franchise for elections to the European Parliament in the United Kingdom are in accordance with the Treaties.[20]

The United Kingdom election regulations are thus a prime example of how legal migrants from certain countries with special ties to the host country may be granted the right to vote and to participate in the polity of a nation.

4 Election Regulation in France

France in many ways has a similar historic background to the United Kingdom, it is traditionally one of the most powerful nations in Europe, it was a great colonial power, it is also a Member State of the EU. Similarly, to the Commonwealth of Nations with more soft goals the International Organization for the Francophonie was also created, which – though not exclusively – also enumerates among its member states the former colonies of France.

In France the right to vote is regulated by the *Code électoral,*[21] which states in its first chapter the requirements for being an elector.[22] This provision clearly states that French nationals have the right to vote in French elections.

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19 Franchise and Electoral Participation of Third Country Citizens Residing in the EU and of EU Citizens Residing in Third Countries [online]. *European Union Democracy Observatory on Citizenship*. European University Institute, Robert Schuman Centre for Advanced Studies [accessed on 2016-09-18].

20 The United Kingdom notes that Article 14 of the TEU and other provisions of the Treaties are not intended to change the basis for the franchise for elections to the European Parliament. See Declaration by the United Kingdom of Great Britain and Northern Ireland on the Franchise for Elections to the European Parliament [online]. In: *EUR-Lex* [accessed on 2016-09-18].

21 FRANCE. Code electoral [online]. In: *Legifrance* [accessed on 2016-09-18] ("Code electoral").

22 Article L2 of Code electoral: *"Sont électeurs les Françaises et Français âgés de dix-huit ans accomplis, jouissant de leurs droits civils et politiques et n'étant dans aucun cas d'incapacité prévu par la loi."*

French nationality is regulated in the *Code civil*.[23] This strict approach thus varies from the regulation of the United Kingdom, which has a broader circle of electors, as a consequence this issue has been debated several times in France and supported most notably by the French Socialist Party. In fact, the debate has been going on about the electoral rights of foreign nationals for more than 30 years. Francois Mitterand presented his 110 proposals in 1981, which also included granting the right to vote to foreigners residing in France for more than five years at local elections.[24]

The debate has been ongoing since with NGOs raising the issue several times,[25] as well as the Socialist Party.[26] However progress has not been reached in this regard and even the EU citizenship introduced by the Treaty of Maastricht in 1993 did not give an impetus, moreover France was the last EU Member State out of the twelve signatories of the Treaty of Maastricht to let EU citizens practice their right to vote in local elections.[27]

The presentation of the French *Code électoral* and its provisions and the brief introduction of the public debate that has been going on in France for more than 30 years both show a contrast to the EU's regulation, which aims at promoting the integration of the migrant Union citizens within their countries of residence and the to the United Kingdom, which has created electoral legislation that also aims at the integration of a certain group of migrants that have historic ties with the host country.

5 Concluding Remarks

Migration is not only a challenge for Europe, but also a fact. Even if the migration crisis caused by the Syrian civil war will be controlled, migration will stay on the agenda of the European continent. Migration also brings the question of integration and long-term policies for states.

23 FRANCE. Code civil [online]. In: *Legifrance*. Titre Ier bis: De la nationalité française [accessed on 2016-09-18].

24 *"Proposition 80 - L'égalité des droits des travailleurs immigrés avec les nationaux sera assurée (travail, protection sociale, aide sociale, chômage, formation continue). Droit de vote aux élections municipales après cinq ans de présence sur le territoire français. Le droit d'association leur sera reconnu."* 110 proposition du parti socialiste pour la France [online]. *Le Grand Soir* [accessed on 2016-09-18].

25 Droits des étrangers [online]. *Ligue des droit de l'Homme* [accessed on 2016-09-18].

26 Le droit de vote des étrangers [online]. *L'Express* [accessed on 2016-09-18].

27 Citoyenneté et droit de vote des étrangers [online]. *Vie publique* [accessed on 2016-09-18].

This paper has briefly introduced the legislation on the level of the EU and the examples of the United Kingdom and France all show certain attitudes towards creating an environment that by granting the right to vote to a certain group of people with different legal standings allows them to participate in a political community.

It can be generally noted that the EU as a whole has realized that granting political rights to migrant can foster integration in host countries, however on the level of individual states in the EU the pattern is not so clear as the difference between the United Kingdom and France shows.

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EXPULSION OF ALIENS IN THE LIGHT OF RIGHT TO PRIVATE AND FAMILY LIFE

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Abstract

The paper examines the interference between a right to private and family life of an individual, guaranteed under several international human rights instruments, and rights of sovereign states to expel aliens from their territory. In the times of migration crisis, when European states are facing unprecedented masses of migrants flowing to their territories, this complex legal issue deserves to be given academic attention. The European Court of Human Rights has repeatedly faced the legal challenge of striking fair balance between individual's right to private and family life granted under Article 8 of the ECHR and general public interests in controlling immigration (which includes enforcing measures of administrative expulsion). The paper analyses a legal basis for granting protection of a right to private and family life to aliens facing expulsion and legal challenges of application and interpretation of this right at domestic and international level.

Key words

Discretionary Powers; Expulsion of Aliens; Right to Private and Family Life; Draft Articles on Expulsion of Aliens; International Law Commission; European Court of Human Rights; Jeunesse v Netherlands.

