Radovan Malachta,
Patrik Provazník (eds.).

COFOLA INTERNATIONAL 2021

International and National Arbitration – Challenges and Trends of the Present and Future

Conference Proceedings

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List of Abbreviations[1]

Art.	Article / Articles
BIT / BITs	Bilateral Investment Treaty / Bilateral Investment Treaties
CETA	Comprehensive Economic and Trade Agreement
CISG	United Nations Convention on Contracts for the International Sale of Goods
CJEU	Court of Justice of the European Union (previously as European Court of Justice)
ECtHR	European Court of Human Rights
EU	European Union
FET	Fair and Equitable Treatment
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
ISDS	Investor-state Dispute Settlement
MIC	Multilateral Investment Court
No.	Number
NYC / New York Convention	United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards
OECD	Organisation for Economic Co-operation and Development

1 The abbreviations listed below are common for more than one contribution featured in these conference proceedings. The authors were allowed to introduce their own abbreviations exclusively for the purposes of their contributions. These are not listed here.

p. / pp.	Page / Pages
para.	Paragraph / Paragraphs
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SIAC	Singapore International Arbitration Centre
Slovak Act on Arbitration	Act No. 244/2002 Coll., on Arbitration
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law
US / U.S.	United States
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume

Preface

The conference "COFOLA = Conference for Young Lawyers" is annually organized by the Masaryk University, Faculty of Law from 2007. The main aim of this conference is to give the 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 a 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 a 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 vital in current days.

This year's COFOLA International conference was titled "International and National Arbitration – Challenges and Trends of the Present and Future". After an enforced year-long break, the oral part of the conference was held online with a record number of 30 participants. Representatives of 9 countries (namely China, Croatia, Czech Republic, Hungary, Italy, Lithuania, Moldova, Poland, and Slovakia) gathered to present their papers on selected topics. This part of the conference was supervized by four academics who focus on arbitration as part of their specialization, two of whom also serve as arbitrators in practice. The papers included in these proceedings represent topics that were successful in an independent review process.

The following papers, in their respective order, may be systematically divided into four sections.

The first group consists of contributions that elaborate on topical issues, both from a societal and technological perspective. First, there is a paper

on the impact of the COVID-19 pandemic on the issue of virtual arbitration hearings. This paper analyzes their advantages and disadvantages as well as the way arbitral tribunals have coped with this "new standard". In terms of the impact of technological developments on the field of arbitration, the possible role of blockchain and the potential for the application of artificial intelligence in the arbitration process are discussed. The last paper, in the context of current reactions to recent events, focuses on the arbitration process in the United Kingdom after the so-called Brexit, which is certainly a relevant topic as London represents one of the busiest centers for resolving disputes in arbitration.

The second group of contributions may be categorized as contributions in the field of investment arbitration. In this section, several contributions are devoted to the impact of EU law on investment arbitration. For example, the question whether a misapplication of EU law gives rise to international responsibility of a Member State under an investment treaty is analyzed. Other contributions focus on the question of the evolution and of the structure of investment dispute arbitration under investment protection agreements concluded by the EU and EU Member States between each other and with third states. The remaining contributions of this section are devoted to general institutes and doctrines, namely the "clean hands" doctrine and the issue of challenging arbitrators in inter-state cases.

The next section consists of papers on international commercial arbitration. In this regard, papers analyzing the status of the "rules of law" and *lex mercatoria* in proceedings before the ICC, sources of transnational public policy, as well as the regulation of arbitration agreements under the New York Convention are featured. Last but not least, a paper comparing ICC expert proceedings and ICC arbitration and the way the outcomes of these proceedings are enforceable in Slovakia is presented.

Finally, the fourth section focuses on selected aspects of the development of national arbitration proceedings, which present a valuable contribution, especially from a comparative perspective. Thus, the reader can get acquainted with the civil law consequences of corruption under Czech law in the light

of international commercial arbitration, the crime of bending the law under Slovak criminal law, the role of the EU Arbitration Convention as a measure of eliminating double taxation (with specific reference to Slovakia), the issue of arbitrability of labor disputes under Croatian law, and with the system and a new regulation of arbitration in Macao SAR.

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Virtual Arbitration Hearings in Times of COVID-19 (And Beyond)

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Abstract

Until 2020, arbitration hearings usually presumed a physical presence of all participants in one room. Although hearings conducted by way of remote communication, i.e., virtual hearings, have been technically possible for several years, their use was limited at best. Due to travel restrictions imposed by the COVID-19 pandemic, the situation changed rapidly and virtual hearings came into the focus of the arbitral community. Mindful of the changing attitudes, this paper firstly discusses attributes of the virtual hearings, their advantages and challenges. Furthermore, with the benefit of the hindsight, the second part looks at how the arbitral institutions handled the "new normal" imposed by COVID-19 in terms of the guidance provided to the tribunals and parties.

Keywords

Virtual Arbitration Hearings; Due Process; Arbitration Rules; Arbitral Institutions; COVID-19.

1 Introduction

International arbitration became a fully independent field of practice and research in the 1950s[1] which makes it comparatively much more modern than court litigation. Nevertheless, oral hearings in arbitration have been traditionally following much older litigation template (with fewer formalities and no wigs). Or at least that is how I would explain the strong preference for in-person hearings in arbitration which remained mostly unchanged

1 SCHINAZI, M. The Three Ages of International Commercial Arbitration and the Development of the ICC Arbitration System [online]. *ICC Dispute Resolution Bulletin*. 2020, no. 2, p. 63 [cit. 10. 6. 2021]. Available at: https://www.shearman.com/Perspectives/2020/08/The-Three-Ages-of-International-Commercial-Arbitration-and-the-Development-of-the-ICC-Arbitration

by the new means of remote technology. Even after videoconferencing became accessible and arbitrators could have been tempted by their practical convenience or more abstract motivators, such as reduction of one's carbon footprint,[2] the "frequent" users of virtual hearings still represented just a very small percentage of arbitration practitioners.[3] In other words, the potential advantages of virtual hearings were largely lost on the arbitration community and relevant means of communication remained untested.

In 2020, COVID-19[4] pandemic momentarily froze the cross-border movement[5] and the field of arbitration was suddenly pushed to challenge the *status quo*. Within the next year, the number of virtual hearings rose rapidly.[6] In a sense, the adaptation of virtual hearings helped to maintain one of the biggest advantages of arbitration, speed, and showcase another, flexibility, or adaptability. In support of the practitioners, many arbitral institutions around the globe were quick to provide guidance on the conduct of virtual hearings, underlining the importance of their existence. In some cases, these efforts were then followed by changes in the arbitration rules to further welcome the development.

2 See, for example, the Campaign for Greener Arbitrations which was founded in 2019; more details available at Campaign for Greener Arbitrations. *greenerarbitrations.com* [online]. 2021 [cit. 10. 6. 2021]. Available at: https://www.greenerarbitrations.com/about

3 See Chart 35 in 2018 International Arbitration Survey: The Evolution of International Arbitration. School of International Arbitration. *Queen Mary University of London* [online]. 2018 [cit. 10. 6. 2021]. Available at: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF

4 All references to "COVID-19" stand for the coronavirus disease which was identified and started to spread from Wuhan, China, in early 2020. See WHO Statement regarding cluster of pneumonia cases in Wuhan, China. *WORLD HEALTH ORGANIZATION* [online]. 9. 1. 2020 [cit. 10. 6. 2021]. Available at: https://www.who.int/china/news/detail/09-01-2020-who-statement-regarding-cluster-of-pneumonia-cases-in-wuhan-china

5 For example, in March 2020, EU has closed its borders for 30 days. See COVID-19 Guidance on the implementation of the temporary restriction on non-essential travel to the EU. On the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy. *European Commission* [online]. 30. 3. 2020 [cit. 10. 6. 2021]. Available at: https://ec.europa.eu/home-affairs/sites/default/files/what-we-do/policies/european-agenda-migration/20200330_c-2020-2050-report_en.pdf

6 See Chart 13 in 2021 International Arbitration Survey: Adapting arbitration to a changing world. *Queen Mary University of London* [online]. 2021 [cit. 10. 6. 2021]. Available at: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf

In this paper, I firstly focus on what remains unchanged regardless of COVID-19, the description of virtual hearings, its aspects and related logistics, and also potential grounds for challenge of such procedure and first court responses thereto. Secondly, I take a look at how the arbitral institutions have handled the COVID-19 situation.

In order to make the topic manageable, I will be mostly excluding specific areas of cybersecurity, ethical or even health concerns,[7] as well as analysis of any specific national arbitration laws, basing my analysis on the assumption that virtual hearings as such do not automatically undermine due process in arbitration.

2 Attributes of Virtual Hearings

Before starting the discussion, I would like to reserve a few lines for a proper definition of the term "virtual hearings".[8]

Excluding the "document-only" arbitrations, arbitration hearings represent one of the distinguishable phases in the process of arbitration which usually follows after the parties' written submissions. Arbitration hearings represent direct communication between the parties and the tribunal, usually including examination of evidence, especially evidence presented by (expert) witnesses, and related exchange of legal arguments and statements.

Although the hearings may usually address the merits as well as procedure,[9] it should be distinguished from mere procedural sessions/meetings used to organize the arbitration at its outset. Discussions dedicated purely to organization, e.g., "case management conferences"[10], were more usually conducted by remote means of communication even before COVID-19 and

7 NAPPERT, S. and M. APOSTOL. Healthy Virtual Hearings. *Kluwer Arbitration Blog* [online]. 17. 7. 2020 [cit. 10. 6. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/07/17/healthy-virtual-hearings/

8 In the context of this paper, the term "virtual hearings" will be used as a simplified reference to "virtual arbitration hearings".

9 For example, Art. 24 para. 1 UNCITRAL Model Law, which specifies the right to the hearings, does not include any restriction. To the contrary, during the drafting a proposal of such limitation was refused. See HOLTZMANN, H. and J. E. NEUHAUS. *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary.* Alphen aan den Rijn: Kluwer Law International, 1995, p. 674.

10 This term is used, for example, in Art. 24 ICC Rules of Arbitration 2021.

as such are not subject of this paper. The only note in this regard is that according to 2021 survey, only 8% of practitioners would prefer to hold procedural conferences and hearings in person while the remaining 92% is almost equally divided between those who prefer a fully virtual form or a mix of the two.[11]

Furthermore, it is worth mentioning that virtual hearings are not interchangeable with the term "online dispute resolution" ("ODR"). ODR is a more general term standing for a *"mechanism for resolving disputes through the use of electronic communications and other information and communication technology"*.[12] ODR may be used in arbitration but also mediation or negotiation. Although virtual hearing may be potentially included in the ODR process, document-only arbitration in the form of the ODR is also possible.

If arbitral hearings are not held in person but remotely, using some kind of a teleconferencing platform, it can be described as a "virtual hearing". In that case, parties still have a direct contact with the exchange of arguments and presentation of evidence in real time, but the meeting takes place on a virtual platform, in a digital hearing room. The difference in the means of communication is not meant to change anything about the content or purpose of the hearings, however, as will be addressed below, virtual hearings have their specific challenges that may potentially affect their effectiveness or even security. This calls for two fundamental questions. Firstly, what is gained and lost in such a switch. Secondly, whether there are any due process concerns that need to be addressed in the case of virtual hearings in particular and, consequently, whether there are any potential grounds for a challenge.

2.1 Advantages and Challenges

Virtual hearing comprises of a set of technology which enables: video-conferencing, electronic communication (via chat), real-time transcription or recording, electronic bundling and presentation of evidence

11 See Chart 17 in 2021 International Arbitration Survey: Adapting arbitration to a changing world. *Queen Mary University of London* [online]. 2021 [cit. 10. 6. 2021]. Available at: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf

12 Technical Notes on Online Dispute Resolution. *UNCITRAL* [online]. 2017 [cit. 10. 6. 2021]. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf

that allows for simultaneous display of submissions and documentary evidence to all participants in the hearing. All of these aspects will ideally be included into one soft-ware platform, however, in any less than ideal scenario, many of them may be omitted (for example, parties may not be interested in electronic bundling or real-time transcription) or supplemented otherwise, for example by a specialized chat software (skype, etc.).

The use of virtual hearings comes with a palette of new options to be considered in order to make use of the new possibilities and advantages. What advantages are those?

In the table below, I have attempted to summarize the practical advantages[13] of virtual hearings, together with the corresponding challenges:

Advantages[14]	**Challenges**[15]
Reduced cost and carbon footprint thanks to avoidance of international travel to one location.	**New specific costs** related, for example, to the cyber security measures or services of a virtual hearing manager.
(Time) efficiency – connecting via internet does not require any additional time (for travel to the location, etc.), which leaves more flexibility for scheduling and more time for the actual hearing. This effect is even more prominent with (expert) witnesses who may more easily connect only for the relevant portion of the hearings.	**Difference in time zones** may potentially lead to impractical timing. **Some aspects may be also more time consuming** (e.g., consecutive interpretation), and participants face technical malfunctions and screen fatigue which require more frequent breaks in the process
Better recording options, use of multiple or 360-degree cameras and possibility to adjust volume, zoom-in or re-visit the recordings after the virtual hearings (during deliberation)	**Loss of interactivity,** especially in relation to witness examination ("reading" the interaction, assessing credibility…), harder communication during the hearing for the counsel teams or the arbitrators.

13 I have purposefully left out the fact that virtual hearings are accessible to people in quarantine and follow the social distancing measures. The reason for this is the fact that these advantages were not relevant before COVID-19 and, hopefully, will not be needed in the long term. I have also left out issues of cybersecurity, potential ethical or procedural abuses and potential due process concerns which will be addressed separately.

14 See Chart 15 in 2021 International Arbitration Survey: Adapting arbitration to a changing world. *Queen Mary University of London* [online]. 2021 [cit. 10. 6. 2021]. Available at: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf

15 Ibid., chart 161.

In essence the summary above does not paint a black or white picture but above all, it shows that the core of the efficient virtual hearings is careful planning, which will now be addressed in detail.

2.2 Logistics of the Virtual Hearings

After the decision is made to hold an arbitral hearing virtually and the date is set, the participants need to agree on a platform which will be used for the meeting. This choice has various consequences and the available possibilities are wide. For example, the International Bar Association ("IBA") has lately published a list of more than a dozen available virtual hearing platforms,[16] including those specialized on ODR (for example, Immediation or Trustpoint.one) as well generally targeted software for everyday use (e.g., Microsoft Teams, WebEx or Zoom).

The diverse spectrum can make the choice of a "correct" platform challenging,[17] I would thus suggest firstly identifying platforms familiar to the tribunal (preferably based on the past personal experience with virtual hearings) and subsequently focusing on how well the short-listed platforms perform with respect to just several basic requirements such as: security (for example, specific ID for each meeting, use of passwords, manual verification of each participant upon entry, encryption of the communication, etc.), costs, document sharing (especially the possibility to share evidence or other documents during the oral hearings), recording, break-out rooms (other means of private conversation / deliberation of the tribunal without the need to leave the platform) and other practical features. The tribunal should also make sure that the full version of licensed software is used (there are either customized solutions or publicly available licensed platforms) and avoid any free-to-use public platforms due to concerns regarding security, confidentiality and data protection.[18]

16 Technology Resources for Arbitration Practitioners – Virtual Arbitrations [online]. *International Bar Association* [cit. 10. 6. 2021]. Available at: https://www.ibanet.org/technology-resources-for-arbitration-va#Content

17 For example, ICC refers to a compare table of available software which categorizes two dozens of different software features which may be considered. See ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic [online]. *International Chamber of Commerce*. 9. 4. 2020 [cit. 10. 6. 2021]. Available at: https://library.iccwbo.org/content/dr/PRACTICE_NOTES/SNFC_0025_EN.htm?l1=Practice+Notes

18 Ibid.

Apart from the fundamental choice of a specific platform for the virtual meeting, there are multiple other options which need to be considered and decided upon in order to make the logistics of the virtual hearing work as smoothly as possible. At first glance, it might seem a little too controlling. After all, certain logistics come also with physical meetings and arrangements are made without a need for specific decision making process. Does the situation change, if the parties trade dealing with the travel arrangements for dealing with decisions about the number of screens and pre-testing of the internet connection? I would argue that while logistic issues surrounding in person hearings are no different from any other type of meetings and their participants thus do not need to give them much of a second thought, virtual hearings do not come quite as naturally. A multiparty virtual meeting operated by a presiding arbitrator (maybe supported by a technical secretary) in accordance with certain procedures designed to maintain equality between the parties may easily be a new experience for the participants. And like any new experience without a "redo" option, it requires more careful planning as a first step towards fully enjoying the advantages offered by the technology. These considerations may have a form of a test run of the proceedings as well as the adoption of a specific protocol for the hearing that would summarize and provide best practice tips on a variety of issues, ranging from cybersecurity, technical requirements and virtual meeting etiquette (in sum: find the mute button in time) to details such as proper "name tags" for the parties or a list of attendees.

As is apparent from the above-mentioned, a potential check list for successful virtual hearings might have quite a few points that participants to the virtual hearings should figure out in advance and in line with their particular needs. One thing that seems more universal and should be thus pointed out as a common issue is the matter of "silent communication" among the legal counsels of one party or between them and their client. In this regard, I note that 40% of the respondents in the 2021 survey named difficulties related to communication among one legal team and with the client as one of the top disadvantages of virtual hearings.[19] From my point of view, each party should consider a secured way of communication

[19] See Chart 16 in 2021 International Arbitration Survey: Adapting arbitration to a changing world. *Queen Mary University of London* [online]. 2021 [cit. 10. 6. 2021]. Available at: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf

separate from the main communication channel (for example, separate from the chat function incorporated in the chosen platform) in order to eliminate the possibility of a human error.

2.3 Due Process in Relation to Virtual Hearings

Usually, oral hearings are considered to be mandatory unless the parties agree on documentary arbitration only.[20] If the hearings are held, the tribunal is obliged to observe due process, including parties' right to be heard and right to be treated equally. Breaches of the due process during the hearings may amount to successful ground for a set aside under Art. V of the United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("NYC").

In case that the parties agree on the use of virtual hearings, the only obstacles concern proper organization thereof. However, if the tribunal decides on the virtual hearing without the agreement of the parties, or even against their explicit objection, there is an added level of consideration for the tribunal and that is the compliance with the relevant arbitration law and arbitration rules in order to minimize any future concern regarding the enforceability of the award. It is worth noting that this consideration is mandatory whenever the arbitration rules require that arbitration tribunals make every effort to render an enforceable arbitration award.[21]

Full analysis of potential limitations in arbitration law in different jurisdictions is unfortunately beyond the scope of this paper[22] but general remarks on the issue are still due. Only a few national laws explicitly address virtual hearings, usually only to recognize it as a possible option for the tribunal.[23]

20 BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2020, p. 2430.

21 For example, Art. 42 ICC Rules of Arbitration 2021.

22 A particularly helpful resource is however already in preparation under the International Council for Commercial Arbitration which has been publishing national reports on the issue September 2020 with a final report to be presented in September 2021 at: ICCA. Does a Right to a Physical Hearing Exist in International Arbitration? *ICCA* [online]. [cit. 10. 6. 2021]. Available at: https://www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration

23 SCHERER, M. Chapter 4: Legal Framework of Remote Hearings. In: SCHERER, M., N. BASSIRI and M. S. A. WAHAB (eds.). *International Arbitration and the COVID-19 Revolution*. Alphen aan den Rijn: Kluwer Law International, 2020, pp. 72–73.

The majority of arbitration laws around the world is silent on the form of an oral hearing or whether the virtual hearings may be ordered. In the absence of parties' agreement, the silence of the arbitration law (and, for the sake of the argument, I assume that the arbitration rules are also silent) leaves space for conflict between the right to a hearing[24] and the tribunal's broad discretion regarding the conduct of the arbitration procedure.[25] In such a scenario, if an oral hearing is planned, the tribunal should not force virtual form thereof without some specific reason for doing so beyond the simple convenience associated with properly planned and executed virtual hearing. These specific reasons were demonstrated in 2020, when restrictions surrounding the pandemic effectively stayed physical meetings, especially those requiring international travel. If that is the case, the tribunal has to consider also possible delays in the procedure which may be both significant and hard to estimate – this significantly adds to the argument that the tribunal should be able to decide in favour of the virtual hearings even if one party objects, in order to be able to proceed with the arbitration.

On the other hand, if a physical meeting is possible under the "standard" circumstances common before COVID-19 (e.g., without the need to multiply travel expenses to avoid closed borders or undergo mandatory quarantines), I see little reason why the tribunal should order the virtual hearings against objection of a party/parties to the arbitration. Even if it may be argued that properly organized virtual hearings save costs and/or time, the tribunal's obligation to observe efficiency of the proceedings should not be interpreted in a way that puts these above the parties' wishes. After all, these expenses are predominantly shouldered by them and were considered in line with the efficient arbitration process in the past.

In the event that a virtual hearing is held despite objections of one party, the question arises, whether that party may successfully argue against the enforcement of a future arbitral award under the NYC.

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24 BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2020, p. 3512.

25 It is typical that the arbitral tribunal decides on the matters of procedure, unless the parties agree or the arbitration rules provide otherwise. Example of such wording can be found in Art. 19 para. 2 UNCITRAL Model law: *"Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate."*

The NYC provides an exhaustive list of grounds for non-enforcement of an arbitral award in its Art. V NYC, several of which might be potentially relevant:

- **Art. V para. 1 letter b) NYC** – the inability to present one's case

  The right to present one's case may be regarded as a specific part of procedural public policy and is recognized and protected throughout jurisdictions[26] and under the NYC. Generally, Art. V para. 1 letter b) NYC may be invoked in cases of due process violations amounting to a *"grave procedural unfairness in the arbitral proceedings"*.[27] Examples of such malpractice include rigid enforcement of overly short time limits[28] or wide exclusion of evidence.[29]

  In relation to the virtual hearings, a party invoking Art. V para. 1 letter b) NYC would have to specify what limitation it faced, when presenting its case, due to the lack of physical hearing. In that regard, a potentially plausible argument under Art. V para. 1 letter b) NYC could be made if the scheduling of the virtual hearings repeatedly ignores time zone limitations of one party, forcing its witnesses, legal counsels, etc., to attend hearings entirely outside normal business hours (e.g., during the night of several days).

  On the other hand, the use of virtual hearings may also serve as a remedy for a potential breach of Art. V para. 1 letter b) NYC because virtual hearings enable the parties to present their arguments to the tribunals despite domestic lockdowns, personal quarantine or other restrictions.[30]

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26 See also Art. 34 para. 2 letter a) point ii) UNCITRAL Model Law.

27 BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2020, p. 3494.

28 SACHS, K. and C. T. PRÖSTLER. Chapter 28: Time Limits in International Arbitral Proceedings. In: SHAUGHNESSY, P. L. and S. TUNG (eds.). *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer*. Alphen aan den Rijn: Kluwer Law International, 2017, p. 288.

29 MARGHITOLA, R. *Document Production in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2015, pp. 185–250.

30 See AGHABABYAN, A., A. HOKHOYAN and S. HABIB,. Global Impact of the Pandemic on Arbitration: Enforcement and Other Implications. *Kluwer Arbitration Blog* [online]. 19. 8. 2020 [cit. 10. 6. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/08/19/global-impact-of-the-pandemic-on-arbitration-enforcement-and-other-implications/

- **Art. V para. 1 letter d) NYC** – breach of the parties' agreement or arbitration law

  There are countless possibilities of a breach of parties' agreement or *lex arbitri* which makes the consideration more about the intensity and consequences of such a breach. In summary, Art. V para. 1 letter d) NYC requires that the breach is material, minor defects would not suffice.

  In the context of virtual hearings, is a change of the used venue and means of the communication of such importance that a shift to virtual hearing could constitute a material breach of procedure or even affect the award? Case law suggests a negative answer to this question. For example, in 2001 English High Court refused such argument under Art. V para. 1 letter d) NYC stating that *"a different location did not affect the fairness of the proceedings or prejudice to that party"*.[31] In my mind, argument under Art. V para. 1 letter d) NYC would be a hard one to make on its own, but it might be sensible to add it on top of other concerns.

- **Art. V para. 2 letter b) NYC** – violation of public policy

  Although the underlying idea behind NYC is that enforcement of an arbitral award shall be governed by international law, Art. V para. 2 letter b) NYC represents an important exception to that principle by giving national authorities limited room to prioritize national laws,[32] however, such prioritization is only possible when the award goes against core values, meaning that it *"disregards essential and widely recognized values which, according to the conceptions prevailing in* […]*, should form the basis of any legal order,"*[33] goes against *"values whose violation* […] *cannot tolerate"*[34] or affecting *"the basis of public and economic life or irreconcilably contradicts* […] *perception of justice"*.[35]

31 Judgment of the High Court of England and Wales of 19 January 2001, *Tongyuan (USA) International Trading Group vs. Uni-Clan Ltd.*, Case No. 2000 Folio No. 1143.

32 For example, awards which grant punitive damages may become unenforceable in some jurisdictions as a matter of public policy under Art. V para. 2 letter b) NYC. See PETSCHE, M.A. Punitive Damages in International Commercial Arbitration: Much Ado about Nothing? *The Journal of the London Court of International Arbitration*, 2013, Vol. 29, no. 1, p. 100.

33 Judgment of the Supreme Court of Switzerland of 8 March 2006, *Tensacciai S.P. A vs. Freyssinet Terra Armata S.R.L.*, Case No. 4P. 278/2005.

34 Judgment of the Court of Appeal of Paris of 16 October 1997, *Agence pour la sécurité de la navigation aérienne en Afrique et à Madagascar vs. M. Issakha N'Doye*, Case No. 96/84842.

35 Judgment of the Higher Regional Court of Munich of 28 November 2005, Case No. 34 Sch 019/05.

> I have intentionally cited the strong wording used in case law as a foreshadowing to my conclusion that the use of the virtual hearings may hardly arise to such a substantial violation. Even if the national courts of the relevant jurisdiction do not use remote means of communication themselves, it is hard to imagine that they would consider it as something intolerable or in blatant disregard of justice. On the contrary, many national courts have conducted virtual hearings throughout 2020 which is good news also for the enforceability of awards originating from similar procedures.

Maybe it is the relative rareness of the virtual hearings that have kept the potential grounds for challenge or set-aside untested. However, the first court case has emerged in the second half of 2020, when the issue of virtual hearings was raised before the Austrian Supreme Court.[36] To summarize the facts of the Austrian case, the underlying arbitration had a seat in Vienna and was conducted under the rules of the Vienna International Arbitral Centre ("VIAC"). The losing party challenged the tribunal's decision to conduct evidentiary hearing remotely via a videoconferencing tool.

The ruling recognizes that the threshold for upholding objections to a procedural decision is high and such objection may only succeed if the tribunal's decision results in a serious procedural violation or permanent and significant (dis)advantages to a party. Keeping this threshold in mind, the court decided that remote hearings were generally permissible under Austrian arbitration law[37] and within the broad discretion of the tribunal on procedural matters including the organization and conduct of the proceedings. Furthermore, alleged inadequacies of remote hearings, such as witness tampering or inconvenient differences in time zones, were considered to be either theoretical or redeemable.[38]

36 Judgment of the Austrian Supreme Court of 23 July 2020, Case No. 18 ONc 3/20s.

37 Act No. 113/1895 Coll., Code of Civil Procedure, RGBl, Sixth Part, Fourth Chapter, as inserted by the Arbitration Law Reform Act No. 7/2006, BGBl. I. *Rechtsinformationssystem des Bundes* [online]. [cit. 10. 6. 2021]. Available at: https://www.ris.bka.gv.at/Dokumente/Erv/ERV_2006_1_7/ERV_2006_1_7.html (German and English language versions).

38 For more details see SCHERER, M. et al. 'First' Worldwide, Austrian Supreme Court Confirms Arbitral Tribunal's Power to Hold Remote Hearings Over One Party's Objection and Rejects Due Process Concerns. *Kluwer Arbitration Blog* [online]. 24. 10. 2020 [cit. 10. 6. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/10/24/in-a-first-worldwide-austrian-supreme-court-confirms-arbitral-tribunals-power-to-hold-remote-hearings-over-one-partys-objection-and-rejects-due-process-concerns/

Around the same time, the Swiss Federal Tribunal issued a decision[39] that dealt with the issue in the circumstances of a classic courtroom, not arbitration, and took a different approach when it sided with an appellant that had objected to the conduct of the main hearing via Zoom. In particular, the Swiss court ruled that concerns and restrictions surrounding the COVID-19 pandemic did not justify imposing the virtual hearings. The court based its decision on the (i) lack of any explicit rule allowing electronic means in case of the main hearings and (ii) procedural principles such as publicity of civil proceedings.[40]

In summary, there is certainly a possibility to make arguments against the use of virtual hearings, especially if both parties prefer to delay the proceedings. On the other hand, the organization and conduct of the hearing remain in the discretion of the tribunal regardless of a party's objections. If objections are raised, there is a certain room for attacking the procedural decision (depending on the possibilities under the national arbitration law) or even enforceability of the resulting award under Art. V NYC. Nevertheless, the window is small and in my opinion it may be further limited if the tribunal gives due consideration to the specific aspects of virtual hearings in order to keep the process as equal and efficient as possible. One of the ways to achieve that may be rooted in the following institutional rules and soft law tools (guidelines, template cyber protocols, check lists, etc.) prepared by arbitral institutions during the past year and a half, as described in detail in the next part of this paper.

3 Changing Attitudes Towards the Use of Virtual Hearings in Times of COVID-19

Although virtual hearings were not completely unknown to the arbitral practitioners before 2020, it was not a frequently used tool. For example, in 2018 approximately 64% of practitioners participating in the survey stated

39 Judgment of the Swiss Federal Tribunal of 6 July 2020, Case No. 146 III 194.

40 ZAUGG, N. and R. SHARIFI. Imposing Virtual Arbitration Hearings in Times of COVID-19: The Swiss Perspective. *Kluwer Arbitration Blog* [online]. 14. 1. 2021 [cit. 10. 6. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2021/01/14/imposing-virtual-arbitration-hearings-in-times-of-covid-19-the-swiss-perspective/

that they have "never" used virtual hearings.[41] Within two years after these answers were recorded, COVID-19 has significantly changed the paradigm and when the same question[42] was posed in the 2021 survey, the amount of "nevers" shrink almost by half to only 35%.[43]

How did this shift register in practice? To provide a basic answer in this chapter, I will leave behind the *status quo* and look more closely at virtual hearing related reactions from arbitration institutions, experiences of practitioners and also some first state court case law during 2021 and the first half of 2020, i.e., "in times of COVID-19".

3.1 Arbitral Institutions: A Show of Good Reflexes

Similarly to the rest of the globe, arbitral institutions must have felt caught off guard by the rapid lock downs around the world in early 2020. For example, the ICC International Court of Arbitration ("ICC") announced in mid-March 2020, that all hearings or meetings to take place at the ICC Hearing Centre in Paris until 13 April 2020 have been postponed or cancelled[44] and similar reactions were seen from many other arbitral institutions, although they have remained operational.[45]

Nevertheless, I would say, that the arbitral institutions were very quick to recuperate. In April 2020, thirteen arbitral institutions and associations issued a joint statement that called for cooperation and collaboration but most importantly named as a priority *"ensuring that pending cases may continue*

41 See 2018 International Arbitration Survey: The Evolution of International Arbitration. School of International Arbitration. *Queen Mary University of London* [online]. 2018 [cit. 10. 6. 2021]. Available at: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF

42 *"How often have you used [virtual hearing rooms] in an international arbitration?"*

43 See Chart 13 in 2021 International Arbitration Survey: Adapting arbitration to a changing world. *Queen Mary University of London* [online]. 2021 [cit. 10. 6. 2021]. Available at: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf

44 Urgent COVID-19 message to DRS community. *International Chamber of Commerce* [online]. 17. 3. 2020 [cit. 10. 6. 2021]. Available at: https://iccwbo.org/media-wall/news-speeches/covid-19-urgent-communication-to-drs-users-arbitrators-and-other-neutrals/

45 For a global overview see COVID-19 and the global approach to further court proceedings, hearings. *Norton Rose Fulbright* [online]. 2020 [cit. 10. 6. 2021]. Available at: https://www.nortonrosefulbright.com/en/knowledge/publications/bbfeb594/covid-19-and-the-global-approach-to-further-court-proceedings-hearings

and that parties may have their cases heard without undue delay" and requested that arbitral tribunals and parties *"mitigate the effects of any impediments to the largest extent possible while ensuring the fairness and efficiency of arbitral proceedings. In so doing, they are invited to use the full extent of our respective institutional rules and any case management techniques that may permit arbitrations to substantially progress without undue delay despite such impediments"*.[46]

Without going into any detail, the joint statement urged the tribunals to follow "institutional rules" and make use of "case management techniques" without making any reference to virtual hearings, videoconferencing or any other type of technology. This provides enough room for an individualized approach by each institution which will be the subject of further analysis. In order to narrow the field, I have chosen to focus only on five signatories of the joint statement, namely Hong Kong International Arbitration Centre ("HKIAC"), Singapore International Arbitration Centre ("SIAC"), ICC, London Court of International Arbitration ("LCIA") and Stockholm Chamber of Commerce ("SCC") (together "Arbitral Institutions").

The Arbitral Institutions are among the most popular in the international community, for example, surveys conducted in 2018 and 2021 name the Arbitral Institutions as the most "preferred" by the respondents.[47] Furthermore, for all of these institutions, 2020 was a busy year when they

46 Arbitral institutions COVID-19 joint statement. *International Chamber of Commerce* [online]. [cit. 10. 6. 2021]. Available at: https://iccwbo.org/publication/arbitral-institutions-joint-statement-in-the-wake-of-the-covid-19-outbreak/

47 See Chart 12 in 2018 International Arbitration Survey: The Evolution of International Arbitration. School of International Arbitration. *Queen Mary University of London* [online]. 2018 [cit. 10. 6. 2021]. Available at: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF; and Chart 6 in 2021 International Arbitration Survey: Adapting arbitration to a changing world. *Queen Mary University of London* [online]. 2021 [cit. 10. 6. 2021]. Available at: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf

saw an increase in the total number of newly filed cases when compared with 2019, in many cases setting new records:

Number of newly filed international arbitration cases					
	HKIAC[48]	SIAC[49]	ICC	LCIA	SCC[50]
2019	308	479	869[51]	395[52]	175
2020	318	1080	946[53]	444[54]	213
% increase	+3,2%	+125,5%	+8,9%	+12,4%	+21,7%

Unfortunately, the so far issued statistics generally do not provide the number of hearings conducted in 2020. The exception to this is HKIAC which has reported 117 hearings in 2020, out of which 80 were held as virtual hearings[55] and some data are available also from SCC which has conducted a survey among the arbitrators, finding that out of the 61 arbitrations that had been finalized at the time of the survey, a virtual hearing had been held in 23 cases.[56] Although we do not have more comprehensive statistics, it is safe to conclude that in 2020, virtual hearings have seen an increase in usage.

Demand of any commodity warrants a response from the providers. In order to categorize reactions of the Arbitral Institutions to COVID-19, I have primarily focused on which guidelines or other soft law support were provided for the arbitrators/parties and how the institutional rules addressed virtual hearings.

48 2020 Statistics. *HKIAC* [online]. [cit. 10. 6. 2021]. Available at: https://www.hkiac.org/about-us/statistics

49 Annual report 2020. *SIAC* [online]. 2020 [cit. 10. 6. 2021]. Available at: https://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2020.pdf

50 SCC Statistics 2020. *SCC* [online]. 2020 [cit. 10. 6. 2021]. Available at: https://sccinstitute.com/statistics/

51 2019 ICC Dispute Resolution Statistics. *ICC* [online]. [cit. 10. 6. 2021]. Available at: https://iccwbo.org/publication/icc-dispute-resolution-statistics/

52 2019 Annual Case Work Report. *LCIA* [online]. [cit. 10. 6. 2021]. Available at: https://www.lcia.org/LCIA/reports.aspx

53 ICC announces record 2020 caseloads in Arbitration and ADR. *ICC* [online]. 12. 1. 2021 [cit. 10. 6. 2021]. Available at: https://iccwbo.org/media-wall/news-speeches/icc-announces-record-2020-caseloads-in-arbitration-and-adr/

54 2020 Annual Case Work Report. *LCIA* [online]. [cit. 10. 6. 2021]. Available at: https://www.lcia.org/LCIA/reports.aspx

55 2020 Statistics. *HKIAC* [online]. [cit. 10. 6. 2021]. Available at: https://www.hkiac.org/about-us/statistics

56 Virtual hearing survey. *SCC* [online]. 2020 [cit. 10. 6. 2021]. Available at: https://sccinstitute.com/media/1773182/scc-rapport_virtual_hearing-2.pdf

3.1.1 Guidelines and Other Soft Law in Support of the Virtual Hearings

Following the joint statement quoted above, the Arbitral Institutions took a variety of approaches when addressing the issue of virtual hearings, which may be summarized as follows:

HKIAC HKIAC issued relatively short guidelines[57] in May 2020. The material seems to be mostly focused on services that can be provided by the institution. Otherwise, the guidelines include basic information with several topics described in more detail, e.g., confidentiality precautions, video conferencing tips and a set-up suitable for witness participation.

The guidelines make no reference to HKIAC arbitration rules.

SIAC SIAC has taken an interesting approach by providing the guidelines (31 August 2020) as a mix of check-list and questionnaire of considerations relevant for remote arbitration in general (not only virtual hearings) *"from beginning to end"*.

The document is comprehensive in navigating parties from the legal framework of the virtual hearings (consent, applicable laws and rules) to technical details. SIAC also addresses the choice of the platform by way of listing issues to consider without naming any particular software and includes a checklist for procedural orders to be issued in relation to virtual hearings.

The guidelines seem to be generally applicable, the very few references to SIAC arbitration rules relate to confidentiality (SIAC 2016 Rules 24.4, 38 and 39)

ICC ICC acted very quickly and on 9 April 2020 issued a comprehensive guide note addressing several concerns raised by COVID-19 with the common topic of *"mitigating delays"*.

57 HKIAC guidelines for virtual hearings [online]. *HKIAC*. 2021 [cit. 10. 6. 2021]. Available at: https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/services/HKIAC%20Guidelines%20for%20Virtual%20Hearings.pdf

In contrast to other similar guidelines, ICC did not shy away from the issue of whether the ICC arbitration rules support the tribunal's decision to order virtual hearings without parties' explicit consent or over objections of a party/parties. In that regard, the guidelines do not provide a simple formula "pandemic = go online" but point out that in case of *"unwarranted and even prejudicial delay"* the tribunals should exercise the authority to establish suitable procedures.

Furthermore, the guideline note provides several interpretations, including Art. 25 para. 2 of the ICC 2017 Rules where it is suggested that wording *"shall hear the parties together in person if any of them so requests"*, may be construed as to allow for an "in person" meeting by way of virtual hearings.

LCIA

Contrary to other Arbitral Institutions, LCIA has not yet issued guidelines or any other type of soft law in relation to COVID-19 but the issue seems less pressing since (i) LCIA already had express references to videoconferencing before COVID-19 and (ii) LCIA arbitration rules were updated in 2021 in order to provide more details on several issues, including virtual hearings.

Thanks to this, the Guidance Notes from 2014 already state that tribunals *"should also consider, where appropriate, whether some or all of those who must attend any meeting or hearing might do so by video conference, rather than in person (for example, if a witness is unable to travel due to health issues)"*.

SCC

In November 2020, SCC published several arbitrator's tips regarding the virtual hearings[58] which however do not go into much detail and in comparison with materials from other Arbitral Institutions seem rather insufficient. In addition, SCC conducted its own survey regarding virtual hearings.[59]

58 SCC arbitrators' tips for a successful virtual hearing. *SCC* [online]. 2020 [cit. 10. 6. 2021]. Available at: https://sccinstitute.com/about-the-scc/news/2020/scc-arbitrators-tips-for-a-successful-virtual-hearing/

59 Virtual hearing survey. *SCC* [online]. 2020 [cit. 10. 6. 2021]. Available at: https://sccinstitute.com/media/1773182/scc-rapport_virtual_hearing-2.pdf

Instead of creating its own material, SCC points arbitrators to several other resources published Jus Mundi, Delos or IBA[60].

To sum up the above-mentioned, it is surprising how much the approaches may vary with respect to the level of detail or ambition to provide interpretation of the arbitration rules. In the long term, it will be interesting to see which approach will be considered as the most useful by the tribunals and practitioners.

3.1.2 Changes in Arbitration Rules With Respect to the Virtual Hearings

Changes in the arbitration rules do not affect the ongoing hearings but send an important signal for the future disputes. In the context of this paper, it makes sense to look (i) whether virtual hearings were in any way incorporated in the relevant rules before COVID-19 and whether (ii) there was any change to the rules during 2020 and first half of 2021 in that regard. Although the topic of virtual hearings, as a special form in which the oral hearings may (not) be conducted, is quite narrow, there are several areas of institutional rules worth looking at.

Generally, the form of oral hearings may be regulated in clauses dealing with general tribunal's power to conduct the arbitration procedure, case management conference, oral hearing, examination of witnesses or expedite or emergency procedures. After examining the relevant provisions in the rules adopted by the Arbitral Institutions up until 2020,[61] the results are a rather interesting mix. The approach of the Arbitral Institutions varies and may be summarized as follows:

SCC SCC 2017 Rules do not include any specific reference to virtual hearings (or to the use of videoconferencing, etc.), nevertheless, Art. 28 of the SCC 2017 Rules states that a case management conference may be conducted *"in person*

60 Information from the SCC relating to covid-19. *SCC* [online]. [cit. 10. 6. 2021]. Available at: https://sccinstitute.com/about-the-scc/information-from-the-scc-relating-to-covid-19/

61 I have looked at the version of the rules in force before 1 January 2020.

or by any other means" which makes certain space for virtual hearings as an alternative to a physical meetings.

SIAC Para. 7 and 8 of Schedule 1 to SIAC 2016 Rules refer to the use of videoconferencing as an *"alternative to a hearing in person"* in case of emergency arbitration.

ICC ICC 2017 Rules make a few references to virtual hearings present prior to COVID-19 in respect of the emergency proceedings[62] or case management conferences.[63]

HKIAC HKIAC 2018 Rules seem to choose the middle ground as the rules are neither entirely silent on the topic of virtual hearings, nor directly address it.

Art. 13.1 of HKIAC 2018 Rules simply requires that the arbitral tribunals take into consideration the *"effective use of technology"* when deciding on the procedure. The wording was added in 2018 among other technology-related updates.[64]

From a practical point of view this wording seems sufficient enough to also cover the use of virtual hearings in the procedure and by including it in the general clause on the conduct of the arbitration, it is easier to read it as the tribunal's discretion.

LCIA Art. 19.2 LCIA 2014 Rules lists *"video or telephone conference"* as an alternative form to in-person hearings and also allows for a *"combination of all three"*. This is the only example of general direct reference to virtual hearings before COVID-19 found among the rules used by the Arbitral Institutions. Although details vary, at least three institutional rules, SCC, SCIA and ICC, made reference to the use of virtual hearing techniques in certain situations, while not using the same wording in the general clause on oral hearings. This begs the question whether virtual hearings may be used in other circumstances or are, *a contrario*, excluded. In this regard, I agree with *Scherer's* view that such argumentation

62 See Art. 4 para. 2 Appendix V ICC 2017 Rules.

63 See Art. 24 para. 4 ICC 2017 Rules.

64 It is worth noting that HKIAC 2018 Rules also recognize use of a secured online repository as an option for delivering and storing electronic documents – See Art. 3 para. 1, Art. 3 para. 3 and Art. 3 para. 4 HKIAC 2018 Rules.

seems rather extreme, and thus nonsensical, because there is no reason why explicit references to virtual hearings in such cases should be interpreted as limitations in the remaining part of the arbitration process.[65] From my point of view, it should be added that both the emergency proceedings and case management conferences are processes that desire speed and in that context it makes sense to explicitly refer to any tool that supports this goal, including the use of remote communication. In other processes, this is less needed which explains the lack of explicit reminder to consider virtual hearings.

Out of the five Arbitral Institutions under my review, only HKIAC and LCIA already had a general framework for using virtual hearings (or at least give consideration to the technology) before COVID-19. During the past year and a half,[66] the ratio has changed only slightly thanks to ICC which has adopted a new set of rules in order to provide more solid and consistent framework for virtual hearings. Furthermore, LCIA has also made an update to its rules in this regard, adding clearer language in support of virtual hearings.