1 Introduction – Right of Private and Family Life v. State's Right to Expel Aliens

As a reflection of the principle of state's territorial sovereignty, states enjoy certain discretionary powers in their treatment of aliens.[1] Right to resi-

1 SHEARER, I.A. *Starke's International Law*. 11th ed. Oxford: Oxford University Press, 2011, p. 316. See also *Draft Articles on the Expulsion of Aliens, with commentaries 2014* [online]. International Law Commission [accessed on 2016-09-19].

dency is not automatically granted to foreigners; on the contrary, states are entitled to determine who can enter and stay on their territory. Aliens may be expelled from the territory of a state of their residence for sufficient cause and their home state is bound to receive them.[2]

Aliens might face expulsion from a territory of a state on several possible grounds. States may use the measure of administrative expulsion against persons whose presence on their territory is declared illegal under their domestic laws. States may also make use of their right to expel an alien if he or she is not a national and has committed an offence which is punishable by administrative expulsion under relevant domestic laws.

Discretionary powers enjoyed by states in their treatment of aliens cannot, however, be regarded as limitless. The right of a state to exercise control over people present on their territory is (or at least should be) limited by the state's obligations to respect human rights, which are universal and belong to all human beings regardless of their sex, nationality, age, religion, or any other distinctive features.

The objective of this paper is to examine limitations of a right to expel aliens by a right to private and family life of an individual. The paper analyses a legal basis for granting the protection of a right to private and family life to aliens facing expulsion and presents legal challenges of application and interpretation of this right within the context of controlled migration.

2 International Sources of Law Granting Right to Private and Family Life to Aliens Facing Expulsion

The paper analyses two international legal documents – Draft Articles on Expulsion of Aliens, prepared by the International Law Commission[3] ("Draft Articles") and the ECHR. The former expressly stipulates the obligation of states to respect the right of an expellee to private and family life, but has not yet become a binding international treaty, whilst the latter's general provisions on the protection of right to private and family life (Article 8 of the ECHR) has already been successfully invoked by the expellees in front of the European Court of Human Rights.

2 CRAWFORD, James. *Brownlie's Principles of Public International Law*. 8th ed. Oxford: Oxford University Press, 2012, p. 374.

3 *Draft Articles on the Expulsion of Aliens, with commentaries 2014* [online]. International Law Commission [accessed on 2016-09-19] ("Draft Articles").

2.1 Draft Articles – An Attempt to a Multilateral Treaty Expressly Granting Protection of Aliens in Expulsion Matters

In 2004, the International Law Commission completed its thorough research of customary rules and state practice in the matters of expulsion and presented, during its sixty-sixth session, its proposal for a new international legal document – Draft Articles.

Even though the text of the Draft Articles has not been adopted into an international convention, its examination is important to understand the current doctrinal trends in the field of legal regulation of the treatment of aliens.

Working under the guidance of the special rapporteur Maurice Kamto, the International Law Commission prepared thirty-one articles complexly treating the subject of expulsion of aliens. The Draft Articles consist of five parts.

General provisions are set forth in Part One, including a legal definition of the term "expulsion"[4] and the scope of application of the Draft Articles.[5] In this part, the Draft Articles recognize that a state has a right to expel an alien from its territory, however, this must be done pursuant to *"a decision reached in accordance with the law"* and that decision shall state the ground provided for by law upon which it is based.

Part Two of the Draft Articles elaborates further on general exceptions to state's right to expel aliens.[6] Part Three of the Draft Articles defines the rights of expellees that states are obliged to protect. Part Four of the Draft Articles deals with certain procedural rules that must be followed in expulsion matters and Part Five of the Draft Articles sets forth the possible consequences of an unlawful expulsion.[7]

4 The term is defined as *"formal act or conduct attributable to State, by which an alien is compelled to leave the territory of that State"* but which excludes following situations: i) extradition; ii) surrender to an international criminal court or tribunal; and iii) the non-admission of an alien to a state.

5 Draft Articles do not apply to aliens enjoying certain privileges and immunities that are ordered to leave the territory of the state (diplomatic personnel, staff of international organisations, etc.)

6 For instance, state must respect the well-established principles of non-refoulement of refugees or stateless persons (Article 7), respect the prohibition of deprivation of nationality for the purposes of expulsion (Article 8), prohibition of collective expulsion (Article 9), etc.

7 Alien should enjoy a right of readmission. Furthermore, responsibility of expelling state might be triggered and alien's state should be entitled to pursue diplomatic protection.

For the purposes of the analysis offered by this paper, Part Three, granting certain rights to aliens facing expulsion, is crucial. International Law Commission generally confirms that *"expulsion brings into play the rights of an alien subject to expulsion and the rights of the expelling State"*. The protection of aliens' right to private and family life is given special attention in Article 18 of the Draft Articles, which reads: *"Expelling state shall respect the right to family life of an alien subject to expulsion. It shall not interfere arbitrarily or unlawfully with the exercise of such right."*

The Commentary to the Article 18 of the Draft Articles[8] explains that the legislation and case-law of various states recognize the "need to take into account family considerations" as a limiting factor in the expulsion of aliens. Human rights principles must be taken into consideration in expulsion proceedings and the expelling State may interfere with the exercise of the right to family life only where provided by law and in achieving a "fair balance" between the interests of the State and those of the alien in question.

According to the Commentary to the Draft Articles, this legal text involves both codification and progressive development of fundamental rules of expulsion of aliens. It seems, however, that it is precisely for the fact that the Draft Articles represent some innovative approach that states are not yet ready to adopt the text of Draft Articles into a binding multilateral convention. An attempt to legal regulation of the treatment of aliens represents a rather politically sensitive issue. It is an area where states already have long-standing, detailed, divergent, and ever-changing national laws and regulations that touch upon sensitive national security concerns.[9]

When the work on the project of Draft Articles was initiated, the International Law Commission registered various suggestions as to how to proceed with the project. States preferred finalizing the project as "guidelines" or "framework principles" or "policy guidelines" but not "draft articles". Already at the initial phase of the project, there was a clear standpoint that states prefer soft-law rules rather than a binding treaty. Upon completion of the Draft

8 The Commentary is the work of the International Law Commission, who decided to accompany the final draft of the Draft Articles with commentaries, explaining the rules set forth therein.

9 MURPHY, Sean D. *The Expulsion of Aliens (Revisited) and Other Topics: The Sixty-Sixth Session of the International Law Commission* [online]. GW Law School Public Law and Legal Theory Paper No. 2014-59, 2014, pp. 5–6 [accessed on 2016-09-19].

Articles, the International Law Commission decided not to recommend to the General Assembly that steps be taken at this time to transform the Draft Articles into an international convention. The General Assembly was recommended to "take note" of the Draft Articles and "encourage their widest possible dissemination".

To summarize, the work done by the International Law Commission in drafting the Draft Articles was certainly worthwhile and it might be a valid source of knowledge and inspiration. However, since the text of Draft Articles has not taken a form of a binding legal treaty, it is rather unlikely that any public authority would refer to Draft Articles when interpreting domestic rules concerning expulsion proceedings.

2.2 ECHR

Besides granting the aliens a protection against the so-called collective expulsion,[10] the ECHR does not expressly recognize, in any of its Articles, any particular rights that aliens should enjoy in expulsion matters.

Nevertheless, as the relevant case-law of the European Court of Human Rights[11] has shown, restrictive administrative measures taken by a state party

10 The obligation of State Parties to the ECHR to refrain from the measures of collective expulsion of aliens is expressed in Article 4 of the Protocol No. 4 of the ECHR. The term collective expulsion is defined as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group. The European Court of Human Rights has already dealt with the alleged violations of Article 4 of the Protocol No. 4 in several cases, including some intra-states disputes – such as, for example, Judgment of the European Court of Human Rights of 3 July 2014. Georgia v. Russia. Application No. 13255/07 [online]. In: *HUDOC* [accessed on 2016-09-19] concerning the alleged mass expulsion of Georgian nationals from the territory of Russia in 2006.

11 See, for instances cases Judgment of the European Court of Human Rights of 18 February 1991. Moustaquim v. Belgium. Application No. 12313/86 [online]. In: *HUDOC* [accessed on 2016-09-19]; Judgment of the European Court of Human Rights of 13 July 1995. Nasri v. France. Application No. 19465/92 [online]. In: *HUDOC* [accessed on 2016-09-19]; Judgment of the European Court of Human Rights of 20 March 1991. Cruz Varas and others v. Sweden. Application No. 15576/89 [online]. In: *HUDOC* [accessed on 2016-09-19]; Judgment of the European Court of Human Rights of 2 August 2001. Boultif v. Switzerland. Application No. 54273/00 [online]. In: *HUDOC* [accessed on 2016-09-19]. A rather rich case-law of the European Court of Human Rights in the expulsion matters was even a source of inspiration for the International Law Commission in their preparatory work on the Draft Articles.

to the ECHR against an alien (expulsion order, refusal to grant residency permit, etc.), might amount to a breach of Article 8 of the ECHR, which reads:

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

The above-cited legal provision was formulated in a way that leaves a rather generous room for flexible (and sometimes extensive) interpretation. Claim of an alleged violation of a right to private and family life might be made in various situations when there is an authoritative intervention to a life of an individual. It then appears quite natural that the cited Article 8 might be invoked in expulsion matters. Expellees might have established a family in a country from which they are expelled and their forced removal might cause the family ties to loosen up or cease to exist.

As it was confirmed by the European Court of Human Rights itself and also by some national judicial authorities, public authorities of states parties to the ECHR must pay due regard to Article 8 when applying and interpreting domestic laws on expulsion.

In 2007, the Slovak Supreme Court confirmed the obligation of administrative bodies to interpret all domestic legal norms in conformity with the ECHR. This ruling[12] was rendered in a case in which an applicant – a person of Vietnamese origin, residing in Slovakia for more than twenty years, even after his original entry visa had expired – challenged his expulsion on the ground that expulsion would severely damage the family ties between him and his two under-aged sons, who were born during his marriage with a Slovak national and who both held Slovak citizenship. The administrative bodies did not accept this claim arguing, among others, that Slovak legal order did not provide for consideration of expellee's right to private and family life. Such refusal of the application of the ECHR was, however, overruled by the Supreme Court, as explained above.

12 Decision of the Supreme Court, Slovak Republik, No. 2 Sža 22/2007.

Another example of a high domestic judicial authority stressing the necessity of compliance between domestic legal norms and obligations set forth by the ECHR is the ruling of the Czech Constitutional Court, in which difference in treatment between "legal" and "illegal" residents was declared unjustified.[13] The Czech Constitutional Court, after presenting results of its profound analysis of the relevant case-law of the European Court of Human Rights, also clarified the rules of interpretation of Article 8 of the ECHR in expulsion matters: *"Aliens do not have subjective right to residency (or right not to be expelled), however, expulsion might interfere with other fundamental rights of individuals, including right to family life, therefore expulsion must be legitimate and proportionate."*

3 Challenges of Application and Interpretation of Article 8 of the ECHR in the Expulsion Matters

The basic rule of interpretation of Article 8 of the ECHR in expulsion matters is that "fair balance" must be struck between a right to private and family life of an individual and general public interests in regulating immigration. In the current migration crisis, this particularly tricky legal challenge is even more accurate. Since every case has specific background, the choice of the most adequate methods for "striking fair balance" between individual interests of the expellees (and their family) and public order interests, appears getting harder and harder to make. Recent decision rendered by the Grand Chamber of the European Court of Human Rights – *Jeunesse v. Netherlands*[14] serves as a good illustrative example.