Regardless of whether the relevant rules include specific language on the topic or not, none of the Arbitral Institutions discouraged tribunals from conducting virtual hearings. In line with the wide discretions of the tribunals, it seems plausible to simply depend on provisions stating that tribunals should conduct the arbitration as they consider "appropriate" or adopt "suitable" procedural rules.[67] Nevertheless, I would suggest that in the case of virtual hearings, it is better to adopt more direct and active approach and thus encourage alternatives to the meetings in person.

4 Conclusion: Virtual Hearings Beyond the Times of COVID-19

In summary, virtual hearings can be beneficial for the time and cost efficiency of the arbitration but in order to collect these benefits, tribunals and parties

65 SCHERER, M. Chapter 4: Legal Framework of Remote Hearings. In: SCHERER, M., N. BASSIRI and M. S. A. WAHAB (eds.). *International Arbitration and the COVID-19 Revolution*. Alphen aan den Rijn: Kluwer Law International, 2020, p. 73.

66 I have looked at time frame from 1 January 2020 to 10 June 2021.

67 See Art. 13 para. 1 HKIAC 2018 Rules or Art. 23 SCC 2017 Rules.

have to give due consideration to various organization matters. A good place to start with such endeavour would be guidelines and other tools provided by arbitral institutions. In that regard, parties should be encouraged to search beyond the website of the institutions chosen to administer the arbitration. This is simply because the level of detail and quality of the materials differs. Furthermore, it might be a good practice to firstly "test" the waters by using virtual hearing room for the earlier stages of the process, typically the case management conference. Although a conference call might suffice for a discussion about scheduling, etc., by opting for a more sophisticated platforms, parties may get a better idea of possible alternatives. This might be beneficial even if they later choose to meet in person. After all, there is no guarantee that their plans will not be interrupted by closed borders or personal quarantines.

Formally, there is little to discourage parties from choosing to conduct the hearings virtually, especially if they are in agreement on such procedure. Even in cases of objections, there seems to be a forming consensus that the order to use virtual hearings as a form of oral hearings is within tribunal's discretion. In some cases, the exercise of such discretion requires consultation with the parties but in any case, it should be supported by some objective need (such as the need to avoid undue delays due to pandemic restrictions). If there are no major breaches of procedure that would cause, for example, inequality between the parties, it would be hard to challenge the award just based on the use of virtual hearings. The first case law on the matter shows that the deference to the tribunal's right to organize the process extends also to the form of oral hearings, while the contra-arguments may be avoided or do not apply in the context of arbitration.

When looking at the reaction from the Arbitral Institutions to the COVID-19 pandemic, it is good to see that the challenge was taken on relatively quickly and with pro-active and constructive approach. The Arbitral Institutions reviewed in this paper and many other around the world made effort to encourage "business as usual" by providing soft law tools but also by updating the institutional rules. This demonstrates that the Arbitral Institutions are capable of an appropriate reaction but one must ask whether that is sufficient. It should be noted that with some exceptions (LCIA and to some extent

HKIAC), the Arbitral Institutions were rather inarticulate on the topic of virtual hearings before it came into focus due to COVID-19. In that regard, it seems that the Arbitral Institutions were successful in supporting their "clients" in time of need but not as effective when it comes to motivating or creating more flexibility in the industry on their own accord.

What aspects of the newly lived experiences with virtual hearings will carry-on after COVID-19 disappears from the societies around the world? The first thing that comes to mind as an answer is "wider use of virtual hearings" but on a second thought, that seems a little bit simplistic. On one hand, it is true that many of the decision makers now have more grounds to build upon when deciding whether to use virtual hearings instead of physical meetings. Nevertheless, their experiences also include the inevitable inconveniences attached to staring into one's screen for hours and days. Still, looking into the future, I believe that the community is gradually warming-up to the idea of virtual hearings and the COVID-19 pandemic should be given credit for speeding up this process.

In the context of the ongoing debate surrounding the diversity in arbitration (or rather the lack thereof), I have lately come across an interesting quote from 2017: *"Substantial development in diversity is not something that can be forced or achieved overnight."*[68] It seems to me, that these words of wisdom could be said about the arbitration as a whole but also represent only part of the truth. Therefore, thinking about all the turmoil of 2020, I would take the liberty to rephrase: *"Substantial development in arbitration is not something that can be forced or achieved overnight. Until it is."* In my mind, this is one of the many lessons learned from COVID-19.

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International Arbitration and Blockchain: Current State, Types, Characteristics and the Future Perspective

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Abstract

The paper is devoted to the issues of the interplay of modern technologies such as blockchain and smart contracts with commercial arbitration: how these can be utilized together to achieve even more flexibility when it comes to the resolution of disputes that might occur between the involved parties. The emphasis is made on the so-called 'on-chain arbitration' that represents the technological solutions that offer blockchain-based dispute resolution – an alternative to conventional commercial arbitration. The pros and cons of the technology are covered in-depth.

Keywords

Commercial Arbitration and New Technologies; Blockchain and International Arbitration; Smart Contract Use in Arbitration; On-Chain Arbitration.

1 Introduction

Commercial arbitration represents a convenient dispute resolution mechanism that is alternative to classic courts and that can be attractive for disputing parties due to its flexibility and established a reputation as an effective tool especially when a dispute involves a cross-border element. In addition to the flexibility of the arbitration proceedings, the existing extensive regulatory framework that encompasses international conventions, national law, developed soft and case law of the commercial arbitration ensures that, just like in classic court proceedings, the participating parties will get an arbitral award that is recognizable and enforceable in most jurisdictions where the winning party may seek enforcement of such an award.

That being said, during the last couple of years some interesting developments in the sphere of technology occurred that might be useful for the already developed system of commercial arbitration and can increase flexibility and attractiveness of arbitration, even more, when being implemented as a part of the system. These new technologies are blockchain and smart contracts.

During the following chapters of the paper, we will see what stands behind the new technologies, how these can be applied in conjunction with the arbitration, what use-cases inspired the development of the blockchain-based dispute resolution mechanisms, etc. The latter is of particular interest to us since it represents the new interpretation of the online arbitration that is built around blockchain as a foundation. We will see how this new so-called 'on-chain arbitration' can be used to effectively solve the disputes that involve smart contracts as their object, what are the benefits as well as the limitations of these new technological solutions. But before we dive deeper into the mentioned problematics, it is necessary to start with the basics – the concepts of blockchain and smart contracts themselves.

2 The General Part

2.1 What Is Blockchain?

During this chapter, I will introduce the reader to the foundations of the concept of blockchain as a distributed ledger technology. Such a basic understanding is important as several subsequent chapters will be devoted to the role of blockchain in modern international arbitration.

To keep it simple, one can describe blockchain as a digital analogue of a ledger – a collection of certain data that is grouped and stored for further reference. Blockchain is a digitized version of such a ledger. But simply being digital is not enough. If blockchain possessed only this quality alone, it would have been indistinguishable from a simple digital database.[1] But there is nothing special in a database that is stored in a digital form. On top of being digitized, blockchain possesses another characteristic – it is not only digital but also

1 KOLBER, A. J. Not-So-Smart Blockchain Contracts and Artificial Responsibility. *Stanford Technology Law Review,* 2018, Vol. 21, no. 2, p. 206.

distributed. This means that any information stored on a blockchain is being duplicated there and transmitted to multiple storage places, i.e., nodes. So, multiple instances of the same set of information exist at any given point in time. That being said, it is not uncommon to imagine that classic digital databases can also possess such a characteristic. Many of the existing online databases implement a simple redundancy policy by keeping a backup copy of any data uploaded onto such databases. Blockchain would need something more substantial to stand out from classic digital databases.[2] And it does have such a feature: it is also a decentralized platform – unlike many more conventional digital databases. This means that among the mentioned multiple instances of the dataset placed onto blockchain there is no master copy (or original) – every copy of the information that is stored on any given node is the authentic one. There is no separation between the main version and the backup one. This is achieved by granting the nodes equal status among them – typically every full node is treated as the source of the original information stored on it.[3] Thus, typically there is no central authority within the blockchain (in most cases)[4] that would have the power to override the data placed on such a blockchain. Finally, blockchain implements a sophisticated mechanism for the input of the data. In order to be placed onto the chain, the information needs to be 'validated'[5] by certain participants of the network called 'validators' and then be 'packed into a block' and added to the chain. This process of validation of the information, packing it into a block and adding the block to a 'chain' is where blockchain got its name – it is a chain that consists of multiple blocks of digital data. So, unlike a classic digital database, it is relatively complicated to add new information onto the chain. Moreover, the data that is already placed onto the chain benefits from the high degree of immutability. This means that if one (even

2 LAMB, K. Blockchain and smart contracts: What the AEC sector needs to know [online]. *CDBB*. 2018, p. 1 [cit. 8. 4. 2021]. Available at: https://doi.org/10.17863/CAM.26272

3 There is a division among nodes participating in the blockchain into so-called 'full nodes', 'light nodes', 'mining nodes', etc., that have different status within a platform. Such a division depends on the structure and the rules of a platform. But such elaboration is excessive for the purposes of the current research.

4 There are certain exceptions to this rule. In the current chapter, we will be describing, predominantly, public permissionless blockchains.

5 There are different methods and approaches to validate the data, e.g., 'proof of work', 'proof of stake', but this information is not that relevant for the purposes of the current research.

if it is the original author of the data who put it onto the chain) wants to add any alteration to the already stored data, such a person would need to convince more than half (50% + 1, to be more precise) of the existing connected nodes[6] to agree to that alteration and authenticate the changes to the set of data stored on the chain.[7] The bigger the network, the harder it is to implement such a change. It is safe to assume, that it is easier to make a new input to the chain rather than try to alter the already existing one. Such a feature is what makes blockchain technology so appealing, as it guarantees the preservation of the data on the chain. It is almost impossible for a third party to corrupt the existing data.

To reiterate, blockchain possesses the following set of core characteristics:

- It is a sort of a database…
- that is distributed;
- decentralized;
- immutable;
- and functions based on the implementation of one of the multiple types of a consensus mechanism.

The mentioned set of features renders blockchain technology completely different from any previously known solution to keep digital data as it is capable to be effective even in an environment where the participants of the same network have zero trusts in each other.

That being said, blockchain as a technological solution was not initially developed with the goal to facilitate the storage of data. This capability is rather a beneficial side effect as in the first place, its creators envisioned blockchain as a platform that hosts records of transactions, transactions that reflect the fact of transfer of some monetary value. It was developed as a driver for the cryptocurrency exchange between the network participants – the bitcoin transactions. This platform was first introduced to the public in 2008 in an article named 'Bitcoin: A Peer-to-peer Electronic Cash System' by the authorship of *Satoshi Nakamoto*.[8] The name Satoshi

6 There is a real user behind any of the nodes connected to the network.

7 NAKAMOTO, S. Bitcoin: A Peer-to-peer Electronic Cash System. *Bitcoin* [online]. 2008, p. 3 [cit. 8. 4. 2021]. Available at: https://bitcoin.org/bitcoin.pdf

8 Ibid.

Nakamoto is most likely a pseudonym and the real identity behind it is still unknown to this date.[9]

The invention of the first cryptocurrency in and of itself marks the beginning of the new stage of the evolution of the payment mechanisms that are essentially different from conventional fiat currencies. But this invention alone is hardly interesting for us from the standpoint of its application in alternative dispute resolution methods including international arbitration. Even being considered together with its underlying technology – the blockchain, it may be relevant only for a limited number of actors in the field of commercial social relations – the so-called 'early adopters' – actors that would like to implement certain cryptocurrency as a medium for their financial operations and, at the same time, opt for arbitration as a platform for the resolution of the possible disputes. Only in these limited situations can the two domains meet. However, during the following chapters, the reader will be able to see that currently, blockchain technology gains traction when it comes to its implementation into the arbitration process. That means that there has to be something more to it that would justify the increased interest in blockchain, some new feature that would extend the functionality of the platform, that would allow for the storage of the types of data that is different from hashes of financial transactions. And such an extension indeed happened with the introduction of smart contracts executable on a blockchain.

2.2 What Is a Smart Contract?

The emergence of bitcoin as the first cryptocurrency and its relatively high success as a new medium for financial exchange sparked interest in this new industry. The first competitors started to emerge – the so-called 'altcoins' – cryptocurrencies with the same core idea in mind – the new 'digital cash' but with their peculiarities such as the new set of functionalities of the blockchain systems tied to those new cryptocurrencies. Today, one of the most well-known alternatives to bitcoin blockchain is the product of *Vitalik Buterin*, a Canadian programmer of Russian descent, – the Ethereum platform with its native cryptocurrency called 'Ether'. In 2013 he published the 'Ethereum

9 BERNARD, Z. and G. KAY. The many alleged identities of Bitcoin's mysterious creator, Satoshi Nakamoto. *Insider* [online]. 26. 2. 2021 [cit. 9. 4. 2021]. Available at: https://www.businessinsider.com/bitcoin-history-cryptocurrency-satoshi-nakamoto-2017-12

Whitepaper' – the source that contains the description of the idea behind the platform and its functionality.[10] There, *Vitalik* describes Ethereum as a 'next-generation smart contract and decentralized application platform' with the main emphasis on the possibility of its blockchain to host and operate with smart contracts and other Dapps.[11] This feature set is what separates Ethereum as a new type of blockchain from Bitcoin blockchain – the one that is rather limited in this regard. But to understand the nature of smart contracts and the idea of their implementation onto a blockchain, we need to trace their roots back in history as a smart contract is a phenomenon that is older than blockchain.

In the nineties, a scholar whose research interests revolved around the issues of cryptography, *Nick Szabo* publishes an article 'Formalizing and Securing Relationships on Public Networks' where he introduces the concept of a smart contract – a special type of contract whose main distinctive feature that separates it from the bulk of existing classic types of contracts is a certain degree of automation of its execution.[12] In his researches devoted to the problem of smart contracts, *Szabo* defined this concept as a 'set of promises, specified in digital form, including protocols within which the parties perform on these promises'.[13] In order to better illustrate the idea of the automation of the execution of the contract that represents the key distinctive feature of a smart contract, *Nick Szabo* compares such contracts to a so-called 'humble vending machine' – a machine for the distribution of soda and claims that smart contracts go beyond such functionality of the vending machine allowing users for a greater degree of autonomy in respect of the values that can be exchanged using such a tool (not just

10 BUTERIN, V. Ethereum Whitepaper. *Ethereum* [online]. 28. 1. 2021 [cit. 9. 4. 2021]. Available at: https://ethereum.org/en/whitepaper/

11 This abbreviation stands for 'decentralized applications' – those that operate on decentralized distributed ledgers, i.e., blockchain.

12 SZABO, N. Formalizing and Securing Relationships on Public Networks. *First Monday* [online]. 1997, Vol. 2, no. 9, p. 1 [cit. 10. 4. 2021]. Available at: https://doi.org/10.5210/fm.v2i9.548

13 SZABO, N. Smart Contracts: Building Blocks for Digital Markets. *fon.hum.uva.nl* [online]. 2018 [cit. 10. 4. 2021]. Available at: https://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart_contracts_2.html

soda cans but 'all sorts of property that is valuable and controlled by digital means').[14]

That was the first look at the nature and aspects of the functionality of the newly emerged concept that was rather limited and concentrated on the technical side of smart contracts. But that draw some attention to the technology and sparked discussions about its future perspectives. Nowadays, some scholars, predominantly those who work in the field of law criticize the comparison of smart contracts to vending machines and point out that smart contracts as a concept are hampered by their name – that in reality, such tech is neither 'smart' nor a 'contract'.[15] There is no universally accepted legal definition of a smart contract.

On top of that uncertainty that accompanies the concept of a smart contract, even more, confusion arises when we are dealing with the intersection of smart contracts and blockchain. As we remember from the previous subchapter devoted to the concept of blockchain, one of the reasons for the development and deployment of the Bitcoin blockchain competitors was the necessity to extend the functionality of the original blockchain. The developers of the Ethereum blockchain specifically mention the capability to host and execute smart contracts as their competitive advantage. This means that the introduction of blockchain technology boosted the popularity of smart contracts and sort of completed their formation as a tool capable enough to attract a greater audience.

Currently, scholars who approach smart contracts executable on blockchain from the legal standpoint, distinguish the following set of features that constitute the notion of a concept at hand:

- it is a computer program (or more specifically, a computer code/script) that…
- features a self-execution mechanism;
- is stored and/or executed on a distributed decentralized ledger (the blockchain element);
- requires a certain trigger to initiate the self-execution mechanism;

14 Ibid.

15 ROHR, J. Smart Contracts in Traditional Contract Law, Or: The Law of the Vending Machine. *Cleveland State Law Review,* 2019, Vol. 67, no. 1, p. 68.

- and the result of such a self-execution would be a certain alteration to the status of the involved parties[16] (their rights and/or obligations, etc.).

As for the definition of a smart contract, based on its key features mentioned above, it is possible to cite the one that is laid down by *Jonathan G. Rohr* in his article 'Smart Contracts and Traditional Contract Law, or: the Law of the Vending Machine' that states the following: *"a smart contract is a computer protocol (code) that is stored on a blockchain (or distributed ledger) and which will be automatically executed by the nodes on the blockchain's network upon the occurrence of specified conditions"*.[17] Such a definition is particularly good for our purposes as it describes the essence of the technology while avoiding (except in the mere name 'smart contract') references to the contractual nature of the concept – the most controversial part where the lack of consensus among scholars is the most evident.

Previously, before the emergence of blockchain, smart contracts were technical tools that allowed their users to simply automate certain processes without any additional benefits of security of the data inputs. It was hard to justify the inclusion of those smart contracts in the contractual activity of the participating parties as regardless of the platform where such tools were executed (hardware solutions like vending machines or digital ones like computer scripts) it was technically more complicated to draft and/or compile them in comparison to the classic 'paper' contracts. In order to attract some user base, smart contracts would need to propose something more substantial than pure automation of their execution. And that is where blockchain technology came in handy. Decentralized distributed ledgers are created with the immutability of the inserted data in mind – the feature that is a starting prerequisite when it comes to the safety of the user information stored on such a platform. Blockchain provides stability and immutability of the data while smart contracts give automation to their users – a combination that is too sweet to stay away from it.

16 The idea of whether a smart contract can represent contractual provisions, i.e., to be treated as a contract from the legal perspective is still debatable among scholars.

17 ROHR, J. Smart Contracts in Traditional Contract Law, Or: The Law of the Vending Machine. *Cleveland State Law Review,* 2019, Vol. 67, no. 1, p. 68.

Now that we understand the basics of blockchain technology and smart contracts and how these two can be used in combination, it is time to see how that can be accustomed to the needs of alternative dispute resolution methods including commercial arbitration.

2.3 The Interplay of Smart Contracts and Blockchain With International Arbitration

There are several instances where blockchain and smart contract technologies can intersect with commercial arbitration: these typically include disputes over cryptocurrencies; use of blockchain and/or smart contracts for the needs of arbitration process, e.g., as information storage tools; alternative online dispute resolution that is built with the utilization of blockchain technologies in mind, etc. Some of the mentioned use-cases would be relatively easy to implement into the day-to-day activities connected with the arbitration, others would require the rethinking of the functionality process of the whole system of alternative dispute resolution (examples of such technological solutions would be covered more in-depth in the subsequent chapters).

Disputes that involve cryptocurrencies and blockchain technology as an object. The simplest possible point of intersection of the commercial arbitration and blockchain technology is the possibility of disputes that could arise over transfers of cryptocurrencies or the functionality of smart contracts.[18] Taking into consideration that bitcoin, as the most well-known cryptocurrency and various altcoins such as Ether, are on the rise and experience high degree of interest towards them, it is quite easy to imagine that the holders of such assets could end up in a dispute over the storage or transfer of cryptocurrencies. Knowing that the legal status of cryptocurrencies and smart contracts is mostly unset and inconsistent across various jurisdictions, it is likely that conventional courts would not become the first option for the disputing parties to rely on. The first tool would likely be mediation followed by commercial arbitration, especially if there is a cross-border element involved. Such a tool is attractive for potential disputing parties due to a number of reasons such as the relative flexibility of the arbitration

18 ROGERS, J. and A. IBRAHIMOV. Cryptocurrencies and Arbitration: A match made in heaven? *International Arbitration Report.,* 2018, no. 10, p. 25.

as well as the advantage of the global enforcement of arbitral awards – one of the most valuable benefits of this type of dispute resolution methods.[19]

That being said, regardless of the mode of operation of such an arbitration process, being it conducted online or offline, the arbitrators would need to consider the peculiarities of the functionality of the mentioned technologies. As we mentioned earlier, one of the key characteristics of blockchain is the immutability of the data that is already added to the chain. This may pose some significant hurdles when we are dealing with the potential arbitral awards that would rule contractual activities between the disputing parties void and would require the reimbursement of spent coins. It is technically impossible to 'reverse' a smart contract or a blockchain transaction to its state prior to the value transfer. This is not even mentioning the potential problem with the legal validity of an arbitration clause if such a clause exists in the form other than in writing (as a part of a conventional written contract).[20]

Blockchain as a storage option for arbitral awards and other materials. This is a purely utilitarian option – to use blockchain's unique features such as immutability for the needs of arbitration for storing important data there. At first glance, it may seem counterintuitive to use such a complicated technology for the storage of data instead of relying on more conventional options such as cloud storage or internal physical servers that are used as databases. But blockchain allows for the storage of data and it is arguably more secure when it comes to the protection of sensitive data from data breaches and hacks. Hacks to gain access to the data associated with arbitration proceedings and to compromise the arbitral institutions already happened as it was the case with the data breach of the website of the Permanent Court of Arbitration in The Hague.[21] By virtue of being

19 Ibid.

20 JEVREMOVIĆ, N. 2018 In Review: Blockchain Technology and Arbitration. *Kluwer Arbitration Blog* [online]. 27. 1. 2019 [cit. 12. 4. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2019/01/27/2018-in-review-blockchain-technology-and-arbitration/

21 PETERSON, L. E. Permanent Court of Arbitration Website Goes Offline, With Cybersecurity Firm Contending That Security Flaw Was Exploited in Concert With China-Philippines Arbitration. *Investment Arbitration Reporter* [online]. 23. 7. 2015 [cit. 14. 4. 2021]. Available at: https://www.iareporter.com/articles/permanent-court-of-arbitration-goes-offline-with-cyber-security-firm-contending-that-security-flaw-was-exploited-in-lead-up-to-china-philippines-arbitration/

decentralized, distributed and boasting the immutability of the data stored on it, blockchain-based storage may become quite a compelling option. Especially taking into consideration the resistance of the whole system to the corruption of individual nodes as it would require the attacker to gain control over 50% of the network's mining power (for 'proof of work' systems) to be able to make alterations to the data stored on a blockchain. Even then it is still impossible to perform such a malicious activity secretly as it will be visible to the whole participants of the system.[22]

Currently, the market of blockchain storage is expanding as multiple providers offer their blockchain-based storage solutions, e.g., Storj, Sia, and Filecoin.[23]

Blockchain-based dispute resolution platforms. In comparison to the previous use-cases where blockchain and/or smart contracts can be used to facilitate the arbitration process without altering its nature, this option represents the next step of involvement of digital technologies into dispute resolution. It requires a significantly higher degree of integration of blockchain into arbitration proceedings altering some processes, e.g., submission of evidence, communication with a tribunal, decision-making, etc., up to the point where the resulting mix of law and technology can raise questions of the legal validity of such proceedings and legal recognition of the arbitral awards. Scholars and practitioners whose research interests revolve around the topics of blockchain-based solutions for online arbitration raise some doubts on whether these new creatures can be called arbitration platforms in the first place and whether their awards can be enforced as typical arbitration awards.[24] We will be diving deeper into this problem in further chapters of the current paper. For now, it is important to mention that there are multiple blockchain-based platforms for dispute

22 SAYEED, S. and H. MARCO-GISBERT. Assessing Blockchain Consensus and Security Mechanisms Against the 51% Attack. *Applied Sciences* [online]. 2019, Vol. 9, no. 9, p. 5 [cit. 15. 4. 2021]. Available at: https://www.mdpi.com/2076-3417/9/9/1788

23 SHEHATA, I. Three Potential Imminent Benefits of Blockchain for International Arbitration: Cybersecurity, Confidentiality and Efficiency. *YAR – Young Arbitration Review*, 2018, Vol. 7, ed. 31, p. 34.

24 BANSAL, R. Enforceability of Awards from Blockchain Arbitrations in India. *Kluwer Arbitration Blog* [online]. 21. 8. 2019 [cit. 16. 4. 2021] Available at: http://arbitrationblog.kluwerarbitration.com/2019/08/21/enforceability-of-awards-from-blockchain-arbitrations-in-india/

resolution that target clients who operate with smart contracts in their contractual activity.[25]

3 The Special Part

3.1 Types of Arbitration That Can Be Used for Solving Disputes That Involve Smart Contracts: Off-Chain Arbitration vs. On-Chain Arbitration

Now, that we have a basic understanding of what the decentralized ledger technology is and how blockchain and/or smart contracts can come in handy for international arbitration, it is time to dive deeper into the specific areas where these new technological solutions can be applied when it comes to the arbitration process. The existing pool of scientific researches in the relevant sphere is concentrated on the two big groups of application of blockchain to alternative dispute resolution mechanisms: the off-chain and on-chain arbitration.

There is no universally agreed distinction between the off-chain and on-chain arbitration as well as a firmly established definition of the phenomenon at hand, however, some of the scholars and practitioners who refer to these types of arbitration in their works understand them as the tools that can help automate or even modify arbitration by benefiting from the inclusion of the blockchain technology into the arbitration process.[26] The main distinction line here lies in the degree of such involvement of technology. On-chain arbitration relies on the use of blockchain-based solutions in the decision-making process and/or the procedure of the execution of an arbitral award while off-chain arbitration benefits from the blockchain or smart contracts as tools for facilitation of, for example, the process of appointment of an arbitrator or arbitrators but without the intervention of tech into the process of arbitration that would alter the course of human

25 JEVREMOVIĆ, N. 2018 In Review: Blockchain Technology and Arbitration. *Kluwer Arbitration Blog* [online]. 27. 1. 2019 [cit. 12. 4. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2019/01/27/2018-in-review-blockchain-technology-and-arbitration/

26 SZCZUDLIK, K. 'On-chain' and 'Off-chain' Arbitration: Using Smart Contracts to Amicably Resolve Disputes. *Newtech.law* [online]. 4. 6. 2019 [cit. 17. 4. 2021]. Available at: https://newtech.law/en/on-chain-and-off-chain-arbitration-using-smart-contracts-to-amicably-resolve-disputes/

conduct during the 'hearing' of a case and decision-making.[27] As the idea of inclusion of a blockchain element into the arbitration process is novel, the dividing line between the concepts of on and off-chain arbitration is rather blurred.

Yet, I find this division line to be important, because when taken to the extreme, it can significantly alter the process of the decision-making in the arbitration as we will be able to observe during the subsequent chapter devoted specifically to the issues of the development and implementation of the on-chain arbitration into the existing framework of classic dispute resolution mechanisms.

3.1.1 The Off-Chain Arbitration

While the off-chain arbitration, for example, the offline or online arbitration that has a certain degree of involvement of smart contracts and blockchain technologies may seem like a classic procedure that would only benefit from such automation of processes, from the fusion of technology and legal practice brings its challenges and raises concerns.

Let us construct a fictional illustration of social relations between the parties who eventually end up in a dispute and rely on blockchain technologies to facilitate the resolution of such a case. Say, we have a situation when two contractual parties decide to regulate their commercial relations using smart contracts instead of conventional written ones. These parties draft a body of a smart contract that includes an arbitration clause and even provide for a certain sum in a certain cryptocurrency to be deposited in a version of an escrow account designed specifically for potential dispute situations. The arbitration clause prescribes that in an event of a dispute between the parties and inability to solve it amicably, the case proceeds to a classic off-chain arbitration. A certain chunk of the operational funds (in cryptocurrency) are locked specifically for the purpose of the possible dispute. In case no such dispute arises during the term lifespan of a smart contract, the funds return to the accounts of both parties. Should there be any non-performance

27 PHORA, D. and A. RAJ. Blockchain Arbitration – The Future of Dispute Resolution Mechanisms? *Cambridge International Law Journal* [online]. 16. 12. 2019 [cit. 16. 4. 2021]. Available at: http://cilj.co.uk/2020/12/16/blockchain-arbitration-the-future-of-dispute-resolution-mechanisms/

on the side of any party, these funds will be used for the enforcement of the arbitral award. Apart from this automation mechanism, everything else is conventional: the parties decide on the composition of the arbitral tribunal, pick the arbitration institution, chose the applicable substantive and procedural law and conduct a classic arbitration proceeding.

The potential **points of concern** in such a fictional situation are numerous: 1) the validity of the arbitration clause; 2) the governing substantive law (especially in case of a cross-border element); 3) the problems with self-execution of a smart contract, especially in a case such a contract is declared null and void; 4) the recognition and execution of an arbitral award; 5) the errors in the smart contract that occurred during the draft stage; 6) the problems of a proper interpretation of the contractual terms, etc. The list can go on. All these legal concerns can be structured into two groups: a) those attributed to the **unclear legal status** of smart contracts and contractual tools.[28] This includes the **problem of the legal recognition of smart contracts**: the technology is rather novel and there is no comprehensive legal regulation that could clarify the status of this tool. There is no uniformity among scholars and practitioners on how to treat smart contracts: as a variation of a classic written contract; as a specific form of a digital type of a contract; as something of its own nature, etc. If these are treated as equal to classic contracts, what to do with different rules on the required elements of a contract that exist in Common and Civil law jurisdictions, e.g., the requirement of the *consideration* in Common Law vs. the concept of *causa (cause)* in Civil Law countries (how to determine its existence or absence in case of a smart contract), etc.[29]

Another problem here is the **question of the validity of the arbitration clause** that is drafted on a smart contract. This is due to the current requirement of the United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") that provide for some specific mandatory requirements for arbitration

28 SCHMITZ, A. J. and C. RULE. Online Dispute Resolution for Smart Contracts. *Journal of Dispute Resolution* [online]. 2019, Vol. 103, no. 2, p. 110 [cit. 18. 4. 2021]. Available at: https://scholarship.law.missouri.edu/facpubs/726

29 TIKNIŪTĖ, A. and A. DAMBRAUSKAITĖ. Understanding Contract Under the Law of Lithuania and Other European Countries. *Jurisprudence* [online]. 2011, Vol. 18, no. 4, p. 1394 [cit. 16. 4. 2021]. Available at: https://repository.mruni.eu/handle/007/11062

agreements and arbitral clauses that are parts of commercial contracts.[30] Para. 2 and 3 of Art. II of the New York Convention state the following:

> *"1. Each Contracting State shall* ***recognize an agreement in writing*** *under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.*
>
> *2. The term* ***agreement in writing*** *shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an* ***exchange of letters or telegrams****."*[31]

As we can see from the article mentioned above, the requirement for an arbitral clause or an arbitration agreement to be in writing has a certain degree of flexibility to it as it allows an 'exchange of telegrams' to be qualified for a written form thus permitting some level of digitization of communications between the parties in these matters. Still, it has no indications as regards the possibility of communications between the parties that are happening on a blockchain via smart contracts to qualify for the requirement of a 'written form'. This poses difficulties for the parties who desire to rely solely on smart contracts to regulate their contractual relations including the arbitration option in a case of a dispute.

In practice, such a requirement has been relaxed with the issuance of the Amendments to the Model Law on International Commercial Arbitration made by the UNCITRAL ("UNCITRAL Model Law") in 2006 where Art. VII provides that the wording 'electronic communication' between the parties should encompass the broader range of tools than just telefax or so as long as such information in an electronic communication 'is accessible so as to be usable for subsequent reference'.[32] Since the publication of the 2006 Amendments to the UNCITRAL Model Law, various national courts started interpreting the requirement of the Art. II para. 2 of the New

30 SZCZUDLIK, K. 'On-chain' and 'Off-chain' Arbitration: Using Smart Contracts to Amicably Resolve Disputes. *Newtech.law* [online]. 4. 6. 2019 [cit. 17. 4. 2021]. Available at: https://newtech.law/en/on-chain-and-off-chain-arbitration-using-smart-contracts-to-amicably-resolve-disputes

31 Art. 2 para. 2 and 3 New York Convention.

32 Art. VII UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006.

York Convention more broadly when enforcing the arbitral awards indicating, for example, that such a New York Convention's requirement 'can take various forms and the term must be given a functional and pragmatic interpretation'.[33] That being said, it is still unclear as to whether courts and arbitration tribunals will be utilizing the same degree of flexibility when deciding on the validity of the arbitration clause/agreement that is drafted as a part of a smart contract.

The **issues of the interpretation of the provisions of smart contracts** also fall into this category of concerns. How to know whether the parties to the contract reached a consensus over all the binding elements of the contract? This question may become quite complicated if we take into consideration that the human language needs to be transcribed into computer code – 'translated from human to computer language' as a smart contract operates within the 'IFTTT' logic[34]. This also introduces an intermediary – a programmer. Parties to a contract can draft contractual provisions if these are relatively simple. If the cross-border element is involved, or if the monetary value of the contract is significant, etc., the parties may refer to lawyers to help draft a contract. Smart contracts require not only lawyers but also programmers to launch such a contract and to ensure that no errors are present in the code of the body of the contract. Such a presence of an additional middleman adds to the potential errors due to a 'human factor'. This situation increases the potential misunderstandings regarding the intentions of the parties and subsequently may lead to a dispute being brought before an arbitral tribunal. The described reality adds additional hurdles in arbitration proceedings, as currently there is no established practice of interpretation of contractual provisions in a form of a computer code and arbitrators will likely need to involve programmers to help them to interpret smart contracts – a time-consuming and costly practice.[35]

33 Court of Appeal of Manitoba (Canada) of 11 December 2002, *Sheldon Proctor vs. Leon Schellenberg,* Case AI02-30-05317.

34 IFTTT stands for 'if this then that' – this is the typical operating logic of a computer script.

35 ROGERS, J., H. JONES-FENLEIGH and A. SANITT. Arbitrating Smart Contract Disputes: Negotiation and Drafting Considerations. *International Arbitration Report,* 2017, no. 9, p. 23.

Those referred to the **nature** of a smart contract and blockchain. During the chapters of the general part of the research, we analyzed the key features of blockchain technology and smart contracts that distinguish these two tools from the other technological solutions. The two of those that are interesting for us in the current section are the **blockchain's immutability feature and the smart contracts' self-execution**. Even though our fictional example of a contract between the parties provides for the arbitration clause and the reservation of a certain sum of coins for the purposes of potential dispute resolution, the problem remains – a typical smart contract is self-executable and will continue to operate regardless of the parties having a dispute. In case the arbitral tribunal recognizes such a contract null and void, it is impossible to simply reverse the state of the parties' social relations to the point prior to entering contractual relations. Sure, smart contracts as technology constantly evolve and become more sophisticated: the modern versions of smart contracts can 'monitor the situation in an off-chain world' through the so-called 'oracles'[36] that act as portals to the web. A smart contract may be able to 'detect' that the parties brought a case before an arbitral tribunal and, in that situation, 'pause' its execution.[37] However, it is unlikely that a smart contract would be programmed in a way that allows it to 'self-destruct' and/or 'rewind' to the stage before its launch (even though it may be technically possible to draft it that way). Even if it is possible, modern smart contracts are inalienable from the blockchain on which they operate. Since a blockchain is designed with the idea of immutability of the data stored on it, it would be burdensome if not impossible to revert the already registered transactions in case an award issued by an arbitral tribunal recognizes the smart contract from our fictional scenario as null and void (at least in case of a public permissionless blockchain). Most likely, it would require the creation of a new smart contract to 'reimburse' the losses that the injured party incurred.

36 Oracles. *Ethereum.org* [online]. 2021 [cit. 21. 4. 2021]. Available at: https://ethereum.org/en/developers/docs/oracles/

37 OPENLAW. Controlling Autonomy: A New Tool to Stop Smart Contracts Once Executed. *Consensys* [online]. 8. 8. 2018 [cit. 22. 4. 2021]. Available at: https://media.consensys.net/controlling-autonomy-a-new-tool-to-stop-smart-contracts-once-executed-bc9de699bca0

As we can see from this chapter, smart contracts can make the contracting activity of the participating parties easier by automating the execution of such contracts. On top of that, smart contracts can contain arbitration clauses and provide the parties with the possibility to address the potential disputes. Arbitration, as one of the most flexible and convenient tools to solve disputes, can be a good option for such tech-savvy users. That being said, the current state of development of the mentioned technologies as well as the existing legal framework regarding blockchain and smart contracts raises many concerns that need to be addressed to let the practice of resolving such disputes via arbitration disseminate globally.

3.1.2 The On-Chain Arbitration

As it was mentioned earlier, the so-called 'on-chain' arbitration is a completely different creature, unlike the solutions for the facilitation of the arbitration procedure that is conducted off-chain, on-chain arbitration is represented by the online platforms that are designed specifically to conduct the arbitration proceedings utilizing distributed decentralized ledgers and smart contracts for those purposes. Among the most well-known solutions for this are platforms like Kleros, Aragon, Jur.io, etc. Developers of these platforms advertise that their products are capable of automation of the process of dispute resolution where smart contracts and blockchain technologies are involved and that such solutions can be cheaper and less time consuming than more conventional dispute resolution mechanisms. It is achieved by the incorporation of the automated dispute resolution mechanism directly into the body of a smart contract.[38]

The idea of an on-chain arbitration platform, in general, revolves around the mixture of capabilities of smart contracts to automate processes, blockchain's immutability feature, use of crypto tokens and the application of game-theory principles to achieve the decision that is deemed to be just on the one hand and achievable by the logical thinking on the other hand.[39]

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38 METZGER, J. The Current Landscape of Blockchain-Based, Crowdsourced Arbitration. *Macquarie Law Journal* [online]. 2019, Vol. 19, p. 87 [cit. 16. 4. 2021]. Available at: https://www.mq.edu.au/__data/assets/pdf_file/0010/866287/Blockchain-Based-Crowdsourced-Arbitration.pdf

39 Ibid., p. 94.

The practical implementation of such an on-chain dispute resolution mechanism can be the following: the participating parties draft a smart contract that would regulate their contractual relations and include there an arbitration clause. The funds, allocated by the parties for the purposes of the execution of this particular contract, are being locked in a smart contract (similar to an escrow account). In case of a dispute, the parties refer to such an on-chain dispute resolution platform which opens the call for the participation of the judges as volunteers. When the panel is composed, the judges cast their votes for the outcome of the case: the case is being decided on a majority basis – the option that gains most of the votes prevails. Those judges who ended up being a majority gain some financial compensation for their participation in the case hearing while those who ended up being a minority – lose their money (in a cryptocurrency). The cryptocurrency donation is a mandatory prerequisite for an arbitrator to join the case (these donations form the fund for subsequent compensation for those arbitrators who sided with the majority when casting their votes).[40]

Taking into consideration the typical situation of a lack of trust among both the contracting parties[41] and the arbitrators[42] that participate in the decision-making process via these on-chain platforms, the idea of utilizing game-theory principles is rather effective. Certain scholars that analyze the phenomenon of the emergence of the on-chain arbitration platforms and the logic behind their functionality indicate underline

40 BUCHWALD, M. Smart Contract Dispute Resolution: The Inescapable Flaws of Blockchain-Based Arbitration. *University of Pennsylvania Law Review* [online]. 2020, Vol. 168, no. 5, p. 1389 [cit. 16. 4. 2021]. Available at: https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9702&context=penn_law_review

41 Smart contracts executable on a blockchain can be a popular option for the regulation of contractual social relations between the parties in a setting where there is a lack of trust (due to the technological characteristics of the mentioned technologies, e.g., immutability feature of a blockchain and the self-execution nature of smart contracts) as the parties may be contracting remotely from distant locations and their real names and background can be hidden behind their 'digital identity'.

42 Their real names and identities can also be hidden from the parties that brought a claim before the 'digital tribunal' as well as from the other participating arbitrators in the panel.

the crucial role of the so-called 'Schelling point'[43] – a theory that a group of people that find themselves in a trustless setting, in case they need to reach a consensus over some issue, will rely subsequently rely on a certain 'focal point'[44] to come to such a consensus.[45]

Now, to better understand the practical implementation of the described ideas, let's take a closer look at some of the on-chain arbitration platforms as a proof of concept that the theories mentioned earlier actually work.

Aragon Network. The developers of this platform advertise it as a one-stop-shop solution: form the creation of a DAO that stands for Decentralized Autonomous Organization and is composed of a multitude of smart contracts that are tied together, to the administration of the disputes that involve smart contracts or a blockchain element. The branch that is responsible for handling the disputes is called *Aragon Court*.[46] In case of a dispute, the jurors are selected to adjudicate such a case based on a draft model, i.e., they are picked from the pool of the persons that volunteered to participate in the dispute resolution. In order to participate in the pool of potential jurors, the volunteer needs to submit a certain sum of money in the form of the specifically developed local token called ANJ[47]. A volunteer 'bet' a certain amount of ANJs to increase his/her chances of being selected to adjudicate a dispute. Once the jurors are selected, they review the evidence submitted by the disputing parties via the Aragon system and vote for the outcome of the case. The result of their vote, say 2 in favour of party A and 1 in favour of the party B, constitutes a preliminary

43 This is a classic illustration of a type of cooperative behaviour of an individual in an environment with a lack of communication between the participants. The modern on-chain arbitration solutions are built around this idea that since a rational actor typically wants to maximize his/her gains, it is predictable that such an actor will always gravitate towards the fairest solution of the dispute as it is the only strategy that would bring him/her the maximum amount of tokens.

44 SCHELLING, T. C. *The Strategy of Conflict*. Cambridge, MA.: Harvard University Press, 1960, p. 57.

45 SCHMITZ, A. J. and C. RULE. Online Dispute Resolution for Smart Contracts. *Journal of Dispute Resolution* [online]. 2019, Vol. 103, no. 2, p. 110 [cit. 18. 4. 2021]. Available at: https://scholarship.law.missouri.edu/facpubs/726

46 Aragon White paper. *GitHub* [online]. 18. 7. 2019 [cit. 24. 4. 2021]. Available at: https://github.com/aragon/whitepaper

47 Stands for Aragon Network Juror. Not to be confused with ANT – Aragon Network Token – the main cryptocurrency of the platform. ANJs are used only by the jurors to participate in case hearings.

ruling – a decision that can be appealed by the disagreeing party for a certain amount of additional fee (when drafting a smart contract, the contracting parties must deposit collateral[48] in the form of ANT that is reserved specifically for the situations of a dispute). When all the adjudication rounds are settled, the winning party gains the reward and the participating jurors face their outcome: the juror that sided with the losing party will also lose his/her ANJs which will be added to the general sum of ANJs in this particular case and distributed evenly between the jurors who cast their votes for the party who ended up winning the case.[49] This approach of depriving the jurors who sided with the majority while casting the votes of their rewards is a perfect illustration of an incentivization scheme described earlier as a Schelling point and is used for promoting jurors to adjudicate fairly (in line with what is understood by a juror as a 'subjective truth') as it is the only way in such a system for a juror to gain profit and subsequently increase his/her reputation and chances of being selected again.[50]

Kleros. Another on-chain arbitration platform that relies on a similar set of rules and approaches towards dispute resolution that involve smart contracts is Kleros. This is a France-based company that launched specifically as an online dispute resolution platform for resolving smart contract disputes but currently expanded to incorporate multiple products such as a P2P (peer-to-peer) transactions marketplace.[51] The idea behind this platform is quite similar to the one developed by Aragon: the disputing parties lodge a claim, provide collateral in the form of cryptocurrency (Ether in our case), the jurors that want to adjudicate this case submit their 'bets' in the form of the local platform's token (Pinakion or PNK in this case) to increase their chances of being selected. After the votes being cast in favour of one of the disputing parties, the jurors who sided with the winning party collect their PNKs back + those Pinakions from the jurors

48 METZGER, J. The Current Landscape of Blockchain-Based, Crowdsourced Arbitration. *Macquarie Law Journal* [online]. 2019, Vol. 19, p. 94 [cit. 16. 4. 2021]. Available at: https://www.mq.edu.au/__data/assets/pdf_file/0010/866287/Blockchain-Based-Crowdsourced-Arbitration.pdf

49 Become a Juror for Aragon Court. *Aragon.org* [online]. [cit. 25. 4. 2021]. Available at: https://anj.aragon.org/#learn

50 Aragon Court. *Aragon Help Desk* [online]. [cit. 25. 4. 2021]. Available at: https://help.aragon.org/article/41-aragon-court

51 About Kleros. *Kleros.io* [online]. [cit. 25. 4. 2021]. Available at: https://kleros.io/about

who sided with the losing party (the implementation of the Schelling point incentivization scheme in practice).[52] On top of that, the jurors who ruled in favour of the subsequent winner of the case will also have their cut from the sum in ETH (Ether) deposited by the disputing parties as collateral.[53] In comparison to other competitive platforms, Kleros can boast a well-developed structure and technical advancement as it not only has the system of hierarchically arranged sub-courts for the resolution of different kinds of disputes but also has the decentralized application or DApp ready for use. On top of that, the internal token that is used for jurors' system of reputation – PNK can be purchased on various token exchanges such as Bitfinex or Ethfinex.[54] If we look at the webpage of the Kleros's Dispute Resolver – a specifically designed portal that displays the statuses of the pending cases, we will find a variety of different disputes ranging from the demands for a refund for a purchase of a pet that turned to be of 'unacceptable quality' to the tenancy disputes.[55] This indicates that a platform is capable of attracting various consumers from those who argue over small claims to the more substantial ones.

Jur. This platform, just like its competition, promises to provide affordable and easy access to online dispute resolution.[56] The solution itself represents an on-chain arbitration platform that functions utilizing the game theory incentivization schemes like the already mentioned Schelling Point to compensate participating jurors for their participation in the adjudication process. However, unlike Kleros and Aragon, Jur platform provides for a slightly different approach towards the redistribution of the tokens (JUR token in our case). Previously, we described the scheme where the tokens were distributed evenly between the participating jurors who sided with the winning majority when casting their votes. Jur platform opts for

52 LESAEGE, C., F. AST and W. GEORGE. Kleros White paper. *Kleros.io* [online]. 2019, p. 2 [cit. 26. 4. 2021]. Available at: https://kleros.io/assets/whitepaper.pdf

53 Ibid., p. 8.

54 METZGER, J. The Current Landscape of Blockchain-Based, Crowdsourced Arbitration. *Macquarie Law Journal* [online]. 2019, Vol. 19, p. 100 [cit. 16. 4. 2021]. Available at: https://www.mq.edu.au/__data/assets/pdf_file/0010/866287/Blockchain-Based-Crowdsourced-Arbitration.pdf

55 Kleros Dispute Resolver. *Kleros.io* [online]". [cit. 27. 4. 2021]. Available at: https://resolve.kleros.io

56 Justice Decentralized. *Jur.io* [online]. [cit. 27. 4. 2021]. Available at: https://jur.io

a different approach: the funds of the jurors who sided with the minority are still redistributed among those who sided with the majority, but not evenly. Only those jurors who voted earliest and whose votes were in favour of the subsequent winner of the case get their tokens back plus the tokens of all other jurors. In practice, this looks the following way: say we have the panel consisting of 7 jurors. The decision is split: 5 in favour of the claimant and 2 in favour of the respondent. In such a case, those jurors who sided with the respondent lose their tokens. These tokens are being added to the general pile of tokens of all jurors. The resulting sum will be redistributed evenly between not 5 but only 3 of the jurors who voted in favour of the claimant and who were the fastest out of the 5 to cast their votes.[57]

Such a mechanism of redistribution of tokens is developed to sort of 'fix' the theoretical flaw of the Schelling Point: without such a procedure, the jurors that vote later than their colleagues might cast their votes based following the already established majority even though they might agree with the arguments of the losing party (from the legal standpoint). This mechanism will not be able to prevent all types of 'abuse' of the platform but combined with the practice of flexible voting time (when the deadline for jurors to cast their votes can be automatically extended under certain circumstances) can deter the participating jurors from executing the so-called 'last-minute attack on the majority'.[58]

Another distinctive feature of the Jur platform is the operation in their activity with the new variation of a smart contract, namely 'smart legal contract'. This concept represents an idea of a merge between classic written contracts and smart contracts where the best of the two worlds (legal recognition from the classic contracts and automation and self-execution from smart contracts) coincide for more efficiency and user flexibility. Jur is not a pioneer in this realm as the concept of a smart legal contract

57 METZGER, J. The Current Landscape of Blockchain-Based, Crowdsourced Arbitration. *Macquarie Law Journal* [online]. 2019, Vol. 19, p. 100 [cit. 16. 4. 2021]. Available at: https://www.mq.edu.au/__data/assets/pdf_file/0010/866287/Blockchain-Based-Crowdsourced-Arbitration.pdf

58 Jur AG White paper. *Jur.io* [online]. 2019, p. 40 [cit. 28. 4. 2021]. Available at: https://jur.io/wp-content/uploads/2019/05/jur-whitepaper-v.2.0.2.pdf

existed before the creation of the platform and revolves around the concept of a 'Ricardian contract'[59], but Jur developers claim that they created various 'detailed templates' with a high degree of automation where users can 'drag and drop' the needed provisions that they would like to see in their contract.[60]

Also, unlike, for example, Kleros, Jur developers designed their platform in a way as to allow the resolution of the disputed stem from contractual relations governed not only by smart contracts but also classic conventional natural language contracts thus making this solution suitable for a wider range of use-cases.[61]

As we can see from the mentioned examples, despite the relative novelty of the concepts of blockchain and smart contracts, the market of the on-chain dispute resolution platforms is already represented by a number of competing solutions that were able to find their niche and attract the user-base. In light of the growing digitization of the processes, conventional arbitration institutions may want to adopt the experience from these new technological solutions to be more attractive to potential clients.

3.2 Advantages and Drawbacks of On-Chain Arbitration Platforms in Comparison to Conventional Commercial Arbitration

Positive sides. Based on the specifications of the technological solutions in the sphere of blockchain-based dispute resolution and the logic behind the idea of on-chain arbitration, we can deduce several advantages of these types of procedures in comparison to the conventional dispute-resolution mechanisms. First of all, on-chain dispute resolution platforms are attractive to their users due to the **automation of the enforcement procedure** of the arbitral awards rendered on-chain. This is due to the self-executory

59 A concept of a Ricardian contract was introduced by Ian Grigg in 2004 and represents an idea of a contract that can be easily readable by people and by programs at the same time, i.e., contains human language semantics and machine identifiers in a form of a computer language. It should be both: 'readable by humans and parsable by programs'. See GRIGG, I. The Ricardian Contract. *Iang.org* [online]. [cit. 28. 4. 2021]. Available at: https://iang.org/papers/ricardian_contract.html

60 Jur AG White paper. *Jur.io* [online]. 2019, p. 18 [cit. 28. 4. 2021]. Available at: https://jur.io/wp-content/uploads/2019/05/jur-whitepaper-v.2.0.2.pdf

61 Ibid., p. 56.

nature of modern smart contracts executable on a blockchain ledger as these allow for a decision of jurors to be executed without delays after its proclamation. In this regard, it is even questionable whether it is correct to describe the procedure that commences after a jurors' decision as an 'enforcement' of an award as it is frequently referred to as a part of the 'recognition and enforcement' of conventional arbitral awards. These kinds of awards are executed automatically without the need for any 'external authorisation' of this process. The researchers who analyze the peculiarities of the functionality of one of the on-chain dispute resolution platforms Kleros, make an emphasis on this distinction.[62]

The other positive sides of the on-chain arbitration systems that stem directly from the mentioned automation of the processes are **savings of time and costs** when compared to the classic arbitration procedures. The submission of a claim, selection of jurors, collection of evidence and the voting process is rather fast and simple. All of the platforms that provide solutions for blockchain-based dispute resolution that were described in the previous chapters describe in their whitepapers and user guides a description of how is the process of dispute resolution being organized and what steps it involves. Some platforms, e.g., Jur build their advertisement around the fact that their approach to dispute resolution allows them to reduce the time and costs required for case hearings indicating that the average time to close a dispute on their platform amounts to 60 days.[63] In contrast, the ICC's 2019 dispute resolution statistics indicate the average time for a case to reach a final award to be between 6 to 26 months. Not to mention that this is true for the expedited procedures – the ones that are suitable for rather small claims.[64] The relatively short average duration of the dispute resolution process on the blockchain-based arbitration platforms also influences the financial expenses of the disputing parties. The on-chain arbitration is cheaper than conventional dispute resolution since the shorter

62 NAROZHNY, D. Is Kleros Legally Valid as Arbitration? *Kleros.io* [online]. 12. 6. 2019 [cit. 28. 4. 2021]. Available at: https://blog.kleros.io/is-kleros-legally-valid-as-arbitration/

63 Meet the Open Justice Platform. *Jur.io* [online]. [cit. 28. 4. 2021]. Available at: https://jur.io/products/open-justice/

64 ICC. Dispute Resolution Statistics. *International Chamber of Commerce* [online]. 2019 [cit. 29. 4. 2021]. Available at: https://iccwbo.org/media-wall/news-speeches/icc-releases-2019-dispute-resolution-statistics/

amount of time required for obtaining an award means that the disputing parties can resume their contractual activity sooner and spend less money for any kind of legal services.

Finally, based on the characteristics of the blockchain technology and smart contracts, e.g., the self-execution of a contract and the automatic implementation of an arbitral award, the on-chain dispute resolution platforms has become an attractive tool for those people who implement smart contracts in their contractual activities and whose disputes are rather small. Such blockchain-based dispute resolution platforms can offer their customers prompt and inexpensive resolution of **small claims** thus occupying a niche of their own with conventional arbitration being reserved for more substantial disputes that involve bigger risks and operate with larger sums of money at stake.

Weak aspects. Unlike the previously mentioned attractiveness of the blockchain-based arbitration platforms for the resolution of small disputes, the disadvantage of on-chain arbitration solutions is their **poor suitability for larger and more complex claims**. This is due to several reasons. First of all, the qualification of the participating arbitrators is hard to verify. Kleros, Jur and other similar solutions have a detailed description of the process of the selection of the volunteers for the position of jurors.[65] The problem is, there are no formal requirements on things like the education, working experience, reputation, etc., of the potential jurors. This means that the disputing parties can only guess how qualified and experienced the selected panel of jurors is. This is partially due to the peculiarities of the functioning of the blockchain-based dispute resolution platforms. The volunteers who want to participate in these platforms as jurors, need to have at least some basic understanding of the functionality of the blockchain technology, smart contracts, cryptocurrencies and tokens, all this – just to be able to register on such platforms and submit their candidacy for the selection process. We can call this 'the minimum technical knowledge threshold' – the new requirement for these 'jurors of the digital age'. It is obvious, that there are far fewer arbitrators in the world who can be both qualified and experienced

65 See white papers of the respective platforms. Many of them have special chapters devoted to the process of the selection of jurors.

from the standpoint of the legal profession and, at the same time, – from the technical side than there are experts in these fields taken separately. For now, in case an arbitrator is proficient in his/her craft (from the legal profession standpoint), he/she is better off sticking to a conventional arbitration rather than trying to gain technical knowledge and entering the realm of on-chain arbitration. Such a situation dictates the relatively flexible requirements for the qualification of the jurors participating in these new technological solutions.

The situation described above is only getting magnified by the **absence of the regulatory framework** when it comes to on-chain arbitration. When we are dealing with conventional dispute resolution, especially if a dispute involves a cross-border element, there exists a combination of national, international legislation, soft law and a developed case-law basis that regulates social relations in the sphere of commercial arbitration. This includes the New York Convention, the UNCITRAL Model Law, the ICC Rules of Arbitration, etc. When it comes to the on-chain arbitration, its situation is different: there is no regulatory framework in place that could serve as a guide for participating parties. This is due to the novelty of the technology itself and the lack of recognition of it in the arbitration community as an alternative tool to conventional dispute resolution. This is probably the most significant drawback of the on-chain arbitration as this 'legal grey area' can scare away the potential clients and deters the development of the technology.

Lastly, I can determine another potential disadvantage of the blockchain-based dispute resolution platforms. The one that has to do with the mode of functioning of a smart contract – the so-called **'IFTTT logic' of smart contracts' execution**. Smart contracts are drafted using programming languages[66]. This means that to represent contractual provisions in a smart contract, the drafters need to reflect them in a computer code variation. This can be done by transcribing the human language logic into the computer one. This can be achieved through the 'if this – then that, else – that'

66 One of the typical programming languages that are used for drafting smart contracts is Solidity.

approach – a typical logic that a computer code operates with.[67] This places certain constraints on the degree of flexibility when drafting contractual provisions on a smart contract. On the one hand, such an approach simplifies the execution phase of a smart contract lifespan as it is predictable how a smart contract will behave when it is launched. On the other hand, not every typical contractual provision can be presented in an IFTTT logic. Take, for example, such rather vague concepts as standards of behaviour in contractual social relations like 'the reasonable person of the same kind', 'utmost good faith', etc. These are impossible to transcribe into a computer code because the former are human language constructs that have a high degree of flexibility and involve human judgment, while the latter is a language that is based on strict and inflexible logic. In case the disputing parties who regulate their contractual relations via a smart contract bring a claim before an on-chain arbitration platform, they might end up in a conundrum on how to interpret the intent of the parties to a contract. They might disagree on certain expectations that they had from their contractual rights and obligations when drafting a smart contract, but once that contract is launched it is the machine that will 'interpret' all the contractual provisions according to its 'if-then-else' logic. This illustration emphasises how rigid and inflexible smart contracts can be when it comes to the composition of contractual provisions that the parties want to embed on them.

3.3 The Future Perspectives and Predictions for the Interplay Between International Arbitration and Smart Contracts Executable on a Blockchain

Describing any possible future perspectives of a novel technology means entering uncharted territory as it is impossible to predict what will be the state of development of a given technological solution and peoples' attitude towards it a couple of decades from now. That being said, based on the previously outlined pros and cons of the on-chain arbitration solutions as well as their functionality, we can already note that these platforms

67 NZUVA, S. Smart Contracts Implementation, Applications, Benefits, and Limitations. *Journal of Information Engineering and Applications* [online]. 2019, Vol. 9, no. 5, p. 68 [cit. 29. 4. 2021]. Available at: https://www.iiste.org/Journals/index.php/JIEA/article/view/49776

grabbed some prospective consumers' attention. The number of cases that these platforms process is smaller than the one in conventional arbitration but blockchain-based dispute resolution has become attractive for people who want to implement smart contracts and blockchain technology in their business activity.

The number one problem that prevents the further growth of these platforms is the lack of a legal framework, i.e., the clear 'rules of the game'. Should this situation change in the future, we will likely see the exponential growth of on-change dispute resolution platforms in the following decade. Without that, the market share of these new technological solutions will remain rather negligible.

I envision that the current trend remains for a couple of years with on-chain arbitration slowly gaining traction in parallel to conventional dispute resolution options and continues to remain under the radar of the big players and investors. Afterwards, if and only if smart contracts as a technology experience a surge in popularity (and this can happen if the process of transcription of contractual provisions into a computer language simplifies to the level that it becomes relatively easy for a non-tech expert, i.e., an average user to operate with it, for example, by creating a user interface that would allow to 'drag and drop' contractual provisions from a list of typical ones onto a smart contract with the further automatic compilation of them into a bytecode, etc.), it is possible that on-chain arbitration will become a competitor to the classic commercial arbitration. In that case, a gradual merge between the two is also possible – with the aim to take all the best from two worlds: take the flexibility and automation of a dispute resolution from on-chain arbitration and legal recognition and regulatory framework from the conventional arbitration.

As for now, the two concepts are just designed for different cases and cannot be mutually interchanged.

4 Conclusion

This research aimed to outline the interconnection of the new technologies, namely a blockchain and a smart contract with the international commercial

arbitration: to illustrate how the new technological solutions can facilitate and enrich the conventional arbitration proceedings introducing certain automation to the sometimes lengthy process of a dispute resolution. We started with the description of the idea behind the concepts of a blockchain and a smart contract, their structuring elements and peculiarities of functionality. Afterwards, we looked at the theoretical use-cases and practical applications of the new tech to the world of international commercial arbitration and found out that there are several levels at which the integration of the two worlds can occur: from pure functional ones, e.g., the use of blockchain as a storage for the data that is generated by the arbitration organizations to the ones that change the whole concept of the provision of the dispute resolution services such as arbitration platforms which functionality is grounded on the blockchain technology.

A certain part of the paper was devoted to the illustration of the differences between the two distinct approaches on how the blockchain and smart contracts can be implemented in the arbitration process besides the mere storage solutions, namely the distinction between the so-called 'off-chain' and 'on-chain' arbitration. It was emphasized that the off-chain arbitration, even though it represents a conventional arbitration but with the presence of the blockchain, cryptocurrency or smart contract element as a part of a dispute, introduces some specific requirements to the level of technical expertise on the side of arbitrators in addition to their qualification as lawyers. This situation allows us to draw a distinctive line between a conventional arbitration and an off-chain arbitration that involves a blockchain element.

The largest part of the paper was devoted to a very specific newly emerged category of services in the field of dispute resolution – the phenomenon of 'on-chain' arbitration – the idea that a dispute resolution may be conducted on a distributed decentralized ledger, i.e., blockchain. We found out that an on-chain arbitration revolves around the emergence of the technological solutions that provide for the possibility to not only solve disputes online with the involvement of volunteering jurors but also to allow for the automatic execution of arbitral awards without leaving blockchain and the need to refer to courts for the recognition and enforcement of such awards. This new method of arbitration is especially attractive for the parties who want

to implement smart contracts into their contractual activity and who have relatively small claims.

Finally, it was underlined that the newly emerged on-chain arbitration system is far from being perfect with its pros and cons that are specific to these new technological solutions with one of the biggest concern being the lack of a legal framework that would regulate the activity of such platforms. The prediction was made that the further evolution and dissemination of on-chain arbitration is dependent on the successful implementation and development of the regulatory framework in this field.

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Use of Artificial Intelligence in Arbitration

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Abstract

The digital revolution of the 20th century made information available everywhere and anytime. Now in the age of Artificial Intelligence, this information is used for automating the decision-making process in the hope of a better and improved future. Bearing all the positives in our minds, we simply cannot forget about the concerns that artificial intelligence will have on dispute resolution. For these reasons, this article aims to analyze the use of artificial intelligence in the process of arbitrary decision-making. Exploring the technical aspects as well as the theoretical implications for decision-making.

Keywords

Arbitration; Artificial Intelligence; Decision-making.

1 Introduction

New technologies and their applications in practice are experiencing an unprecedented boom. Our society has moved from its primary development from a collection-oriented economy, through production to current mass production. Industrialization also meant a shift of society to the so-called knowledge society, societies where goods and services are based on information.[1] Information thus began to be a very valuable asset and contributed to the dynamic development of technology. It is technologies based on collecting and analysing information that are the driving force of current society. At this very moment, the entry of a new technology into the game can be observed. Technology that has the potential to further

1 See GYURÁSZ, Z. and M. MESARČÍK. Nové technológie a regulačné výzvy. In: ANDRAŠKO, J. et al. *Právo informačných a komunikačných technológií (2. díl)*. Bratislava: TINCT, 2021, 328 p.

influence the paradigms of our lives. Artificial intelligence ("AI") has already entered the daily existence of society. At the same time, however, according to some, it poses threats that need to be approached prudently.[2]

Even though the development of AI has begun as early as the 1950s, a significant step forward did not occur until the last decades, while the original product did not reach the original ambitions and expectations. These ambitions and expectations, simply put, were the goal of developing a machine that can replicate human thinking and thus solve tasks more efficiently and make work easier for our society. We are still a long way from general AI and thus from a machine that will handle universal tasks. Nevertheless, at present, we can see the application of AI in specific areas.[3] One of these areas is the arbitration process.

In these days of rising concerns about the resources and time that takes to decide disputes, AI has the potential not only to reduce the time and cost of resolving disputes but by increasing predictability and reducing risk, and to discourage unmeritorious claims to create incentives to settle early. However, at the same time, concerns are raised about the impact that AI will have on decision making and access to justice depending on who has access to its benefits, the transparency of, and control over, the arbitral data and algorithms, including publication of awards and potential risks to confidentiality and personal data protection, to name a few.

2 Arbitration and Use of Modern Technology

In the last years, we are witnesses of an immense impact of the new technologies on our life. Transformational innovations change the way how people live their everyday lives, how they perform daily task, communicate, and even carry out their work task. The new and modern technology had tremendous impact to legal processes as well. The international arbitration,

2 BLACK, J. Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World. *Current Legal Problems* [online]. 2001, Vol. 54, no. 1, pp. 103–146 [cit. 6. 6. 2021]. Available at: https://www.researchgate.net/publication/30527050_Decentring_Regulation_Understanding_the_Role_of_Regulation_and_Self-Regulation_in_a_%27Post-Regulatory%27_World

3 See CORRALES, M., M. FENWICK and N. FORGO (eds). *Robotics, AI and the Future of Law (Perspectives in Law, Business and Innovation)*. Singapore: Springer, 2018, 358 p.

as one of the methods of alternative dispute resolution is not an exception. In this part of the article, our goal is to analyze the role of the technology in the current arbitration processes and effect that the technology had so far in field of dispute resolution via arbitration, e.g., the e-mail and other types of electronic communications between arbitration tribunal, arbiters and parties, storage of information for access by the parties and the tribunal using portable or fixed storage media, hearing room technology, etc.[4]

Recently, the international arbitration as well as any decision-making process has been facing unprecedented challenges in the form of the world pandemic changing all the processes as we knew them. The answer of the international arbitration community lies in increased interest and the support of the technology in the processes.

The impact of the modern technologies in the decision-making processes can be divided in two categories. First one enshrines all technological tools or methods helping the arbiter. For example, online dispute resolution methods, online communication, remote videoconference hearings, etc. These technologies' main goal is not to resolve the case. The second category is use of AI itself, which can reach the final judgment by itself.

2.1 Use of Technology in the Arbitral Rules

In this chapter of the article, we are analysing the regulation of the use of modern technology in chosen arbitration rules guidelines. Namely, of the International Court of Arbitration at the International Chamber of Commerce ("ICC"), the Singapore International Arbitration Centre ("SIAC") as two leading arbitration institutions.

Recently, the ICC revised its arbitration rules and published ICC Rules of Arbitration 2021 introducing multiple changes, including some crucial changes in connection to the use of a new technology. Technology has always an irreplaceable role in the process of international arbitration, mostly because of its international nature. New amendment regulating written notifications or communications (Art. 3 para. 1 of the ICC Rules of Arbitration) removes

4 ICC Commission Report on Information Technology in International Arbitration 2017. *International Chamber of Commerce* [online]. [cit. 6. 6. 2021]. Available at: https://iccwbo.org/content/uploads/sites/3/2017/03/icc-information-technology-in-international-arbitration-icc-arbitration-adr-commission.pdf

an obligation of a party to provide each document in a sufficient number of copies for each party, each arbitrator and to the Secretariat.[5] The new regulation also called a green arbitration simply states the obligation to "send" each document to each party, arbitrator and to the Secretariat presuming only electronic communication. Additionally, several articles of the ICC Rules of Arbitration 2021 confirm the step towards electronic communication by stating that sending hardcopies of the documents shall be performed when requested.[6] In practice, electronic filing and electronic communication between the parties have a potential to significantly change the character of the arbitration proceeding since electronic delivery is not only faster method but also more economically and ecologically convenient.

ICC Rules of Arbitration 2021 also regulates another ground-breaking innovation, i.e., remote conference hearings introduced in the Art. 26 of the ICC Rules of Arbitration 2021. No necessity to conduct hearing in persons is established. It remains solely up to the arbitrators whether they decide to conduct in person hearing on basis of the relevant facts and circumstances of the case or if the parties must be consulted as a preliminary step. The Art. 26 para. 1 lists individual means of the remote hearings, like videoconference, telephone, and other appropriate means of communication. At the beginning of the COVID-19 pandemic, when the new electronic measures were adopted and new amendments introduces, the question arose whether the "online" communication and hearing will prevail, or the world will come back to normal and to face to face hearings. Now, at least in the field of the arbitration, the ICC Rules of Arbitration 2021 confirm that electronic communication will be the future of the hearings rather than the temporary covid prevention measure.

It is necessary to add, that the format of remote hearing might not be suitable for every arbitration proceeding therefore in person hearing are certainly not over. At the same time, even if the ICC Rules of Arbitration 2021 allows virtual hearing to take place, they remain obstructed by the *lex arbitri*.

The situation is slightly different while comparing ICC Rules of Arbitration to the SIAC 2016 Rules unlike the ICC Rules of Arbitration do not directly

5 Art. 3 para. 1 ICC Rules of Arbitration 2021.
6 Art. 4 para. 4 letter b) ICC Rules of Arbitration 2021.

regulate a possibility to conduct remote hearings, on the other side,[7] videoconferences are not explicitly excluded. Consequently, as a response to the pandemic, the SIAC issued guidelines called *Taking your arbitration remote*. Guidelines issue in August 2020 specifically enumerates main consideration of remote arbitration hearing in all phases of the proceeding, e.g., efficiency to hold virtual hearing in individual cases, requirements of the contract law or under any applicable law in connection to the remote hearing, etc.[8] Guidelines at the same time provide instruction on how to proceed with arbitration hearing in the online environment.

Among other leading world arbitration centres, the London Court of International Arbitration ("LCIA") introduced possibility to use online hearing earlier than the ICC by adopting LCIA Rules of Arbitration 2020 which similarly to ICC Rules of Arbitration 2021 support use of the electronic communication and e-mail delivery of documents instead of sending a hardcopy.[9] According to the Art. 19.2. of the LCIA Rules of Arbitration 2020: *"The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, duration, form, content, procedure, time-limits and geographical place (if applicable). As to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form)."*[10] Therefore new methods of arbitration hearing are introduced allowing more flexible way to resolve dispute by using technology.

The UNCITRAL Arbitration rules, which are mostly used in the *ad hoc* arbitrations, were not updated due to COVID-19 pandemic, however their latest version issued in 2010 stipulates in Art. 28 para. 4 that the *"arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means*

7 Art. 19 para. 1 2016 SIAC Rules which provides that the tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final resolution of the dispute.

8 SIAC Guides on Taking Your Arbitration Remote. *SIAC* [online]. August 2020 [cit. 6. 6. 2021]. Available at: https://www.siac.org.sg/images/stories/documents/siac_guides/SIAC%20Guides%20-%20Taking%20Your%20Arbitration%20Remote%20(August%202020).pdf

9 See Art. 4 para. 2 LCIA Rules of Arbitration 2020.

10 Art. 19 para. 2 LCIA Rules of Arbitration 2020.

of telecommunication that do not require their physical presence at the hearing (such as videoconference).”[11]

2.2 Practical Challenges of Using Technology in the Arbitration Proceeding

The biggest challenges connected to the use of the technology in the arbitration proceeding are connected to the videoconferencing and they were outlined in the 7th Asia Pacific ADR Conference which gave rise the Seoul Protocol, which are possible hacking, confidentiality issues, ensuring the due process and witness tutoring.[12]

In 2017, the ICC issued a report on information technology in international arbitration specifying some issues which needs to be taken into consideration to perform remote hearing and using IT in the arbitration.[13] Below, we have chosen some of the considerations which are most crucial for the successful functioning of the international arbitration.

First, the question which must be considered to successfully use modern technologies in the arbitration process is whether the parties must agree with their use. Should agreement of the parties with use of e-mail or with other type of online communication and online filing be required? And what about the use of the videoconference? And finally, which consideration shall be considered by the tribunal? The specific guideline will have to be set eventually.

In connection to the institutional arbitration, the arbitration rules are applied to the arbitration held therein. Even if, the agreement of the parties shall prevail, in some cases it remains necessary to consider, whether in the event of certain variations from the arbitration rules, the institution will still be prepared to cover the arbitration proceedings.[14] Pursuant to the Rules of Arbitration of the Vienna international Arbitration Center, the Board

11 Art. 28 para. 4 UNCITRAL Arbitration rules 2010.

12 CHAKRABORTY, A. and A. CHAKRABORTY. Rethinking the Practicalities of Arbitration in the Age of a Pandemic. *SSRN* [online]. 18. 5. 2020 [cit. 6. 6. 2021]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3628923

13 ICC Commission Report on Information Technology in International Arbitration 2017. *International Chambre of Commerce* [online]. [cit. 6. 6. 2021]. Available at: https://iccwbo.org/content/uploads/sites/3/2017/03/icc-information-technology-in-international-arbitration-icc-arbitration-adr-commission.pdf

14 GYARFÁŠ, F. et al. *Zákon o rozhodcovskom konaní. Komentár.* Bratislava: C. H. Beck, 2016, pp. 60–82.

may refuse to administer the proceedings if the arbitration agreement deviates fundamentally from and is incompatible with the Vienna Rules.[15] In this problem, two levels can be observed.

First one, considering even the slightest use of the modern technology, meaning e-mail or the online documentation filing which is today connected to the day-by-day functioning of the parties as well as of the arbitration tribunals. Therefore, excluding of any use of the modern technology could have retrograde effect to the decision-making process itself.

Second level considers use of the virtual hearings and possibility for arbitration court to make parties resolve their dispute via online and virtual hearing instead of face-to-face physical communication. As we mentioned above, some institutional rules already presume performance of video conferences. Pursuant to the ICC Rules of Arbitration 2021, it is up to the arbitrators to decide whether to pursue with the online proceeding. But what happened if parties disagree? Can arbitration tribunal force parties to undergo the online hearing against will of both or even of the one party? This problematic is a grey area in desperate need for the guidance. Some might be found in the ground-breaking judgment of the Austrian Supreme Court of 23 July 2020, Case No. 18 ONc 3/20s. In the case, the arbitration tribunal examined, whether conducting an arbitration hearing by videoconference over the objection of a party may violate due process.[16] The Austrian Supreme Court rejected the claim[17] and most likely even set standards for challenges concerning decisions to conduct hearing remotely. The decision of the Arbitration Tribunal to conduct remote hearing despite the objection of the parties does not violate Art. 6 of the European Convention on Human Rights of 3 September 1953 according to the Austrian Supreme Court.

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15 Art. 1 para. 3 Rules of Arbitration and Mediation 2018 (Vienna Rules and Vienna Mediation Rules 2018). *VIAC* [online]. [cit. 6. 6. 2021]. Available at: https://www.viac.eu/en/arbitration/content/vienna-rules-2018-online

16 SCHERER, M. et al. In a 'First' Worldwide, Austrian Supreme Court Confirms Arbitral Tribunal's Power to Hold Remote Hearings Over One Party's Objection and Rejects Due Process Concerns. *Kluwer Arbitration Blog* [online]. 24. 10. 2020 [cit. 6. 6. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/10/24/in-a-first-worldwide-austrian-supreme-court-confirms-arbitral-tribunals-power-to-hold-remote-hearings-over-one-partys-objection-and-rejects-due-process-concerns/

17 Judgment of the Austrian Supreme Court of 23 July 2020, Case No. ONc 3/20s.

To answer previously posed questions, arbitration proceeding remains alternative to court decision making process and the parties' autonomy certainly should not be suppressed, however this should not prevent parties from using modern procedural rules allowing to resolve dispute the fastest and most effective way possible.

Another second identified consideration, which certainly should be taken into consideration while holding remote videoconferences in *lex arbitri*. In principle, the arbitration proceeding is regulated by the law of the place of arbitration.[18] Therefore, place of the arbitration has a crucial role regarding, e.g., applicability of mandatory rules and principles of *lex fori*, including issues of arbitrability and validity of arbitration agreement, extent of intervention and support by state courts.[19] But how is the place of arbitration defined when all arbitration process is held online? If the parties agree on the place of the arbitration, there will be no issue. On the other hand, issue arises, when the parties have not reached an agreement on the seat of the arbitration. The internet cannot be pinpointed to a single location. There may be various ways to determine the place of arbitration which have been proposed by the legal theorists, e.g., pursuant to the location of the e-arbitration provider,[20] the place where servers are[21], etc.

At the beginning of this chapter, we have divided the modern technology in the decision-making in two categories. This analysis was focused on the use technological tools which facilitates the arbitration process itself by easing the communication process between arbitration tribunal and the parties, by introducing online filling of the documents and virtual conferences.

To this day, technology is widely applied in the arbitration proceedings. In the last 2 decades, its development had huge impact on the settlement

18 LYSINA, P., M. ĎURIŠ and M. HAŤAPKA. *Medzinárodné právo súkromné*. Bratislava: C. H. Beck, 2016, p. 487.

19 HALLA, S. Arbitration Going Online – New Challenges in 21st Century? *Masaryk University Journal of Law and Technology* [online]. 2011, Vol. 5, no. 2, pp. 215–225 [cit. 6. 6. 2021]. Available at: https://journals.muni.cz/mujlt/article/view/2583/2147

20 ABDEL WAHAB, M. S. ODR and e-Abritation – Trends & Challenges. *Mediate.com* [online]. May 2013 [cit. 6. 6. 2021]. Available at: https://www.mediate.com/pdf/wahabearb.pdf

21 KADIOGLU, C. and S. HABIB. Virtual Hearings to the Rescue: Let's Pause for the Seat? *Kluwer Arbitration Blog* [online]. 13. 7. 2020 [cit. 6. 6. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/07/13/virtual-hearings-to-the-rescue-lets-pause-for-the-seat/

of disputes, including the arbitration proceeding. Nevertheless, up to this day, we are not making use of the full potential of the modern technology in the arbitration process. Even if, together with the corona crisis, new regulations and guidelines have been introduced, multiple consideration must still be resolved to observe full benefit of the modern technology.

3 Use of Artificial Intelligence in Arbitration

The site effect of the COVID-19 pandemic as well as of any major world catastrophe in the last century, was a massive development of the technology. In the last decade, the slow shift of the legal decision making towards the AI was visible, and now, more than ever, the topic of the role of the AI in the arbitration proceeding gains its importance.

Current high demand for the fast-decision-making process which is at the same time efficient and just remains unfulfilled and it is more than certain, than in the following years, the role of the AI in the legal sector will rise. Even today, millions of people lack access to justice or their access to justice is limited due to bureaucratic inefficiencies, costs that are beyond their reach, and/or corruption.[22] Even if the legal technology is already part of all arbitration processes (as we analyzed it the chapter 1.2), in this chapter, we will be focusing on the use of the AI in the arbitration process and to the main legal challenges and limitations which are connected to the use of AI in the arbitration.

But before delving deeper into the issue of AI arbitration, we consider it appropriate to start at the very beginning, by defining the basic concepts. As we believe that it is important to be clear about the terms and concepts used in this article, to avoid any additional confusion.

3.1 What Do We Mean by Artificial Intelligence?

The most frequently used term we can encounter in this area is logically the term "artificial intelligence". This term, nevertheless, is quite often used as an umbrella term for other terms such as machine learning, deep learning,

22 MARROW, P. B., K. MANSI and S. KUYAN. Artificial Intelligence and Arbitration: The Computer as an Arbitrator – Are We There Yet? *Dispute Resolution Journal* [online]. 2020, Vol. 74, no. 4 [cit. 6. 6. 2021]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3709032

super intelligence, and even robotics.[23] However, these terms are not semantically identical, moreover, the very concept of artificial intelligence does not have a well-established definition to this day. Already we can see why we consider it so important to establish a clear definition of terms from the beginning, which we will use for the analyze in this article.

The prospect of creating machines with general intellectual abilities fascinated people long before we had the first computers. But what do we mean by artificial intelligence, and why is this concept so difficult to define? Even though, it is beyond the scope of this article to discuss the whole concept of AI in depth[24], put it simply, the very idea of the existence of AI is based on the principle that human intelligence can be described in such a way that the machine can easily imitate it and perform tasks that only humans should be able to do.[25] However, the precise definition and meaning of the term human intelligence, (and even more so of "artificial" intelligence), is still the subject of much discussion and research,[26] and finding a consensus is almost impossible. Some explain our inability of finding a consensus by the rapid development in the field AI, where the definitions used formerly are always changing.[27] With the advances in this field of technology, previous benchmarks that defined AI have become obsolete and we have had to adapt to these changes.[28]

Today, even with the most common search for the definition of artificial intelligence, one is confronted with different definitions. The Encyclopedia

23 For more in-depth comparison on these terms, See MESARČÍK, M. and Z. GYURÁSZ. *Umelá inteligencia a právna úprava zdravotníctva v Slovenskej republike.* Bratislava: Právnická fakulta, Univerzita Komenského v Bratislave, 2020, pp. 12–17.

24 For more in-depth discussion on the concept of AI, See GYURÁSZ, Z. and M. MESARČÍK. Nové technológie a regulačné výzvy. In: ANDRAŠKO, J. et al. *Právo informačných a komunikačných technológií (2. díl)*. Bratislava: TINCT, 2021, 328 p.

25 BOSTROM, N. and E. YUDKOWSKY. The Ethics of Artificial Intelligence (Draft for Cambridge Handbook of Artificial Intelligence). *Nickbostrom.com* [online]. 2011 [cit. 6. 6. 2021]. Available at: http://faculty.smcm.edu/acjamieson/s13/artificialintelligence.pdf

26 MCFADDEN, J. Integrating information in the brain's EM field: the cemi field theory of consciousness. *Neuroscience of Consciousness*, 2020, Vol. 2020, no. 1, pp. 11–13.

27 KOK, Joost N. et al. Artificial intelligence: Definition, Trends, Techniques, and Cases. *Encyclopedia of Life Support Systems (EOLSS)* [online]. P. 68 [cit. 6. 6. 2021]. Available at: http://www.eolss.net/sample-chapters/c15/e6-44.pdf

28 We believe that as a good illustration of advances in the field of AI is a comparison to the two greatest achievements in aviation history. If we imagine that it is almost 66 years since the Dartmouth Conference in 1956, and exactly 66 years have passed between the first controlled human flight and the landing of a man on the moon. We can see the pace that this field is moving forward. And as we so well know, even these steps were small for man but a huge leap for humanity.

Britannica states that: *"artificial intelligence is the ability of a digital computer or computer-controlled robot to perform tasks commonly associated with intelligent beings"*, while the English Oxford Living Dictionary defines artificial intelligence such as: *"The theory and development of computer systems capable of performing tasks that usually require human intelligence, such as visual perception, speech recognition, decision making, and translation between languages."* One of the more modern approaches to the definition of artificial intelligence is the definition used by *Dimiter Dobrev*[29] in his work *"A definition of artificial intelligence"*, where he defines artificial intelligence as *"a program that can handle tasks no worse than man in any world"*. And while the above-mentioned definitions are here to bring more light in this topic on the jurisprudential level, for us lawyers a rather *"hard definition"* will perhaps be more suitable. Thankfully, earlier in 2021 on 21 April, the European Commission presented the long-awaited Proposal for a Regulation on a European Approach for Artificial Intelligence.[30] In this document the European Commission relies on a definition where *"artificial intelligence system means software that is developed* […] *for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with"*. As this definition is the latest and it is very likely that this is the definition, that we all shall be familiar with moving forward, we believe that this definition is the most concise, so for the purposes of this article, and we shall lean towards this definition of artificial intelligence.

3.2 (Artificially) Intelligent Decision-making

Now that we addressed the problem of definition of AI, there is one more question that needs to be answered in the light artificially intelligent arbitration. The question is how do arbitrators or judges decide cases?

This questing though obviously central to the law, the mental processes of making decisions remain an uncertainty in the heart of legal discourse.

29 DOBREV, D. A. Definition of Artificial Intelligence. *Mathematica Balkanica* [online]. 2005, New Series, Vol. 19 [cit. 6. 6. 2021]. Available at: http://www.math.bas.bg/infres/MathBalk/MB-19/MB-19-067-073.pdf

30 Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonized Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts 2021. *EUR-Lex* [online]. 21. 4. 2021 [cit. 6. 6. 2021]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1623335154975&uri=CELEX%3A52021PC0206

The significance of decision making in the translation of legal rules into action is self-evident. As it is difficult to imagine any occasion when legal rules shall mechanically apply at any stage of the legal process.

For the process such as *"arbitration"* or *"judiciary"* it is considered a rational legal process if it achieves logical and social legitimacy.[31] And the guiding concept of the legitimacy in most law systems is the doctrine of rule of law.[32] The rule of law is a statement on legitimate political authority, and it entails a theory of judicial reasoning called legal rationalism.[33] A concept based on reason, where reason is a power of the mind and one that could uniquely filter out the relevant from the irrelevant. And if reason is the source of true knowledge, then reason could likewise be applied to legal disputes to solve the cases. According to this rationalist view, therefore legal decisions emanate naturally from prescribed forms of logical inference, namely deductions, inductions, and analogies.[34]

However, during the turn of the 20th century, the received view of legal theory was threatened by the foundational challenge posed by the American legal realism movement.[35] This movement challenged the idea that judges were constrained by legal rules. They did this, by looking at the hard cases that were politically or socially contentious. In the hard cases, the application of legal rules does not clearly lead to an objective outcome. This alternative position, associated with *Oliver Wendell Holmes*, and the legal realists, contends that *"the life of the law"* is based not on logic, but rather that the felt necessities of the time, avowed and unconscious intuitions of public policy, and even judicial prejudices have more to do with legal decisions than the formal axioms of logical inference.[36]

31 EPSTEIN, D. Rationality, Legitimacy, & The Law. *Washington University Jurisprudence Review* [online]. 2014, Vol. 7, no. 1, pp. 1–38 [cit. 6. 6. 2021]. Available at: https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1103&context=law_jurisprudence

32 See LYSINA, P. Právny štát ako spoločná hodnota členských štátov európskej únie? In: *Bratislava Legal Forum 2020*. Bratislava: Comenius University, Faculty of Law, 2020, pp. 38–47.

33 MACCORMICK, N. *Rhetoric and The Rule of Law: A Theory of Legal Reasoning*. Oxford: Oxford University Press, 2010, 304 p.

34 EPSTEIN, D. Rationality, Legitimacy, & The Law. *Washington University Jurisprudence Review* [online]. 2014, Vol. 7, no. 1, pp. 1–38 [cit. 6. 6. 2021]. Available at: https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1103&context=law_jurisprudence

35 Ibid.

36 See HOLMES, O. W. *The Common Law*. Mineola: Dover Publications, 1991, 480 p.

Nevertheless, through history realists and rationalist alike, instinctively believed that legal decision-making requires a cognitive process which is ontologically privileged to human existence, and therefore this phenomenon cannot be achieved by computer programs.[37] And yes, that was the case for many decades, with common computers. But now in the age of AI, we start to see a swing in the pendulum. Several studies[38] lend support to the thesis that computer programs are even better than humans in predicting the outcome of legal decision-making. And the basic explanation for this is apparently trivial. AI based systems are not limited by our fragile human bodies, as human brains suffer "hardware" limitations which computer programs can surpass easily.

For this reason, we should take a closer look on the topic of automated decision-making.

3.2.1 Automated Individual Decision-making

It is said that the idea automated decision-making of has fascinated academics since the early 1970s.[39] A world where automated systems could be used for decisions that must be made frequently and rapidly were for some utopic. It was believed that if the decision rules can be readily codified, and if high-quality data are available, chances are good that the decision can be automated.[40] And

37 On this topic see GYURÁSZ, Z. Problematika "telo – myseľ" v 21. storočí (dôležitosť filozofie mysle pre modernú podobu umelej inteligencie). *COMENIUS časopis* [online]. 2021, no. 1, pp. 16–26 [cit. 6. 6. 2021]. Available at: https://comeniuscasopis.flaw.uniba.sk/wp-content/uploads/2021/04/Comenius_1_2021_fin-3.pdf

38 For some of earlier studies, see GUIMERA, R. and M. PARDO. Justice Blocks and Predictability of U.S. Supreme Court Votes. *PLOS ONE* [online]. 9. 11. 2011 [cit. 6. 6. 2021]. Available at https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0027188; or RUGER, T. et al. The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decision making. *Columbia Law Review* [online]. 2004, Vol. 104, no. 4, pp. 1150–1210 [cit. 6. 6. 2021]. Available at: https://www.jstor.org/stable/4099370?seq=1

39 See GORRY, A. and M. MORTON. *A Framework for Management Information Systems* [online]. Massachusetts: Massachusetts Institute of Technology, 1971, p. 12 [cit. 6. 6. 2021]. Available at: https://dspace.mit.edu/bitstream/handle/1721.1/47936/frameworkformana00gorr.pdf

40 HARRIS, J. and T. DAVENPORT. Automated Decision Making Comes of Age. *MIT Sloan Management Review* [online]. 15. 7. 2005 [cit. 6. 6. 2021]. Available at: https://sloanreview.mit.edu/article/automated-decision-making-comes-of-age/

despite the earlier limitations of technologies[41], automated decision-making have come of age.