13 Decision of the Constitutional Court, Czech Republic of 9 December 2008, No. Pl. ÚS 26/07 [online]. In: *NALUS* [accessed on 2016-09-19]. The case concerned alleged unconformity of the relevant domestic laws (CZECH REPUBLIC. Act No. 326/1999 Coll., on Residency of Aliens) with the Constitution. The contested legislation allowed for distinction between legal (having a valid residency permit) and illegal migrants (who are not in possession of a valid residency permit) in their right to judiciary review of their administrative expulsion. Illegal aliens could not challenge the expulsion order issued against them by administrative body in front of the court of law. After the court found that such legislation breached the constitutional principles, the contested legal provisions lost legal effect.

14 Judgment of the European Court of Human Rights of 3 October 2014. Jeunesse v. The Netherlands. Application No. 12738/10 [online]. In: *HUDOC* [accessed on 2016-09-19].

3.1 Jeunesse v. Netherlands – Obligation to Consider Particular Circumstances of the Expellee, Including the Best Interest of Children

The applicant in this case is Ms. Jeunesse, a Surinamese national residing in the Netherlands with her family, whom the Dutch authorities refused to grant residency permit and requested her to leave the country. She was born in Surinam when it was still a part of Dutch territory and acquired Dutch nationality at birth. She lost her Dutch nationality after independence of Surinam was declared and she remained a Surinamese national. She came to the Netherlands after marrying a Dutch national – a man of Surinamese origin, whom she met and started relationship with in Surinam, but who later moved to the Netherlands and naturalised there. After the couple settled in the Netherlands, three children were born in this marriage and they all have Dutch nationality.

The case at hand concerned the refusal of Dutch authorities to allow Ms. Jeunesse to reside in the Netherlands on the basis of family life. Ms. Jeunesse had been residing in the Netherlands for more than sixteen years and the authorities were duly notified of her stay in the country. Several times Ms. Jeunesse applied for the residence permit, but her efforts were in vain. When a final decision on her denial of the residency permit was rendered and was requested to leave the country, she argued, in her appeal, that she had resided in the country peacefully for a considerable period of time, she had no criminal record, and finally, that her settling in Surinam would entail a degree of hardship for her underage children and the rest of the family.

The European Court of Human Rights took all of the above-stated particularities of Ms. Jeunesse situation into consideration. It came to the conclusion that the Dutch authorities had failed to take account of, and assess the evidence on, the practicality, feasibility and proportionality of the refusal, particularly in the light of the best interests of the children. In the court's view, the situation of the whole family should have been examined. The three young children of Ms. Jeunesse were emotionally dependent on her and in case her expulsion order was executed, they would have to follow her to Surinam. They were, however, Dutch nationals and were already well established in the country, attending schools there and having built social

contacts. Sudden change of social environment would cause them an intolerable amount of hardship.

The European Court of Human Rights concluded that a fair balance was not struck between the personal interests of Ms. Jeunesse and her family in maintaining their family life in the Netherlands and the public order interests of the Dutch Government in controlling immigration. Therefore, the court found a violation of Article 8 of the ECHR.

3.2 Execution of the Judgment and an Upgrade to Governmental Policy

Pursuant to the Action Report of the Government of the Netherlands on the implementation of the judgment in case *Jeunesse v. Netherlands,*[15] firstly, the Dutch State Secretary of Security and Justice had informed the Dutch Parliament of the judgment. The Dutch Government concluded that this judgment did not create an obligation for the Government to change Dutch immigration policy.

Furthermore, since the European Court of Human Rights found violation mostly due to the fact that the Dutch authorities put insufficient weight to certain specific and exceptional circumstances in this individual case,[16] the government proceeded to remind the Dutch Immigration and Naturalisation Service on the importance of a thorough assessment of the particular circumstances of each individual case. The Dutch Immigration and Naturalisation Service were instructed to make this assessment more visible in the decision-making and official guidelines for the Immigration and Naturalisation Service were modified accordingly.

The interesting result of the execution of this judgment is that despite the existence of exceptional circumstances of the case, the Dutch government

15 Action Report (01/04/2015) – Communication from the Netherlands Concerning the Case of Jeunesse against the Netherlands (Application No. 12738/10), Document No. DH-DD(2015)416 [online]. *Council of Europe* [accessed on 2016-09-19] ("Action Report").

16 Particular circumstances are: i) the fact that Ms. Jeunesse once was a holder of the Dutch nationality, ii) the fact that her children were Dutch nationals and would suffer extreme hardship if their mother was expelled, iii) her clear criminal record, iv) the long-lasting acceptance of Ms. Jeunesse's residency on the Dutch territory by the pertinent authorities., etc.

was still able to exercise certain degree of generalization. Probably the most impactful action of the government is a modification of the official guidelines, which represent an official manual for the Immigration and Naturalisation Service on how to implement Article 8 of the ECHR in its decision-making process.[17]

4 Conclusive Remarks

Even though an examination of migration policy has a particular accuracy in Europe, which is dealing with the historically worst migration crisis, the increased rates of immigration indeed represent a global concern. Policymakers across the globe are struggling to adopt policies that would effectively deal with certain migration-related problems, such as increasing numbers of undocumented migrants, failed integration, social tensions, etc. Very particular challenge is to determine the methodology on finding the fair balance between aliens' right to private and family life and state's sovereign right to expel aliens and the general public interests in controlling immigration. This paper suggests two modest steps to be taken at national and international level to tackle this complex legal challenge.