If we take a closer look into the opinion of the Art. 29 Working Party on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679,[42] we may see that a solely automated decision-making is defined as *"the ability to make decisions by technological means without human involvement"*.[43] According to the opinion of the Art. 29 Working Party an automated decisions can be based on any type of data, but mainly:

a) data provided directly by the individuals concerned (such as responses to a questionnaire),
b) data observed about the individuals (such as location data collected via an application),
c) derived or inferred data such as a profile of the individual that has already been created (e.g., a credit score).

The beauty of automated decision-making lies in the very essence of new technologies, in the idea that they are here to make our lives better and easier. Nevertheless, we still believe that there is a long road ahead from the point where the phenomenon of decision-making completely ceases to exist as an ontologically privilege of human existence and becomes a common trait for AI in every aspect of our lives. We must believe that reason as the power that can uniquely filter out the relevant from the irrelevant requires a pinch of, shall we say, common sense.

For this very reason the biggest challenge remains the question of data management. As we all very well know, correlation does not necessarily

41 See the shift from the expert systems to machine learning and more in GYURÁSZ, Z. and M. MESARČÍK. Nové technológie a regulačné výzvy. In: ANDRAŠKO, J. et al. *Právo informačných a komunikačných technológií (2. díl).* Bratislava: TINCT, 2021, 328 p.

42 Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679 (wp251rev.01) adopted on 3 October 2017. *European Commission* [online]. [cit. 6. 6. 2021]. Available at: https://ec.europa.eu/newsroom/article29/items/612053

43 While the guideline points it out that an Automated decision-making has a different scope and may partially overlap with or result from profiling. Profiling and automated decision-making are not necessarily separate activities. Something that starts off as a simple automated decision-making process could become one based on profiling, depending upon how the data is used. For more on profiling See MESARČÍK, M. Policajné profilovanie v kontexte základných ľudských práv a slobôd. *Acta Facultatis Iuridicae Universitatis Comenianae,* 2019, Vol. 38, no. 2, pp. 178–226.

mean causality. *"The problem is that most machine learning systems do not combine thinking with calculations. They simply spew a correlation of data, whether they make sense or not."*[44] Examples include the finding of ZestFinance Inc, which found from its data that higher people are better able to repay loans, or the information that people who fill out their loan applications using only capital letters make their payments than people who they use only lowercase letters. Of course, in practice, it will probably be difficult for a person's height to affect our ability to repay a loan. Ultimately, what we can see is that AI can make systems smarter, but without the addition of a pinch of common sense, it can cause considerable inconvenience.

4 Challenges of the AI in the Arbitration Process

In theory, the nowadays AI is developed enough to resolve dispute based on the initial facts typed into the computer. Machine learning algorithm capable to predict outcome of the European Court of the Human rights have been introduced, with accuracy up to 79%.[45] However, the main issue why we are not yet replacing judges and arbiters with the AI technology are mostly legal.

Currently, the focus of the AI development is not only on the replacement of lawyers by the AI but also to assist them with the decision-making process. For this reason, we are going to analyze possibility of supporting role of the AI in the international arbitration, namely in the process of selection of arbitrators, researching processes and drafting/suggesting of the arbitral award.

One of the methods which can be used to facilitate the international arbitration is the selection of the arbitrators. One of the principles of the arbitration proceeding is the possibility of the parties to choose their arbitrator. The method pursuant to which parties can do so varies depending on the agreement of the parties, as well as of the applicable law and arbitral institution

44 CAGE, D. Big Data Uncovers Some Weird Correlations. *The Wall Street Journal* [online]. 23. 3. 2014 [cit. 6. 6. 2021]. Available at: https://www.wsj.com/articles/SB10001424052702303369904579423132072969654

45 Please compare ALETRAS, N. et al. Predicting judicial decisions of the European Court of Human Rights: a Natural Language Processing perspective. *PeerJ Computer Science* [online]. 24. 10. 2016 [cit. 6. 6. 2021]. Available at: https://peerj.com/articles/cs-93/

rules.[46] E.g., the ICC Rules of Arbitration 2021 states that the dispute shall be decided by a sole arbitrator or by three arbitrators.[47] If parties do not agree on the number of the arbitrators, the arbitration tribunal shall appoint sole arbitrator, the court shall appoint a sole arbitrator, save where it appears to the court that the dispute is such as to warrant the appointment of three arbitrators.[48] At the same time, if parties fail to agree on the sole arbitrator in the prescribed period, he shall be appointed by the court. Similar rights have the Arbitration tribunal if the parties agreed on the three arbitrators and additionally, it is up to the court to appoint the third arbitrator which will act as the president of the arbitration tribunal.[49] The similar procure is contained in many others arbitration rules. Main advantages of selection of arbitrators by the AI may be seen in the saving time.

Using the AI in the supporting role does not constitute many legal challenges, since role of the AI remains like the role of the modern technology. Modern technology, e.g., videoconferencing facilitates communication between the tribunal and the parties. Similarly, the AI might have only supporting role, facilitating, and fastening the process by, e.g., performing choice of sole arbitrator if parties fail to do so or of the third arbitrator.

The biggest challenges are not connected to the supporting role of the AI rather than the decision making one. Even the suggestion of the decision making by the AI is causing great concerns. The main legal issue of using AI in the decision-making process are the validity of the arbitration clause whereas parties agree on AI arbitrator and afterwards enforceability of the arbitral award issued by the AI arbitrator.

Currently, use of the AI in the arbitration process is not regulated. Even if parties may agree with use of AI arbitrator, some European jurisdictions expressly states that the arbitrator must be a human being.[50] In the same

46 MARQUEZ, A. S. Can Artificial Intelligence be used to appoint arbitrators? Practical and legal implications of the use of Artificial Intelligence in the appointment of arbitrators in International Commercial Arbitration. *AVANI* [online]. 2020, no. 1, pp. 249–272 [cit. 6. 6. 2021]. Available at: https://avarbitraje.com/wp-content/uploads/2021/03/ANAVI-No1-A12-pp-249-272.pdf

47 Art. 12 para. 1 ICC Rules of Arbitration 2021.

48 Art. 12 para. 2 ICC Rules of Arbitration 2021.

49 Art. 12 para. 5 ICC Rules of Arbitration 2021.

50 See Art. 1450 French Code of Civil Procedure in force 14 May 1981; or Art. 1023 Dutch Code of the Civil Procedure in force 1 December 1986.

way, Act No. 244/2002 Coll., on Arbitration (Slovak Republic) ("Slovak Act on Arbitration") in the Section 6 states that the arbitrator can be a human being fulfilling some conditions such as being adult a with full legal capacity.[51]

The UNCITRAL Model Law does not specifically regulate, that the arbitrator must be a human, but conditions which must be fulfilled by the arbitrator in order to be eligible for the arbitrator position signifies that the arbitrator shall be a human. Namely, Art. 11 para. 1 of the UNCITRAL Model Law presume that no person shall be precluded by reasons of its nationality to act as an arbitrator.

At the same time, the United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") does not prevent parties from choosing an AI arbitrator, nor does it regulate any of such rules. However, Art. V of the New York Convention stipulating ground for the refusal of the recognition and enforcement of the arbitral awards states that the recognition and enforcement might be refused if it is in the contrary to the public policy of the country in which the enforcement and recognition is sought.[52]

Notion of the public policy is a vague concept varying from one national legislation to another. Since it represents powerful weapon in the hands of the national court which allows it to refuse enforcement of an arbitral award,[53] it shall be interpreted restrictively. The public policy concept is the subject of the interpretation of the national court, not even the New York Convention itself provide guideline on its interpretation. The Slovak Act on Arbitration proceeding adopted the similar concept of the public policy as can be found in the New York Convention or in the UNCITRAL Model Law. The Slovak law also recognizes the concept of the procedural public policy whereas also elementary requirement of a fair trial can be public policy norms.[54] We believe that rendering the final arbitral award not by a human but solely by a machine may impact some of the rights for the fair trial of an individual.

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51 See Section 6 para. 1 Act No. 244/2002 Coll., on arbitration proceeding.

52 Art. V para. 2 letter b) New York Convention.

53 SATTAR, S. Enforcement of arbitral award and public policy: same concept, different approach? *ela.law* [online]. [cit. 6. 6. 2021]. Available at: https://www.ela.law/Templates/media/files/Misc%20Documents/Enforcement-of-Arbitral-Awards-Public-Policy.pdf

54 GYARFÁŠ, F. et al. *Zákon o rozhodcovskom konaní. Komentár.* Bratislava: C. H. Beck, 2016, pp. 518–593.

Legal challenges of the arbitration process remain a concern which must be resolved to fully use the AI in the arbitration procedure. Its use as the supplementary method enabling dispute resolution does not seem to be problematic since it's like current use of the modern technology in the arbitration proceeding. However, before using AI as the arbiter multiple questions must be resolved and regulated to fulfil full AI's potential.

5 Conclusion

In this article we have analyzed the concept of the AI in the legal decision-making process. The potential of the AI arbitration is undeniable. Even more in this unusual and challenging times. AI poses multiple questions technical ones as well as legal. Intentionally or unintentionally incomplete or selected data, or data programmed in a selective way, could lead to biased or unreliable results.[55]

The legal challenges to the AI arbitration will probably be harder to overcome than the technical one since the regulation of the AI is still at the beginning and multiple controversial question at the international as well as national level must be resolved to fully benefit from its potential.

The International arbitration is the most suitable dispute resolution process for the application of the AI, since it is the most used in the international commercial disputes as well as it is based on the free will of the parties to resolve their dispute by the arbitration proceeding instead of court litigation. It remains to believe that the legal as well as the technical obstacles will be shortly overcome allowing subject to resolve their disputes via AI Arbitration.

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The Impact of Brexit on the Arbitration Procedure in Great Britain

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Abstract

The current position of the UK as the most frequently chosen place for international commercial arbitration is the result of long period of growth and development of arbitration proceedings in this country. As of 31 December 2020, the UK ceased to be a member of the EU, the problem arose how would international arbitration in this country look like. The main aim of this contribution is firstly to show how the arbitration procedure in the UK works and what is its legal basis. The paper then focuses on the procedure for the recognition and enforcement of arbitral awards, which is particularly important now in the view of Brexit. Next, the author presents issues that may be problematic in connection with Brexit, i.e., so called anti-suit junctions and public policy.

Keywords

Arbitration; Brexit; Anti-suit Injunction; Public Policy; Arbitration Act 1996; Arbitration Procedure; New York Convention 1958.

1 Introduction

Over the past decades, the United Kingdom ("UK") has become a major, if not the most important, center for the settlement of international disputes - international companies are more likely to choose English law than any other one as the law applicable and on the other hand more likely to settle disputes in English courts than in other courts. The question of how Brexit will affect the legal framework of international disputes' settlement is therefore of crucial importance – both for the UK individuals and companies but also for the European Union ("EU"). There is therefore no doubt that Brexit is one of the greatest legal challenges of recent times.

On 23 June 2016 – the British people voted in a referendum to leave the EU. Subsequently, on 29 March 2017 the UK formally notified[1] the European Council of its intention to withdraw, and a month later the European Council's, at an extraordinary meeting adopted guidelines[2] setting out a framework for negotiations.

UK's withdrawing from the EU relied on the procedure introduced into the Treaty on European Union by the Treaty of Lisbon, i.e., under Art. 50. This article confirms that any Member State may decide, in accordance with its own constitutional requirements, about its withdrawing from the EU. Under the terms of Art. 50 para. 2 of the Treaty on European Union, a Member State which decides to withdraw shall notify the European Council of its intention.

The first withdrawal agreement[3] was negotiated by British Prime Minister Theresa May, but it didn't gain the approval of the British Parliament. It was only on 17 October 2019 that the European Council approved the revised withdrawal agreement and accepted the revised text of the political declaration[4], and on 21 October 2019 the Council adopted Decision (EU) 2019/1750 amending Decision (EU) 2019/274 (5) on the signature of the withdrawal agreement[5].

1 A letter of 29 March 2017 from the Prime Minister of the United Kingdom to the President of the European Council, Cover Note from General Secretariat of the Council to Delegations, XT 20001/17, BXT 1. *Consilium.europa.eu* [online]. [cit. 30. 5. 2021]. Available at: https://data.consilium.europa.eu/doc/document/XT-20001-2017-INIT/en/pdf

2 Guidelines Following the United Kingdom's Notification Under Article 50 TEU, EUCO XT 20004/17. *Consilium.europa.eu* [online]. [cit. 30. 5. 2021]. Available at: https://www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf

3 European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, TF50 (2018) 33. *European Commission* [online]. [cit. 30. 5. 2021]. Available at: https://ec.europa.eu/info/sites/default/files/draft_withdrawal_agreement.pdf

4 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, (2019/C 384 I/01). *EUR-Lex* [online]. 12. 11. 2019 [cit. 30. 5. 2021]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT(02)&from=PL

5 Council Decision (EU) 2019/1750 of 21 October 2019 amending Decision (EU) 2019/274 on the signing, on behalf of the European Union and of the European Atomic Energy Community, of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, LI 274/1. *EUR-Lex* [online]. 28. 10. 2019 [cit. 30. 5. 2021]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019D1750&from=PL

On 9 January 2020 House of Commons approved the Withdrawal Agreement Bill ("WAB")[6]. The Council subsequently adopted in written procedure a decision to conclude, on behalf of the EU, an agreement on the UK's withdrawal from the EU. The Council adopted the decision to conclude the Brexit agreement on behalf of the EU on 30 January 2020, which was equivalent to ratifying the agreement on behalf of the EU. On 1 February 2020, a transitional period commenced and lasted until 31 December 2020. During this time, the UK continued to apply EU law, but was no longer represented in the EU institutions.[7]

From now on, the UK is no longer a Member State of the EU and is therefore treated as a third country. This means that not only EU's primary law (treaties), but also secondary one, (regulations and directives) ceases to apply in the UK. UK also no longer participates in the creation of new EU law, nor it is subject to the case law of the Court of Justice of the European Union ("CJEU"). At the same time, none of the three aforementioned main documents on the UK's withdrawal from the EU, i.e., the first withdrawal agreement negotiated by Theresa May, WAB and finally Withdrawal Agreement refer in any way to arbitration proceedings that are still pending or yet to be initiated in the UK, both during and after the so-called transition period, which started on 1 February 2020 and ended on 31 December 2020.

2 Arbitration Procedure

Arbitration procedure in the UK, which undoubtedly determines its popularity, is characterized by clarity and transparency of rules. According to Art. 1 of the Arbitration Act 1996[8] the purpose of arbitration is to receive a fair settlement of a dispute by an impartial tribunal without undue delay

6 European Union (Withdrawal Agreement) Bill, House of Commons, Committee Stage Briefing, January 2020. *JUSTICE.ORG.UK* [online]. [cit. 30. 5. 2021]. Available at: https://files.justice.org.uk/wp-content/uploads/2020/01/06170033/JUSTICE-WAB-Briefing-Committee-Stage.pdf

7 Brexit: Council adopts decision to conclude the withdrawal agreement. *Consilium.europa.eu* [online]. 30. 1. 2020 [cit. 30. 5. 2021]. Available at: https://www.consilium.europa.eu/pl/press/press-releases/2020/01/30/brexit-council-adopts-decision-to-conclude-the-withdrawal-agreement/

8 Arbitration Act 1996, UK Public General Acts 1996 c. 23. *Legislation.gov.uk* [online]. [cit. 30. 5. 2021]. Available at: https://www.legislation.gov.uk/ukpga/1996/23/contents

or cost.[9] The parties should have freedom to agree on the method of dispute resolution, subject only to such guarantees as are necessary in the public interest, and in matters included in Part I of the Act the court should not intervene, except as provided by this Part.[10]

These principles are reflected in the general duties of the arbitration tribunal. Indeed, under Art. 33 para. 1 of the Arbitration Act 1996, the tribunal shall act fairly and impartially as between the parties, giving each party a reasonable opportunity to present its arguments and to deal with the arguments of the opposite site, and adopt procedures appropriate to the circumstances of the case, avoiding unnecessary delay or costs, so as to provide a fair means of resolving the cases to be decided.[11]

The courts found that the main aim of the Arbitration Act 1996 was to allow the parties to settle disputes through arbitration rather than in court. That is why in fact most commercial disputes can be settled by arbitration (see, e.g., *Fulham Football Club (1987) Ltd vs. J. Sir David Richards et al., [2011] EWCA v 855*). Courts are prepared to interpret arbitration agreements broadly to cover both non-contractual and contractual disputes (*Fiona Trust & Holding Corporation vs. Privalov, [2007] UKHL 40*).[12] Only in very few cases disputes are not subject to arbitration:

a) where the employee can only submit his dispute to adjudication by an employment tribunal (*Clyde & Co LLP v Bates van Winkelhof [2011] EWHC 668*), i.e., where the judicial proceedings are mandatory,
b) insolvency proceedings (which are subject to the statutory regime set out in the Insolvency Act 1986),
c) criminal matters.[13]

The Arbitration Act 1996 concerns the procedure for the settlement of disputes on which an agreement has been concluded that they will

9 Art. 1 letter a) Arbitration Act 1996.
10 Art. 1 letter b) and c) Arbitration Act 1996.
11 Art. 33 para. 1 Arbitration Act 1996.
12 WILLIAMS, J., HAMISH, L., HORNSHAW, R. Arbitration procedures and practice in the UK (England and Wales): overview [online]. *Akin Gump*. p. 4 [cit. 10. 6. 2021]. Available at: https://www.akingump.com/a/web/101415/aokvH/practical-law-arbitration-procedures-and-practice-in-the-uk-.pdf
13 Ibid., pp. 4–5.

be submitted to arbitration. In such a context an 'arbitration agreement'[14] means an agreement submitting to arbitration current or future disputes (whether they arise under contract or not).[15]

Previously indicated articles contain a number of provisions that provide a great freedom of the disputing parties in shaping the arbitration proceedings. This freedom is expressed, *inter alia*, in the possibility of freely:

a) agreeing on the number of arbitrators to be members of the tribunal and whether to appoint a chairman or umpire[16],
b) agreeing on the procedure for the appointment of arbitrators, including the procedure for appointing the chairperson or mediator (conciliator)[17],
c) agreeing on what will happen if the procedure of establishing an arbitral tribunal does not work in proper way[18],
d) agreeing on the functions of the chairman concerning making decisions, issuing orders and awards[19],
e) agreeing under what circumstances the arbitrator's power of attorney may be revoked[20],
f) choosing by party to arbitral proceedings if she or he is represented in the proceedings by a lawyer or another person chosen by her or him[21],
g) agreeing on the powers that the arbitral tribunal may use for the purposes and in connection with the proceedings[22],
h) agreeing on the powers of the tribunal in the event that a party fails to do what is necessary for the proper and efficient conduct of the arbitration proceedings[23],
i) choosing the law applicable to the substance of the dispute[24], or,

14 *"The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement."* – Art. 6 para. 2 Arbitration Act 1996.
15 Art. 6 para. 1 Arbitration Act 1996.
16 Art. 15 para. 1 Arbitration Act 1996.
17 Art. 16 para. 1 Arbitration Act 1996.
18 Art. 18 para. 1 Arbitration Act 1996.
19 Art. 20 para. 1 Arbitration Act 1996.
20 Art. 23 para. 1 Arbitration Act 1996.
21 Art. 36 Arbitration Act 1996.
22 Art. 38 para. 1 Arbitration Act 1996.
23 Art. 41 para. 1 Arbitration Act 1996.
24 Art. 46 para. 1 letter a) Arbitration Act 1996.

j) agreeing on the powers of the arbitral tribunal with regard to legal remedies[25],

k) agreeing on the power of the tribunal to grant interest[26],

l) agreeing on the form of an award[27],

m) agreeing on the date on which the award was made[28],

n) agreeing on the requirements as to notification of the result of the arbitration proceedings to the parties[29].

The Arbitration Act 1996 has greatly clarified the relationship between the courts and arbitration tribunals, reducing significantly the power of courts to interfere in the process and supervision of arbitration.[30] In turn, the court should interfere in the procedure for setting up the arbitral tribunal only if there is no agreement between the dispute's parties on the above mentioned subject. These powers of the court are: (a) giving directions for making any necessary appointments, (b) ordering that the tribunal should take into account these appointments (one or more of them), (c) revocating of appointments already made, (d) making the necessary appointments on its own.[31]

The court also has the power to interfere at the stage of dismissal of the arbitrator. According to Art. 24 para. 1, a party to arbitration proceedings may apply to the court for dismissal of the arbitrator.[32] Subsequently, the court's intervention is also possible when it decides on legal issues arising

25 Art. 48 para. 1 Arbitration Act 1996.
26 Art. 49 para. 1 Arbitration Act 1996.
27 Art. 52 para. 1 Arbitration Act 1996.
28 Art. 54 para. 1 Arbitration Act 1996.
29 Art. 55 para. 1 Arbitration Act 1996.
30 SHONE, M. J. Is it Necessary to Register an Award to Enforce it in the United Kingdom? *Arbitration: The Journal of International Arbitration, Meditation, and Dispute Management*, 2005, Vol. 71, no. 1, p. 52.
31 Art. 18 para. 3 Arbitration Act 1996.
32 The catalogue of reasons why an arbitrator can be removed is predetermined. The grounds for removing an arbitrator from his/her position include: (a) circumstances that give rise to justifiable doubts as to his impartiality, (b) lack of the qualifications required by the arbitration agreement, (c) physical or mental incapability of conducting the proceedings or there are justifiable doubts as to his capacity to do so. – Art. 24 para. 1 Arbitration Act 1996; Finally, arbitrator can also be removed on the ground that he has refused or failed: (i) to conduct properly the proceedings, or (ii) to use all reasonable despatch in conducting the proceedings or making an award, and that substantial injustice has been or will be caused to the applicant. – Art. 24 para. 1 letter d) Arbitration Act 1996.

in the course of the proceedings. In accordance with Art. 45 para. 1, unless the parties have agreed otherwise, the court may, at the request of a party to the arbitration proceedings (after notifying the other parties), resolve any legal issue arising in the course of the proceedings. The only condition is that the court must be convinced that these legal issues significantly affect the rights of one or more parties.[33] An award given by an arbitral tribunal pursuant to an arbitration agreement may, with the consent of the court, be enforced in the same way as a judgment or court order having the same effect.[34] Unless the parties decide otherwise, the court may, by order, extend any time limit agreed by them with respect to all matters related to the arbitration […] with effect in the event of no such agreement.[35]

Next, the position of both the arbitrator and the arbitral tribunal in the UK also results from the fact that the arbitrator has immunity and the arbitral tribunal can decide all procedural and evidential matters. It results from Art. 29 para. 1, according to which the arbitrator shall not be liable for acts or omissions in the performance or alleged performance of the arbitrator's functions, unless it is proved that the act or omission was in bad faith.[36]

Then, it shall be for the tribunal to decide all procedural and evidential matters.[37] In particular, unless the parties have agreed otherwise, the arbitral tribunal may – (i) appoint experts or legal advisors to report to the tribunal and the parties, or (ii) appoint experts to assist it on technical matters,

33 Art. 45 para. 1 Arbitration Act 1996.
34 Art. 66 para. 1 Arbitration Act 1996.
35 Art. 79 para. 1 Arbitration Act 1996.
36 Art. 29 para. 1 Arbitration Act 1996.
37 *"Procedural and evidential matters include – (a) when and where any part of the proceedings is to be held; (b) the language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied; (c) whether any and if so what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended; (d) whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage; (e) whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done; (f) whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented; (g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law; (h) whether and to what extent there should be oral or written evidence or submissions."* – Art. 34 para. 2 Arbitration Act 1996.

and may authorize participation of any such expert or legal advisor in the proceedings.[38] The tribunal may order a claimant to lodge a security for the costs of the arbitration proceedings.[39] The tribunal may give directions in respect of any thing which is the subject of the proceedings or in respect of which any question arises in the proceedings, and which is the property of or in the possession of a party to the proceedings – (a) for the inspection, photographing, preservation, custody or detention of the thing by the tribunal, an expert or a party, or (b) by ordering that samples be taken, observations made or experiments made on the thing.[40] Finally, the tribunal may order that a party or a witness be heard under oath or with confirmation, and may, for this purpose, take the necessary oath or receive the necessary confirmation.[41] It can also provide instructions to a party in order to preserve any evidence under its custody or control for the purposes of the proceedings.[42]

Unless otherwise agreed by the parties, the tribunal has the power to make a declaration as to any matter to be determined in the proceedings.[43] *"The tribunal may order the payment of a sum of money, in any currency."*[44] The tribunal has the same powers as the court – (a) to order a party to do or refrain from doing anything; (b) to order specific performance of a contract (other than a real estate one); (c) to order the correction, setting aside or annulment of a notarial deed or any other document.[45]

Unless otherwise agreed by the parties, the award given by the arbitral tribunal pursuant to the arbitration agreement shall be final and binding both on the parties and on all persons claiming through them or on their behalf.[46]

In the course of the arbitration proceedings, parties are obliged to cooperate with the tribunal. This manifests itself primarily in taking all actions that are

38 Art. 37 para. 1 Arbitration Act 1996.
39 Art. 38 para. 3 Arbitration Act 1996.
40 Art. 38 para. 4 Arbitration Act 1996.
41 Art. 38 para. 5 Arbitration Act 1996.
42 Art. 38 para. 6 Arbitration Act 1996.
43 Art. 48 para. 2, 3 Arbitration Act 1996.
44 Art. 48 para. 4 Arbitration Act 1996.
45 Art. 48 para. 5 Arbitration Act 1996.
46 Art. 58 para. 1 Arbitration Act 1996.

necessary for the proper and efficient conduct of the arbitration proceedings. The parties do everything necessary for the proper and efficient conduct of the arbitration proceedings.[47] This includes – (a) complying promptly with any tribunal's orders concerning procedure or evidence matters, as well as with any other orders or instructions from the tribunal, and (b) where appropriate, promptly taking without all necessary steps to obtain a court decision on a preliminary questions concerning jurisdiction or law.[48]

If the tribunal is satisfied that the claimant has suffered an undue and unforgivable delay in the pursuit of his claim and that the delay – (a) causes or may create a significant risk that it is impossible to obtain a fair settlement of the dispute, or (b) has caused or may cause serious damage to the defendant, the tribunal may make an award dismissing the claim.[49] The tribunal may also make an order dismissing the claim if the claimant does not comply with a peremptory order given by the tribunal to provide security for costs.[50]

If a party, without giving sufficient reason, – (a) does not appear or will not be represented at an oral hearing that was duly notified, or (b) in cases to be decided in writing, fails to provide written evidence after due notice or requests in writing, the tribunal may continue the proceedings in the absence of that party and may make an award on the basis of the evidence presented.[51] If a party, without showing sufficient reasons, fails to comply with any order or instruction of the tribunal, the tribunal may make a peremptory order to the same purpose, setting such time for compliance as it deems appropriate.[52]

3 Recognition and Enforcement of Arbitral Awards

The legal status of arbitration proceedings taking place in London remains unchanged. It means that arbitration proceedings' clauses will remain in force, while the awards of the arbitral tribunals will continue

47 Art. 40 para. 1 Arbitration Act 1996.
48 Art. 40 para. 2 Arbitration Act 1996.
49 Art. 41 para. 3 Arbitration Act 1996.
50 Art. 41 para. 6 Arbitration Act 1996.
51 Art. 41 para. 4 Arbitration Act 1996.
52 Art. 41 para. 5 Arbitration Act 1996.

to be enforced on the basis of the United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[53]

The UK is a party to the New York Convention and will remain it even after Brexit. All EU Member States are also signatories to the above-mentioned Convention. That's why the UK's withdrawal from EU does not affect the validity of arbitration agreements for which English law is proper one. It also doesn't affect enforcement and recognition of arbitral awards issued in the UK.

According to Art. 1 para. 1 of the New York Convention, the Convention applies to the recognition and enforcement of arbitral awards[54] rendered in the territory of a State other than that in which recognition and enforcement of such awards are sought and arising from differences between natural or legal persons. It also applies to arbitral awards not recognized as domestic in the State where their recognition and enforcement are sought.[55] Each Contracting State recognizes a written agreement[56] by which the parties undertake to submit to arbitration all or any disagreements which arise or may arise between them in relation to a particular legal relationship,

53 It is worth noticing here that the foreign arbitration award may be enforced not only on the basis of the New York Convention. In fact, such an award, if it is entitled to enforcement at common law, may be enforced in the same manner as domestic award. The party seeking to rely on the award is not restricted to bringing the action on the award. A foreign award may be enforced by obtaining leave to enforce under Art. 66 of the Arbitration Act 1996. – SHONE, M. J. Is it Necessary to Register an Award to Enforce it in the United Kingdom? *Arbitration: The Journal of International Arbitration, Meditation, and Dispute Management*, 2005, Vol. 71, no. 1, p. 53; According to above-mentioned Art. 66, an award given by a tribunal pursuant to an arbitration agreement may, with the consent of the court, be enforced in the same way as a judgment or order having the same effect. – Art. 66 para. 1 Arbitration Act 1996; If permission to participate in the procedure has been granted, a judgment may be issued in accordance with the judgment. – Art. 66 para. 2 Arbitration Act 1996; Permission to enforce the award shall not be granted if or to the extent to which the person against whom the award is sought to be enforced proves that the tribunal lacked substantive jurisdiction to issue the award. – Art. 66 para. 3 Arbitration Act 1996.

54 *"The term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted."* – Art. 1 para. 2 New York Convention.

55 Art. 1 para. 1 New York Convention.

56 *"The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."* – Art. 2 para. 2 New York Convention.

whether contractual or not, on a matter that may be settled by arbitration.[57] A court of a Contracting State shall, in the event of an action being brought in a matter in respect of which the parties have concluded an agreement within the meaning of this article, at the request of one of the parties, refer the parties to arbitration, unless it finds that the agreement is invalid, ineffective or incapable of being performed.[58] Each Contracting State shall consider arbitral awards to be binding[59] and enforce them in accordance with the procedural rules in force in the territory in which the award is invoked, under the conditions set out in the following articles. No considerably more onerous conditions, fees or charges than those imposed for the recognition or enforcement of domestic arbitral awards may be imposed on the recognition or enforcement of arbitral awards to which this Convention applies.[60]

Recognition and enforcement of an award may be refused upon application by the party against whom recognition and enforcement is sought, only if that party provides the competent authority, where the recognition and enforcement is sought, proof that: (a) the parties to the contract for which recognition and enforcement is sought, referred to in Art. II, were legally incapable under the law applicable to them, or the said contract is invalid under the law to which the parties have subjected it, or, in the absence of any indication to that effect, under the law of the country in which the award was made; or (b) the party against whom the award was invoked was not properly notified of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to make a case; or (c) the award relates to a difference not provided for or not covered by the terms of the submission to arbitration, or contains decisions on matters outside the scope of the submission to arbitration, provided that, if the decisions in the cases submitted to arbitration can be separated from those which have not been submitted to arbitration, that part of the award which contains

57 Art. 2 para. 1 New York Convention.

58 Art. 2 para. 3 New York Convention.

59 *"To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply: (a) the duly authenticated original award or a duly certified copy thereof; (b) the original agreement referred to in article II or a duly certified copy thereof."* – Art. 4 para. 1 New York Convention.

60 Art. 3 New York Convention.

decisions on cases submitted to arbitration may be recognized and enforced; or (d) the composition of the arbitration panel or the arbitration procedure was not in accordance with the agreement of the parties, or, in the absence of such agreement, was not in accordance with the law of the country in which the arbitration took place; or (e) the award has not yet become binding on the parties, or has been revoked or suspended by the competent authority of the country where, or under the law of which, that award was given.[61] Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought determines that: (a) the subject of the disagreement is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to public policy of that country.[62]

Regulations concerning recognition and enforcement of arbitral awards under the New York Convention are contained in the Arbitration Act 1996. Part III of the Act: 'Recognition and Enforcement of Certain Foreign Awards' deals with matters falling within the scope of the New York Convention. According to Art. 100 para. 1 of the Arbitration Act 1996, *"in this Part a 'New York Convention award' means an award made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention"*.[63] An award made under the New York Convention is deemed binding on the persons between whom it was rendered, and therefore may be relied upon by such persons by way of charge, set-off or otherwise in any court proceedings in England and Wales or Northern Ireland.[64] An award given under the New York Convention may, with the consent of the court, be enforced in the same manner as a judgment or court order having the same effect.[65] Recognition

61 Art. 5 para. 1 New York Convention.
62 Art. 5 para. 2 New York Convention.
63 Art. 101 para. 1 Arbitration Act 1996.
64 Ibid.
65 Art. 101 para. 2 Arbitration Act 1996.

or enforcement of an award given under the New York Convention may not be refused except in the following cases.[66]

Six EU Member States (Cyprus, Denmark, Romania, Slovenia, Hungary, and Poland) have ratified the New York Convention with reservation that it will only apply to arbitral awards in commercial cases. In these countries this excluded from the Convention's scope of application cases that concern, for example, arbitration in sports, family, or employment matters, which are not commercial in nature. Then, as it comes up clearly from the provisions of the New York Convention cited above, arbitration agreement, in order to be recognized and enforced, under this Convention, must be in writing. In practice, this means that if the arbitration agreement is not in writing, any subsequent award rendered in the course of the arbitration proceedings cannot be enforced under the Convention.

4 Anti-suit Injunctions

After Brexit, it is certain that the current prohibition imposed by the CJEU on English courts on issuing so called anti-suit injunctions, no longer applies to UK courts. Anti-suit injunction is an order issued by a court or arbitral tribunal that prevents an opposing party from commencing or continuing a proceeding in another jurisdiction or forum. If the opposing party contravenes such an order issued by a court, a contempt of court order may be issued by the domestic court against that party.[67] Because of the possibility of even indirectly affecting the jurisdiction of another

66 Art. 103 para. 1 Arbitration Act 1996; *"Recognition or enforcement of the award may be refused if the person against whom it is invoked proves: (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity; (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; (d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4)); (e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place; (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made."* – Art. 103 para. 2 Arbitration Act 1996.

67 LEVY, L. Anti-suit Injunctions Issued by Arbitrators. In: GAILLARD, E. (ed.). *Anti-Suit Injunctions in International Arbitration*. Berne: Staempfli Verlag AG, 2005, p. 116.

court, anti-suit injunctions are one of the most important and at the same time most controversial remedies international civil procedure.[68] The anti-suit injunction includes a prohibition on commencing or continuing proceedings before a court in another State and, if commenced earlier, an order to terminate them.[69]

Issues concerning arbitration proceedings have been excluded from the scope of many EU instruments on cooperation in civil and commercial matters, regardless of the fact if they are international agreements or strictly EU's law acts such as regulations or directives. According to the wording of Art. 1 point 4 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters ("Brussels Convention"), the Convention shall not apply to arbitration.[70]

Similarly, the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("2007 Lugano Convention") excluded arbitration from its scope by virtue of Art. 1 para. 2 letter d)[71]. Subsequently, under Art. 1 para. 2 letter d) of 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 judgments in civil and commercial matters ("Brussels I bis Regulation")[72], this Regulation shall not apply to arbitration.[73] However, the preamble to the latter regulation explains what it means to exclude arbitration cases from its scope. According to point 12, this Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State which brought

68 AMBROSE, C. Can Anti-Suit Injunctions Survive European Community Law? *The International and Comparative Law Quarterly*, 2003, Vol. 52, no. 2, p. 401.

69 HARTLEY, T. C. Comity and the Use of Antisuit Injunction in International Litigation. *The American Journal of Comparative Law*, 1987, Vol. 35, no. 3, p. 487.

70 Art. 1 point 4 Brussels Convention.

71 *"The Convention shall not apply to arbitration."* – Art. 1 para. 2 letter d) 2007 Lugano Convention.

72 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 judgments in civil and commercial matters. *EUR-Lex* [online]. [cit. 30. 5. 2021]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215; Similarly, previously applicable Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters in its Art. 1 para. 2 letter d) excluded arbitration issues from its scope of application.

73 Art. 1 para. 2 letter d) Brussels I bis Regulation.

the action in the case in which the parties concluded the arbitration agreement from referring the parties to arbitration, suspending or dismissing the proceedings, or from examining whether the arbitration agreement is invalid, inoperative or incapable of being performed in accordance with their national law. A judgment given by a court of a Member State as to the nullity, voidness or impossibility of enforcing an arbitration should not be subject to the rules of recognition and enforcement set out in this Regulation, irrespective of whether the court decided has decided on the matter as the main question or ancillary. On the other hand, where a court of a Member State having jurisdiction under this Regulation or under national law finds that the arbitration agreement is invalid, inoperative or incapable of being performed, this should not prevent recognition or, as the case may be, enforcement of a decision of that court on the merits in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the New York Convention, which takes precedence over this Regulation. This Regulation should not apply to any action or ancillary proceedings relating, in particular, to the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of arbitration proceedings or any other aspect of such proceedings, nor to any action or judgment relating to the annulment, review, appeal, recognition or enforcement of an arbitral award.[74]

In turn, with regard to the Brussels Convention, in February 2021 the UK Government notified the Secretary-General of the EU's Council that it ceased to apply this Convention to the UK and Gibraltar from 1 January 2021.[75]

Nevertheless, despite the exclusions outlined above, the CJEU has referred to the issue of anti-suit injunctions, specifically to the prohibition of their applying. In its Judgment of 10 February 2009, *Allianz SpA, formerly Riunione*

74 Point 12 Preamble Brussels I bis Regulation.

75 The UK's Notification regarding the Brussels Convention 1968 and the 1971 Protocol, including subsequent amendments and accessions, having ceased to apply to the United Kingdom and Gibraltar from 1 January 2021, as a consequence of the United Kingdom ceasing to be a Member State of the European Union and of the end of the Transition Period, 5816/21. *Consilium.europa.eu* [online]. 1. 2. 2021 [cit. 10. 6. 2021]. Available at: https://data.consilium.europa.eu/doc/document/ST-5816-2021-INIT/en/pdf

Adriatica Di Sicurtà SpA, Generali Assicurazioni Generali SpA vs. West Tankers Inc., Case C-185/07[76], CJEU clearly declared that even if the proceedings do not fall within the scope of Regulation No 44/2001, they may nevertheless have effects which undermine its effectiveness, namely to prevent the objectives of harmonizing conflict-of-law rules in civil and commercial matters and the free movement of decisions in those matters. This is the case, *inter alia*, where such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it by Regulation No 44/2001, (point 24). In that regard, […] if, given the subject-matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings fall within the scope of Regulation No 44/2001, a preliminary question as to the applicability of the clause on an arbitration court, including in particular its validity, also falls within the scope of its

76 In August 2000, Front Comor, a vessel owned by West Tankers and chartered by Erg Petroli SpA ('Erg'), collided in Syracuse (Italy) with a wharf owned by Erg and caused damage. The charter contract was governed by English law and included a clause providing for arbitration in London (United Kingdom), (point 9). Erg claimed damages from its insurers, Allianz and Generali, up to the sum insured, and then commenced arbitration proceedings in London against West Tankers for the payment of the excess. West Tankers denied its liability for the damage caused by the collision, (point 10). After having paid Erg compensation under the insurance policies for the loss suffered, Allianz and Generali brought an action before the Tribunale di Siracusa (Italy) on 30 July 2003 against West Tankers in order to recover the sum paid to Erg. The action was based on their statutory right to claim Erg's claims pursuant to Article 1916 of the Italian Civil Code. West Tankers raised a plea of lack of jurisdiction due to the existence of an arbitration clause, (point 11). In parallel, West Tankers brought an action before the High Court of Justice of England and Wales, Queens Bench Division (Commercial Court) on 10 September 2004, seeking a declaration that the dispute between itself, on the one hand, and Allianz and Generali, on the other hand, should be settled by arbitration in accordance with the arbitration agreement. West Tankers also applied for an order that Allianz and Generali discontinue all proceedings other than the arbitration proceedings and that they be ordered to terminate the proceedings instituted before the Tribunale di Siracusa ('dropout injunction'), (point 12). By judgment of 21 March 2005, the High Court of Justice of England and Wales, Queens Bench Division (Commercial Court), granted West Tankers' claims and issued an anti-suit injunction against Allianz and Generali. The latter appealed against that judgment to the House of Lords. They argued that issuing such an order was contrary to Regulation No 44/2001, (point 13). In those circumstances, the House of Lords decided to stay the proceedings and refer the following question to the Court for a preliminary ruling: 'Is it consistent with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?', (point 18). – Judgment of the CJEU of 10 February 2009, Case C-185/07.

application, (point 26). This statement is confirmed in point 35 of the Report on the accession of the Hellenic Republic to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36) ('the Brussels Convention'), presented by Messrs *Evrigenis* and *Kerameus* (OJ 1986 C 298, p. 1). This point provides that the verification, as an incidental issue, of the validity of an arbitration clause invoked by a litigant to challenge the jurisdiction of the court before which it was defendant under the Brussels Convention should be regarded as falling within the scope of that Convention, (point 26). Consequently, the use of an order against the defendant to prevent a court of a Member State, which normally has jurisdiction to settle a dispute under Art. 5 para. 3 of Regulation No 44/2001, from ruling, in accordance with Art. 1 para. 2 letter d) of that Regulation, as regards the mere application of the regulation to the dispute pending before it, deprives that court of jurisdiction to rule on its own jurisdiction under Regulation No 44/2001, (point 28). It follows, first, […] that an injunction, such as that in the main proceedings, is contrary to the general rule which follows from the case-law of the CJEU on the Brussels Convention, that each court seized itself determines, in accordance with the provisions applicable to him, whether he is competent to resolve the dispute before him […]. In that regard, it should be recalled that Regulation No 44/2001, with a few limited exceptions which are not relevant to the main proceedings, does not allow the jurisdiction of a court of a Member State to be reviewed by a court of another Member State. This jurisdiction is determined directly by the rules established by that regulation, including those relating to its scope. Thus, in no event is a court of one Member State better able to determine whether the court of another Member State has jurisdiction, (point 29). Moreover, by making it difficult for a court of another Member State to exercise the powers conferred on it by Regulation No 44/2001, namely, to rule on the basis of the provisions defining the material scope of that regulation, including Art. 1 para. 2 letter d) whether that regulation is applicable, such an injunction against action is also contrary to the trust that Member States place in each other's legal systems and judicial institutions and on which the system of jurisdiction provided for in Regulation No 44/2001 is based (point 30). Consequently,

an order against the action, such as that in the main proceedings, does not comply with Regulation No 44/2001, (point 32).[77]

This above mentioned CJEU decision has been hailed because it maintains the principle of mutual trust among EU Member States courts as it ensures that no Member State court can interfere with the judical sovereignty of other Member States courts by determining jurisdiction or reviewing a decision of the other Member State court as this is not in line with the principles of the Brussels Regulation. In this way therefore it can be argued that the CJEU decision puts EU law and more importantly judical sovereignty above commercial interest. However, the CJEU decision is problematic as it creates a situation in which an opportunistic potential defendant can commence tactical proceedings in a Member State court to have the effect of delaying the resolution of the substantive dispute. On the one hand, there are the members of the House of Lords who state that the ability to issue anti-suit injunctions is one of the advantages that London offers as an 'important and valuable weapon' in the hands of the English courts to exercise their supervisory role over arbitration. On the other hand, there is a view of Advocate General, preparing opinion to the above-mentioned judgment, who dismisses these arguments as being of a 'purely economic nature' and therefore they cannot justify infringements of Community law.[78]

Therefore, in the absence of being bound by EU legislation and, above all, by the case-law of the CJEU, the UK courts will be free to issue anti-suit injunctions, particularly as they appear to emphasize the role of that remedy.[79] According to point 17 of the *Judgment C-185/07*, cited above, the House of Lords has already made it clear that the UK courts have been granting anti-suit injunctions for many years. This practice is, in his opinion, a valuable tool for the court in the place of arbitration, exercising its supervisory jurisdiction over the arbitration, as it promotes legal certainty

77 Judgment of the CJEU of 10 February 2009, Case C-185/07.

78 NDOLO, D. and M. LIU. Does the Will of the Parties Supersede the Sovereignty of the State? Anti-suit Injunctions in the UK Post-Brexit. *Arbitration: The Journal of International Arbitration, Meditation, and Dispute Management*, 2017, Vol. 83, no. 3, pp. 260–261.

79 Anti-suit injunctions are frequently issued by the UK courts, for example in *C vs. D, ([2007] 2 Lloyd's Rep 367), Atlas Power Ltd & Ors vs. National Transmission and Despatch Co Ltd ([2018] EWHC 1052*) cases.

and reduces the possibility of a conflict between an arbitration award and a national court judgment. Moreover, the adoption of this practice by courts in other Member States would increase the competitiveness of the European Community vis-à-vis international arbitration centers such as New York, Bermuda, and Singapore.[80]

5 Public Policy of the EU

According to Art. 5 para. 2 letter b) of the New York Convention, *"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 the recognition or enforcement of the award would be contrary to the public policy of that country"*.[81]

Although different jurisdictions define public policy differently, there is a tendency to refer to a public policy basis for refusing recognition and enforcement of an award under Art. 5 para. 2 letter b) of the New York Convention when the core values of a legal system have been deviated from. Public policy is generally interpreted to mean those fundamental rules of the State where recognition and enforcement of an award is sought from which no derogation can be allowed. Invoking the public policy exception is a safety valve to be used in those exceptional circumstances when it would be impossible for a legal system to recognize an award and enforce it without abandoning the very fundaments on which it is based.[82] It is widely accepted that public policy within the meaning of above-mentioned Article refers to the public policy of the forum State. Indeed, Art. 5 para. 2 letter b) explicitly refers to 'the public policy of that country', in reference to the country

80 Judgment of the CJEU of 10 February 2009, Case C-185/07, para. 17.

81 Art. 5 para. 2 letter b) New York Convention.

82 It is not disputed that certain mandatory rules meet the standard of the public policy defence to recognition and enforcement of awards. – VILLIERS, L. Breaking in the "Unruly Horse": The Status of Mandatory Rules of Law as a Public Policy Basis for the Non-Enforcement of Arbitral Awards. *Australian International Law Journal*, 2011, Vol. 18, pp. 179–180; Constitutional principles may also interact with the public policy exception to the recognition and enforcement of foreign arbitral awards under the New York Convention. – UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958). *United Nations UNCITRAL* [online]. P. 247 [cit. 10. 6. 2021]. Available at: https://newyorkconvention1958.org/pdf/guide/2016_Guide_on_the_NY_Convention.pdf

where recognition and enforcement is sought. However, in relation to the assessment of the international or domestic character of public policy, most jurisdictions recognize that a mere violation of domestic law is unlikely to amount to a ground to refuse recognition or enforcement on the basis of public policy.[83]

For example, in the field of competition law, the CJEU held that Art. 101 of the Treaty on the Functioning of the European Union ("TFEU"), which renders automatically void certain anti-competitive agreements or decisions, constitutes *"a fundamental provision which is essential for the accomplishment of the tasks entrusted to the [Union] and, in particular, for the functioning of the internal market"*.[84] The CJEU held that for this reason it should be regarded as a matter of public policy within the meaning of Art. 5 para. 2 letter b) of the New York Convention. It has thus imposed on the courts of the EU Member States the obligation to refuse recognition and enforcement to all awards which conflict with Art. 101 TFEU.[85] It therefore follows that the notion of public policy may be interpreted by taking into account EU values. Now that the UK has left the EU, this may change, as it is no longer bound by either EU law or the case-law of the CJEU.

On the one hand as long as EU-derived law remains on the UK register of laws, it is essential that there is a common understanding of the meaning of the law and the Government believes that this can be best achieved by ensuring continuity in the way it is interpreted before and after the exit day. Therefore, in order to maximize certainty, the [Great Repeal] Bill will foresee that any questions regarding the meaning of EU secondary law will be decided in the UK courts by referring to the CJEU case law as it stood on the date of leaving the EU (point 2.14). On the other hand, insofar as the case law concerns an aspect of EU law which is not converted into UK law, this element of case law will not need to be applied by the UK courts, (point 2.14). What's more, the British Parliament remains sovereign, and parliamentary

83 UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958). *United Nations UNCITRAL* [online]. Pp. 240–247 [cit. 10. 6. 2021]. Available at: https://newyorkconvention1958.org/pdf/guide/2016_Guide_on_the_NY_Convention.pdf

84 Ibid., p. 245.

85 Ibid.

sovereignty is the cornerstone of the British Constitution and EU law has supremacy only for as long as the UK is a member state, (point 2.18). Therefore, in the event of a conflict between EU secondary law and the new primary law passed by Parliament after the UK leaves the EU, the newer law will take precedence over EU secondary law. In this way, the Great Repeal Bill will put an end to the general supremacy of EU law, (point 2.19). In fact, after Brexit, EU law will be applied only if a conflict arises between two pre-departure laws, one of which is EU-derived law and the other is not, then the EU-derived law will take precedence over the other law in force before leaving the EU. Any other approach would result in a change of law and would create uncertainty as to its meaning, (point 2.20).[86] It follows, therefore, that after Brexit EU law will be applied in the UK to a very limited extent, namely only to facts which occurred before the UK's withdrawal from the EU. It is also obvious that in view of the withdrawal from the EU, the UK's courts will no longer interpret the concept of public policy in the spirit of the EU. If the *acquis communautaire* is not treated as part of the UK legal order, arbitration tribunals' awards will not be challenged in the proceedings set out in Art. 66–69 of the Arbitration Act 1996.

6 Conclusions

The place of conducting arbitration proceedings influences the efficiency and effectiveness of this proceedings. Also, the availability and transparency of judicial instruments supporting arbitration, including the possibility of challenging and enforcing awards of arbitration tribunal, are of great importance. It is therefore not surprising that the choice of arbitration proceedings' place is crucial to its further success.

It is a commonly known fact that the UK in general, and London in particular, have for many years been popular places to conduct arbitration proceedings, even though neither the parties nor the subject matter of the arbitration have any connection to the UK. This seems to be influenced by the stability

86 The Repeal Bill: White Paper. Policy paper. Legislating for the United Kingdom's withdrawal from the European Union. *GOV.UK* [online]. 15. 5. 2017 [cit. 10. 6. 2021]. Available at: https://www.gov.uk/government/publications/the-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union

of UK law, as well as the condition of the UK judiciary, which is considered to be efficient and impartial. Moreover, there is no doubt that, also because of the country's colonial past, both arbitral tribunals and common courts in the UK, have experience in resolving international disputes concerning multiple jurisdictions. Moreover, many years of experience in arbitration have also resulted in a highly qualified staff of who can act not only as arbitrators, but also as legal advisors in the arbitration procedure.[87]

The Arbitration Act 1996 gives arbitral tribunals wide discretion in procedural matters, subject to the parties' right to agree otherwise. It also allows (limited) intervention by the courts to assist arbitration, including, *inter alia*, to require a party to comply with the tribunal's procedural orders, to issue injunctions, to compel witnesses to give evidence and to secure it. Such procedural measures can be important for the smooth running of the arbitration, especially when a party attempts to delay and disrupt the process.

Taking above into account, Brexit does not appear to have had a significant impact on the popularity of UK arbitration. What's more, the first agreement concerning the UK's withdrawal from the EU was negotiated by Theresa May's government. According to Art. 62 of that agreement, entitled Applicable law in contractual and non-contractual matters, *"the following acts shall apply as follows: (a) Regulation (EC) No 593/2008 of the European Parliament and of the Council shall apply in respect of contracts concluded before the end of the transition period"*.[88] The same provision is repeated in final version of the UK's Withdrawal Agreement from the EU.[89] According to its Art. 66, *"in the United Kingdom, the following acts shall apply as follows: (a) Regulation (EC) No 593/2008 of the European Parliament and of the Council (71)*

87 For example, the International Arbitration Centre in the City of London.

88 Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. *European Commission* [online]. [cit. 10. 6. 2021]. Available at: https://ec.europa.eu/info/sites/default/files/draft_withdrawal_agreement.pdf

89 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01). *EUR-Lex* [online]. 12. 11. 2019 [cit. 30. 5. 2021]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1580206007232&uri=CELEX%3A12019W/TXT%2802%29

shall apply in respect of contracts concluded before the end of the transition period".[90] At the end of the transitional period, (23.00 London time, 31 December 2020) an instrument called The Law Applicable to Contractual and Non-Contractual Obligations (Amendment etc.), (UK Exit) Regulations 2019, came into force. It deals with the continued application of the Rome II Regulation as domestic law in all parts of the UK.[91]

As the UK has retained the application of the Rome I Regulation on the law applicable to contractual obligations, parties to a contract will still, even after Brexit, be able to choose English law[92] as the law applicable to their contractual relationship. In turn choice of English law will further encourage to submit disputes arising out of that contractual relationship to the UK's arbitration tribunals.

What's the most important, the UK has also retained its binding effect of the New York Convention. In view of the fact that there is currently uncertainty as to what legal regime will be applied between the EU and the UK on the recognition and enforcement of judgments, arbitration appears to be a much more attractive solution.

90 Ibid., Art. 66.

91 The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019. *Legislation.gov.uk* [online]. [cit. 10. 6. 2021]. Available at: https://www.legislation.gov.uk/uksi/2019/834

92 Until now, English law has most often been chosen as the law applicable to commercial matters.–2010 International Arbitration Survey: Choices in International Arbitration. *Queen Mary University of London* [online]. [cit. 10. 6. 2021]. Available at: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf; With 94% of its cases in 2017 seated in London, the London Court of International Arbitration's ("LCIA") statistics are reflective of arbitration activity in London. It is therefore also noteworthy that the LCIA reported for 2017 a steady and diverse caseload, with non-UK parties accounting for more than 80% of its users. The LCIA also saw an increase in claims of US $ 20 million or more (now accounting for 31% of disputes), with trending industries including Energy and natural resources (accounting for 24% of disputes). – WILLIAMS, J., L. HAMISH and R. HORNSHAW. Arbitration procedures and practice in the UK (England and Wales): overview. *Akin Gump* [online]. P. 1 [cit. 10. 6. 2021]. Available at: https://www.akingump.com/a/web/101415/aokvH/practical-law-arbitration-procedures-and-practice-in-the-uk-.pdf

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May Misapplication of EU Law Give Rise to International Responsibility of the Member State Under Investment Treaties?

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Abstract

This paper seeks to answer the question whether Member States may be responsible for violation of investment standards by misapplication of EU law. It consequently deals with a number of preliminary issues. First, it asks whether liability for breaches of EU law lies within the exclusive domain of the Member States courts and the Court of Justice of the European Union. Second, it analyzes the status of EU law under investment treaties, while having regard mainly to substantive aspects. Subsequently, it integrates misapplication of EU law into the matrix of state responsibility under investment treaties. Finally, the paper offers some thoughts on how misapplication of EU law is treated under the Comprehensive Economic and Trade Agreement between the EU and Canada. The overall conclusion of the paper being that misapplications of EU law have remained important in the context of investment protection.

Keywords

Comprehensive Economic and Trade Agreement; European Union Law; Investment Protection; International Responsibility; Investment Treaties; Investor; Misapplication; Standards of Investment Protection.

1 Introduction

It is the Opinion 1/17 of the Court of Justice of the European Union ("CJEU") that has sparked the author's interest in this paper's topic. The CJEU has found that the investment tribunals competent to decide disputes under the Comprehensive Economic and Trade Agreement ("CETA") has

no jurisdiction to interpret or apply EU Law.[1] One of the repercussions of Opinion 1/17 being that the CETA tribunals should not be entitled to find Member States responsible for misapplication of EU law under investment treaties, for the tribunals may not apply EU law (see 9.1 below).

First and foremost, it seems that Opinion 1/17 is in a clear contradiction to the one the CJEU reached in the *Achmea* case, in which it considered EU law as a law originating from international law as well as forming part of Member States' legal orders.[2] However, in the latter case, the CJEU declared that investment disputes arising from bilateral investment treaties ("BIT" in singular or "BITs" in plural) are disputes concerning interpretation and application of EU law, where such treaty refers expressly to the domestic law of the Member State as its party. If the intra-EU BIT refers to the domestic law of the party, the resolution of an investment dispute lies in the exclusive competence of the CJEU.

Given the significance of EU law in the context of international investment law, it has appeared counter-intuitive that an infringement of EU law could never give rise to an investment claim under CETA.

Nonetheless, one may go one step further and ask whether, if EU law is applicable to the substance of investment disputes under (both intra- and extra-EU) BITs, may a misapplication of an EU law rule give rise to international responsibility for violation of one more standards of investment protection?

The present topic continues to be relevant, notwithstanding the two CJEU's rulings. Firstly, investment tribunals have refused to decline their jurisdiction, in spite of the *Achmea* dictum.[3] Secondly, *Achmea* does

1 EU-Canada Comprehensive Economic and Trade Agreement (CETA). *European Commission* [online]. [cit. 24. 7. 2021]. Available at: https://ec.europa.eu/trade/policy/in-focus/ceta/

2 Judgment of the CJEU (Grand Chamber) of 6 March 2018, *Slowakische Republic vs. Achmea BV*, Case C-284/18.

3 See, e.g., Award of the ICSID of 16 May 2018, *Masdar Solar & Wind Cooperatief U. A. (Claimant) vs. Kingdom of Spain (Respondent)*, Case ARB/14/1, para. 162; Award of the ICSID of 9 October 2018, *UP (formerly Le Chèque Déjeuner) and C.D. Holding Internationale (Claimant) vs. Hungary (Respondent)*, Case ARB/13/35, para. 252–267; Decision on the Achmea Issue of the ICSID of 31 August 2018, *Vattenfall AB; 2. Vattenfall GmBH; 3. Vattenfall Europe Nuclear Energy GmBH; 4. Kernkraftwerk Krümmel GmBH & Co. OHG; 5. Kernkraftwerk Brunsbüttel GmBH & Co. OHG Claimants and Federal Republic of Germany Respondent*, Case Arb/12/12, para. 232 ii et passim.

not seem to apply to investment treaties between Member States and third states. Thirdly, it seems that the conclusions of *Achmea* apply only to the investment treaties between Member States that do list domestic law, incorporating EU law, as applicable.

The mere fact that EU law forms part of the Member State's legal order does not make it applicable in the particular case before the investment tribunal.[4] Although, the case may involve an EU element, despite the fact that the intra-EU BIT does not refer to the Member State's domestic law. Yet, this will not be the case in all intra-EU investment arbitrations. For instance, it would be absurd to argue that EU law applies to the substance of the case where an investor argues that a wrong application of domestic criminal law has caused harm to its investment.[5] Lastly, the CJEU Opinion 1/17 has revived interest in the role of EU law within the area of international investment protection (see 9 below).

Thus, this paper will seek to give answers to the following research questions. First, does EU judiciary have monopoly over interpretation and application of EU law? Second, what is the status of EU law in the context of the international law of investment protection? Third, may Member state incur international responsibility under investment treaties and CETA for misapplication of EU law?

2 The Methodological Discussion and Limits

This paper is based predominantly on an abductive approach. It is thus founded on reflexive contemplations about the consequences of misapplication of EU law by a Member State within the context of international investment law. There are then two hypotheses. First, EU law can be misapplied by Member States to the extent that it may cause legally relevant harm

4 FANOU, M. Intra-European Union Investor-State Arbitration post-Achmea: RIP? An assessment in the aftermath of the Court of Justice of the European Union, Case C-284/16, Achmea, Judgment of 6 March 2018, EU:C:2018:158. *Maastricht Journal of European and Comparative Law,* 2019, Vol. 26, no. 2, p. 325; *contra* SOLOCH, B. CJEU Judgment in Case C-248/16 Achmea: The Single Case and its Multi-Faceted Fallout. *The Law and Practice of International Courts and Tribunals,* 2019, Vol. 18, pp. 9–10.

5 Final Award of the Stockholm Chamber of Commerce, Arbitration Institute, of 10 March 2017, *IP Busta & JP Busta (Claimants) vs. Czech Republic (Respondent)*, Case V 2015/14, para. 304–308.

to foreign investors. Second, EU law does not offer an adequate mechanism for enforcement of the investor claims stemming from EU law. In any case, there is no monopoly of the CJEU and Member States over resolution of investment disputes stemming from misapplications of EU law.

The paper is further based on the assumption that the same set of facts may give rise to breach of an investor right and, as a result, state's responsibility under more systems of law, viz. international, EU, and domestic law. Consequently, a misapplication of EU law may be classed as a violation of international law, including investment treaties, without excluding liability of the Member State under EU or domestic law. There is the clear limit of prohibition of double compensation to the investor though (see 5 below).

Moreover, there seems to be no reason to erect an impenetrable wall between the enforcement of the rights stemming from EU law and international (investment) law.[6] As a consequence, this paper is focused on the confluence of EU and international investment law with regard to the state responsibility arising from these legal systems, rather than a conflict between the two legal systems.

Furthermore, although this paper starts from the premise of pluralism, it does not fully adopt its main conclusion, that international and EU legal systems lack any shared, meta-legal principles that would resolve incompatibilities and conflicts among them.[7]

Thus, it is submitted that two such principles exist. First, it is *pacta sunt servanda*.[8] Thus, Member States must observe all their obligations, whether their origin being international or EU law. This principle then finds reflection in national constitutions.[9]

6 For instance, the CJEU has recently qualified the breach of provisions of the General Agreement on Trade and Services as an infringement of EU law. See Judgment of the CJEU (Grand Chamber) of 6 October 2020, *European Commission vs. Hungary*, Case C-66/18, para. 139 and 156.

7 For the critical analysis of the concept of legal pluralism employing the conclusion of Santi Romano's institutional theory of law see FONTANELLI, F. Let's Disagree to Disagree. Relevance as the Rule of Inter-Order Recognition. *The Italian Law Journal,* 2019, Vol. 4, no. 2, pp. 320–323.

8 Art. 26 Vienna Convention on the Law of the Treaties ("VCLT"); Judgment of the CJEU (Grand Chamber) of 6 October 2020, *European Commission vs. Hungary*, Case C-66/18, para. 92.

9 See, e.g., Art. 1 para. 2 in conjunction with Art. 10 and 10a of the Constitution of the Czech Republic.

Second, access to justice for individuals, including investors, is the principle shared by the three legal systems. While the concept of access to justice is not short of ambiguities, the bottom line seems to be that individuals, including investors, ought to have a real and effective, not theoretical or illusory, possibility to enforce their claims.[10]

Therefore, it may be assumed that investors should have as wide an access to justice as possible, which should not include only Member State courts or (to a limited extent) the CJEU, but also international investment tribunals (see below). Access to justice thus includes also the choice of the forum where investors pursue their claims, including the corresponding qualification of the claim fitting to the legal order of the forum. This is not, in and of itself, something deplorable.[11]

Moreover, EU and investment protection share some substantive principles, like that of prohibition of unjustified discrimination.[12] Thus, this is another important intersection between the two legal systems.

Nevertheless, this paper's vantage point is that of public international law, namely its specific regime of investment protection. Accordingly, EU law will be viewed either as a specific sub-system of international law or part of domestic law (see below). Moreover, the concept of "autonomy" of EU law repeated as a mantra in both Opinion 1/17 and *Achmea* does not seem to be a formidable obstacle for the investment tribunals to apply EU law.[13]

As will be seen, it is a difficult task to build a bridge between the status of EU law under investment treaties and the responsibility for violation of standards of investment protection. This task will entail three steps. First the very status of EU law under investment treaties needs to be explained.

10 Judgment of the ECtHR of 9 October 1979, *Airey vs. Ireland*, Application no. 6289/73, para. 24.

11 NAGY, C. I. Intra-EU Bilateral Investment Treaties and EU Law After Achmea: "Know Well What Leads You Forward and What Holds You Back". *German Law Journal,* 2018, Vol. 19, no. 4, p. 1003 (forum shopping might be "reprehensible", but is not legally prohibited).

12 SATTOROVA, M. Investor Rights under EU Law and International Investment Law. *The Journal of World Investment & Trade,* 2016, Vol. 17, no. 6, p. 898.

13 Judgment of the CJEU (Grand Chamber) of 6 March 2018, *Slowakische Republik (Slovak Republic) vs. Achmea BV*, Case C-284/16, para. 32–37; Opinion 1/17 of the CJEU (Full Court) of 30 April 2019, para. 70–76.

Second, the existence of international legal obligation reflecting EU law as one of the essential requirements for responsibility must be proved. Third, the EU law must be situated within the structure of international responsibility of states under international investment law.

Investment treaties may be concluded between Member States or the Member State and third state. It seems plausible that EU law plays different role in the two kinds of investment treaties. In intra-EU BITs, EU law remains binding on both parties. This has an impact on interpretation of the treaty (see below). However, it terms of a (mis)application of EU law, there appears to be no dramatic difference between intra- and extra-EU investment treaties, as EU law is binding on the host state in both types of treaties. Thus, breaches of EU law may lead to international responsibility in both cases.

There are important limits of this paper. First, this paper examines only the role of EU law in the investor-state dispute resolution under investment treaties, leaving aside the dimension of inter-state investment disputes.[14] Second, it deals only with breach of international obligation, thus leaving aside the additional necessary condition for international responsibility to arise, i.e., whether the conduct may be attributed to the Member State or the EU.[15] Thus, this paper considers only misapplications of EU law attributable to the Member State, which is bound by an investment agreement. Third, this paper does not focus on the relation between application of EU law and recognition and enforcement of arbitral awards. Four, this paper does not delve into the question whether arbitrators are obliged to search for EU law or to have it served by the parties. However, this paper presumes that it is the part of the arbitrator's mission in investment arbitration to look for the applicable rules, independently on the parties' submissions.

14 See thereto HAZARIKA, A. *State-to-state Arbitration Based on International Investment Agreements: Scope, Utility and Potential.* Cham: Springer, 2021, p. 19.

15 Art. 4-11 Draft Articles on Responsibility of States for Internationally Wrongful Acts ("DARSIWA"). *United Nations Office of Legal Affairs* [online]. [cit. 24. 7. 2021]. Available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf; Art. 6-9 Draft Articles on the Responsibility of International Organizations. *United Nations Office of Legal Affairs* [online]. [cit. 24. 7. 2021]. Available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf

3 Misapplication of EU Law in the Context of Investment Protection

First and foremost, it is important to elucidate whether and how EU law applies in international investment arbitration, before identifying the consequences ensuing from its misapplication. Although, more precisely, it is an EU legal rule that is misapplied and the object of the breach is the investor's right stemming from this rule.

Furthermore, there is no universally accepted definition of "application" of law within the legal doctrine.[16] Nevertheless, "application" refers to the process whereby legal rules are applied to the facts of the case, whereas "interpretation" denotes the notion of giving meaning to the legally binding text.[17] The prevailing view is that the application of a legal rule requires its previous interpretation.[18] Thus, the concept of misapplication will include misinterpretation of EU law.

The question of (mis)application of EU law in the investment context assumes legal issues common to both areas exist. These are of two kinds; procedural and substantive. Regarding the procedural aspect, arbitration and Member State courts concur in their jurisdiction to resolve a variety of disputes.[19] As to the substantive aspect, investment protection and EU law may involve the same business sectors. Thus, Member States have obligations towards investors stemming from the sources of EU law. There are then corresponding rights, e.g., the right to establishment or protection against anticompetitive conduct on the internal market (see 7.1 below).[20] It Is thus reasonable to examine misapplication of EU law only insofar as the EU law lays down some rights of the investors.

However, the important methodological caveat is that it will not be always clear that it is useful to subsume specific rights stemming from EU law

16 See, e.g., WRÓBLEWSKI, J. *The Judicial Application of Law*. Dordrecht: Springer, 1992, p. 1.
17 BARAK, A. *Purposive Interpretation in Law*. New Jersey: Princeton University Press, 2007, p. 3.
18 Ibid., p. 4.
19 PAPP, K von. *EU Law and International Arbitration*. Oxford: Hart, 2021, pp. 6–7 and 59–68.
20 Art. 49–55 (right to establishment), and Art. 101 and 102 (competition law) Treaty on the Functioning of the European Union ("TFEU").

under general standards of investment protection. In this connection, one may argue that the enforcement of specific rights is more predictable and efficient than relying on ambiguous legal standards.[21] Nevertheless, as will be shown below, investment arbitration as a dispute resolution system balances this (possible) disadvantage of investment law.

Also, it would be difficult to see an EU law element in, for instance, the most of criminal law cases, in which area the EU has had also limited competence.[22] In such case, it makes little sense to consider breaches of EU law as a basis for international responsibility under investment treaties.

Moreover, the fact that investment treaties and EU law concern the same or similar business activities does not imply that the application of the former excludes application of the latter, and *vice versa*. Investment tribunals have declared that EU law and investment treaties neither cover the same subject matter in terms of procedure, nor substance, and therefore may be applied simultaneously.[23]

In addition, misapplication of EU law overlaps, in part, with non-implementation of EU law. While implementation of directives includes transposition and implementation in the strict sense, regulations are implemented, without normally requiring a legislative act that would incorporate EU law into the Member State's legal order.[24]

In the following, the regard will be had to specific implications such misapplication may have for investors rather than systemic consequences of non-implementation of EU law. Thus, this paper concerns situations where the Member State's organs have completely omitted to apply an EU regulation giving a subjective right to the investor or they require the investor to meet obligations that do not actually arise under the EU legislative acts.

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21 KLEINHEISTERKAMP, J. Financial Responsibility in European International Investment Policy. *The International and Comparative Law Quarterly,* 2014, Vol. 63, no. 2, p. 465.

22 SCHROEDER, W. Limits to European Harmonisation of Criminal Law. *The European Criminal Law Associations' Forum* [online]. 2020, no. 2, pp. 144–148 [cit. 24. 7. 2021]. Available at: https://eucrim.eu/media/issue/pdf/eucrim_issue_2020-02.pdf#page=82

23 KRIEBAUM, U. The Fate of Intra-EU BITs from an Investment and Public International Law Perspective. *ELTE Law Journal,* 2015, no. 1, p. 31.

24 SCHÜTZE, R. *An Introduction to European Law.* Cambridge: Cambridge University Press, 2012, p. 120.

Nonetheless, it should be borne in mind that an act or omission of the Member State may be legal under EU law, but violate standards of investment protection.[25] Nevertheless, the relationship between compliance with EU and violation of investment standards is more complex than this (see the analysis below).

Furthermore, non-application of EU law is an emblematic example of its misapplication. This is the situation where the Member State's court refuses to apply an EU regulation giving a right to the investor. While it is an objective fact whether EU law was applied or not, non-application may arise only when the application should have taken place. Admittedly, this may be a matter of (subjective) perspective.

Finally, it may well be that the misapplication of EU law inflicts no legally relevant harm on the investor. In such case, it is more likely than not that the investor will have no claim under the investment treaty and/or will not be awarded damages for its violation.[26]

4 Does the EU Judiciary Have Monopoly to Interpret and Apply EU Law?

The preliminary question arises as to whether CJEU and Member States' courts being two pillars of EU judiciary have monopoly over interpretation and application of EU law. The answer is both yes and no, depending on whether one adopts an internal or external perspective of EU law.

Viewed from the EU internal perspective, the CJEU found in *Achmea* that resolution of intra-EU disputes concerning interpretation and application of EU law must lie within the exclusive jurisdiction of the CJEU.[27] As a result, Member States may not submit these disputes to investment arbitration, since investment arbitrators called upon to interpret and apply EU law

25 KLEINHEISTERKAMP, J. Financial Responsibility in European International Investment Policy. *The International and Comparative Law Quarterly,* 2014, Vol. 63, no. 2, p. 461.

26 The breach of an investment standard has been found, but no compensation has been awarded. In Award of the ICSID of 24 July 2008, *Biwater Gauff (Tanzania) Ltd. vs. United Republic of Tanzania*, Case ARB/05/22, para. 807.

27 Judgment of the CJEU (Grand Chamber) of 6 March 2018, *Slowakische Republik (Slovak Republic) vs. Achmea BV*, Case C-284/16, para. 32.

by virtue of investment treaties neither ensure its uniform interpretation through the preliminary ruling procedure nor effectiveness of EU law.[28]

However, imagine a commercial arbitration seated in Switzerland, in which arbitrators are to decide a dispute between a French and Italian company. The French company insists that the Italian company caused damages to the former by abusing its dominance on the relevant market. The resolution of the dispute would require application of European competition law.[29]

Accordingly, CJEU cannot exclude by its case law that an arbitral tribunal sitting in Switzerland may apply EU law in a commercial dispute before it. It is for the arbitral tribunal, which bears responsibility for the arbitral process and its outcome, to decide how it interprets and applies (EU) law. The same holds true for the classification of EU law as law as opposed to fact (see 6.2.3 below).[30]

As a result, this single example of commercial arbitration outside the territory of Member States reveals the fact that no CJEU's monopoly over interpretation and application of EU law has ever existed.[31] There are also numerous other examples of judicial or quasi-judicial bodies applying EU law, as the European Court of Human Rights ("ECtHR").[32]

The reason behind this lack of monopoly over interpretation and application of EU law is not that one could not imagine that CJEU and Member States' courts were only bodies allowed to interpret and apply EU law. Yet, this is not possible in all situations as a matter of the limits of the EU judiciary

28 Ibid., para. 43, 46, and 49.

29 Art. 102 TFEU; Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, pp. 1–19.

30 This has to do with the principle of *jura novit curia*. A fresh look at the principle in the international law has recently been put forward by TANZI, A. M. On judicial autonomy and the autonomy of the parties in international adjudication, with special regard to investment arbitration and ICSID annulment proceedings. *Leiden Journal of International Law,* 2020, Vol. 33, no. 1, pp. 60–62, et passim.

31 See CARDUCCI, G. A State's Capacity and the EU's Competence to Conclude a Treaty, Invalidate, Terminate – and "Preclude" in Achmea – a Treaty or BIT of Member States, a State's Consent to be Bound by a Treaty or to Arbitration, under the Law of Treaties and EU Law, and the CJEU's Decisions on EUSFTA and Achmea. Their Roles and Interactions in Treaty and Investment Arbitration. *ICSID Review,* 2018, Vol. 33, no. 2, p. 599.

32 For an overview see COUNCIL OF EUROPE. Case-law concerning the European Union. *European Court of Human Rights* [online]. [cit. 24. 7. 2021]. Available at: https://www.echr.coe.int/documents/fs_european_union_eng.pdf

power.[33] Hence, in a Spinozian understanding of law: a big fish can eat a small fish, because, and only if, it can do so.[34]

In summary, there is no monopoly of the EU judiciary over interpretation and application of EU law. As a consequence, the EU judiciary has no monopoly to decide whether the Member State has misapplied EU law and what are the legal consequences ensuing thereof.

5 Does Enforcement of an EU Right as an Investment Claim Make a Sense?

The investor may pursue its EU law right both in national courts and investment arbitration, as this does not constitute a situation of *lis pendens* in the eyes of international law.[35]

All the same, it may be no bed of roses for an investor to go both ways. First of all, the investment treaty may contain a fork-in-the-road clause, which would preclude the investor from suing the state in the second forum.[36] In addition, the investor would not be able to request double compensation, as either the investment tribunal or domestic court may refuse to order the state to pay the compensation of damages the latter has already paid to the investor in other proceedings.[37]

33 It does not seem that the Swiss award would be annulled or refused recognition due to a mere fact that arbitrators applied EU competition law, in particular if the arbitrators applied EU law in conformity with the CJEU's case law in competition law matters.

34 SPINOZA, B. *Tractatus Theologico-Politicus/Traité Théologico-Politique*. Paris: Presses Universitaires de France, 1999, p. 504: *"Ex. gr. pisces a natura determinati sunt ad natandum, magni ad minores comedendum, adeoque pisces summo naturali jure aqua potiuntur et magni minores comedunt. Nam certum est naturam absolute consideratam jus summum habere ad omnia, quae potest, hoc est, jus naturae eo usque se extendere, quo usque ejus potentia se extendit."* The present author is aware of the fact that the above interpretation of the Spinoza's concept of law is a "popular" one, which might not withstand the scrutiny of the connoisseurs of his work. However, it is also this author's view that Spinoza pays attention to the fact that the real power to enforce rights is an important consideration. See BALIBAR, É. *Spinoza et la politique. Réimpression de la 3e Edition*. Paris: Presses Universitaires de France, 2005, pp. 72–78.

35 NOVÝ, Z. Lis Pendens Between International Investment Tribunals and National Courts. In: ŠTURMA, P. (ed.). *Czech Yearbook of Public & Private International Law. Vol 8*. Prague: Czech Society for International Law, 2017, pp. 539–544.

36 McLACHLAN, C. *Lis Pendens in International Litigation. Pocketbooks of the Hague Academy of International Law*. Leiden/Boston: Martinus Nijhoff, 2009, pp. 66, 262–268.

37 CRAWFORD, J. *State Responsibility. The General Part*. Cambridge: Cambridge University Press, 2014, pp. 673–674.

Is it then more convenient for the investor to commence proceedings before Member States courts seeking damages caused by the breach of EU law by the latter, or to dress up the claim stemming from EU law in the attire of an investment claim?

It is submitted that investment arbitration offers a more efficient protection of investor rights derived from EU law than through the EU judiciary for three reasons.

Firstly, investment arbitration offers the mechanism of enforcement of the EU investor rights, in which they stand on equal footing with states.[38] This mechanism has no equivalent in EU law.[39] Secondly, investment law guarantees broad substantive protections, *inter alia*, against indirect expropriation, or FET. Comparable protections cannot be found in the EU law.[40] Thirdly, international investment awards may be enforced either on the basis of the New York Convention or International Centre for Settlement of Investment Disputes ("ICSID") Convention worldwide.[41]

Moreover, the enforcement of investor rights through EU law has a number of disadvantages.

For instance, it is national courts of the delinquent Member State who will decide whether the conditions for state liability for breach of EU law are met.[42] An investor's claim for damages for breach of EU law before national courts presupposes that the justice served by domestic courts respects the requirements of the rule of law and is of sound quality, which is far from granted.

38 SADOWSKI, W. The Rule of Law and the Roll of the Dice. The Uncertain Future of Investor-State Arbitration in the EU. In: BOGDANDY, A. von, p. BOGDANOWICZ, I. CANOR, C. GRABENWARTER, M. TABOROWSKI and M. SCHMIDT (eds.). *Defending Checks and Balances in EU Member States.* Berlin: Springer, 2021, p. 354.

39 NAGY, C. I. Intra-EU Bilateral Investment Treaties and EU Law After Achmea: "Know Well What Leads You Forward and What Holds You Back". *German Law Journal,* 2018, Vol. 19, no. 4, p. 994.

40 SADOWSKI, W. The Rule of Law and the Roll of the Dice. The Uncertain Future of Investor-State Arbitration in the EU. In: BOGDANDY, A. von, p. BOGDANOWICZ, I. CANOR, C. GRABENWARTER, M. TABOROWSKI and M. SCHMIDT (eds.). *Defending Checks and Balances in EU Member States.* Berlin: Springer, 2021, p. 355.

41 It remains to be seen whether the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters will be an efficient and practical instrument.

42 Judgment of the CJEU of 29 July 2019, *Hochtief Solutions AG Magyarországi Fióktelepe vs. Fővárosi Törvényszék*, Case C-620/17, para. 66 (1).

Thus, in *Tempel vs. the Czech Republic*, the ECtHR described the judicial ping-pong among Czech criminal courts as follows: *"the particular succession of events in the present case strongly indicates a dysfunction in the operation of the judiciary, vitiating the overall fairness of the proceedings."*[43]

Connected therewith, EU law does not offer any remedy against malfunctioning of Member States courts.[44]

In addition, while the legal basis for the enforcement of EU liability is a domestic statute, it may be nigh on impossible for the investor to invoke the liability for certain misapplications of EU law by the Member State. This is the reason responsibility of the state under international law does not depend on whether it is liable under its national law.[45]

In summary, it does not seem reasonable to leave the protection of investors solely in the hands of Member States' courts.

6 Integrating (Mis)application of EU Law Into the Matrix of International Investment Law

The applicable law in international investment law has two main components:

- The law applicable to procedure;
- The law applicable to the substance of the dispute.[46]

It is not uncommon that host states' non-investment obligations find their place in the decision-making of investment tribunals.[47] This holds true, in particular, for international human rights norms.[48]

EU law may enter the sphere of investment treaties in two ways.

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43 Judgment of the ECtHR of 25 June 2020, *Tempel vs. Czech Republic*, Application No. 44151/12, para. 71.

44 SATTOROVA, M. Investor Rights under EU Law and International Investment Law. *The Journal of World Investment & Trade,* 2016, Vol. 17, no. 6, p. 900; GAMBARDELLA, M. and D. ROVETTA. Intra-EU BITs and EU Law: What to Learn from the Micula Battle. *Global Trade and Customs Journal,* 2015, Vol. 10, no. 6, p. 197.

45 Art. 3 and 12 DARSIWA.

46 ALTER, C. and S. LEUNG WING CHEUNG. Post-Achmea Investment Treaty Arbitration: A departure from the EU-centric approach. In: MEULEMEESTER, D. de, M. BERLINGIN and B. KOHL (eds.). *LIBER AMICORUM 50 years of solutions – 50 ans de solutions – 50 jaar oplossingen Cepani 1969–2019*. Mechelen: Wolters Kluwer, 2019, p. 337.

47 BRABANDERE, E. de. *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications*. Cambridge: Cambridge University Press, 2014, p. 129.

48 Ibid., pp. 134–135.

Firstly, the customary rule reflected in Art. 31 para. 3 letter c) of the VCLT requires to take into account in the interpretation of the investment treaty *"relevant rules of international law applicable in the relation between the parties"*.[49] However, the EU law will be "relevant" for interpretation of the investment treaty, as EU law is binding between Member States. Thus, EU law must be deemed a specific (treaty) regime of international law for the purposes of systemic interpretation, for there is no meta-legal norm allowing a cross-fertilisation between international and EU legal orders (see 6.2.2 below).[50]

Secondly, EU legal rules may become part of applicable law to the substance of the dispute. This latter case will lie at the heart of our interest in the following analysis.

6.1 Do Investment Tribunals Have Jurisdiction Over Claims Based on Misapplication of the EU Law?

The host state's consent expressed in the investment treaty's dispute resolution clause is an indispensable condition for the investment tribunal's jurisdiction to resolve the dispute concerning violations of one or more investment standards laid down in the investment treaty. The tribunal bases its jurisdiction on the twofold basis consisting of host state's offer to arbitrate and its acceptance by the investor by commencing the investment arbitration.[51]

The investment tribunal's jurisdiction under an investment treaty and violation of standards of investment protection are relatively independent issues. In other words, not all breaches of investment standards may be heard by the investment tribunal.[52]

A broad wording of a dispute resolution clause, as *"any dispute which may arise between an investor of one Contracting Party and the Other Contracting Party*

49 Art. 31 para. 3 letter c) VCLT.

50 This is expressed, e.g., in the Decision on the Achmea Issue of the ICSID of 31 August 2018, *Vattenfall AB; 2. Vattenfall GmBH; 3. Vattenfall Europe Nuclear Energy GmBH; 4. Kernkraftwerk Krümmel GmBH & Co. OHG; 5. Kernkraftwerk Brunsbüttel GmBH & Co. OHG Claimants and Federal Republic of Germany Respondent*, Case Arb/12/12, para. 165.

51 NOVÝ, Z. and B. WARWAS. The Recent Developments in Arbitration and the European Regulatory Space. In: ALMEIDA, L. de, M. CANTERO GAMITO, M. DJUROVIC and K. P. PURNHAGEN (eds.). *The Transformation of Economic Law. Essays in Honour of Hans-W. Micklitz*. Oxford: Hart Publishing, 2019, p. 253.

52 Breaches of some standards may be reserved to inter-state investment arbitration. See, e.g., *e contrario* Art. 8 para. 1, in conjunction with Art. 9 of the Czech-UK BIT.

in connection with an investment",[53] could allow the tribunal to hear the whole spectrum of claims based not only on the investment treaty in issue, but also international customary rules, other international treaties, or a contract with the host state (as to the latter see 6.2.5 below).[54]

Thus, the existence of the investment tribunals' jurisdiction for a self-standing claim stemming from EU law is not wholly unimaginable. However, the essential, and far from self-evident, condition must be fulfilled, that EU law is considered to form part of international law (see the discussion in 6.2.2 below). As a consequence, the claim will no longer be considered as an EU law claim, but one stemming from international law.

Alternatively, EU law may be considered a mere fact, which may form part of a broader factual matrix underlying a breach of standard of investment protection or be part and parcel of domestic law, to the extent the latter is applicable under the treaty (see below).

Moreover, it seems that the investor would have to prove, in order to establish the tribunal's jurisdiction over a claim stemming from EU law, that the claim is in relation to the investment.

Nonetheless, the host state may argue that its offer to arbitrate contained in the dispute resolution clause does not include breaches of EU law. After all, the state might not have been member of the EU at the time when the parties concluded the treaty.

In resolving this matter, the choice between static and evolutionary interpretation of dispute resolution clauses will be of utmost importance for finding whether a misapplication of EU law falls within the tribunal's jurisdiction or not.[55]

53 See, for instance, the dispute resolution clause in Art. 9 para. 1 Agreement concerning the promotion and reciprocal protection of investment with exchange of notes (Signed at Copenhagen on 30 March 1992 between Denmark and Lithuania).

54 DEMIRKOL, B. Non-treaty Claims in Investment Treaty Arbitration. *Leiden Journal of International Law*, 2018, Vol. 31, no. 1, pp. 90–91; PARLETT, K. Claims under Customary International Law in ICSID Arbitration. *ICSID Review – Foreign Investment Law Journal,* 2016, Vol. 31, no. 2, pp. 444–453.

55 The static interpretation reflecting the principles of "contemporaneity" seems to have prevailed in investment law thus far. Yet, there are also signs of evolutionary approach to interpretation of investment treaties. See TRIANTAFILOU, E. E. Contemporaneity and Its Limits in Treaty Interpretation. In: CARON, D. D., S. W. SCHILL, A. COHEN SMUTNY and E. E. TRIANTAFILOU (eds.). *Practising Virtue Inside International Arbitration.* Oxford: Oxford University Press, 2015, pp. 474–482.

Misapplication of EU law may be subsumed under standards of investment protection, even though the host state was not member of the EU at the time of the conclusion of the investment treaty. Such a presumption may be upheld on the basis of evolutionary interpretation. It is difficult to argue that the investment treaty parties intended to freeze its provisions in time, without taking into consideration the changes that have arisen in domestic laws of the parties as well as international law during decades since the moment the treaty came into force.[56] As a result, the tribunals possess jurisdiction over EU law issues being subsumed under the standards of investment protection at the time of the resolution of the dispute.

In addition, the question arises as to whether the Member State against which the investor has invoked its EU right coloured as an investment claim may successfully raise the argument that the infringement procedure under Art. 258 of the TFEU is the exclusive means of legal redress against the breaches of EU law by the Member State.

As evidenced, *inter alia*, by the Micula case, the Member State may face both investment arbitration and the infringement procedure before the CJEU.[57] The member state thus remains bound by both obligations flowing from investment and EU law. Thus, the Member State may not successfully invoke its own infringement of EU law as a justification for violation of standards of treatment under investment treaties.

At the end of the day, the safest way to involve EU law for the purposes of jurisdiction is to subsume the latter under a standard of the treaty, for the breaches of which the tribunal has had the express legal basis in the dispute resolution clause.[58]

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56 Judgment of the ICJ of 13 July 2009, *Case Costa Rica vs. Nicaragua (Dispute regarding Navigational and Related Rights)*, para. 66–67.

57 Award of the ICSID of 11 December 2013, *Ioan Micula, Viorel Micula, SC European Food S.A., S. C. Starmill S.R.L. and Multipack S. R. L. vs. Romania*, Case ARB/05/20; STRUCKMANN, K., G. FORWOOD and A. KADRI. Investor-State Arbitrations and EU State Aid Rules: Conflict or Co-existence. *European State Aid Law Quarterly,* 2016, Vol. 15, no. 2, p. 263.

58 Some dispute resolution clauses thus refer to other provisions of the treaty containing the particular standard of treatment. See, e.g., Art. 8 para. 1 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investment with Protocol. *UNCTAD* [online]. Prague, 10 July 1990, with an Amending Exchange of Notes. Prague 23 August 1991 [cit. 24. 7. 2021]. Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1243/czech-republic---united-kingdom-bit-1990-

6.2 Applicable Law to the Substance of Dispute in Investment Arbitration

Applicable law to the substance of the investment disputes combines sources of international law, first of all the investment treaty, with domestic law.[59] International customary law remains important as a source of applicable law, namely for (quite a number of) questions not regulated by the investment treaty in issue.[60]

The rules of applicable law may be expressly laid down by the state parties in the investment treaty or the treaty may foresee that the parties' have chosen the applicable law and provides applicable rules in case that parties have not used this option.[61] Also, as will be examined below, if the state and investor choose the law applicable to their contract, that law, including EU law where applicable, will have an important consequences for their investment dispute under an umbrella clause (see below 6.2.5).