Firstly, local authorities dealing with expulsion matters, as well as appellate bodies reviewing the expulsion orders, would make great use of some guidelines, which would, in details, treat the subject of expulsion and diverging interests of parties. Such guidelines (similar to those the Dutch Government has already enacted and revised after *Jeunesse v. Netherlands* case was decided) would be prepared by legal experts of various professional backgrounds, whose role would be to prepare a comprehensible "manual" on how to properly assess the expellees' situations and how to strike a proper balance between diverging interests in expulsion matters. Various circumstances that might appear in expulsion proceedings would be given attention and the mode of their assessment would be proposed, for instance, how to assess the best interest of children, evaluate security concerns, etc.

Secondly, international community should advance a step further in determining more precise content of aliens' rights in expulsion matters. Concerning the Draft Articles, the special rapporteur initially proposed

17 See Action Report, pp. 3–4.

that International Law Commission recommend to the General Assembly to recommend to the states, when expelling aliens, to take appropriate measures to ensure that the rules set out in these Draft Articles are taken into account. This proposal, however, was not adopted by the International Law Commission and such recommendations to states were not made by the General Assembly. With respect to this, it might be the time for reconsidering making such recommendations to states, or finding another way to somehow revive this well prepared legal text, which might shed some more light in this challenging matter.

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DIFFERENCES BETWEEN THE 1951 GENEVA CONVENTION AND THE EUROPEAN ASYLUM POLICY REGARDING THE RIGHT TO SEEK ASYLUM

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Abstract

The recent events of refugee crisis pose real challenges not only on international, on European level as well. This crisis crystallizes the problems of effective refugee protection under both level of regulation. This paper aims at pointing out these issues, especially of provisions on freedom of movement, outlining the hardship refugees facing when applying for protection in the EU. At some point the contrasts between the international and EU law seem to be insoluble: at one side stands the international approach providing extensive protection, while on the other side stands the European approach of a rather restrictive regime.

Keywords

Common European Asylum System; Freedom of Movement; Refugee Law, Geneva Convention of 1951.

1 Introduction

In recent days, refugee crisis in Europe became a daily issue that is considered both on international level by the UN High Commissioner for Refugees ("UNHCR") and also by the EU. Refugees fleeing from their country of origin had been acknowledged before the creation of the international mechanism still applicable in these days, for instance: in the 1920s, Armenians fleeing from the Ottoman Empire and persons fleeing from or being persecuted

from Soviet territories had created a situation that needed to be properly addressed at international level. Thus, a consensus on a need for creating an international regime for the protection of the refugees lead to the adoption of several conventions under the aegis of the League of Nations. After the Second World War, the ever emerging need to adopt a convention that could effectively provide protection for refugees has led to the adoption of the Geneva Convention.[1] In its original wording, the Geneva Convention was only applicable to events occurring before 1951, bearing a limited scope. Only in 1967 had been this clause abolished, providing an international convention that is adopted to *"meet new refugee situations which have arisen"*.[2]

2 Comparison of the International and European Approach

2.1 Protection of Refugees under International Law

According to Article 1(2) of the Geneva Convention, read in conjunction with the Protocol, refugee is a person who *"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country"*. Here, it has to be highlighted that one does not become a refugee because municipal law constitutes this status – namely, after conducting the asylum procedure in a host state – but he or she is to be considered a refugee by the reason of satisfying the five qualifiers set out in the aforementioned Article, making the municipal procedure only declaratory in character.[3] As stated in Article 14 of the Universal Declaration Human Rights[4] *"everyone has the right to seek asylum in other countries from persecution"*, providing the possibility for refugees to find a country in which they wish to avail themselves of protection and feel safe to do so, meaning that a state is not eligible to refuse asylum only

1 Convention Relating to the Status of Refugees of 1951 [online]. *UNHCR The UN Refugee Agency* [accessed on 2016-03-14] ("Geneva Convention").

2 LAUTERPACHT, Sir Elihu; BETHLEHEM, Daniel. The Scope and Content of the Principle of Non-refoulement: Opinion. In. FELLER, Erika; TÜRK, Volker; NICHOLSON, Frances (eds.). *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*. Cambridge: Cambridge University Press, 2003, p. 101.

3 *Ibid*., p. 116.

4 Universal Declaration of Human Rights of 10 December 1948 [online]. *UN* [accessed on 2016-03-14].

on the ground that it could be sought from another state – unless having a closer link or connection with another state can serve as a basis to call upon the asylum seeker to request asylum from that state.[5] The most important aspect of being qualified as a refugee is the notion of "well-founded fear of persecution", meaning that an asylum seeker, if sent back to the country of origin, would face a *"serious possibility of persecution"*,[6] inserting an objective element into the rather subjective wording of the definition. Furthermore, this notion is closely connected to the principle of non-refoulement,[7] and to the freedom of movement, as states shall not send back a refugee in any manner whatsoever (e.g. rejection at the frontier, or expulsion, compulsory return) to another state where he or she may be subjected to persecution,[8] or would face risk of torture or inhuman, degrading treatment if sent back.[9] Concerning the freedom of movement of refugees, this right can be limited by the states regarding the protection and controlling of their frontiers. There is an inherent conflict between the sovereignty of states over the control of their frontiers and the freedom of movement of refugees and their ability to seek asylum. Obviously, border control is an essential part of state sovereignty in relation to protection, as well as admittance of foreigners to its territory.

In my view, the freedom of movement of refugees can be examined in a threefold manner. First of all, in connection with non-refoulement, states have limited latitude on sending back persons to territories of other states seeking asylum in their territory or at their frontiers. The second

5 *Refugees without an Asylum Country* [online]. Executive Committee of the High Commissioner's Programme, 1979 [accessed on 2016-03-14].