Alternatively, the treaty may be silent on an applicable law. EU law has not usually been mentioned in investment treaties among the sources of applicable law. As a result, it seems that EU law must qualify either as international or domestic law of the Member State to be applied to the substance of the dispute. Let us have a look at the status of EU law under investment treaties in the following.

6.2.1 EU Law Applicable to the Substance of Disputes in International Investment Law

The treatment of EU law as the law applicable to the substance of the dispute is a different question to that whether the tribunal has jurisdiction to find international responsibility for breaches of EU law.

In the eyes of international law, EU law may be applied as a specific regime of international law or a part of domestic law of the Member State.[62]

59 SCHREUER, C. Investment Arbitration. In: ROMANO, C. P. R., K. J. ALTER and Y. SHANY (eds.). *The Oxford Handbook of International Adjudication.* Oxford: Oxford University Press, 2013, p. 368.

60 Ibid., p. 369.

61 Art. 42 ICSID Convention.

62 FANOU, M. Intra-European Union Investor-State Arbitration post-Achmea: RIP? An assessment in the aftermath of the Court of Justice of the European Union, Case C-284/16, Achmea, Judgment of 6 March 2018, EU:C:2018:158. *Maastricht Journal of European and Comparative Law,* 2019, Vol. 26, no. 2, pp. 324–325.

Moreover, if the parties choose the law of the Member State as applicable to the merits of their dispute, e.g., by virtue of Art. 42 of the ICSID Convention, then EU law should apply as its integral part, unless its application is expressly excluded by the parties.

As a result, EU law is law, if it is a sub-system of international law or if the investment treaty expressly commands that domestic of law of the Member State must be applied. It is rare in practice that investment treaties would refer expressly to EU law. Thus, if the applicable law under the investment treaty includes domestic law, then it must be treated as law by virtue of the parties' will so expressed. In other cases, EU law will be treated as a mere fact (see 6.2.3 below).

6.2.2 EU Law as International Law

Investment tribunals must apply the investment treaty itself and other rules contained in the sources of international law, as enumerated in the Art. 38 para. 1 of the Statute of the International Court of Justice.[63] On the other hand, a legal basis for their application of EU law is less clear.

Nonetheless, the misapplication of EU law may be subsumed under an investment standard (see 7 below).

It seems that some investment tribunals consider EU law as a sub-system of international law, and thereby the EU law receives the treatment as law. Accordingly, in *Electrabel*, the tribunal found that: *"EU law has a multiple nature: on the one hand, it is an international legal regime; but on the other hand, once introduced in the national legal orders of EU Member States, it becomes also part of these national legal orders* … [reference omitted]."[64]

The tribunal in *Electrabel* has finally inclined more to the concept of EU law as international law. It has recalled the idea that EU law is based on international treaties.[65] Yet, according the tribunal not only primary law, but also secondary EU legislative acts are of international legal origin *(sic)*.[66]

63 UNITED NATIONS. Handbook on the Peaceful Settlement of Disputes between States. *United Nations* [online]. P. 62 [cit. 24. 7. 2021]. Available at: https://www.un.org/law/books/HandbookOnPSD.pdf

64 Award of the ICSID of 25 November 2015, *Electrabel S. A. vs. Hungary*, Case ARB/07/19, para. 4.118.

65 Ibid., para 4.120.

66 Ibid., para 4.122.

Nonetheless, should one stick to the classification of EU law as international law, it seems that regulations, directives and decisions as binding sources of the secondary legislation would be considered the acts of EU as an international organisation.[67] This conclusion is fraught with difficulties, given the common acceptance that EU is a supra-national organisation.

Furthermore, the tribunal has declared that EU law is a regime of international law and only once incorporated into domestic law becomes part of it. Following this approach, it may seem, EU law is international law, hence law, unless having been introduced into domestic law, thereby becoming a mere fact.[68]

The fact that EU law becomes incorporated into national law, however, does not deprive EU law of its international law character.[69] The *Electrabel* tribunal puts it clearly thus: *"there is no fundamental difference in nature between international law and EU law that could justify treating EU law, unlike other international rules, differently in an international arbitration requiring the application of relevant rules and principles of international law."*[70]

In summary, EU law may be viewed as a specific regime of international law for the purposes of international investment law. The conception of EU law as domestic law will be examined in the following.

6.2.3 Domestic Law Under General International Law

General international law recognizes only international and domestic law: *tertium non datur*. It thus does not specifically address the status of EU law. Besides the approach adopted by the tribunal in *Electrabel,* EU law may be considered to be domestic law.

Consequently, general international law has perceived domestic law as fact (see also 9 below).[71] This has three important consequences. First, domestic

67 See MALENOVSKÝ, J. *Mezinárodní právo veřejné – obecná část – a poměr k jiným právním systémům*. Brno: Masaryk University, 2020, p. 171.

68 Award of the ICSID of 25 November 2015, *Electrabel S. A. vs. Hungary*, Case ARB/07/19, para. 4.127–4.128.

69 Ibid., para. 4.124.

70 Ibid., para. 4.126.

71 HEPBURN, J. *Domestic Law in International Investment Arbitration*. Oxford: Oxford University Press, 2017, p. 104.

law is not applicable, since only "law" seems capable of being "applied". Second, states do not usually bear international responsibility for a mere breach of domestic law. Third, Art. 3 of Draft Articles of State Responsibility stipulates that: *"the characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."*[72] Thus, the state's compliance with its domestic law, including EU law, may not exonerate it from responsibility under general international law.

6.2.4 Domestic Law Under Investment Treaties

International investment law is a *lex specialis* to general international law.[73] This means*, inter alia*, that the specific regime of investment law may treat domestic law differently to general international law.[74]

Investment treaties may contain general and specific references both to domestic law of the investor's state and the host state (viz. Member State). The general reference denotes the express listing of the domestic law among the sources of applicable law in the investment treaty, whereas the specific reference means, for instance, that the investment must be made *"in accordance with domestic law"*.[75]

If there is such general reference to domestic law, then the treaty masters' will that domestic law be treated as law must be respected.[76]

On the other hand, if a reference to domestic law as applicable lacks in the investment treaty, the rules of general international law apply, including the treatment of domestic law as fact. The latter approach to domestic law

72 Art. 3 DARSIWA.

73 See the discussion in SIMMA, B. and D. PULKOWSKI. Chapter 5. International Investment Agreements and the General Body of Rules of Public International Law. 1. Two Worlds, but Not Appart: International Investment Law and General International Law. In: BUNGENBERG, M., J. GRIEBEL, S. HOBE and A. REINISCH (eds.). *International Investment Law.* Baden-Baden: Nomos, 2015, pp. 362–367; see also McLACHLAN, C., L. SHORE and M. WEINIGER. *International Investment Arbitration: Substantive Principles.* Oxford: Oxford University Press, 2017, pp. 17–22.

74 As to the secondary rules of responsibility see Art. 55 DARSIWA.

75 See, e.g., Czech-UK BIT.

76 With reference to Art. 42 ICSID Convention see GAILLARD, E. L'avis 1117 rendu le 30 avril 2019 par la Cour de justice de l'Union européenne revêt une importance capitale pour le droit des investissements. *Journal du Droit International*, 2019, no. 3, p. 852.

is based on the assumption that the parties' intention behind this silence must be interpreted as implying that domestic law ought to be treated in the same manner as under general international law. Accordingly, the tribunal in *AES Summit vs. Hungary* stated that *"the Respondent's acts/measures are to be assessed under the ECT and the applicable law but that the EC law is to be considered and taken into account as a relevant fact"*.[77]

6.2.5 Umbrella and "Other Rules" Clauses

EU law may become part of the applicable rules in international investment arbitration through umbrella clauses. These clauses bring contractual disputes between the investor and the host state under the protective umbrella of the investment treaty.[78] Thus, if the host state does not honour its (mostly contractual) commitments towards a foreign investor, international responsibility for the breach of an umbrella clause may arise.[79] When the contract between the investor and the Member State is governed by the law of the latter, EU law may come into play, to the extent it regulates the contractual relationship between the host state and investor or has a direct impact thereupon.[80]

Misapplication of EU law seems to be relevant also under "provisions on application of other rules" contained in investment treaties.[81] These clauses maintain application of other rules of domestic or international law, which may be more favourable to investors than the investment treaty provisions.[82] Arguably, EU law might be more favourable than the treaty provisions, namely

77 Award of the ICSID of 23 September 2010, *AES Summit Generation Limited AES-Tisza Erömű KFT vs. Republic of Hungary*, Case ARB/07/22, para. 7.6.12.

78 E.g., Art. 10 para. 1 Energy Charter Treaty ("ECT"); Art. 2 para. 3 Czech-UK BIT.

79 See REINISCH, A. and C. SCHREUER. *International Protection of Investments. The Substantive Standards.* Cambridge: Cambridge University Press, 2020, p. 859.

80 One can imagine that not only rules that directly regulate contracts, but also, e.g., EU rules on public procurement, for instance, may come into play here.

81 See the complex treatment of these clauses in CISÁR, I. Provision on Application of Other Rules in Bilateral Investment Treaties. In: DRLIČKOVÁ, K. and T. KYSELOVSKÁ (eds.). *COFOLA INTERNATIONAL 2016. Resolution of International Disputes Public Law in the Context of Immigration Crisis.* Brno: Masaryk University, 2016, pp. 196–210.

82 See, e.g., Art. 8 Agreement between the Czech Republic and the Kingdom of Saudi Arabia for Encouragement and Reciprocal Protection of Investments. *Ministerstvo financí České republiky* [online]. [cit. 24. 7. 2021]. Available at: https://www.mfcr.cz/cs/legislativa/dohody-o-podpore-a-ochrane-investic/prehled-dohod-o-podpore-a-ochrane-invest

if the former provide a specific obligation of the Member State *qua* host state, which may not be inferred easily from the text of the treaty or which has come into existence after the conclusion of the investment treaty.[83]

However, there are some caveats related to this type of clause. First, it cannot compensate for the tribunal's lack of jurisdiction to decide on a misapplication of EU law (see 6.1 above). Second, investment tribunals might be cautious not to anchor investment claims in other sources of law than the investment treaty (and standards of protection contained therein). Third, it remains unclear whether these clauses only maintain application of more favourable rules to the investor or whether they provide also more favourable regime of the host state's responsibility.

6.2.6 Should EU Law Be Treated in the Same Manner as Domestic Law?

It is not self-evident that EU law should be treated in the same way as domestic law. However, the Member State's legal order contains EU norms and domestic norms *stricto sensu*. If domestic law is perceived as one system, no difference appears between the two kinds of norms within it, in terms of their interpretation and application. As a result, investment tribunals should not treat them differently.

The international legal conception of domestic and EU law forming one legal system, i.e., a monistic approach, presents both advantages and disadvantages for the treatment of EU law.[84] The advantage is that the norms originating in EU law will never be treated worse than the norms of domestic law *stricto sensu*. The disadvantage is that EU law will never gain an upper hand over it, as the primacy of EU law would normally command (external perspective), unless the domestic law itself so requires (internal perspective).[85]

As a result, it is submitted that EU law may be treated in the same manner as domestic law for the purposes of application under investment treaties.

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83 See Art. 11 Czech-UK BIT.

84 On the concept of monism with relation to domestic and EU law see GRAGL, P. *Legal Monism: Law, Philosophy, and Politics*. Oxford: Oxford University Press, 2018, pp. 251–290.

85 See, e.g., 1A and 7A European Union (Withdrawal Agreement) Act 2020. *legislation.gov.uk* [online]. [cit. 24. 7. 2021]. Available at: https://www.legislation.gov.uk/ukpga/2020/1/contents

7 Does Misapplication of EU Law as Domestic Law Give Rise to International Responsibility of the Member State for Violation of an Investment Treaty?

A legal obligation to be "international" must stem from a formal source of international law, typically international treaty or custom.[86] International customary law does not seem to contain an express duty to observe EU law. Nor does it lay down an overarching duty for states to observe their own law, and thus EU law as part of it. It thus remains for an international treaty to set forth such duty. It is the Treaty on European Union which lays down such duty of Member States.[87]

However, as has been alluded to in the previous text, the proper legal basis of the international responsibility of the Member State would be the investment treaty binding on the Member State. Nonetheless, the host states' obligations are embodied by standards of treatment in investment treaties, which are formulated in general fashion and to a considerable extent vaguely. As a result, it remains for investment tribunals to provide interpretation of these standards, including whether a misapplication of an EU law duty may give rise to their breach.

Moreover, it is questionable whether the mere fact that domestic law is listed among applicable sources in the investment treaty, implies that the state bears international responsibility under the treaty for breach of domestic, and hence EU law.

In addition, not all misapplications of domestic or EU law will amount to violation of standards of investment protection.

First of all, a number of Member States entered into intra-EU BITs before their accession to the EU. It is, therefore, hard to see how a reference to the host state's law in such treaties could include EU law. In other words, EU law as a part of domestic law could not have been considered by the parties when concluding the investment treaty in, for instance, 1990.[88]

86 Art. 38 para. 1 letter a) and b) Statute of the International Court of Justice.
87 Art. 4 para. 3 Consolidated Version of the Treaty on European Union.
88 See the analysis in BURGSTALLER, M. European Law and Investment Treaties. *Journal of International Arbitrtion,* 2009, Vol. 26, no. 2, p. 195.

It would require an evolutionary interpretation of the concept "the law of the contracting party" under the investment treaty, to allow application of EU law by the virtue of the former. It is imaginable that the express formulation "the law of the contracting party" is amenable to evolutionary interpretation as per the criteria defined by the International Court of Justice ("ICJ").[89]

Yet, what if the treaty does not refer to domestic law? Ought static interpretation to be used? While static interpretation would equal to a stabilization clause for the investors, which would need to be contained in a contract between the investor and the host state.[90] The investment treaty, in and of itself, does not suffice to freeze the content of the term "domestic law" for ever.[91]

Furthermore, it would seem difficult to sustain the argument that the breach of EU law is, without more, equally or even more serious than violation of a domestic statute. Some misapplications of EU law will be of sufficient gravity to amount to the violation of an investment treaty, some will not. Thus, the outcome of such cases will be fact-sensitive.

In the light of the above considerations, it seems sensible to use as a starting point the analysis by *Jarrod Hepburn*, who aptly systemised the relationship between domestic law and standards of investment protection, namely fair and equitable treatment ("FET") and the prohibition of arbitrary measures, as follows:

- Domestic legality may contribute to compliance with investment standards;
- Domestic illegality may contribute to breach of investment standards;
- Domestic legality is irrelevant;
- Domestic legality is a contributory factor to breach of investment standards;
- Domestic legality as a proxy for breach of investment standards.[92]

89 Judgment of the ICJ of 13 July 2009, *Costa Rica vs. Nicaragua (Dispute regarding Navigational and Related Rights)*, para. 66–67.

90 See GEHNE, K. and R. BRILLO. Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment. *Martin-Luther-Universität Halle-Wittenberg* [online]. Pp. 6–8 [cit. 24. 7. 2021]. Available at: https://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20143.pdf

91 For the concept of stabilisation clauses see ibid., p. 6.

92 However, the author focuses predominantly on FET and arbitrary conduct of the state, excluding impliedly expropriation. HEPBURN, J. *Domestic Law in International Investment Arbitration*. Oxford: Oxford University Press, 2017, pp. 13–40.

Based on this classification, the misapplication of EU law will not be completely irrelevant to violations of investment standards, provided that EU law is relevant to the case before the arbitral tribunal (see the discussion above). Compliance with EU law may, albeit does not necessarily have to, contribute to compliance with standards of investment protection. Along similar lines, non-compliance with EU law, in particular an arbitrary refusal to apply it, could contribute to the breach of investment standards under the investment treaty.[93] If the breach of EU law is of a technical nature, it could turn out to be irrelevant for the resolution of the investment case.

7.1 Violation of Standards of Investment Protection and EU Law

Whether as a specific regime of international law or part of domestic law, EU law plays an important role in international investment law. However, what about the role of EU law in finding of violation of standards of investment protection?

In the vast majority of cases, the host state is internationally responsible for a distinct violation of one or more standards of investment protection laid down, typically, in an investment treaty. Depending on the treaty, the standards include: FET, full protection and security ("FPS"); prohibition of expropriation or measures with equivalent effect; prohibition of arbitrary and/or discriminatory measures; national and most-favoured-nation treatment.[94]

EU law may be highly relevant to the substance of the dispute in international arbitration.[95] As a result, (mis)application of the EU law may be decisive for the outcome of the dispute. The examples of EU law's areas having had an intersection with substantive investment protection is banking or competition law to name but few.[96]

93 See ibid., p. 34.

94 See generally REINISCH, A. and C. SCHREUER. *International Protection of Investments. The Substantive Standards.* Cambridge: Cambridge University Press, 2020, 1056 p.

95 See PAPP, K. von. *EU Law and International Arbitration.* Oxford: Hart, 2021, p. 95.

96 ACHTOUK-SPIVAK, L. Banking and Financial investment arbitration: past, present and future post *Achmea* and Opinion 1/17. In: MERSCH, Y., L. ACHTOUK-SPIVAK, G. AFFAKI, C. CONTARTESE and R. V. PUIG (eds.). *The new challenges raised by investment arbitration for the EU legal order. European Central Bank Legal Working Paper Series* [online]. 2019, no. 19, p. 35 [cit. 24. 7. 2021]. Available at: https://www.ecb.europa.eu/pub/pdf/scplps/ecb.lwp19~e4d0a59cea.en.pdf

In the context of investment arbitration, a misapplication of EU law may lead to the violation of one or more of the standards.

For instance, imagine a foreign-owned company ("FOC") incorporated in one of the Member States, which agreed to buy products exclusively from another, local, company, the sole distributor of the products on the market in the Member State. The FOC becomes very successful, hence a strong competitor to the local company. The latter therefore seeks to destroy the business of FOC by refusal to supply it its products on various pretexts. This would be found as a breach of right to supply under EU based on the abuse of dominance pursuant to Art. 102 of the TFEU.[97] The competition authority of the Member State refuses to do anything about the breach of EU law though.[98]

The above situation would qualify as a violation of FET standard, as it is not fair, if the Member State turns a blind eye to destroying of the FOC's business. In addition, the omission of the competition authority may amount to a discriminatory treatment by the Member State, being contrary to FET, and depending on the circumstances, also arbitrary and/or discriminatory conduct, as well as breach of the national treatment standard. The competition authority's omission to undertake steps to prevent the continuation of the anticompetitive conduct may violate the standard of FPS, because the Member State cannot sustain the argument that it protected the FOC's investment by doing virtually nothing.

Furthermore, consider another scenario. A parent company ("PC"), having its seat in France, owns a subsidiary company ("SC") incorporated in the Czech Republic ("CR"). The PC's moveable asset of a considerable value is situated in the premises of the SC in CR.

A Czech court declares SC bankrupt. The bankruptcy trustee appointed by the court thereafter seizes the moveable asset, and includes it into the SC's bankruptcy estate. With the permission of the Czech court, the trustee sells the moveable asset in a public auction to satisfy the SC's local creditors.

97 Consolidated Version of the TFEU.

98 See Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

It is submitted that an erroneous assumption[99] of bankruptcy jurisdiction over the debtor's assets, who does not have the centre of main interests under the EU Insolvency Regulation in the state of the bankruptcy court, might arguably violate standards of FET under the Czech-French BIT.[100]

Moreover, if the PC is irreversibly deprived of the asset in a public auction, the wrongful assumption of jurisdiction may be considered not only as a breach of FET, but also as an initial step in the incremental process of creeping expropriation.[101] As Judge *Fitzmaurice* remarked in his Separate Opinion to the Barcelona Traction case, this may amount to *"a disguised expropriation of the undertaking"*.[102]

In summary, the Member State, which does not comply with its obligations owed to the investor under EU law, may violate a number of the standard of investment protection.

8 Summary of Situations Where Misapplication of EU Law May Give Rise to International Responsibility Under International Treaty

If the investment treaty expressly refers to the domestic legal order of the Member State as one of the sources of applicable law, then

99 Insolvency seems to be a highly specialized area of EU law, which requires specialized courts and judges. See Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), Preamble 86; it has been also remarked that an uneven situation regarding the availability of specialized insolvency courts and judges exists in the EU. See WOLF, A. and H. MARJOSOLA. The Evolution of European Insolvency Law from Regulatory Competition to Harmonization. In: ALMEIDA, L. de, M. CANTERO GAMITO, M. DJUROVIC and K. P. PURNHAGEN (eds.). *The Transformation of Economic Law. Essays in Honour of Hans-W. Micklitz*. Oxford: Hart, 2019, pp. 203–204.

100 Art. 3 Accord entre la Republique Federative Tcheque et Slovaque et la Republic Francaise sur l'encouragement et la protection reciproques des investissements.

101 See also the discussion in Decision on Jurisdiction and Liability of the ICSID of 24 August 2015, *Dan Cake (Portugal) S. A. vs. Hungary (Respondent)*, Case ARB/12/9, para. 158–160 (with the result that no violation of the investment treaty has been committed by selling the investor's assets in public auction).

102 Separate Opinion of Judge Fitzmaurice (to the Barcelona Traction Case). *International Court of Justice* [online]. Para. 71 [cit. 24. 7. 2021]. Available at: https://www.icj-cij.org/public/files/case-related/50/050-19700205-JUD-01-04-EN.pdf

the responsibility for misapplication of EU law as part of the domestic law may arise.

If EU law is part of the host state law applicable to a contract between an investor and the host state under a choice-of-law clause contained therein or, in the absence of the latter, by virtue of rules of private international law, then EU law may become an indirect source of responsibility for the state through an umbrella clause, provided that the latter is contained in the investment treaty.

If EU law is a sub-system of international law, then state responsibility for breach of an norm laid down in EU law may arise. For instance, the breach of the right to establishment under EU law gives rise to the violation of an investment standard.

EU law is treated as fact, when the parties are silent on the application of domestic law. Hence, the misapplication of EU law, as such, cannot give rise to the violation of the investment treaty. Yet, it may nevertheless become part and parcel of a violation of one or more investment standards.

9 The CETA

The foregoing analysis has demonstrated that misapplication of EU law may amount to the breach of a standard of investment protection. In the following, a critical look will be had at how CJEU treats EU law in interpreting the CETA Agreement, as well as whether Member State may incur international responsibility for misapplications of EU law under CETA.

The CETA has been one of the most closely observed treaties concluded by the EU recently.[103] It is intended to be binding on the EU and its Member States.

The CETA has come under fire due to the allegedly lacking legitimacy of the new system of investment courts, which should replace (said

103 Comprehensive Economic and Trade Agreement. *European Commission* [online]. [cit. 24. 7. 2021]. Available at: https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/

to be already problematic) arbitral tribunals under BITs between Member States and Canada.[104]

As the procedural mechanism in CETA is international courts, not arbitral tribunals, it might seem that a point of comparison between the two is lacking.[105] However, it is submitted that the content of applicable (substantive) law under intra-EU investment treaties and CETA may be reasonably compared.[106]

The CETA's Chapter 8, dedicated to investment protection establishes tribunals for the resolution of investment disputes, including procedural matters necessary to their functioning. It also sets forth the standards of investment protection. The breadth of these standards is limited by a list of qualifications and exceptions (see 9.2 below).

9.1 Opinion 1/17

Belgium contested the compatibility of CETA with the EU law, and therefore asked the CJEU to give its opinion thereupon under Art. 218 para. 11 TFEU.[107]

In its extensive Opinion 1/17, CJEU found, *inter alia*, that *"the CETA does not confer on the envisaged tribunals any jurisdiction to interpret or apply EU law other than that relating to the provisions of that agreement"*.[108]

If this statement is put into the context of the entire Opinion 1/17, the conclusion seems quite clear: EU law as applicable law is out of play.[109]

104 BUNGENBERG, M. and A. REINISCH. *European Yearbook of International Economic Law. Special Issue: From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement.* Berlin: Springer, 2020, pp. 17–18, et passim.

105 But see REINISCH, A. Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration. *Journal of International Economic Law,* 2016, Vol. 19, no. 4, pp. 766–767.

106 Actually, whether intra-EU arbitration and the CETA differ to each other concerning applicable law is one of the most important questions in the recent discussion on the reform of investment arbitration. However, the full analysis of the issue is beyond the scope of this article.

107 Opinion 1/17 of the CJEU (Full Court) of 30 April 2019, para. 46–69.

108 Ibid., para. 136.

109 Ibid., para. 122.

CJEU supported this view by the argument concerning the envisaged Patent Court. Thus, the Patent Court would have to apply EU law frequently, whereas no such need would exist in the decision-making of CETA tribunals.[110]

Similarly, CJEU stated in *Achmea* that the *"tribunal* […] *would be called upon to give rulings on disputes that might concern the interpretation or application of EU law"*.[111] Thus, the same "problem" arose with the arbitral tribunal in *Achmea* as with the Patent Court. *Per argumentum e contrario*, CETA tribunals cannot encounter the issue of interpretation and application of EU law in the future application of CETA.

Subsequently, CJEU elucidated that the principle of mutual trust, lying at the heart of the EU judicial system, does not apply to international agreements between the EU and a non-Member State.[112] Thus, no mutual trust equals no application of EU law.

CJEU also stated with no ambiguity that: *"The fact that there is no jurisdiction to interpret the rules of EU law other than the provisions of the CETA is also reflected in Article 8.21 of that agreement, which confers not on the CETA Tribunal, but on the Union, the power to determine, when a Canadian investor seeks to challenge measures adopted by a Member State and/or by the Union, whether the dispute is, in the light of the rules on the division of powers between the Union and its Member States, to be brought against that Member State or against the Union …"*[113]

According to the CJEU, there is no room for EU law in the tribunals' decision-making. Accordingly, no claim arising from misapplication of EU law would be successful. In the following, however, the analysis will show that the issue is more complex than this.

9.2 Applicable Law Under CETA

The pertinent provision for our analysis is Art. 8.31, which reads as follows:

> *"1. When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the Vienna Convention*

110 Ibid., para. 131.
111 Judgment of the CJEU (Grand Chamber) of 6 March 2018, *Slowakische Republik (Slovak Republic) vs. Achmea BV*, Case C-284/16, para. 56.
112 Opinion 1/17 of the CJEU (Full Court) of 30 April 2019, para. 128–129.
113 Ibid., para. 132.

> *on the Law of Treaties, and other rules and principles of international law applicable between the Parties.*
>
> *2. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party."* [114]

CJEU has found in its Opinion 1/17 that the above provision: *"serve[s] no other purpose than to reflect the fact that the CETA Tribunal, when it is called upon to examine the compliance with the CETA of the measure that is challenged by an investor and that has been adopted by the investment host State or by the Union, will inevitably have to undertake, on the basis of the information and arguments presented to it by that investor and by that State or by the Union, an examination of the effect of that measure. That examination may, on occasion, require that the domestic law of the respondent Party be taken into account. However, as is stated unequivocally in Article 8.31.2 of the CETA, that examination cannot be classified as equivalent to an interpretation, by the CETA Tribunal, of that domestic law, but consists, on the contrary, of that domestic law being taken into account as a matter of fact, while that Tribunal is, in that regard, obliged to follow the prevailing interpretation given to that domestic law by the courts or authorities of that Party, and those courts and those authorities are not, it may be added, bound by the meaning given to their domestic law by that Tribunal."* [115]

As a result, EU law as a part of domestic law may be treated by CETA tribunals at best a fact. Consequently, a misapplication of EU law being "breach of a fact" may not give rise to international responsibility for breach of the CETA.

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114 The first part of this CETA provision seems to be informed by Art. 26 para. 6 ECT. The second part then appears to have found inspiration in Decision of the *ad hoc* committee of the ICSID of 5 June 2007, Case ARB/02/7, on the application for annulment of Mr. Soufraki, para. 96.

115 Opinion 1/17 of the CJEU (Full Court) of 30 April 2019, para. 131.

9.3 Critical Assessment of the Role of Domestic and EU Law Under CETA

In examining of Art. 8.31, the regard must be had not only to the interpretation provided by CJEU in its Opinion 1/17, but also to its (con)text.

The textual analysis shows that the tribunals ought to apply, first of all, the CETA, and then other sources of international law to fill the lacunae that may be left by the former. EU law is not expressly mentioned. So far the CETA follows the common solution found in international investment treaties (see above).

Contrary to the Opinion 1/17, it is submitted that the text of the Art. 8.31 offers no justification why the EU law could not form part of the domestic law. Had the CETA parties intended domestic law without EU legal rules, such important legal consequence would have been stipulated expressly.

However, Art. 8.31 is perhaps the first provision in an international treaty explicitly stating that domestic law is fact. CETA thereby endorses the standard approach of general international law (see also above), which resembles the well-known dictum in the Upper Silesia case: *"The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention."*[116]

National courts or authorities are not bound by the CETA tribunals' decisions domestically. Interestingly, though, what if the interpretation of domestic law conflicts between executive and judicial branch of the state?

Moreover, it remains unclear "how prevailing" the interpretation should be and, last but not least, what the tribunal should do, if such "prevailing" interpretation does not exist.[117] Also, it may well be that the Member State's courts adopt a prevailing interpretation in accordance with

116 Judgment of the PCIJ of 25 May 1926, Case concerning certain German interests in Polish Upper Silesia (The Merits), p. 19; LEONELLI, G. C. CETA and the External Autonomy of the EU Legal Order: Risk Regulation as a Test. *Legal Issues of Economic Integration,* 2020, Vol. 47, no. 1, p. 47.

117 KÁPOSZNYÁK, A. Reinterpretation of the Requirements to Preserve the Autonomy of the EU Legal Order in Opinion 1/17. *ELTE Law Journal,* 2019, no. 2, p. 98; GATTI, M. Opinion 1/17 in Light of Achmea: Chronicle of an Opinion Foretold? *European Papers,* 2019, Vol. 4, no. 1, p. 118.

an EU directive, which has not been duly implemented into their domestic law.[118] If this is the case, then the CETA tribunal cannot ignore such prevailing interpretation, including EU law rules underpinning it.

Along similar lines, no provision of domestic law may give an answer to the contested question before the CETA tribunal, but for an EU law provision being a part of domestic law, e.g., a concept contained in an EU directive. In such a scenario, the CETA tribunals will find themselves between Scylla and Charybdis. On the one hand, the tribunals will not be able to refuse deciding the issue submitted to it, for it would amount to denial of justice. On the other hand, as the CETA tribunals will not be entitled to ask the CJEU for preliminary ruling, there would be a lack of uniformity of interpretation of EU law and difficult foretelling of the CETA tribunals' decisions.[119]

Moreover, the concept of EU law as belonging to both domestic and international (treaty) law envisaged in *Achmea* does not seem to be overcome, as a matter of principle, even after the Opinion 1/17.[120] Not least because Opinion 1/17 is no more (and no less) binding on the CETA tribunals than the judgment in *Achmea*, which expressly states the nature of EU law *qua* law (see above).

It seems that EU law may not be considered as international law under CETA. Canada is not bound by EU law, which is thus not applicable "between the parties".[121] Nonetheless, it would be difficult to preclude the CETA tribunals from treating EU law as international law, in accordance with *Achmea* and *Electrabel*, and contrary to Opinion 1/17.[122]

Moreover, nothing deprives the Canadian investor from the possibility to invoke EU law against the Member State or EU before the CETA

118 Member States are obliged to interpret their domestic law in accordance with EU law. See SCHÜTZE, R. *An Introduction to European Law.* Cambridge: Cambridge University Press, 2012, pp. 128–132.

119 Opinion 1/17 of the CJEU (Full Court) of 30 April 2019, para. 134.

120 Judgment of the CJEU (Grand Chamber) of 6 March 2018, *Slowakische Republik (Slovak Republic) vs. Achmea BV*, Case C-284/16, para. 41.

121 But see PAPP, K. von. *EU Law and International Arbitration*. Oxford: Hart, 2021, pp. 81–82.

122 STOPPIONI, E. The Interactions between EU Law and International Investment Law. The Five Acts of Kabuki Play. *Hitotsubashi Journal of Law and Politics,* 2020, Vol. 48, p. 50.

tribunal. It would amount to an unjustified discrimination and non-reciprocal treatment, if Canada was internationally responsible for the breaches of Canadian law, hence standards of investment protection thereunder, towards EU investors, whereas Member States would not be responsible for breaches of EU law towards Canadian ones.[123]

In addition, if the CETA tribunal considers an EU law rule to be a factual finding, such a finding could not be overturned outside the system of tribunals under the CETA. Thus, it seems that Member States courts will not have the possibility to review the tribunal's factual finding concerning EU law, in case that the investor asks for recognition and enforcement of a CETA decision.[124] This is a clear disadvantage of treating EU law as a fact.

Also, Opinion 1/17 casts doubt on whether a claim "unfounded as a matter of law" pursuant to Art. 8.33 of the CETA includes also unfoundedness as a matter of EU law. Following the mechanical logic employed in Opinion 1/17, one would incline to conclude that the respondent, i.e., the Member State or the EU, cannot raise an objection based on the EU law against the Canadian investor's claim "as a matter of law" before CETA tribunals.

Finally, if the tribunal finds that the application of EU law is necessary to decide the case, then it cannot resign on its application. CETA tribunals will bear responsibility for the process, including interpretation and application of (EU) law. It is thus fully in their competence to decide whether they may apply EU law or not, reflecting the principle of *jura novit curia* and the need for avoidance of *non-liquet*.[125]

In summary, the problem with CJEU's approach to domestic/EU law seems to lie in that it is unconvincing that domestic law, hence EU law, should be treated as fact to the extent as the fact that was raining yesterday. A number

123 Opinion 1/17 of the CJEU (Full Court) of 30 April 2019, para. 117 ("reciprocal nature of international agreements").

124 It is common knowledge that courts cannot review arbitral awards with regard to the fact-finding by the tribunal. See, e.g., BLACKABY, N., C. PARTASIDES, A. REDFERN and A. HUNTER. *Redfern and Hunter on International Arbitration. Student version.* Oxford: Oxford University Press, 2015, p. 591.

125 As to the prohibition of *non-liquet*; Art. 42 para. 2 Convention on the Settlement of Investment Disputes between States and Nationals of other States; TANZI, A. M. On judicial autonomy and the autonomy of the parties in international adjudication, with special regard to investment arbitration and ICSID annulment proceedings. *Leiden Journal of International Law,* 2020, Vol. 33, no. 1, p. 62.

of authors see this approach to EU law as a fact as more of a fiction than reality.[126] As a result, EU law would be treated in the very same way as "law". As a result, it is not excluded that misapplication of EU law may lead to international responsibility of the Member State under CETA.

9.4 Misapplication of EU Law and Substantive Standards in the CETA

CETA contains traditional standards of investment protection, in particular FET; FPS; prohibition of expropriation without compensation; national treatment; and most-favoured-nation treatment. Thus, in principle, misapplication of EU may fall within the scope of these standards (see the discussion above).

However, the novelty is the considerable qualifications of these standard and a high threshold for their breach.[127] Thus, for instance, the broad standard of FET is confined to specific categories of breaches, like the denial of justice. Along similar lines, arbitrariness must be "manifest" to amount to violation of the standard.[128]

One of the key limitations of the claims based on EU law is also the CETA's express endorsement of the Member State's right to regulate, without providing for compensation to investors.[129]

It would be thus difficult to successfully claim, for instance, that the Member State indirectly expropriated the investment by a mere transposition of an EU directive, as it may argue that the transposition constitutes a regulation in public interest. Although, it seems that international responsibility under CETA may arise with regard to the so-called gold plating,

126 GALLO, D. and F. G. NICOLA. The External Dimension of EU Investment Law: Jurisdictional Clashes and Transformative Adjudication. *Fordham International Law Journal,* 2016, Vol. 39, no. 5, p. 1126; FLAVIER, H. L'avis 1/17 sur le CETA: de l'autonomie à l'hermétisme. *Journal d'Actualité des Droits Européens* [online]. 6. 9. 2019 [cit. 24. 7. 2021]. Available at: https://revue-jade.eu/article/view/2573 ("la distinction du fait et de droit est artificielle").

127 See, e.g., REINISCH, A. The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court. In: MESTRAL, A. de (ed.). *Second Thoughts: Investor-State Arbitration between Developed Democracies.* Waterloo (CA): Centre for International Governance Innovation, 2017, pp. 342–346.

128 See only 8.10 CETA.

129 Art 8.9 CETA, and specifically with regard to expropriation Annex 8-A3 CETA.

whereby the state exceeds the requirements of EU law in its implementation, without that being demanded by the EU legislative act in issue.[130]

In addition, breach of domestic law does not automatically amount to violation of standards under CETA (see also above).[131] Thus, if EU law is considered as domestic law for the purposes of CETA, then its misapplication does not trigger, in and of itself, international responsibility of the state for a breach of CETA.

However, regulation cannot be equated with misapplication. Therefore, it remains possible that the Member State will be liable for the breach of substantive standards under CETA by various forms of misapplication of EU law.

10 Findings

This paper has shown that EU law may not only be applied, but also the investor rights stemming from it may be enforced in international investment arbitration. Given that the EU judiciary has little to offer to investors, investment arbitration provides a better avenue for enforcement of EU rights.

It would be a false dichotomy, if EU law were reserved to the EU judiciary and investment law to arbitral tribunals. The very fact that investment tribunals assess whether the Member State complied with its EU law obligations does not seem to be something reprehensible.

Moreover, it has been demonstrated that EU law may have the status of a sub-system of international law or domestic law in investment disputes on the one hand or a mere fact on the other hand. Consequently, the most convincing interpretation seems to be that only a misapplication of EU law *qua* law may give rise to international responsibility for a violation of standards of investment protection under investment treaties.

Accordingly, the tribunal's approach in *Electrabel* perceiving EU law as a special regime of international law seems to be meaningful. However, two conditions must be met.

130 4th MEETING of the High Level Expert Group on Monitoring Simplification for Bene-ficiaries of ESI Funds: Gold-plating. *European Commission* [online]. [cit. 24. 7. 2021]. Available at: https://ec.europa.eu/futurium/en/system/files/ged/hlg_16_0008_00_conclusions_and_recomendations_on_goldplating_final.pdf

131 Art. 8.10.7 CETA.

First, the tribunal must have jurisdiction to decide over misapplications of EU law as a specific regime of international law. Thus, an investment tribunal may assume its jurisdiction to assess a misapplication of EU law, given that the wording of the dispute resolution clause in the investment treaty is broad enough to include misapplications of EU law related to the investment or refers to standards of investment protection, under which the misapplication of EU law may be subsumed. From the perspective of procedure, thus, an investment dispute may relate to a misapplication of EU law.

Second, there must be a legal basis for application of EU law in the investment treaty. Arbitrators would have to classify EU law, in all probability, as a specific treaty regime under international law. Albeit, it remains unclear how EU secondary legislative acts may be seen as belonging to a treaty law.[132] It seems possible that these rules may be put on equal footing with acts of international organization, which would nonetheless require that EU be deemed an international organization.

Furthermore, it has remained unclear whether a mere misapplication of EU law as part of domestic law, to which the investment treaty explicitly refers, might not lead to international responsibility of the state. While, as *Upper Silesia* has shown, breach of domestic law may give rise to international responsibility, as a matter of principle. However, in an analogy with domestic law, it seems that misapplication of EU law will not be tantamount to a violation of standards of investment protection in all situations. Thus, the aspect of subjective judgment as to whether a misapplication of EU law is fundamental or of a "technical" nature will play certain role in such assessment.

At any rate, misapplication of EU law may hardly be seen as a defence against state responsibility under investment treaties.

In addition, it is difficult to imagine that international responsibility arises when EU law is perceived as a fact, although the distinction between "law" and "fact" is debatable.

132 However, some recognized authors admit the use of the VCLT interpretation rules, intended for international treaties, for Security Council Resolutions. Thus, it seems conceivable that the rules applicable to the founding treaty may be applied also to the acts derived thereof, See WOOD, M. The Interpretation of Security Council Resolutions. *Max Planck Yearbook of United Nations Law* [online]. 1998, Vol. 2, pp. 88–95 [cit. 24. 7. 2021]. Available at: https://www.mpil.de/files/pdf2/mpunyb_wood_2.pdf

Opinion 1/17 has turned out to be problematic, for it excludes *a priori* that the tribunals established under CETA may interpret and apply EU law. Making of a watertight distinction between "fact" and "law" on the one hand and "appreciation" and "interpretation and application" of domestic law on the other hand seems to be highly artificial, in terms of a description of the decision-makers' intellectual process. Additionally, if a CETA investor or the Member State invoke EU law in an actual investment case, the principles of *jura novit curia* and avoidance of *non-liquet* would prevent the tribunal from turning a blind eye to the EU legal rules.

Thus, it has been submitted that international responsibility for misapplication of EU law under CETA is not totally excluded. Opinion 1/17 has done more harm than good by stating that CETA tribunals would not be able to request preliminary ruling by the CJEU for two reasons. First, tribunals may decide to treat EU law as a factual finding, thereby liming the possibility to overturn such finding by national courts in the stage of annulment or recognition and enforcement of the award, since this would amount to a *révision au fond*.[133] Second, CETA tribunals may want to render a decision based on a proper analysis of both law and facts. The fulfilment of this judicial role my require submitting of a request for preliminary ruling to the CJEU. It would be then interesting to see whether the CJEU would dismiss such request, notwithstanding the critical importance of its answer for the resolution of the dispute before the CETA tribunal.

At the end of the day, while Opinion 1/17 may be criticised for a somehow forced attempt to make a rigid distinction between "law" and "fact", *Achmea* is the real elephant in the room. On the one hand, the CJEU says that EU law may be applied in investment arbitration. On the other hand, it ousts investment arbitrators from the possibility to apply EU law. This tension between the substantive and procedural dimension of EU law established by the CJEU in *Achmea* is indeed one of the causes for exacerbating the unnecessary conflict between EU law and international investment protection.

133 The interference of EU law with final arbitral awards seems to be on the increase. See PENADES FONS, M. The Effectiveness of EU Law and Private Arbitration. *Common Market Law Review,* 2020, Vol. 57, no. 4, pp. 1105–1106.

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International Investment Court System: The Future of Investment Dispute Settlement?

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Abstract

The paper is concerned with examining the texts of the Investment Protection Agreements concluded by the European Union, for the purpose of addressing some of the issues created by the shortcomings of the texts. Focus is given to the provisions related to the Investment Court System established under the respective agreements. The relevant provisions are subject to analysis and conclusions are drawn in an effort to address the issues that arisen. Taken into consideration are works of various other scholars who contributed to the topic.

Keywords

European Union; International Investment Arbitration; International Investment Court; Investment Protection Agreement; CETA; EU-Singapore Investment Protection Agreement; EU-Vietnam Investment Protection Agreement; Multilateral Investment Court; New York Convention.

1 Introduction

With the conclusion of a number of new-generation Investment Protection Agreements ("IPAs") by the EU in recent years and new treaties being in the process of negotiation[1], it is of the utmost importance to examine the newly established Investor-state dispute settlement ("ISDS") mechanism provided for in these IPAs. In the present, it is widely spread that the EU's new-generation IPAs renounce the well-established mechanism of settling investment disputes in arbitration. It comes as the EU's reaction

1 EU reached an agreement in principle with Mexico in April 2018. The text of the agreement is now in process of legal revision.

to long-standing criticisms of the ISDS. Instead, the EU's IPAs aim to submit the disputes to an investment Tribunal with a guaranteed appeal mechanism and its own procedural alterations. So far, the ratification process is still ongoing for all the EU's IPAs, which results in being impossible to examine the impacts and operation of the investment Tribunals established under these agreements. Moreover, despite the provisional application of Comprehensive Economic and Trade Agreement ("CETA"), the relevant provisions of chapter 8 (Investment) do not fall under the provisional application.[2] Subject to examination, therefore, remains only the published texts of the IPAs taken together with statements and declarations by the respective parties to these agreements. However, this does not prevent from addressing some of the issues that arise after only reading through the respective provisions concerning the resolution of investment disputes.

This paper will not focus on the reasons for replacing the common arbitration proceedings, as this topic was already addressed by various scholars in the past.[3] Rather, this paper will pursue to examine the nature of the Investment Court System ("ICS") and strive to shed light on its procedural divergencies (as regards arbitration). Taken into consideration will be all the CETA, the EU-Singapore IPA, and the EU-Vietnam IPA. Although it was also taken into account, the EU-Mexico IPA won't be explicitly mentioned in this paper because it being still in the process of legal revision and therefore subject to potential modifications in the future. Nevertheless, the author points out that all the provisions examined below are either identical or extremely similar to those provided for in the (draft

2 See Notice concerning the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part. *EUR-Lex* [online]. 16. 9. 2017 [cit. 6. 5. 2021]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=urisrv:OJ.L_.2017.238.01.0009.01.ENG

3 See MARCEDDU, M. L. Implementing Transparency and Public Participation in FTA Negotiations: Are the Times a-Changin'? *Journal of International Economic Law*. 2018, no. 21, p. 693; see also BROWN, C. M. Chapter 13: The EU's Approach to Multilateral Reform of Investment Dispute Settlement. In: STANIČ, A. and C. BALTAG (eds.). *The Future of Investment Treaty Arbitration in the EU: Intra-EU BITs, the Energy Charter Treaty, and the Multilateral Investment Court*. Alphen aan den Rijn: Wolters Kluwer, 2020, p. 219; GICQUELLO M. The Reform of Investor-State Dispute Settlement: Bringing the Findings of Social Psychology into the Debate. *Journal of International Dispute Settlement*, 2019, no. 10, p. 562.

of the) EU-Mexico IPA.[4] As a result of leaving out the EU-Mexico IPA, this paper endeavours to draw parallels between the remaining IPAs.

2 Investment Court System

As was already mentioned, some of the most distinctive aspects of the EU's IPAs are the provisions related to dispute settlement. The agreements renounce *ad hoc* arbitration as a form of settling disputes and replace it with its own mechanism of a two-instanced court-like tribunal. The Tribunal established by each agreement is called up to adjudicate investment disputes under each agreement respectively. In this regard, the EU makes clear its intent to create a Multilateral Investment Court ("MIC") that, once established, shall assume all the agenda from the Tribunals created by the respective agreements. CETA, the EU-Singapore IPA, and the EU-Vietnam IPA all contain articles dedicated to pursuing the creation of a MIC in the international community.[5] However, until a MIC is established, the Tribunals are the bodies to adjudicate all disputes related to investments made under the IPAs.

2.1 Organisation Issues

The investment courts created by each agreement are to be *permanent*[6] bodies consisting of a Tribunal (of First Instance[7]) and an Appeal Tribunal. Both tiers are to have a certain number of *members* to whom will be distributed the cases. The Tribunal under CETA shall have 15[8] members, whilst under the EU-Vietnam IPA the number is lowered to 9[9] members and under the EU-Singapore IPA it further decreases to 6[10] members. The term is set to be 5 years long in the case

4 Draft EU-Mexico agreement, Section on Resolution of Investment Disputes. *European Commission* [online]. [cit. 7. 5. 2021]. Available at: https://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156814.pdf

5 Art. 8.29 CETA; Art. 15 EU–Vietnam FTA; See CETA: EU and Canada agree a new approach on investment in trade agreement. *European Union* [online]. 29. 2. 2016 [cit. 6. 5. 2021]. Available at: http://europa.eu/rapid/press-release_IP-16-399_en.htm

6 See para. 1.6 below.

7 EU-Singapore IPA refers to the first instance body as a Tribunal of First Instance, whereas the other agreements use the term Tribunal.

8 Art. 8.27 para. 2 CETA.

9 Art. 3.38 para. 2 EU-Vietnam IPA.

10 Art. 3.9 para. 2 EU-Singapore IPA.

of CETA[11], 4 years under the EU-Vietnam IPA[12], and 8 years in the case of EU-Singapore IPA.[13] The agreements with Canada and Vietnam add that the term is renewable once, however, in relation to Singapore it is stated that a member's term may be renewed by decision of the Committee upon expiry.[14] In this case there is no indication about limited renewability.

2.2 Appointment

The Committee[15] is to be holding a key position in the process of appointing the members to the Tribunal. Upon the entry into force of the agreements, the respective Committee shall appoint the members of the Tribunal, out of whom 1/3 will be nationals of a member state of the EU, 1/3 will be nationals of either Canada, Vietnam, or Singapore respectively, and 1/3 shall be nationals of third countries. Upon the appointment of its members, the Tribunal will be able to hear individual cases. Each individual case will be heard by a division of three members of the Tribunal, of whom one shall be a national of EU member state, one a national of the other Party, and one a national of a third country, who will also be the chair of the division.[16]

The process of appointing the members of the Tribunals brings an issue regarding the party's autonomy. The principal advantage of (current) investor-state arbitration over state-to-state arbitration or diplomatic protection consists of the capability of the Investor party to a dispute to be in full control over its case. Some examples may be the option to initiate the proceedings, the option to select the procedural rules, and most importantly the capability to appoint the arbitrators. Naturally, there are certain limits in a form of the state's (pre-)given consent to arbitration. Nevertheless, the key feature of the established ISDS mechanism is the appointment of adjudicators by the parties to the dispute. This crucial trait and standing characteristic of investment arbitration is completely abandoned in the ICS.

11 Art. 8.27 para. 5 CETA.
12 Art. 3.38 para. 5 EU-Vietnam IPA.
13 Art. 3.9 para. 5 EU-Singapore IPA.
14 Ibid.
15 Each agreement provides that an organization body (Committee) which will consist of representatives both from the EU and the particular state shall be created. See Art. 26.1 CETA, Art. 4.1 EU-Vietnam IPA, Art. 4.1 EU-Singapore IPA.
16 Art. 8.27 para. 6 CETA, Art. 3.38 para. 6 EU-Vietnam IPA, Art. 3.9 para. 7 EU-Singapore IPA.

In replacement, the ICS provides for a system that strongly resembles a national law procedure of naming judges to courts. In the EU's IPAs the parties to a dispute are in no control over the selection of adjudicators who will hear their case. Instead, this authority is handed over to the respective Committees. This way the states retain control over the composition of the Tribunal to some minor extent, however, any additional control over the composition of individual divisions is excluded. Instead, the selection of members of the Tribunal who will be hearing a particular case will be determined on a rotation basis.[17]

The lack of party autonomy in selecting the adjudicators gives the impression of the true nature of the ICS. As it abandons the standing arbitration characteristic the ICS appears to carry more judicial aspects which may cause issues in relation to enforcement of its decisions.

Also, as was already stressed out hereinbefore, the adjudicators are consistently referred to as "members of the tribunal". This makes clear the intention of the drafters to neither use the term judges nor arbitrators. Although merely symbolic, this modification is likely an attempt to address some legitimate concerns expressed by the public in the past.[18]

2.3 Permanency

It is not quite certain as to whether the Tribunals will be in fact permanent bodies or merely conceptual structures.[19]

It is clear that the term "permanent" has to be interpreted in accordance with the remaining provisions regarding the Tribunals. Developing on this idea,

17 Art. 8.27 para. 7 CETA, Art. 3.38 para. 7 EU-Vietnam IPA, Art. 3.9 para. 8 EU-Singapore IPA.

18 SARDINHA, E. The New EU-Led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU–Vietnam Free Trade Agreement. *ICSID Review*, 2017, Vol. 32, no. 3, p. 633; see also SARDINHA, E. The Impetus for the Creation of an Appellate Mechanism. *ICSID Review*, 2017, Vol. 32, no. 3, p. 503.

19 The opinions of scholars have differed in the past. *Sardinha* writes about a permanent structure, however, mentions the missing term "permanent" in the CETA Art. 8.28 para. 1, see SARDINHA, E. The New EU-Led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU–Vietnam Free Trade Agreement. *ICSID Review*, 2017, Vol. 32, no. 3, p. 633; *Thanvi* on the other hand clearly states that the Tribunals won't be permanent structures, but rather two-tier systems, see THANVI, A. The Investment Court System under the EU-Canada Comprehensive Economic and Trade Agreement: Proposal and Some Unaddressed Issues. *Indian Journal of Arbitration Law*, 2019, Vol. 8, no. 2, p. 100.

permanency seems to be the only feasible manner to accomplish the creation of a roster of members of the Tribunal as mentioned above. If it was not permanent, the pool of adjudicators appointed by the Committees would not be able to operate properly. The IPAs provide that in order to ensure their availability, members of the Tribunal shall be paid a monthly retainer fee.[20] Taking these provisions into consideration, a conclusion can be drawn that the relation between members of the Tribunal and the Tribunal itself is of permanent nature. Following this conclusion, it is necessary to point out that permanency is another aspect of a judicial organ rather than an arbitration body. Arbitration is defined by its *ad hoc* and temporary nature. Although there are arbitration centres that are permanent (e.g., ICSID, LCIA, SCC)[21] and have rosters of arbitrators, all of these are in fact permanent organs (with designated seats and administrative organisation). In contrast, the Tribunals created by the EU's IPAs shall utilize the ICSID Secretariat, which shall provide them with appropriate support, as Secretariat to the Tribunals.[22] Moreover, there is no indication about the possible seat of the Tribunals.

Interestingly, it has to be pointed out that the specific term "permanent" is not included in CETA's investment chapter and is only marginally mentioned in the EU-Singapore and EU-Vietnam IPAs.[23] Consequently, there cannot be found any clear indication about the permanent nature of CETA's Tribunal in the wording of the agreement itself. However, this seems to be at odds with the proclamations made by the EU in the past relating to CETA.[24] Also, as the Investment Court established under CETA is aimed

20 Art. 8.27 para. 12 CETA, Art. 3.38 para. 14 EU-Vietnam IPA, Art. 3.9 para. 12 EU-Singapore IPA.

21 The International Centre for Settlement of Investment Disputes; The London Court of International Arbitration; The Arbitration Institute of the Stockholm Chamber of Commerce.

22 Art. 8.27 para. 16 CETA, Art. 3.38 para. 18 EU-Vietnam IPA, Art. 3.9 para. 16 EU-Singapore IPA.

23 EU-Singapore and EU-Vietnam IPAs include the term "permanent" only in relation to the Appeal Tribunal, see Art. 3.10 para. 1 EU-Singapore IPA, Art. 3.39 para. 1 EU-Vietnam IPA.

24 Investment provisions in the EU-Canada free trade agreement (CETA). *European Commission* [online]. [cit. 7. 5. 2021]. Available at: https://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf; Similarly, the EU-Singapore IPA mentions permanency regarding only the Appeal Tribunal, but presents the entire Tribunal as a permanent body, see European Union – Singapore Trade and Investment Agreements. *European Commission* [online]. [cit. 7. 5. 2021]. Available at: https://trade.ec.europa.eu/doclib/docs/2019/february/tradoc_157684.pdf

to be a small-scale variant of the MIC (which is intended to be a permanent body), it would seem only natural for the court to be of permanent character as well. Moreover, in the event of interpretation issues (which are clearly present), the permanent nature of the ICS would be most probably found according to Art. 31 of the VCLT[25], as the purpose of the ICS to be a new standing mechanism of dispute settlement is made obvious.

3 Ethics

Another notable aspect of the EU's IPAs is the inclusion of provisions related to ethics and code of conduct for the members of the Tribunal and Appeal Tribunal.[26] While EU-Vietnam and EU-Singapore IPAs also include the code of conduct for the members of the Tribunal and the Appeal Tribunal in the form of annexes, CETA adopted the code of conduct only very recently[27] through the Committee on services and investment pursuant to CETA Art. 8.44 para. 2.

Should a particular member of the Tribunal not meet the mentioned ethical standards, the articles on ethics also carry provisions related to the removal of a Member of the Tribunal either from a particular division or from the Tribunal or Appeal Tribunal in general. These procedures may serve as another example of a departure from the currents ISDS and the established procedures regarding challenges and disqualification of arbitrators. Whereas under the ICSID provisions, the decision on a challenge of an arbitrator is taken out by the other members of the tribunal, the CETA provides for a decision on a challenge to be taken out by the President of the ICJ[28], and the EU-Singapore and EU-Vietnam agreements entrust the decision to the President of the Tribunal of the Appeal Tribunal respectively.[29]

25 Vienna Convention on the Law of Treaties 1969.

26 CETA Art. 8.30 para. 1 mentions that only *"members of the Tribunal shall be independent"*, but there is no indication that members of the Appellate Tribunal should not be bound by this provision as well. See SARDINHA, E. The New EU-Led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU–Vietnam Free Trade Agreement. *ICSID Review*, 2017, Vol. 32, no. 3, p. 647.

27 See Decision of the Committee on Services and Investment of 29 January 2021, No 001/2021 (Code of conduct for the members of the Tribunal, Members of Appellate Tribunal and mediators). *European Commission* [online]. [cit. 7. 5. 2021]. Available at: https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159403.pdf

28 Art. 8.30 para. 2–3 CETA.

29 Art. 3.40 para. 2–3 EU-Vietnam IPA, Art. 3.11 para. 2–3 EU-Singapore IPA.

The agreements also prevent members of the Tribunals from serving as counsel, party-appointed expert, or witness in any other pending or new investment dispute, either under these or any other international agreements. The prohibition does not include acting as an arbitrator in other such proceedings, provided that the affected member of the Tribunal remains available and able to perform his/her duties under the EU's IPAs.[30]

Interestingly, according to the code of conduct created by the CETA Committee, the members of the Tribunal (of first instance) are guided to "take appropriate account" of other dispute settlement activities under CETA and in particular of awards (decisions) rendered by the Appeal Tribunal.[31] Whilst similar provision would not seem odd if incorporated into the provisions related to the constitution of the Tribunal itself, its placement in the code of conduct might implicate the "moral" obligation imposed on the members of the Tribunal to follow the rulings of the Appeal Tribunal. This issue might be addressed in the future given the connection between the obligations provided for in the code of conduct and the possibility of removal from the Tribunal should the member demonstrate behaviour that is inconsistent with his/her obligations under the code of conduct.

Naturally, a conclusion can be drawn that the rules of conduct and the requirements set on the members of the Tribunal override the provisions established in, e.g., the ICSID Convention. In other words, the procedural rules selected by the investor party to the dispute will apply with the exception of (*lex specialis*) rules provided for in the particular EU's IPA.

4 Procedural Distinctions

As expected, all the EU's IPAs offer to the investor the option to select the procedural rules for the resolution of the dispute. The contracting parties' consent has been given for the application of (a) the ICSID Convention and Rules of Procedure for Arbitration, (b) the ICSID Additional Facility

30 Art. 8.27 para. 11 CETA, Art. 3.38 para. 13 EU-Vietnam IPA, Art. 3.9 para. 11 EU-Singapore IPA.

31 Art. 4 para. 10 Decision of the Committee on Services and Investment of 29 January 2021, No 001/2021 (Code of conduct for the members of the Tribunal, Members of Appellate Tribunal and mediators). *European Commission* [online]. [cit. 7. 5. 2021]. Available at: https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159403.pdf

Rules, (c) the UNCITRAL Arbitration Rules, or (d) any other rules that the disputing parties may agree to.[32] It needs to be pointed out, that the ICSID Convention does not allow for the accession of international organizations to the Convention, and thus the investor pursuing his claim against the EU might be limited as to the choice of the procedural rules. The EU-Singapore IPA mentions this issue in a footnote added to the ICSID Additional Facility Rules, which shall apply instead (should the investor wish to).

Each agreement has its own manner of expressing the consent of the respondent to ICS. However, all of the IPAs provide that the respondent's consent together with the investor's submission of a claim under the respective IPA's investment provisions (claimant's consent) shall satisfy the requirements of Art. 25 of the ICSID Convention, ICSID Additional Facility Rules for written consent and Art. II of the United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") for an agreement in writing.

Notwithstanding the applicable procedural rules, the UNCITRAL Transparency rules (as modified by the agreements) shall apply to the proceedings under CETA and the EU-Vietnam IPA.[33] Consequently, the discretion to make the relevant documentation public is taken away from the parties to the dispute, who are now obliged to merely accept this reality. Not only is certain documentation made public, but also the hearing shall be open to public access. However, should the proceedings be concerned with protected or confidential information, appropriate redacting measures are to be taken before making the documentation publicly available.

The Tribunal may also accept written or oral submissions from the non-disputing party to the agreement regarding the interpretation of the respective treaty.[34] The exception is the EU-Vietnam IPA which

32 Art. 8.23 para. 2 CETA, Art. 3.33 para. 2 EU-Vietnam IPA, Art. 3.6 para. 1 EU-Singapore IPA.

33 Art. 8.36 para. 1 CETA, Art. 3.46 para. 1 EU-Vietnam IPA; EU-Singapore IPA Art. 3.16 refers to Annex 8 which mentions a list of documents to be made available to the public and also obliges the Tribunal to conduct the hearings open to public.

34 Art. 8.38 para. 2 CETA, Art. 3.17 para. 1 EU-Singapore IPA.

grants the non-disputing party merely the right to make oral representations relating to the interpretation of the IPA.[35]

4.1 Appeal

The pronounced aspect of the ICS is the possibility to appeal against awards rendered by the Tribunal (of First Instance).[36] However, it has to be pointed out that the possibility to revise an award is not an entirely new concept. For instance, the ICSID Convention provides for revision under its Art. 51, although on a much narrower scale in comparison with the EU's IPAs. The ICS on the other hand provides the Appeal Tribunal with the option to uphold, modify or reverse the award.[37] The grounds for appeal are also quite broad, especially in comparison with the limited grounds for revision and annulment under the ICSID Convention.[38] The grounds for appeal in the ICS are (a) error in application or interpretation of the applicable law, (b) manifest error in the appreciation of the facts, and (c) the grounds set in Art. 52 of the ICSID Convention (Annulment).

As the IPAs stipulate, only an award may be subject to appeal. In this regard, *Sardinha* points out that under the ICISD Convention rules, the Tribunal renders also procedural decisions[39] (e.g., decision on jurisdiction[40]). She follows with a question whether such decisions shall be subjects to appeal.[41] The author of this paper would answer in the negative. According to Art. 41 of the ICSID Convention, the objection regarding jurisdiction, if dealt with in the form of a separate decision, constitutes merely a preliminary question. Therefore, although being subject to a separate decision, it makes part of the (final) award rendered by the tribunal. Consequently, decisions

35 Art. 3.51 para. 2 EU-Vietnam IPA.

36 See SARDINHA, E. The Impetus for the Creation of an Appellate Mechanism. *ICSID Review*, 2017, Vol. 32, no. 3, p. 503.

37 Art. 8.28 para. 2 CETA, Art. 3.54 para. 3 EU-Vietnam IPA, Art. 3.19 para. 3 EU-Singapore IPA.

38 See Art. 51 and 52 ICSID Convention.

39 SARDINHA, E. The New EU-Led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU–Vietnam Free Trade Agreement. *ICSID Review*, 2017, Vol. 32, no. 3, p. 642.

40 See Award-ICSID Convention. *ICSID* [online]. [cit. 8. 5. 2021]. Available at: https://icsid.worldbank.org/services/arbitration/convention/process/award

41 SARDINHA, E. The New EU-Led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU–Vietnam Free Trade Agreement. *ICSID Review*, 2017, Vol. 32, no. 3, p. 642.

on jurisdiction rendered under the ICSID procedural rules shall be subject to appeal, however only through an appeal to the (final) award.

Another interesting issue arises from the option of the Appeal Tribunal to refer the matter back to the Tribunal (of First Instance) for adjustments.[42] In that case, the Tribunal (of First Instance) shall be bound by the findings and conclusions of the Appeal Tribunal. Accordingly, with the provided findings and conclusions, the Tribunal (of First Instance) will render (another/a new) award. However, whether such an adjusted award shall also be subject to appeal is unclear.

5 Enforcement of the Tribunal's Decisions

Having hereinbefore mentioned the judicial aspect of the ICS, it raises the expected question of whether the decisions of the Tribunal and the Appeal Tribunal will be enforceable under the NYC.

Right before attempting to provide an answer to this question, one other characteristic of the ICS demands mentioning. The decisions rendered by the Tribunals are referred to as (final) awards.[43] This implicates further ambiguity of the ICS. On one hand, the system is permanent in nature (although with issues addressed hereinbefore) and deprives the investor party to the dispute of its discretion regarding the selection of adjudicators [judicial characteristics]. On the other hand, it maintains the option of selecting the procedural rules and calls its decisions awards (and not judgments) [arbitral characteristics]. Taking all of these aspects into consideration, the true nature of the ICS is hybrid.[44]

42 Art. 3 para. 3 Decision of the CETA Joint Committee of 29 January 2021, No 001/2021 (setting out the administrative and organisational matters regarding the functioning of the Appellate Tribunal). *European Commission* [online]. [cit. 8. 5. 2021]. Available at: https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159401.pdf; Art. 3.54 para. 4 EU-Vietnam IPA. In the case of the EU-Singapore IPA, it is stipulated that the referral to the Tribunal is not optional but rather mandatory, see Art. 3.19 para. 3 EU-Singapore.

43 Art. 8.39 CETA, Art. 3.55 EU-Vietnam IPA, Art. 3.18 EU-Singapore IPA.

44 See THANVI, A. The Investment Court System under the EU-Canada Comprehensive Economic and Trade Agreement: Proposal and Some Unaddressed Issues. *Indian Journal of Arbitration Law*, 2019, Vol. 8, no. 2, p. 100; see also GAFFNEY, J. and S. NAPPERT. Investor-state disputes under new generation EU free trade and investment protection agreements. *Thomson Reuters Pracitical Law* [online]. 2020 [cit. 8. 5. 2021]. Available at: https://ca.practicallaw.thomsonreuters.com/w-025-6387?transitionType=Default&contextData=(sc.Default)

Having come to the conclusion about the hybrid nature of the ICS, the question regarding the enforceability of its awards is ever more important to address. For the NYC to be applicable, it is required that the award is either (a) made in the territory of a State other than the State where the recognition and enforcement of such award are sought[45] or to (b) awards not considered as domestic in the State where recognition and enforcement is sought.[46] The NYC applies to awards rendered in any state, whether or not a contracting state to the NYC.[47] The conditions for applying the NYC do not exclude one another, but rather complement each other. As was already mentioned, there is no indication of the location of the possible seat of the Tribunals. However even if the award was rendered in the territory of the state of enforcement, the award should still be considered as non-domestic in this state. This is because the awards rendered by the ICS might be considered "international awards" (or also "a-national") because they are not governed by any national law and therefore complying with the non-domestic criterium.[48]

Moreover, NYC Art. I para. 2 explains that the term "arbitral awards" shall include awards made by permanent arbitral bodies to which the parties have submitted. Permanency shall after all not be the issue when it comes to enforcement under the NYC. However, having mentioned the judicial aspects of the ICS, there might appear voices arguing against the ICS qualifying as an arbitral body.[49]

Also, the NYC offers to its signatories the option to declare that they will apply the Convention only to differences arising out of legal relationships, which are considered as commercial under the national law of the respective States

45 Art. 1 para. 1 NYC.

46 Ibid.

47 EHLE B. Commentary on Article I. In: WOLFF, R. (ed.). *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary*. Munich: Beck / Oxford: Hart Publishing/Baden-Baden: Nomos, 2012, pp. 26 and 56.

48 See New York Convention Guide, Art. I(C)(b). *United Nations UNCITRAL* [online]. [cit 8. 5. 2021]. Available at: https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=617&opac_view=-1

49 Notwithstanding the potential debate, the author of this paper is of the opinion that the ICS shall after all qualify as an arbitral body, given its similarities with the Iran-US Claims Tribunal, which had been found complying with the concept of arbitral body stipulated in the NYC; further see Judgment of the US Court of Appeals, Ninth Circuit of 23 October 1989, Case No. 88-5879, 88-5881.

making such declaration. To address this potential issue with enforcement of the Tribunals' awards, all of the EU's IPAs carry a provision indicating, that for the purposes of the NYC, the awards issued by the Tribunals are deemed to relate to claims arising out of a commercial relationship or transaction.[50]

Ultimately, the NYC requires an agreement in writing under which the parties submit their dispute to arbitration.[51] Yet again, the EU's IPAs do address this issue and provide that the consent given by the parties to the respective agreements taken together with the submission of a claim to the Tribunals shall satisfy the requirements of the NYC for an agreement in writing.[52]

In conclusion, although not being crystal clear, it appears that the Tribunals' awards shall be enforceable under the NYC.

6 Conclusion

In the effort made to address the issues created by the shortcomings of the legal texts, it became apparent that the respective IPAs are very much alike. The reason can be most likely explained by the negotiating position of the EU in the international community and its strong determination to reform the established ISDS system. Given these factors, the contracting partners to the IPAs had probably a limited space for demanding desired alterations to the concept proposed by the EU. Moreover, the similarities between the IPAs are desirable also for the purpose of creating the MIC. Merging of identical Tribunals may come with the benefit of not having to interfere with potential ongoing proceedings, although the administrative load probably would still be enormous.

It has been found that the nature of the ICS holds significant judicial characteristics, mainly the reduction of party autonomy. Also, the intention to make the proceedings accessible to the public should not be overlooked. Despite these modifications, its creator still wished for the ICS to comply

50 Art. 8.41 para. 5 CETA, Art. 3.57 para. 7 EU-Vietnam IPA, Art. 3.22 para. 5 EU-Singapore IPA.

51 Art. 2 para. 1 NYC.

52 Art. 8.25 para. 2 letter b) CETA, Art. 3.36 para. 4 letter b) EU-Vietnam IPA, Art. 3.6 para. 2 letter b) EU-Singapore IPA.

with the definitions of arbitral bodies. The result can't be anything else but a hybrid system.

Whether this system shall find its use or not will be clear only once it begins operating. However, given the number of resources that the EU and its contracting counterparts have spent on the creating of the ICS, one would find it difficult to imagine them abandoning the system despite it resulting unsatisfactory.

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EU and Its New Mechanism for the ISDS in the Protection of FDI – What the Future Holds?

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Abstract

The contribution deals with two debates that are taking place within the EU. Internally inside the EU about a possible alternative to ISDS, if any is needed. Specifically, the questions are: *what are the possibilities? And how does the progress in the EU looks like?* Externally, with non-EU countries via bilateral agreements, free trade agreements and globally within UNCITRAL.

Keywords

ISDS; Reform of International Investment Arbitration; EU; BIT; FDI; Achmea; Intra-EU; Extra-EU; FTA; ICS; CETA; UNCITRAL; MIC.

1 Introduction

International investment law is a branch of law that emphasises the protection of foreign investments. International investment law developed from the mixture of general international law, general standards of economic law, and distinct rules peculiar in its domain. The primary purpose of international investment law is to provide foreign investors with the protection of their investments against interference by the host state where the investor operates.[1] The international investment law has become a needful tool over the last century, especially after World War II.[2] From the 1950s, there was an expansion of the international capital market, and the idea is that the flow of capital was supposed to increase

1 DOLZER, R. and C. SCHREUER. *Principles of International Investment Law*. Oxford: Oxford University Press, 2008, pp. 1–3.
2 Ibid.

the economic development of states involved in international investments.[3] The legal sources of the international investment law are mainly bilateral investment treaties ("BITs"), investment chapters of free trade agreements ("FTAs") and regional treaties.[4] Today the BITs are the most common legal source of international investment law. Moreover, since the first BIT was signed between Germany and Pakistan in 1959,[5] BITs have spread widely.[6] In November 2021, United Nations Conference on Trade and Development ("UNCTAD") registered 2258 BITs in force and 324 treaties with investment provisions.[7]

Investment law provides for substantive guarantees.[8] International investment arbitration is the procedural mechanism that guarantees the procedural guarantees.[9] Also, most international investment treaties include a provision enabling investor-state dispute settlement ("ISDS") mechanism for resolving disputes.[10] The ISDS is one of the pivotal elements of international investment arbitration, and has turned the investment

3 AKYÜZ, Y. and A. CORNFORD. Capital flows to developing countries and the reform of the international financial system. *UNCTAD* [online]. November 1999, pp. 1–7 [cit. 25. 5. 2021]. Available at: https://unctad.org/system/files/official-document/dp_143.en.pdf

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5 Germany–Pakistan BIT (1959). *Investment Policy Hub* [online]. [cit. 25. 5. 2021]. Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bits/1732/germany---pakistan-bit-1959-

6 SORNARAJAH, M. *The International Law and Foreign Investment*. Cambridge: Cambridge University Press, 2010, pp. 1–7.

7 International Investment Agreements Navigator. *Investment Policy Hub* [online]. [cit. 25. 5. 2021]. Available at: https://investmentpolicy.unctad.org/international-investment-agreements

8 For example, national treatment, most favoured nation and fair and equitable treatment ("FET"), et cetera. DOLZER, R. and C. SCHREUER. *Principles of International Investment Law*. Oxford: Oxford University Press, 2008, pp. 220–222.

9 EUROPEAN COMMISSION. Factsheet on Investor-State Dispute Settlement. *SICE* [online]. 3. 10. 2013, p. 1 [cit. 22. 11. 2021]. Available at: http://www.sice.oas.org/tpd/USA_EU/Studies/tradoc_151791_Investor-State_Dis_e.pdf

10 POHL, J., K. MASHIGO and A. NOHEN. OECD Working Papers on International Investment - Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey. *OECD Publishing* [online]. February 2012, p. 10 [cit. 22. 11. 2021]. Available at: https://www.oecd.org/daf/inv/investment-policy/WP-2012_2.pdf

law into the instrument it is today.[11] Therefore, under these provisions, foreign investors have access to resolve the disputes with the other state via arbitration instead of relying on their home states to pursue their claims through diplomatic protection.[12] However, ISDS system is now being challenged by the states involved because they are not convinced if ISDS fulfils its desired goals. Furthermore, whether the price that states must pay is not unnecessarily high, specifically in the form of the awarded compensation or relinquishing certain privileges and the states' rights. Here are some of the examples of the current and emerging issues about ISDS from the states' perspective: who precisely is the investor under the treaty,[13] the costs of ISDS cases,[14] remedies for foreign investors under investment treaties and their possible impact on a level playing field for domestic and foreign investors,[15] the enforcement and execution of ISDS awards,[16] third party financing of ISDS,[17] the characteristics, selection and regulation of arbitrators in ISDS,[18] forum shopping and treaty shopping by investors, the question of the consistency of decision-making in ISDS,[19] the transparency (or better non-transparency) of the ISDS cases[20] and

11 UNCTAD. Reform of Investor-State Dispute Settlement: In Search of a Roadmap. *UNCTAD* [online]. 23. 6. 2013, p. 2 [cit. 22. 11. 2021]. Available at: https://unctad.org/system/files/official-document/webdiaepcb2013d4_en.pdf; Investor-State Dispute Settlement (ISDS). *Thomson Reuters Practical Law* [online]. [cit. 22. 11. 2021]. Available at: https://uk.practicallaw.thomsonreuters.com/0-624-6147?transitionType=Default&contextData=(sc.Default)&firstPage=true

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14 Ibid., p. 19.

15 Ibid., p. 24.

16 Ibid., p. 30.

17 Ibid., p. 36.

18 Ibid., p. 43.

19 Ibid., p. 51.

20 ROBERTS, A. and Z. BOURAOUI. UNCITRAL and ISDS Reforms: Concerns about Costs, Transparency, Third Party Funding and Counterclaims. *EJIL:Talk!* [online]. 6. 6. 2018 [cit. 22. 11. 2021]. Available at: https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-costs-transparency-third-party-funding-and-counterclaims/

an effect on the states' ability to govern issues inside their country without a possibility that some foreign investors would not like the new legislative.[21]

The discussion about the need and form of international investment arbitration reform echoes between states and other important international actors.[22] Especially in the United Nations Commission on International Trade Law ("UNCITRAL") and within the European Union ("EU"). It can be easily estimated that the EU is one of the main actors and promoters in this global debate.[23]

There are currently two wholly separate but parallel debates, one outside the EU and the other inside the organisation itself. In both, the EU plays a significant role. However, the debates are different. Therefore, there needs to be a distinction between them, and they need to be analyzed separately. The intra-EU debate considers a need to develop a new mechanism inside the EU, a unique international organisation that created its own legal subsystem. In addition, by acceding to the EU, Member States grant the EU part of their sovereignty necessary to fulfil the common goals. The Court of Justice of the European Union ("CJEU"), in the Achmea judgment, stated that the arbitration clauses are incompatible with the EU law. Therefore, it is necessary to revise inside the EU the need to invent an alternative intra-EU mechanism. On the other hand, the extra-EU debate concerns

21 See, e.g., Final Award of PCA of 2 May 2018, *Antaris Solar GmbH and Dr. Michael Göde vs. Czech Republic*, Case No. 2014-01; Final Award of PCA of 15 May 2019, *WA Investments Europa Nova Ltd. vs. Czech Republic*, Case No. 2014-19; Final Award of PCA of 15 May 2019, *I.C.W. Europe Investments Limited vs. Czech Republic*, Case No. 2014-22; Final Award of ICSID of 21 October 2019, *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) vs. Kingdom of Spain*, Case No. ARB/13/31.

22 SKOVGAARD PAULSEN, L. and G. GERTZ. Reforming the investment treaty regime: A 'backward-looking' approach. *Brookings* [online]. 17. 3. 2021 [cit. 25. 5. 2021]. Available at: https://www.brookings.edu/research/reforming-the-investment-treaty-regime/

23 The EU moves forward efforts at UN on multilateral reform of ISDS. *European Commission* [online]. 18. 1. 2019 [cit. 25. 5. 2021]. Available at: https://trade.ec.europa.eu/doclib/press/index.cfm?id=1972; HALLAK, I. Multilateral Investment Court: Overview of the reform proposals and prospects. *European Parliament* [online]. January 2020 [cit. 25. 5. 2021]. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf; MEIJER, G., K. SCHWEDT and X. TATON. State of Play of EU Investment Protection: Investor-State Arbitration Laws and Regulation. *ICLG* [online]. 16. 11. 2020 [cit. 25. 5. 2021]. Available at: https://iclg.com/practice-areas/investor-state-arbitration-laws-and-regulations/4-state-of-play-of-eu-investment-protection

the global discussion caused by dissatisfaction in the global field. However, it does not aim to unify the objectives within a legal subsystem which would not be possible at the global level, but to address global concerns and create a compromise between states, as the individual delegations in the UNCITRAL negotiations are trying to do.

This piece aims to outline the possible forms of both intra-EU and extra-EU reforms. The second chapter appraises the readers of the background, which led to the current situation, and highlights the intra-EU possible forms in the ISDS. The third chapter deliberates upon the mechanisms developed in the FTAs solely for the disputes with countries outside the EU and the process of the establishment of the Multilateral Investment Court ("MIC").

2 Intra-EU Debate

2.1 Background of the Debate

Some Member States and the Commission used to discuss whether intra-EU BITs are compatible with EU law.[24] One of the expressed concerns was that the provisions in the intra-EU BIT might lead to the more favourable treatment of investors who are nationals of Member States party to the BIT by excluding the same protection to investors from the other Member States. That conduct could lead to discrimination based on the nationality of the foreign investor.[25] Conversely, another discussed matter was whether if the EU law unable the possibility of intra-EU ISDS, it would be the end of efficient and protection of foreign direct investment ("FDI"). The turning point of this debate was the Achmea judgment,[26] wherein the CJEU held that the arbitration clauses in intra-EU BITs are incompatible with the EU law.[27]

24 LAVRANOS, N. The Impact of EU Law on ISDS. In: *International Comparative Legal Guides: Investor-State Arbitration 2021*. London: Global Legal Group, 2020, p. 5.

25 KRAUSE, C. von. The European Commission's Opposition to Intra-EU BITs and Its Impact on Investment Arbitration. *Kluwer Arbitration Blog* [online]. 28. 10. 2010 [cit. 22. 11. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2010/09/28/the-european-commissions-opposition-to-intra-eu-bits-and-its-impact-on-investment-arbitration/

26 Judgment of the CJEU of 6 March 2018, Case C-284/16.

27 HINDELANG, S. The Limited Immediate Effects of CJEU's Achmea Judgement. *Verfassungsblog* [online]. 9. 3. 2018 [cit. 25. 5. 2021]. Available at: https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement/

Specifically, in this judgment, the CJEU ruled that the ISDS clause included in the Netherlands–Czechoslovakia BIT was incompatible with EU law.[28] The crucial reason for this reasoning was that according to the CJEU, arbitral tribunals operate "outside" the domestic legal system of the Member States; hence they cannot request preliminary rulings from the CJEU whenever the interpretation of the EU law is at stake.[29] The CJEU specifically stated: *"In the present case, however, apart from the fact that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation both of that agreement and of EU law, the possibility of submitting those disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by the Member States. Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the precise nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation referred to in paragraph 34 above."*[30] In other words, investment arbitral tribunals operate outside the scope of the CJEU, and they might jeopardise the uniformity, consistency and harmonized interpretation of EU law. Moreover, it could undermine the authority of the CJEU as a conclusive interpretative body of the EU law.

In January 2019, three political Declarations were adopted. Each clarifies the possible implications of the results of the Achmea judgment[31] and the agreed approach of the Member States on the future of the intra-EU ISDS.[32]

In May 2020, some Member States signed the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European

28 LAVRANOS, N. The Impact of EU Law on ISDS. In: *International Comparative Legal Guides: Investor-State Arbitration 2021*. London: Global Legal Group, 2020, p. 5.

29 Judgment of the CJEU of 6 March 2018, Case C-284/16, para 42.

30 Ibid., para 58.

31 LAVRANOS, N. The Impact of EU Law on ISDS. In: *International Comparative Legal Guides: Investor-State Arbitration 2021*. London: Global Legal Group, 2020, p. 5.

32 BRAY, D. and S. KAPOOR. Agreement on the Termination of Intra-EU BITs: Sunset in Stone? *Kluwer Arbitration Blog* [online]. 4. 11. 2020 [cit. 25. 5. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/11/04/agreement-on-the-termination-of-intra-eu-bits-sunset-in-stone/

Union ("Termination Agreement"),[33] which, after the ratification of the signing member states, terminates the intra-EU BITs.[34] However, some states have not signed it – the UK (for obvious reasons based on Brexit and the Withdrawal Agreement), Ireland (already terminated its BITs), Finland, Austria and Sweden (have committed to terminating their BITs bilaterally).[35] Furthermore, the Commission has issued formal infringement notices to Finland as well as to the UK.[36] The Termination Agreement entered into force on 29 August 2020, after Denmark (on 6 May 2020) and Hungary (on 30 July 2020), the first two EU Member States were out of the 23 signatories to ratify the Termination Agreement.[37] With the ratification of the Termination Agreement, the intra-EU ISDS cease to exist.

The Termination Agreement reproduces the outcomes of the Achmea judgment and the principal values of the Declarations mentioned above.[38] Thus, all intra-EU BITs and disputes based on them are declared incompatible with EU law. New intra-EU BIT arbitrations should not be initiated,[39] as Art. 5 of Termination Agreement states that arbitration clauses in intra-EU BITs *"shall not serve as the legal basis for New Arbitration Proceedings."*[40] The Termination Agreement requires that the Member

33 Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (Termination Agreement). *EUR-Lex* [online]. 29. 5. 2020 [cit. 25. 5. 2021]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22020A0529%2801%29

34 LAVRANOS, N. The Impact of EU Law on ISDS. In: *International Comparative Legal Guides: Investor-State Arbitration 2021*. London: Global Legal Group, 2020, p. 5.

35 Termination of intra-EU bilateral investment treaties: the UK – the last safe haven? *Dentons* [online]. 9. 11. 2020 [cit. 25. 5. 2021]. Available at: https://www.dentons.com/en/insights/articles/2020/november/9/termination-of-intra-eu-bilateral-investment-treaties; LAVRANOS, N. The Impact of EU Law on ISDS. In: *International Comparative Legal Guides: Investor-State Arbitration 2021*. London: Global Legal Group, 2020, p. 5.

36 Termination of intra-EU bilateral investment treaties: the UK – the last safe haven? *Dentons* [online]. 9. 11. 2020 [cit. 25. 5. 2021]. Available at: https://www.dentons.com/en/insights/articles/2020/november/9/termination-of-intra-eu-bilateral-investment-treaties

37 Agreement for the termination of intra-EU BITs enters into force. *Lexology* [online]. 8. 9. 2020 [cit. 25. 5. 2021]. Available at: https://www.lexology.com/library/detail.aspx?g=bdf7412c-5cd3-4e18-997b-a387fc25b044

38 LAVRANOS, N. The Impact of EU Law on ISDS. In: *International Comparative Legal Guides: Investor-State Arbitration 2021*. London: Global Legal Group, 2020, p. 5.

39 NEMESCSÓI, A., M. DESPLATS and S. DELI. The end of Intra-EU BITs. Now what? *DLAPIPER* [online]. 4. 8. 2020 [cit. 26. 5. 2021]. Available at: https://www.dlapiper.com/en/us/insights/publications/2020/08/the-end-of-intra-eu-bits-now-what/

40 Art. 5 Termination Agreement.

States inform arbitral tribunals about new or pending arbitrations that the arbitration clause contained within the relevant intra-EU BIT cannot serve as a legal basis for those proceedings.[41]

As it was already said, the Termination Agreement has precluded the possibility of investor-state arbitration within the EU and the BITs in total. However, not all the Member States have signed a Termination Agreement, and the fate of these intra-EU BITs is ambiguous.

2.2 What Now?

According to the author, following the Termination Agreement, a new mechanism had become an exigency to fill the rip legal vacuum in investment protection for intra-EU investors. According to the European Commission ("EC"), there is no gap to full after Achmea because the EU is operating on the principle of mutual trust; therefore, the EU law and Member States' national law covers the required protection of the foreign investors and investors' access to justice; hence the intra-EU BITs are no longer requirable. However, the EC suggested in its 2018 Communication[42] to *"provide guidance on existing EU rules for the treatment of cross-border EU investments."*[43]

However, providing just guidance seems insufficient based on the structure of the EU. According to the author, the EU pretends to be clear on the issue, although no statement that would clarify the matter has been issued. Although the EC has issued a consultation, it has not yet commented on how it would imagine the system would, could or should appear. It is somewhat strange that even though the EC seems to believe that it is sufficient to bring disputes arising from the FDI protection before national courts, why did it launch a consultation if it is a closed topic? Moreover, in the ongoing consultation, the EU clarifies the occasional incompetence of the courts. Hence, according to the author, just some guidance is not enough because silence disturbs

41 Termination of intra-EU bilateral investment treaties: the UK – the last safe haven? *Dentons* [online]. 9. 11. 2020 [cit. 25. 5. 2021]. Available at: https://www.dentons.com/en/insights/articles/2020/november/9/termination-of-intra-eu-bilateral-investment-treaties

42 Communication from the Commission to the European Parliament and the Council: Protection of intra-EU investment. *EUR-Lex* [online]. 19. 7. 2018 [cit. 25. 5. 2021]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0547&from=en

43 Ibid, p. 1.

the harmony inside the EU. Furthermore, Luxembourg and Portugal noted that similarly. Luxembourg called upon the EC and the Member States *"to start a process to ensure complete, strong and effective protection of investments within the EU and adequate instruments in this regard."*[44] Furthermore, Portugal *"called to assess the establishment of new or better tools under European Union law and to carry out an assessment of the current dispute settlement mechanisms which are essential to ensure legal certainty and the protection of interests of investors."*[45]

The issues are now to consider if the new mechanism should be even developed or not. And if yes, how it should be constructed for the beneficence of all involved parties. The EU has to consider the significant factor that investment disputes usually require specific sector skills and have significant interests at stake. Furthermore, the judicial systems of EU Member States often lack the efficiency and effectiveness required to render a timely and well-reasoned decision by competent adjudicators.[46] For future references, there are ***these possible approaches:***

1. Due to the implementation of the Termination Agreement, the legal protection will be based solely on EU or national protection, and claims will be brought before domestic courts.
2. EU will desire to invent an alternative mechanism to ISDS that will have to reflect the issues raised in Achmea judgment.

The EC issued a public consultation that should help solve the dilemma of the need of inventing a new mechanism.[47] However, the outcomes have

44 INGWERSEN, H. and K. SCHWEDT. Treaty to terminate intra-EU BITs enters into force. *Linklaters* [online]. 10. 9. 2020 [cit. 25. 5. 2021]. Available at: https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2020/september/treaty-to-terminate-intra-eu-bits-enters-into-force

45 Ibid.

46 LEIKIN, E., B. KASOLOWSKY and I. BORGDORF. The Future of Intra-EU Investment Protection: An Urgent Call for a New Roof and a Level Playing Field. *Kluwer Arbitration Blog* [online]. 7. 11. 2020 [cit. 25. 5. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/11/07/the-future-of-intra-eu-investment-protection-an-urgent-call-for-a-new-roof-and-a-level-playing-field/

47 Public Consultation Document an Intra-EU Investment Protection and Facilitation Initiative. *European Commission* [online]. [cit. 25. 5. 2021]. Available at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/2020-investment-protection-consultation-document_en.pdf; EC launches consultation on facilitating intra-EU investment. *IISD* [online]. 14. 7. 2020 [cit. 25. 5. 2021]. Available at: https://www.iisd.org/itn/2020/07/14/ec-launches-consultation-on-facilitating-intra-eu-investment/

not been presented yet. All citizens concerned organisations and actors were welcomed to participate.[48] Therefore, the consultation should provide much valuable and helpful information. Ideally, this consolation will help the EC develop the most efficient mechanism for intra-EU dispute resolution and show how these actors view the FDI protection under EU law.