6 The Refugee Convention, 1951. The Travaux Préparatoires Analysed with the Commentary by Dr. Paul Weis [online]. *UNHCR The UN Refugee Agency*. p. 7 [accessed on 2016-03-14].

7 Article 33 of the Geneva Convention states that no Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

8 UN General Assembly Declaration on Territorial Asylum of 14 December 1967 [online]. *Refworld* [accessed on 2016-03-14].

9 LAUTERPACHT, Sir Elihu; BETHLEHEM, Daniel. The Scope and Content of the Principle of Non-refoulement: Opinion. In: FELLER, Erika; TÜRK, Volker; NICHOLSON, Frances (eds.). *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*. Cambridge: Cambridge University Press, 2003, pp. 101, 149–150.

aspect relates to the regular or irregular entry into a state's territory, while the third one relates to right to choose of residence and freedom of movement in the territory of states.

The main question arises in connection to the second and third aspects. According to Article 31 of the Geneva Convention, *"the Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence"*. Under the Universal Declaration of Human Rights every person has the right to leave any country, including his own, and to return to his country, yet the declaration does not provide the right to enter another, not imposing an obligation on states to provide asylum.[10] This lack of obligation has to be balanced somehow, providing some kind of guarantee to refugees, as the right to seek asylum is without its obligatory correspondent. This conflict is mitigated by the declaratory nature of refugee status, decreasing the discretionary power of states and strengthening the position of refugees to be admitted.

Article 31 of the Geneva Convention intends to resolve this issue, providing the possibility to enter a state where the refugee wishes to seek asylum, even if he enters unlawfully, without penalisation. In such cases, regard had to be given to the notion of "directivity". The expression is deceptive, as it seems to be vague and only applicable to situations where a refugee is directly coming from the country of origin. The term arriving directly from a territory where their life or freedom was threatened does not imply that it must be the country of origin from where they are coming from, but also any other state, where there is a possibility of threat to a refugee's life or freedom. This involves the analysis of risk at various stages of the journey and the transit countries, where the refugees are unable

10 Study Guide – The Rights of Refugees [online]. *University of Minnesota Human Rights Library Database* [accessed on 2016-03-14].

to find protection from persecution or have other good causes for not applying for asylum.[11] Beside fear from persecution, the UNHCR went further in the interpretation of the Geneva Convention extending Article 31 to situations, where refugees are unable to find protection in the first country compelling them to seek asylum in other states,[12] incontestably leading to a wider interpretation. This leads to the conclusion that "directivity" can involve a large geographical trajectory and sometimes will be dependent upon the given situations that are not connected to threat to the lives or freedom of refugees, extending their possibility to seek out the most favourable state that can provide effective protection or safeguard for them.

Moving onward, the freedom of movement and entering another state after being recognised as refugees as well as mass influx situations constitutes a concern that has been scrutinized by the UNCHR. The main issue is the possible irregular movement from the country of refuge to the country of arrival without proper documentation or with falsified documents. According to the UNHCR, such movement usually involves persons who might wish to move to another state due to economic or social reasons, such as lack of educational and employment possibilities or integration.[13] Then, the second country of refuge will be considered as the "latest" destination of the trajectory of a refugee.[14] In the situation of continuous movement, refugees can be subjected to immigration procedures: if the aforementioned compelling situations are non-existent, then refugees cannot refer to Article 31(1) of the Geneva Convention to escape penalisation, due to the fact that they are moving onwards for economic reasons or for better standard of living. In order to avoid such occurrences, states must provide possibilities and incentives for integration possibilities and respect

11 GOODWIN-GILL, Guy S. Article 31 of the 1951 Geneva Convention Relating to the Status of Refugees: Non-penalization, Detention and Protection. In: FELLER, Erika; TÜRK, Volker; NICHOLSON, Frances (eds.). *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge: Cambridge University Press, 2003, pp. 217–218.

12 Summary Conclusions: The Principle of Non-Refoulement, 2003 [online]. *Refworld* [accessed on 2016-03-16].

13 *Problem of Refugees and Asylum-Seeker Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection* [online]. Executive Committee of the High Commissioner's Programme, 1989 [accessed on 2016-03-15].

14 UNHCR, Refugee Protection and International Migration [online]. In: *UNHCR The Refugee Agency* [accessed on 2016-03-15].

Article 26 of the Geneva Convention, securing the freedom of movement and the right to choose the place of residence, by which not only it is possible to provide a safeguard for states to prevent irregular movements but also for refugees the ability to find a place to resettle, meaning that states' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by the Geneva Convention and the ECHR.[15]

The other issue relates to mass influx (or large-scale influx) situations that entails some concerns. Firstly, "mixed migration" involves the movement of migrants (mainly for economic reasons) and asylum seekers fleeing from their country of origin. These occurrences can be worrisome as states, in order to protect their borders and secure their territory free from irregular movement, have been introducing measures to deter migrants from establishing in their territories, albeit having a deterring effect on asylum-seekers.[16] Secondly, in events, where national authorities face mass influx situations, they might not be prepared to grant asylum to every person, yet this cannot mean that they can reject asylum claims at the frontiers, rather search for a durable solution with respect to the principle of non-refoulement, such as transferring refugees to safe third countries or applying temporary protection.[17] There has been a twofold approach formed in mass influx situations: on one hand, scholars argue that there is nothing in the provisions of the Geneva Convention that would suggest the inapplicability to large-scale influx as it aims at the protection of persons belonging to a particular group or category – breaking through the concept of individualisation.[18] Yet state practice does not confirm this viewpoint, as they mostly apply individualised processes that is, to say, correspond with their interest of maintaining control over irregular or regular migration, even in mass influx situations.

15 Judgement of the European Court of Human Rights of 25 June 1996. Amuur v. France. Application No. 19776/92 [online]. In: *HUDOC* [accessed on 2016-03-15].

16 UNHCR, Refugee Protection and International Migration [online]. In: *UNHCR The Refugee Agency* [accessed on 2016-03-15].

17 LAUTERPACHT, Sir Elihu; BETHLEHEM, Daniel. The Scope and Content of the Principle of Non-refoulement: Opinion. In: FELLER, Erika; TÜRK, Volker; NICHOLSON, Frances (eds.). *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*. Cambridge: Cambridge University Press, 2003, p. 113.

18 DURIEUX, Jean-Francois; MCADAM, Jane. Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies. *International Journal of Refugee Law*. 2004. Vol 16, p. 9.

The problem with the aforementioned reasoning on group-approach is that states might lose effective control over persons crossing their border, which they might not be willing to loosen, and in mixed migration situation, there is a need for individualised procedure in order to decide whether a person seeking asylum is to be considered a refugee or a migrant. In an unequivocal situation, where only asylum seekers arrive to the border or territory of a state "en masse", the group-approach can be justified, but in mixed migration situations, states obviously tend to retain their individualised approach that can make the processing of asylum claims lengthier and detention in aliens policing procedures prolonged, also increasing the chances of unlawful detention, and the violation of human rights.

This line of argument leads straightforward to the third relevant question under Article 31 in connection with freedom of movement, that penalties shall not be imposed on asylum seekers on the account of their illegal entry. Beside the non-penalisation, the restriction of freedom of movement can only be justified if it is necessary and only applicable until such persons' status is regularised or they obtain admission into another country.[19] In cases of detention, there are certain guarantees that States must observe, such as, inter alia, informing the refugees about the ground on which they are detained, bringing them promptly before a judicial or other authority, the length of custody must be set and cannot be unlimited or of excessive length[20] and further detention can only be justified in cases of threat to security or a great or sudden influx.[21] This question raises further issues under European law.

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19 Article 31(2) of the Geneva Convention: *"The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."*

20 U.N. Commission on Human Rights Working Group on Arbitrary Detention: Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment Regarding the Situation of Immigrants and Asylum-Seekers; U.N. Doc. E/CN.4/2000/4/Annex 2 (1999) [online]. *University of Minnesota Human Rights Library* [accessed on 2016-09-19].

21 GOODWIN-GILL, Guy S. Article 31 of the 1951 Geneva Convention Relating to the Status of Refugees: Non-penalization, Detention and Protection. In: FELLER, Erika; TÜRK, Volker; NICHOLSON, Frances (eds.). *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*. Cambridge: Cambridge University Press, 2003, p. 195.

2.2 Asylum Policy in the EU

The existing mechanism on the examination of asylum claims is based on the Schengen-Dublin axis with Schengen defining the rules on external borders examinations, and the Dublin III Regulation[22] determining the responsible Member State for the examination of international protection claims. By reading the two main piece of legislation in conjunction, it is apparent that Member States with external borders are overburdened, either the asylum-seekers are arriving in a regular or in an irregular manner: as if they arrive in a regular manner, then under Article 7(2) of Dublin III Regulation, the Member State responsible for the examination of asylum claims will be the one where the applicant first lodged his or her application for international protection. Concerning irregular entry, Article 13 of the Dublin III Regulation points to the Member State with initial entry – namely, States with external frontiers. At this point, European legislation shows a discrepancy with international refugee law, limiting the right of asylum-seekers to seek asylum in the first country in which they wish to do so. This inherent conflict can be read out from the UNHCR Executive Committee documents, as even in large-scale influx situations, under the international regime, refugees should be admitted to the State in which they first seek refuge (that would not necessarily be a Member State of the EU with an external border), or admit them at least on a temporary basis,[23] either way channelling the responsibility to Member States with external frontiers at EU level. This issue can also provide a differentiated interpretation of Article 18 of the Charter of Fundamental Rights[24] concerning right to asylum, questioning its practical correspondence with the Geneva Convention: with the primary territorial limitation for seeking asylum at European level, the possibility for refugees to claim asylum has

22 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person [online]. In: *EUR-Lex* [accessed on 2016-03-16] ("Dublin III Regulation").

23 *Protection of Asylum-Seekers in Situations of Large Scale Influx* [online]. Executive Committee of the High Commissioner's Programme, 1981 [accessed on 2016-03-16].

24 Charter of Fundamental Rights of the European Union [online]. In: *EUR-Lex* [accessed on 2016-03-16].

been limited, paring down their possibilities to find a safe country to which they wish to avail themselves. On the side of Member States, the European legislation clearly impose an obligation to process asylum claims, that in this sense, lacks at international level for the favour of persons claiming protection. Albeit, when a Member State carries out a negative decision, other Member States are bound to recognise it, yet there is no obligation imposed on national authorities to do so with positive decisions, creating a 'one-stop-shop' procedure.[25] With this line of argument, it is easy to conclude that the trajectory possible to be made by the asylum-seeker is rather limited, seems to be almost unreachable.

Moving onward to the question on who could be qualified as a refugee, under the Qualifications Directive[26] two kind of protection can be provided to third-state persons: international protection and subsidiary protection. Although, under the international regime, there is no differentiation between persons persecuted on the basis of the five qualifiers and the extended UNHCR definition, persons fleeing from indiscriminate effect of armed conflict or natural disasters, *"outside their country of origin or habitual residence and unable to return there owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order"* [27] are to be considered refugees as well. Under Article 10 of the Qualifications Directive only the five qualifiers, delineated above, are taken into account, theoretically following the wording of the Geneva Convention, yet providing a stricter interpretation on the refugee-definition, while under Article 15 of the Qualifications Directive on subsidiary protection are the other qualifiers listed, such as torture, inhuman or degrading treatment or punishment, death penalty, providing a less compatible approach with the international counterpart. Not only in the core definition we can find discrepancies, but

25 CHALMERS, David; DAVIES, Gareth; MONTI, Giorgio. *European Union Law*. Cambridge: Cambridge University Press, 2011, p. 487.

26 Directive 2011/95/EU on Standards for the Qualification of Third-country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted [online]. In: *EUR-Lex* [accessed on 2016-03-16] ("Qualifications Directive").

27 *UNCHR Resettlement Handbook and Country Chapters* [online]. UNCHR, 2011, p. 81. [accessed on 2016-03-16].

as stated above, a refugee cannot be penalised on account of his irregular entry – even in cases of forgery or obtaining documents in a fraudulent manner – is also interpreted widely at international level. Yet under EU legislation, under Article 14 of the Qualifications Directive, Member States have to revoke, end or refuse to renew refugee status of a third country national, if he had obtained this status by misrepresentation or omission of fact, using false documents it was decisive for granting the refugee status. In my opinion, such act of national authorities could amount to some kind of penalisation, as refugees, in fear of non-admission, might attempt to cross the external frontiers of the EU with falsified documents and even if they obtain international protection through a fraudulent manner easily leading to their refusal or expulsion with the possible result of sending them back to a state on their previous trajectory that can only provide lesser protection or maybe none at all. Additionally, the CJEU in the *Qurbani* case[28] denied jurisdiction to rule on Article 31 of the Geneva Convention on the question on how to define 'coming directly' by stating that there is no *renvoi* to the convention. Being in an easy position to deny jurisdiction, the CJEU keeps scholars waiting to find out whether the definition of 'directivity' holds any differences from the international approach.

Concerning the freedom of movement, Article 33 of the Qualifications Directive only provide a vague wording, stating that Member States shall provide the beneficiaries of international protection the freedom of movement under the same conditions and restrictions provided for other third-country nationals legally resident in their territories. The question of restriction of choosing a place of residence has been recently investigated by the CJEU, due to the differentiated approach under EU law, and ruled that it is possible for national authorities to impose restrictions on beneficiaries of subsidiary protection status regarding residence conditions in order to achieve an appropriate distribution of the benefits connected to this status.[29] Although the freedom of movement in the host Member State

28 Judgement of the Court of Justice of 17 July 2014. Criminal Proceedings against Mohammad Ferooz Qurbani. Case C-481/13 [online]. In: *EUR-Lex* [accessed on 2016-03-16].

29 Judgement of the Court of Justice of 1 March 2016. Kreis Warendorf v. Ibrahim Alo and Amira Osso v. and Region Hannover. Joined Cases C-443/14 and C-444/14 [online]. In: *EUR-Lex* [accessed on 2016-03-17].

or within an area assigned to them is observed, yet it enables restrictions that had not been foreseen under the Geneva Convention. Such restrictions under EU law in mass influx situations might be considered permissible, but as this issue is not addressed under the Geneva Convention, we have no exact guideline on whether the two layer of regulation is compatible or not. Yet an indirect guidance could be extracted from the 1967 Declaration on Territorial Asylum[30] stating that for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons, states can deviate from admitting asylum-seekers. And if there is a possibility of deviation, then it is presumably allowed in large-influx cases, that is always accompanied with overburdened national authorities, to order restrictions on freedom of movement and right to choose the place of residence, if its necessity and proportionality is justified and provided that it is applied only a temporary basis.

3 Conclusion

This paper aimed at analysing the differences and discrepancies as far as possible between the international and European approach of refugee law and freedom of movement connected to it. It is possible to come to the finding that the European regulation mechanism is much more complex and segregated, being revised over the years. In my opinion, the revision of pieces of legislations under the CEAS, on the contrary to the international counterpart, does not show a progressive evolution in favour of persons in need, rather a progressive change that seems to be reluctant to address the evolving nature under international law and also, the recent changes in humanitarian situations. Not only the European regulatory system seems to be problematic, but also the Geneva Convention, as it is somewhat outdated as at the time of the adoption of the convention, Contracting States did not face such mass-influx flight that is common nowadays. This leads to the conclusion that answers and interpretations should not be sought in the original wording of the Convention but rather in the recent large scale influx situations, that can help the analysation of existing gaps and achieving

30 UN General Assembly Declaration on Territorial Asylum of 14 December 1967 [online]. *Refworld* [accessed on 2016-09-19].

possible solutions. As there is no comprehensive procedure and solution for mass-influx situations, the question of limitation of freedom of movement arises: can it be justifiable on this ground and the answer is yes, then to what extent? Under the international regime the answer is clearly a negative one, yet under the European approach it seems to be otherwise. Also, it is apparently more difficult to observe and respect human rights in such circumstances, putting more pressure on national authorities. Moving further, the restrictive approach under EU law shows an apparent gap between the approach of the European Court of Human Rights and the CJEU, creating different standards to be observed by the Member states. Under the European regime, there is hardly any piece of legislation that can correctly address mass-influx situation in mixed migration, only the main aim of aversion of secondary movement can be read out. Yet, when Member States are overburdened, this movement is inevitable and at the same time the aversion is impossible, that has to be monitored with the cooperation of States. All in all, refugee crisis what Europe now faces clearly leads to the breakpoint: whether we can solve this situation jointly in a manner that shows humanitarian concerns for persons in need, or breaking apart in the midst of crisis.

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