However, as mentioned, this was just the brief intel into the issue of the substantive law, and the author thenceforward discusses only the procedural part.

2.2.1 How the Procedure Regarding Investor-State Disputes Should Look Like?

The only thing that is clear for now is that the intra-EU ISDS, as was known, is dead. Furthermore, a kind of vacuum has been created, so what now?

Some may say that the debate is over for the EU and the Member States and that intra-EU state-investor disputes will be resolved before national courts where the investor operates. That approach is entirely in line with the Achmea judgment and the CJEU argumentation. On the other hand, the EU is aware that some member states' domestic court systems can be unpredictable, time-consuming and ineffective.[49] Also, the EC is aware that the domestic courts (of at least some particular the Member States) have shown themselves unwilling or unable to hold national governments to account and apply the law in a truly neutral and impartial manner.[50] In addition, the CJEU ruled that, for example, the Polish courts are not sufficient and impartial.[51] Therefore, if the CJEU stated that in its ruling, the EU must consider that not all domestic courts can provide an efficient system; hence, creating an alternative system would be a suitable solution.

48 Cross-border investment within the EU – clarifying and supplementing EU rules – Public consultation. *European Commission* [online]. [cit. 25. 5. 2021]. Available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12403-Investment-protection-and-facilitation-framework/public-consultation

49 LEIKIN, E., B. KASOLOWSKY and I. BORGDORF. The Future of Intra-EU Investment Protection: An Urgent Call for a New Roof and a Level Playing Field. *Kluwer Arbitration Blog* [online]. 7. 11. 2020 [cit. 25. 5. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/11/07/the-future-of-intra-eu-investment-protection-an-urgent-call-for-a-new-roof-and-a-level-playing-field/

50 Ibid.

51 Judgment of the CJEU of 16 November 2021, Joined Cases C-748/19 and C-754/19.

Moreover, as mentioned earlier, investment disputes usually require specific sector skills and significant interests. And the judicial systems of EU Member States often lack the efficiency and effectiveness required to render a timely and well-reasoned decision by competent adjudicators. Finally, foreign investors often face a language barrier when litigating disputes before domestic courts in the host State's language.[52] Furthermore, investors do not see this option as an optimal solution based on the public consultation outcomes (at least what was published so far).[53]

Another possible option can be a new procedural mechanism altogether. This possibility has many alternatives, which the author outlines further in this article. The EU must consider that an effective procedural mechanism must provide for certain critical elements: 1) *expert and experienced adjudicators*; 2) *a reliable and impartial forum*; 3) *a neutral procedural language*; and 4) *the straightforward enforcement of decisions.*[54]

One option is establishing an arbitral forum administrated by the Permanent Court of Arbitration ("PCA") or creating the 'Unified Investment Court'.[55] The 'Unified Investment Court' would be an independent adjudication body

52 LEIKIN, E., B. KASOLOWSKY and I. BORGDORF. The Future of Intra-EU Investment Protection: An Urgent Call for a New Roof and a Level Playing Field. *Kluwer Arbitration Blog* [online]. 7. 11. 2020 [cit. 25. 5. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/11/07/the-future-of-intra-eu-investment-protection-an-urgent-call-for-a-new-roof-and-a-level-playing-field/

53 E.g., Position Paper of the German Insurance Association (GDV) on the Public consultation on an intra-EU investment protection and facilitation initiative. *European Commission* [online]. [cit. 25. 5. 2021]. Available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12403-Investment-protection-and-facilitation-framework/public-consultation_en

54 LEIKIN, E., B. KASOLOWSKY and I. BORGDORF. The Future of Intra-EU Investment Protection: An Urgent Call for a New Roof and a Level Playing Field. *Kluwer Arbitration Blog* [online]. 7. 11. 2020 [cit. 25. 5. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/11/07/the-future-of-intra-eu-investment-protection-an-urgent-call-for-a-new-roof-and-a-level-playing-field/

55 HINDELANG, S. The Limited Immediate Effects of CJEU's Achmea Judgement. *Verfassungsblog* [online]. 9. 3. 2018 [cit. 25. 5. 2021]. Available at: https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement/

similar to the Iran-United States Claims Tribunals.[56] And both of these possible approaches would need to be integrated into the EU legal system[57] to be compatible with the outcomes of the Achmea judgment.

Another approach is to create the 'EU Multilateral Investment Court'.[58] That would be a new international court with jurisdiction on intra-EU investment disputes.[59] Nevertheless, according to some experts, it would seem challenging to harmonise it with the EU's fundamental principles, particularly with the conditions set by the CJEU in Achmea.[60]

Both of the approaches mentioned in the last two paragraphs raise the question of the compatibility with the EU law and fundamental principles, as was discussed in the Achmea judgment. Furthermore, as was, for example, raised in the times of the EU's accession to the European Convention on Human Rights. The relevant solution would be strictly up to the EU and its perspective on this issue. However, according to the author, the solution could be that the EU would enable this adjudicatory body to start a preliminary ruling and raise questions.

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56 ANDERSEN, T. and S. HINDELANG. The Day after: Alternatives to intra-EU BITs. *Journal of World Investment & Trade*, 2016, Vol. 17, no. 6, pp. 984–1014; HINDELANG, S. The Limited Immediate Effects of CJEU's Achmea Judgement. *Verfassungsblog* [online]. 9. 3. 2018 [cit. 25. 5. 2021]. Available at: https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement/; LEIKIN, E., B. KASOLOWSKY and I. BORGDORF. The Future of Intra-EU Investment Protection: An Urgent Call for a New Roof and a Level Playing Field. *Kluwer Arbitration Blog* [online]. 7. 11. 2020 [cit. 25. 5. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/11/07/the-future-of-intra-eu-investment-protection-an-urgent-call-for-a-new-roof-and-a-level-playing-field/

57 HINDELANG, S. The Limited Immediate Effects of CJEU's Achmea Judgement. *Verfassungsblog* [online]. 9. 3. 2018 [cit. 25. 5. 2021]. Available at: https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement/

58 ORECKI, M. Foreign Investments in Poland in Light of the Achmea Case and "Reform" of Polish Judicial System – Catch 22 Situation? *Kluwer Arbitration Blog* [online]. 22. 4. 2018 [cit. 25. 5. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2018/04/22/foreign-investments-poland-light-achmea-case-reform-polish-judicial-system-catch-22-situation/?doing_wp_cron=1598448710.7851428985595703125000; Multilateral investment court: Council gives mandate to the Commission to open negotiations – press release. *consilium.europa.eu* [online]. 20. 3. 2018 [cit. 25. 5. 2021]. Available at: https://www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations/

59 Ibid.

60 Judgment of the CJEU of 6 March 2018, Case C-284/16.

The alternative approach in the form of the "European Investment Court"[61] is also discussed between experts. It would be a hybrid system comprised of *ad hoc* adjudicatory bodies. It would allow the delivery of timely decisions and the appointment of adjudicators with specific sector skills while providing for an appeal mechanism for manifest errors of law to a permanent body embedded within the EU judicial system. It could be created either as a specialized chamber of the EU's General Court in Luxembourg or as a joint court to all Member States. The court would maintain a preselected roster of arbitrators authorized to hear the investment dispute. Furthermore, operating as an appellate court for setting-aside decisions.[62] This option might establish the necessary link to the judicial system of the Member States and of the EU, which the CJEU said in the Achmea decision that was crucially missing for current arbitral tribunals.[63] Therefore based on the above-mentioned, the author views this approach as the probably most efficient one. But just in theory. The problem is that only the practice can show how this solution would work as a result of the matter.

The last-mentioned option in this chapter is the creation of new specialized courts within the existing judicial system of the Member States.[64] The model for this option could be the mechanism of the investment disputes resolution of Singapore International Commercial Court,[65] the Astana International Financial Centre Court,[66] or the Dubai International Financial Centre Courts.[67] The advantages of this approach are competent,

61 It was proposed by Paschalis Paschalidis. The pressing need for a European investment court. *GAR* [online]. 10. 2. 2020 [cit. 25. 5. 2021]. Available at: https://globalarbitrationreview.com/the-pressing-need-european-investment-court

62 Ibid.

63 Judgment of the CJEU of 6 March 2018, Case C-284/16.

64 LEIKIN, E., B. KASOLOWSKY and I. BORGDORF. The Future of Intra-EU Investment Protection: An Urgent Call for a New Roof and a Level Playing Field. *Kluwer Arbitration Blog* [online]. 7. 11. 2020 [cit. 25. 5. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/11/07/the-future-of-intra-eu-investment-protection-an-urgent-call-for-a-new-roof-and-a-level-playing-field/

65 Overview of the SICC. *SICC* [online]. [cit. 25. 5. 2021]. Available at: https://www.sicc.gov.sg/about-the-sicc/overview-of-the-sicc

66 The Astana International Financial Centre (AIFC) Court. *SIFOCC* [online]. [cit. 25. 5. 2021]. Available at: https://sifocc.org/countries/kazakhstan/

67 Dubai International Financial Centre. *DIFC* [online]. [cit. 25. 5. 2021]. Available at: https://www.difc.ae/

internationally experienced judges, time-efficient case management, flexible procedural rules and English-language proceedings.[68] However, similarly to other mentioned approaches, there could be a problem harmonising this approach with the EU law and the Achmea ruling because this approach desires to create the extra-territorial body.

All of the above-mentioned approaches are just suggestions; however, the EU has not proposed any possibility other than resolving the disputes before domestic courts. As the author stated in a few paragraphs above, that is not the most efficient solution. According to the author, the best resolution would be the creation of the European Investment Court, but the EU would need to secure that this approach would be properly implemented into the EU law and reflect the issues raised in Achmea. Nonetheless, it seems that the EU does not perceive the resolution before the national courts as an issue; hence the question of whether the EU would create an alternative remains unanswered.

3 Extra-EU Debate

Alongside the intra-EU debate, the other parallel discussion is being negotiated. Many states are not satisfied with the current system; hence they try to invent a reform of the current ISDS. There are many discussed issues, but just to give an example, the States are not satisfied with the level of transparency (or better to say non-transparency) of the proceedings, with the system of appointment of arbitrators, and even some of them would like to have a possibility of the appeal. Also, some states view the ISDS as an intervention into its sovereignty since an extra adjudicatory body decides the disputes involving the states.

The extra-EU debate is built on different issues that the intra-EU, some countries are not satisfied with the current system and try to reform it. From the EU's point of view, there are two levels of extra-EU debate, one taking

68 LEIKIN, E., B. KASOLOWSKY and I. BORGDORF. The Future of Intra-EU Investment Protection: An Urgent Call for a New Roof and a Level Playing Field. *Kluwer Arbitration Blog* [online]. 7. 11. 2020 [cit. 25. 5. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/11/07/the-future-of-intra-eu-investment-protection-an-urgent-call-for-a-new-roof-and-a-level-playing-field/

place at the bilateral level between the EU and third countries, the other taking place in the field of UNCITRAL. And why this distinction between these two levels? The advocate for the reform on the bilateral level between the EU and third countries is more accessible to accomplish through trade policy. Howbeit, that is not that easy within UNCITRAL, since there are many delegations with even slightly different opinions on the matter.

3.1 EU and Extra-EU Debate Taking Place on the Bilateral Level

The EU has determined the possibility of the ISDS between the Member States. Since the Lisbon Treaty entered into force, the EU has exclusive competence to negotiate investment protection agreements with third countries.[69] And since 2011, when the negotiations on Transatlantic Trade and Investment Partnership ("TTIP") were taking place, the EU has faced many controversies that these negotiations have brought. Especially from non-governmental organisations and the Member States, who have debated whether ISDS is the right solution to disputes in this area. The negotiations about the ISDS mechanism 'shipwrecked'; but the EU decided to propose establishing the Investment Court System ("ICS").[70] According to the EC, the ICS will provide clear rules applied by impartial judges through a transparent and neutral process in the interest of States and investors. The ICS should provide a neutral venue for the settlement of investment disputes. In contrast to ISDS, ICS is supposed to be a more cost-effective and faster investment dispute resolution system.[71]

The first discussed agreement is the TTIP between the EU and the USA, which has never been finalized. One of the disagreements between

69 Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishes a framework for screening foreign direct investments into the Union transitional arrangements for bilateral investment agreements between the Member States and third countries.

70 HALLAK, I. Multilateral Investment Court: Overview of the reform proposals and prospects. *European Parliament* [online]. January 2020 [cit. 25. 5. 2021]. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf

71 EUROPEAN COMMISSION – Memo. Why the new EU proposal for an Investment Court System in TTIP is beneficial to both States and investors. *European Commission* [online]. 12. 11. 2015 [cit. 28. 5. 2021]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_6060

the parties was about the investment chapter. The EU wanted the ICS system, a new approach as a pre-step towards the reform on the global level. The USA preferred the current ISDS system. In 2019 the negotiations were put on hold. Furthermore, the near future will show if President Biden will continue with the negotiations after President Trump, who was not a big fan of this agreement. The author sees the situation over the TTIP as an excellent example when the actors have a different point of view on the reform. As one of the leading promoters of global reform, the EU wants to start the reform with its partners. The US is quite satisfied with the current system and not very fond of the possible changes.[72]

The WTO Dispute Settlement System inspires the ICS, and it is a semi-permanent, two-tier, court-like system that is significantly distant from arbitration. The ICS would consist of a first instance tribunal with fifteen members and an appellate tribunal of six members. The investor would not have any power over selecting the tribunal members. The Contracting Parties would appoint all members by joint agreement.[73] The EC has announced a tender for the candidates for dispute settlement activities under EU trade and investment agreements with third countries.[74] In December 2020, the EC issued a decision to create a panel of independent experts who would assist the EC in selecting candidates that would be applied to exercise the roles of trade law arbitrators, experts and investment adjudicators in dispute settlement mechanisms under EU agreements.[75] The EU has successfully negotiated ICS implementation into the FTAs with Canada,

72 TIP draft to be prepared by July; ISDS being built based on both EU and U.S. proposals. *IISD* [online]. 16. 5. 2016 [cit. 28. 5. 2021]. Available at: https://www.iisd.org/itn/en/2016/05/16/ttip-draft-to-be-prepared-by-july-isds-being-built-based-on-both-eu-and-u-s-proposals/; The Transatlantic Trade and Investment Partnership (TTIP). *European Commission* [online]. [cit. 28. 5. 2021]. Available at: https://ec.europa.eu/trade/policy/in-focus/ttip/

73 LAVRANOS, N. The Impact of EU Law on ISDS. In: *International Comparative Legal Guides: Investor-State Arbitration 2021*. London: Global Legal Group, 2020, p. 6.

74 Candidates for dispute settlement activities under EU trade and investment agreements. *European Commission* [online]. 18. 12. 2020 [cit. 25. 5. 2021]. Available at: https://trade.ec.europa.eu/doclib/press/index.cfm?id=2224

75 Selection panel. *European Commission* [online]. 18. 12. 2020 [cit. 25. 5. 2021]. Available at: https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159205.pdf

Vietnam, Singapore, and Mexico to accept the ICS system in the new FTAs,[76] which will be discussed in this subsection.

The EU negotiated or is negotiating quite an amount of the FTAs with countries all around the world.[77] Some are already in force (e.g., EU-Canada FTA, EU-Mexico FTA, EU-Japan FTA, EU-South Korea FTA, or EU-Vietnam FTA).[78] However, some of them have been adopted not ratified yet (e.g., EU-China Comprehensive Agreement on Investment, EU-Vietnam Investment Protection Agreement).[79] Some of them are being negotiated (e.g., EU-Australia FTA or EU-New Zealand FTA).[80] And with some countries, the EU has never reached an agreement, or the negotiations were put on hold (e.g., FTA with the USA called TTIP).[81] As mentioned earlier, the EU is trying to implement into these agreements the ICS mechanism. In the following paragraphs, the author briefly outlines CETA[82] and TTIP[83] as two counterparts of the debate.

The EU negotiated the Canada-EU Trade Agreement with the northern neighbour of the USA, and both of the parties agreed on the use of the ICS system. CETA provisionally came into force in 2017.[84] And even though the ICS is implemented in CETA, it has not been used in practice yet as the EU issued a tender for the appointment of the panel of arbiters. Even though the CJEU rendered its Opinion 1/17 in 2017, which stated that ICS, as contained in CETA, is compatible with EU law.[85] The CETA agreement will show in practice if the reform could be successful; however, any result could not be seen since the ICS has not yet been field-tested. It is pretty strange

76 LAVRANOS, N. The Impact of EU Law on ISDS. In: *International Comparative Legal Guides: Investor-State Arbitration 2021*. London: Global Legal Group, 2020, p. 6.

77 EU trade agreements 2021. *European Commission* [online]. [cit. 28. 5. 2021]. Available at: https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159174.pdf

78 Ibid.

79 Ibid.

80 Ibid.

81 Ibid.

82 CETA – EU – Canada Comprehensive Economic and Trade Agreement.

83 TTIP – Transatlantic Trade and Investment Partnership between EU and USA.

84 EU-Canada trade agreement (CETA) enters into force. *EUR-Lex* [online]. [cit. 28. 5. 2021]. Available at: https://eur-lex.europa.eu/content/news/eu_canada_trade_agreement-ceta.html

85 LAVRANOS, N. The Impact of EU Law on ISDS. In: *International Comparative Legal Guides: Investor-State Arbitration 2021*. London: Global Legal Group, 2020, p. 6.

that even though the EU had the consensus since 2017, the creation is still not completed. Also, the EU and Canada are both promoters of the MIC, and it seems that the establishment of ICS is a pre-step of the formation of MIC.[86]

The future of ISDS, based on the agreements currently being concluded by the EU, seems to have a relatively straightforward goal, namely that the EU is trying to overthrow a reformed system in the form of ICS, which could gradually lead to the emergence of a MIC.[87] However, not all countries identify with this system, so it is questionable how the EU will advocate this type of reform.

3.2 The Creation of MIC

The creation of the MIC is one of the possible reforms of ISDS on the global level.[88] Furthermore, as mentioned many times above, the EU is one of the leading promoters of establishing MIC in the UNCITRAL Working Group III.[89] In 2017 the EU, Canada and Mauritius proposed in UNCITRAL the creation of a working group, which should identify and examine the current ISDS system's issues and come up with possible solutions.

The prime proposal is to set up a two-tier international investment court composed of a first instance court and an appeal body. MIC would adjudicate claims brought under investment treaties that member states of UNCITRAL have assigned to its authority. Both of its bodies would be staffed by tenured adjudicators chosen and remunerated permanently by the member states and assisted by a secretariat.[90] In October 2020, the draft statute of MIC was presented, and so far, it seems that the MIC will be composed of "The Plenary Body", "Judges of the MIC", "The Advisory

86 HALLAK, I. Multilateral Investment Court: Overview of the reform proposals and prospects. *European Parliament* [online]. January 2020 [cit. 25. 5. 2021]. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf

87 Ibid.

88 Ibid.

89 LAVRANOS, N. The Impact of EU Law on ISDS. In: *International Comparative Legal Guides: Investor-State Arbitration 2021*. London: Global Legal Group, 2020, pp. 6–7.

90 CROISANT, G. Multilateral Investment Court. *JUS MUNDI* [online]. 17. 2. 2021 [cit. 28. 5. 2021]. Available at: https://jusmundi.com/en/document/wiki/en-multilateral-investment-court

Centre", and "The Secretariat."[91] However, the precise structure is still being negotiated, and the result will be based on the outcome of ongoing international negotiations.[92]

Even the EU, Canada and many other countries are convinced that the formation of MIC is the right choice; many states are not convinced at all. For example, the USA and UK are some of them.[93] On the other hand, it seems that the EU desires to succeed in the creation of MIC. That may seem obvious from the FTAs' negotiations between the EU and third countries, where the EU tries to implement the ICS. According to the EU, the ICS provision in the FTA should smooth the ICS transition towards MIC.[94]

Even though the EU seems quite sure about the establishment of MIC, the reality may be different, and there is no guarantee if the MIC will be created and, if yes, then when. Why? It may take years or even decades to pursue such a reform; however, it heads towards the right direction. Furthermore, the negotiations are now taking place; for example, the 41st session of the UNCITRAL Working Group III takes place on 15 November 2021.

4 Conclusion

As it is recognisable from the article, it is necessary to distinguish between the intra-EU and extra-EU debates. Although both debates are linked by EU involvement, they are built on slightly different goals and different proposals.

91 BUNGENBERG, M. and A. REINISCH. Draft Statute of the Multilateral Investment Court. *UNCITRAL* [online]. November 2020 [cit. 28. 5. 2021]. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/bungenberg_reinisch_draft_statute_of_the_mic.pdf; See Art. 3 Draft statute of MIC.

92 CROISANT, G. Multilateral Investment Court. *JUS MUNDI* [online]. 17. 2. 2021 [cit. 28. 5. 2021]. Available at: https://jusmundi.com/en/document/wiki/en-multilateral-investment-court

93 U.S. officials raise concerns over proposed MIC in talks with the United Kingdom, documents say. *IISD* [online]. 17. 12. 2019 [cit. 28. 5. 2021]. Available at: https://www.iisd.org/itn/en/2019/12/17/u-s-officials-raise-concerns-over-proposed-mic-in-talks-with-the-united-kingdom-documents-say/

94 HALLAK, I. Multilateral Investment Court: Overview of the reform proposals and prospects. *European Parliament* [online]. January 2020, p. 2 [cit. 25. 5. 2021]. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf

Concerning the intra-EU debate, the problem is built around the discussion of whether the national courts of the Member States are competent and qualified to resolve the disputes arising from the protection of FDI or whether the new alternative development is required. The domestic courts meet the requirements set in Achmea judgment. On the other hand, according to the author, some of the alternative approaches may seem more efficient, the creation and implementation of such system would be more difficult. From the author's point of view, all the possible alternative solutions mentioned in the article could, under the proper gestation and implementation, serve the desired purpose very well. However, that would depend on how the EU and the Member States handle the creation of the alternative mechanism. In compliance with the author's point of view based on the available information, establishing the European Investment Court or creating new specialized courts within the Member States' existing judicial system seems the two best options. The European Investment Court could provide the "best of both worlds", because it is a hybrid system of *ad hoc* adjudicatory bodies and the court of appeal.

Moreover, it would be created under the EU authority; therefore, it would serve the whole organisation. Another great option is to create new specialized courts within the existing judicial system of the Member States. Nevertheless, as mentioned multiple times in the article, both of the mentioned approaches would need to fulfil the requirements set in the Achmea judgment and Termination Agreement.

There are two levels of discussions in the bilateral level between the EU and the third states in the extra-EU debate. Within this debate, the EU has the authority to negotiate the agreements; hence, the EU can engineer its visionary reforms through these treaties. Specifically, via them, it seeks to enforce ICS, which is a pre-step for creating the MIC. On the global level, the EU can try to pursue its goal; however, the EU needs to consider many other states with other opinions on the matter. The formation of MIC could bring some transparency, effectiveness and sufficiency into the ISDS on the procedural level. However, the creation will be a tardy process.

Also, the possibility of the succession of the results is slightly different. If we look at possible implementation, it is more likely that the intra-EU debate

will be resolved faster than at the global level, specifically in UNCITRAL, where it is often complicated (challenging) for states to agree on something so fundamental. There is no clear answer to the problem. Instead, it raises more and more questions. Furthermore, just time, negotiations, and the EU/worldwide opinion will clear it up.

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(Un)Clean Hands in International Investment Arbitration: Some Cleaning Required?

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Abstract

The aim of the paper is to examine the so-called doctrine of clean hands frequently utilized as a defence in Investor-State arbitration procedures under international investment agreements in cases, where the law of the host State has been violated. The paper thus provides a historical and comparative context of the doctrine at hand stemming from the common law tradition. Furthermore, it scrutinizes the status of the doctrine under contemporary international law by analysing the scholar views, as well as the jurisprudence of international bodies.

Keywords

Clean Hands Doctrine; General Principles of Law; Investment Arbitration; Comparative Law.

1 Introduction

Cases of corruption, fraud, or other violations of host State laws are no exceptions in international investment disputes. Regularly, the scenarios may be summarized by a situation where the investor faces the potential direct, or indirect expropriation by a State that pursues the misconduct committed by the investor. More often, than not, such cases involve high stakes. In this regard the so-called doctrine of clean hands may seem as an ideal defence for the host State, barring any further claims of the corrupt, or fraudulent investor. However, the status of the doctrine throughout the history of international law, as well as in the international investment arbitration has been at the very least controversial. Therefore, the present paper aims to clarify

the formal status of the doctrine under international law and its involvement in the investment disputes, as compared to the roots of the doctrine. Hence, the paper will be dealing with the historical and theoretical foundations of the doctrine in a comparative perspective, analysing both common-law, as well as civil-law jurisdictions. Then it will proceed to assess the practice of international bodies and its status as a general principle of law under Art. 38 para. 1 letter c) of the International Court of Justice ("ICJ") Statute and finally the paper will compare the findings established in arbitral awards *vis-à-vis* the domestic law practice.

2 Historical and Comparative Context

While the doctrine of clean hands has received a well-deserved attention in the recent years, it must be acknowledged right at the outset that it is not a novel concept of law. It is then vital to firstly examine its historical and comparative roots, in order to show the fundamental mechanism of the doctrine, for the right assessment of its status under international law. It is the historical basis of the doctrine that may have a significant impact for the assessment whether the clean hands doctrine falls within the scope of sources recognized in Art. 38 para. 1 of the ICJ Statute,[1] as the earlier scholarship surprisingly resembles the approaches taken by investment tribunals with regards to conduct of investors in violation of the host State's law.

2.1 Common-Law

Frequently, the roots of the doctrine are attributed by scholars to Anglo-American legal tradition,[2] more specifically to equity,[3] where the doctrine

1 Statute of the International Court of Justice of 18 April 1946. Discussed below in Chapter 3.

2 KALDUŃSKI, M. Principle of Clean Hands and Protection of Human Rights in International Investment Arbitration. *Polish Review of International and European Law,* 2015, Vol. 4, no. 2, p. 70; KREINDLER, R. Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine. In: HOBER, K. et al. (eds.). *Between East and West: Essays in Honour of Ulf Franke*. Huntington, New York: Juris, 2010, p. 317.

3 A specific body of law, originating in antiquity, furthermore developed in English law as developed as *"an alternative jurisdiction to furnish relief to those who did not have an adequate remedy at common law."* TITI, C. *The Function of Equity in International Law*. Oxford: Oxford University Press, 2021, p. 25.

operates as a positive defence.[4] Additionally, the clean hands doctrine has been also included in the so-called "Twelve Maxims of Equity"[5] coined by *Snell*, a leading authority on equity.[6] But it was not until the eighteenth century, when the maxim materialized into a specific formula defined by an otherwise unknown barrister *Richard Francis*, in his work of *Maxims of Equity* first published in 1728[7] as follows: *"He that hath committed iniquity shall not have equity."*[8]

The development was advanced by the end of eighteenth century, when the doctrine in its present shape has been famously adopted by the English Court of Exchequer,[9] where Chief *Baron Eyre* stipulated in *Dering vs. Earl of Winchelsea* that *"a man must come into a Court of Equity with clean hands"*.[10]

Whereas the origins of the clean hands doctrine are intertwined with the development of English law and it is perceived as the British legacy,[11] the practical reach has not been strictly limited to the United Kingdom. As a matter of fact, one of the most prominent American legal scholars, *Zechariah Chafee*, has paralleled the born of the maxim with the United States

4 SEIFI, J. and K. JAVADI. The Consequences of the "Clean Hands" Concept in International Investment Arbitration. *Asian Yearbook of International Law*, 2013, Vol. 19, no. 1, p. 126.

5 The Twelve Maxims of Equity serve as a non-exhaustive list of guiding principles governing the equity and are as follows: 1. Equity will not suffer a wrong to be without remedy; 2. Equity follows the law; 3. Where there is equal equity, the law shall prevail; 4. Where the equities are equal, the first in time shall prevail; 5 He who seeks equity must do equitably; 6. He who comes into equity must come with clean hands; 7. Delay defeats equities; 8. Equality is equity; 9. Equity looks to the intent rather than to the form; Equity looks on that as done which ought to be done; 11. Equity imputes an intention to fulfil an obligation; 12. Equity acts 'in personam'. For further reference, see FALCÓN Y TELLA, M. J. *Equity and Law*. Leiden: Martinus Nijhoff Publishers, 2008, pp. 64–65.

6 Ibid.

7 CHAFEE Jr., Z. Coming into Equity with Clean Hands I. *Michigan Law Review*, 1949, Vol. 47, no. 7, p. 880.

8 It was the second maxim coined by Francis, based on nine excerpts from equity cases. The second maxim, quoted under FRANCIS, R. *Maxims of Equity. Collected from and Proved by Cases out of the Books of the best Authority in the High Court of Chancery*. Dublin: Henry Watts, 1791, pp. 5–8.

9 An English court vested with the powers to adjudicate the matters of equity, see also BAKER, J. *Introduction to English Legal History*. Oxford: Oxford University Press, 2019, pp. 54–57.

10 Judgment of the Court of Exchequer of 1787, *Dering vs. Earl of Winchelsea,* Case 1 Cox Eq. 320, 29 Eng. Rep. 1185 (1787), .

11 ANENSON, T. L. *Judging Equity – The Fusion of Unclean Hands in U.S. Law*. Cambridge: Cambridge University Press, 2018, p. 23.

("US") Constitution, as it is exactly as old as the founding law of the US federal system.[12] At the same time, it must be stressed that it is not the only parallel with the legal development in the US. It is quite the opposite, considering that the doctrine of clean hands has also played a vital role in the jurisprudence of the US Supreme Court (known as SCOTUS) as well as lower federal courts. Subsequently, it has been considered as well-settled[13] and by the half of the twentieth century considered as *"so ancient an origin that extended analysis of its scope and effect would seem unnecessary"*[14] and has been almost verbatim referenced in the jurisprudence.[15]

Example of the said scholarship is, for instance, *John Pomeroy*, who underscored that the maxim of clean hands, rather a universal rule guiding and regulating the action of equity courts, applies *"whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine"*.[16] By this approach the court will then refuse to take any further steps and will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy. Moreover, according to *Pomeroy*, the principles involved in clean hands express the basic conceptions of equity jurisprudence, as it is based upon conscience and good faith.[17]

As regards the material scope of the doctrine, *Pomeroy* concedes that the principle is rather broad, but at the same time observes the limits thereto. Hence, in order to invoke the consequences of the equitable relief at hand, the misconduct must be connected with the matter in litigation. Accordingly, the court will not go outside the subject-matter of the case.[18]

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12 CHAFEE JR, Z. Coming into Equity with Clean Hands I. *Michigan Law Review*, 1949, Vol. 47, no. 7, p. 880.

13 Judgment of the U.S. Supreme Court of 1831, *Cathcart vs. Robinson*, Case 30 U.S. 264 (1831), p. 276.

14 Judgment of the Circuit Court of Appeals, Sixth Circuit of 6 December 1932, *General Excavator Co. vs. Keystone Driller Co.*, Case 62F.2d 48 (6th Cir. 1932), p. 50.

15 *"He who comes into equity must come with clean hands."* Judgment of the U.S. Supreme Court of 23 April 1945, *Precision Instrument Manufacturing Co. vs. Automotive Maintenance Machinery Co.*, Case 324 U.S. 806 (1945), p. 814.

16 POMEROY, J. N. *A Treatise on Equity Jurisprudence, as administered in the United States of America adapted for all the States, and to the Union of Legal and Equitable Remedies under the Reformed* Procedure. San Francisco: Bancroft-Whitney Company, 1918, pp. 737–738.

17 Ibid., p. 739.

18 Ibid., p. 741.

Finally, *Pomeroy* proceeds with the illustrations where the doctrine may be applied, which are surprisingly close to questions arising out of investment disputes. The first example is connected with a contract and the question whether a party has either obtained or performed a contract inequitably, or unconscientiously (for example, by taking undue advantage of one's position). In such circumstances, a court will refuse the claimant a remedy.[19] Another example worth of discussion is a fraud. It has been clarified that in a situation where the claim emanates from, or is dependent upon a claimant's prior fraud, the court will likewise deny any relief.[20] Very similar and common event, when the clean hands may be invoked is the illegality, where it is well-settled that court will not aid, either by enforcing the contract or obligation while it is yet executory, nor set it aside, or will not enable the party to recover the title to property.[21]

2.2 Civil-Law

Albeit, the previous space has been devoted principally to Anglo-American legal system, it is certainly correct to assume that the doctrine is not strictly limited to common-law jurisdictions. But the opposite is the case, seeing that the overall roots of the doctrine have been traced to antiquity and the Roman Law.[22]

Scholars and jurisprudence[23] usually refer to several legal maxims as the sources forming the unclean hands doctrine.[24] *De Alba* specifically names:

- *ex turpi causa non oritur actio* (an action does not arise from a dishonorable cause),

19 Ibid., pp. 743–744.
20 Ibid., pp. 745–749.
21 Ibid., p. 750.
22 NEWMAN R. A. *Equity and Law: A Comparative Study*. New York: Oceana Publications, 1961, p. 31.
23 These will be further referenced in particular attention to arbitral awards below.
24 It is worth mentioning that even the US Department of State referred to the maxim of *ex dolo malo non oritur action* in relation to the Pelletier case and reaffirmed that it is the principle of public policy. Additionally, it submitted that this principle has been applied by *"innumerable rulings under the Roman common law, as held by nations holding Latin traditions, and under the common law as held in England and the United States"*. This elaboration has been labelled as *"the most notable exposition and application of the principle"*. United States, Papers Relating to the Foreign Relations of the United States, For the Year 1887, Transmitted to Congress, With a Message of the President, June 26, 1888. *Document No. 385*, *Mr. Bayard to Mr. Thompson* [online]. 8 March 1887, p. 607 [cit. 20. 5. 2021]. Available at: https://history.state.gov/historicaldocuments/frus1887/d385

- *nemo auditur propriam turpidunem allegans* (no one can be heard to invoke his own turpitude) and
- *nemo ex suo delicto meliorem suam conditionem est facit* (no one can perfect his condition by a crime).[25]

Kałduński additionally provides the principle *nullus commodum capere potest de sua iniuria propria* (a party may not derive an advantage from its own unlawful acts) as a further embodiment of the clean hands doctrine.[26]

Building upon these principles, the attention should be brought also to civil law jurisdictions, where the doctrine of unclean hands can be derived from the provisions of Civil Codes, such as § 242 of the German Civil Code *(Bürgerliches Gesetzbuch)*,[27] § 6 of the Czech Civil Code *(Občanský zákoník)*,[28] as well as in the Draft Common Framework of Reference under the heading of "Not allowing people to rely on their own unlawful, dishonest or unreasonable conduct".[29]

Apart from the potential situations, where the clean hands doctrine may be applicable, it is important to highlight the role of the doctrine, which will be important with respect to balancing the interests of parties. The scholars have often stressed the fact that it enforces certain ethical ideals and values such as good faith, but most importantly, the principal objective of the doctrine is to protect the court and its judicial integrity, as well as to promote justice.[30] Would it be otherwise, the courts could risk a potential doubt as to the overall fairness of the framework.

25 DE ALBA, M. Drawing the line: addressing allegations of unclean hands in investment arbitration. *Revista de Direito Internacional*, 2015, Vol. 12, no. 1, p. 323.

26 KALDUŃSKI, M. Principle of Clean Hands and Protection of Human Rights in International Investment Arbitration. *Polish Review of International and European Law,* 2015, Vol. 4, no. 2, p. 70.

27 An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration. See also WESTERMANN, H. et al. *Erman Bürgerliches Gesetzbuch*. Köln: Otto Schmidt, 2014, pp. 782–837.

28 No person may benefit from their dishonest or illegal act. LAVICKÝ, P. § 6. In: LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část (§ 1–654)*. Praha: C. H. Beck, 2014, p. 72.

29 BAR, C. von et al. *Principles, definitions and model rules of European private law: draft common frame of reference (DCFR)*. London: Oxford University Press, 2010, p. 67.

30 LAWRENCE, W. J. Application of the Clean Hands Doctrine in Damage Actions. *Notre Dame Law Review*, 1982, Vol. 57, no. 4, pp. 674–675.

3 Doctrine of Cleans Hands and Its Status Under International Law

The next important question to address is the status and role of the clean hands doctrine under international law. More specifically, whether the doctrine can be considered as a source of international law falling within the scope of Art. 38 para. 1 of the ICJ Statute.[31]

Firstly, to the very best knowledge of the author, at the present time, no international treaty prescribes the doctrine of unclean hands as a norm of international law. Furthermore, the status of the doctrine as an international custom fulfilling the criteria of state practice and *opinio juris* has been rejected as well.[32]

3.1 General Principle of Law?

As will be shown, the most controversial consideration of the clean hands doctrine is established under Art. 38 para. 1 letter c) of the ICJ Statute as a general principle of law recognized by civilized nations.

Although no watertight definition of general principles of law exists, *Pellet* and *Müller* point out that there is little doubt that they are unwritten legal norms of a wide-ranging character, they must be recognized in the municipal laws of States, and transposable at the international level.[33] The *travaux préparatoires* of the Statute also point towards the conclusion that those principles envisaged by Art. 38 para. 1 letter c) of the ICJ Statute are accepted by all nations in *foro domestico*.[34] *Gutteridge* has emphasises that among those principles that have been already applied are the doctrine of unjust enrichment, estoppel, and general principles of equity.[35] As was

31 Art. 38 para. 1 of the ICJ Statute is generally considered as listing the formal sources of international law. See THIRLWAY, H. *The Sources of International Law*. Oxford: Oxford University Press, 2019, p. 8.

32 BALCZERAK, F. *Investor – State Arbitration and Human Rights*. Leiden/Boston: Brill – Nijhoff, p. 146.

33 PELLET, A. and D. MÜLLER. Article 38. In: ZIMMERMAN, A. et al. *The Statute of the International Court of Justice (3rd Edition): A Commentary*. Oxford: Oxford University Press, 2019, p. 923.

34 Ibid., p. 927.

35 GUTTERIDGE, H. C. The Meaning and Scope of Article 38(1)(c) of the Statute of the International Court of Justice. *Transactions of the Grotius Society, Problems of Public and Private International Law*, 1952, Vol. 38, p. 125.

already pointed out, the doctrine of clean hands retains the main attributes of equity maxims, thus could be potentially considered as a general principle of law in the same line. What was in this line, almost prophetically, put forth by *Bassiouni* is that *"as the world's interdependence increases, there will doubtless be greater reliance on international law as a means to resolve a variety of issues which neither conventional nor customary international law is ready to meet"*.[36] He then proceeded to enumerate, in his view, four most pressing areas of law, where the employment of general principles of law will be influential, among them the human rights, the environment, international and transnational criminality and last, but not least the economic development.[37]

Undoubtedly, the importance of the general principles of law as foreseen by Art. 38 para. 1 letter c) of the ICJ Statute has been acknowledged in association with the field of foreign investment and especially within the relationships between host States and investors.[38]

Building upon the fact that the sources of general principles of law are emerging from common cultural and legal traditions[39] the methodology for identifying their exact scope and content should be based on comparative law, in particular by looking at two legal orders, common-law and civil-law.[40]

Despite the doctrine enjoys the recognition in *foro domestico*, as has been stressed above, a considerable part of the controversy associated with the clean hands doctrine is stemming from international jurisprudence, in particular, from the case-law of the "World Court" and its predecessor.

3.2 Jurisprudence of the PCIJ and the ICJ

The maxim has been referred to already by the judges of the Permanent Court of International Justice ("PCIJ"), in the *Meuse Water Case*.[41] Specifically,

36 BASSIOUNI, M. C. A Functional Approach to "General Principles of International Law." *Michigan Journal of International Law*, 1990, Vol. 11, no. 3, p. 769.

37 Ibid.

38 GAZZINI, T. General Principles of Law in the Field of Foreign Investment. *The Journal of World Investment & Trade*, 2009, Vol. 10, p. 109.

39 Ibid., p. 133.

40 ELLIS, J. General Principles and Comparative Law. *European Journal of International Law*, 2011, Vol. 22, no. 4, p. 957.

41 This elaboration has been labelled as *"the most notable exposition and application of the principle"*, compare SCHWEBEL, S. Clean Hands, Principle, § 2. *Max Planck Encyclopedia of Public International Law* [online]. March 2013 [cit. 20. 5. 2021]. Available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e18?rskey=11WN80&result=1&prd=MPIL

judge *Manley Hudson* listed several maxims of equity and concluded that *"it is in line with such maxims that a court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper"*.[42] This argument was supported by the fact that the utilisation of equity under international law is not strictly limited by deciding case *ex aequo et bono*.[43]

In addition to that, judge *Anzilotti* argued that *"principle inadimplenti non este adimplendum is so just, so equitable, so universally recognized, that it must be applied in international relations also"* and concluded that it does indeed fall within the scope of general principles of law.[44] Interestingly though, his views remained consistent, as in the earlier case concerning the *Legal Status of Eastern Greenland* he concluded his observations by stating that the claim of Norwegian government should be rejected, as *"the unlawful act cannot serve as the basis of an action at law"*.[45]

Apart from several blinks of light in the jurisprudence of the PCIJ, the jurisprudence gained momentum in subsequent judgments of the ICJ and has been relied on by the States in several contentious cases and advisory opinions. For instance, in *Nauru vs. Australia,* the ICJ dealt with an argument referring to principles of good faith with a consequence of declining to hear the case.[46] Furthermore, in *Oil Platforms*, the US suggested to dismiss the claim at the merits stage and to refuse the relief sought by Iran, based on its allegedly unlawful conduct.[47] Even more specifically, in the *Wall Advisory Opinion*, Israel referred to the doctrine of clean hands, which in its own words provided *"a compelling reasons that should lead the Court to refuse the General Assembly request"*.[48] Finally, the doctrine has been invoked also

42 Individual Opinion by Mr. Hudson of 28 June 1937, Case *The Diversion of Water from the Meuse (Netherlands vs. Belgium)*, PCIJ (Ser. A/B) No. 70, p. 77.

43 Ibid., p. 76; Compare also LAUTERPACHT, H. *Private Law Sources and Analogies of International Law*. London, New York: Green and Co. Ltd., 1927, p. 63.

44 Dissenting Opinion of M. Anzilotti of 28 June 1937, Case *The Diversion of Water from the Meuse (Netherlands vs. Belgium)*, PCIJ (Ser. A/B) No. 70, p. 50.

45 Dissenting Opinion of M. Anzilotti of 5 April 1933, Case *Legal Status of Eastern Greenland (Denmark vs. Norway)*, PCIJ (Ser. A/B) No. 53, p. 95.

46 Judgment of the ICJ of 26 June 1992, Case *Phosphate Lands in Nauru (Nauru vs. Australia)*, § 37.

47 Judgment of the ICJ of 6 November 2003, Case *Oil Platforms (Islamic Republic of Iran vs. United States of America)*, § 27-30.

48 Advisory Opinion of 9 July 2004, ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, § 63-64.

in the currently pending cases,[49] but the ICJ has refrained from taking a conclusive position.[50]

Notwithstanding these facts, the individual judges of the ICJ provided in their dissenting opinion a guidance on the applicability of the doctrine at hand. Such views ranged from tacit employment of the clean hands doctrine,[51] *in abstracto* consideration,[52] or a full-fledged usage in the argumentation.[53]

Probably the clearest and most referenced elaboration up to date has been made by judges *Schwebel* and *Weeramantry*. The former has submitted in the *Nicaragua* case that Nicaragua should have been deprived of the *locus standi* due to its own illegal conduct, as it *"has not come to Court with clean hands"*.[54] *Schwebel* grounded his arguments in the already mentioned jurisprudence of the PCIJ,[55] principles stemming from common-law and civil law system based on Roman law[56] and scholar views.[57] By the same token, judge *Weeramantry* argued in *Legality of Use of Force* that the "clean hands" principle has been well recognized in all legal systems.[58]

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49 See, for example, Preliminary Objections Judgment of 2 February 2017, Case *Maritime Delimitation in the Indian Ocean (Somalia vs. Kenya)*, ICJ, § 139–140; Preliminary Objections Judgment of 13 February 2019, Case *Certain Iranian Assets (Islamic Republic of Iran vs. United States of America)*, ICJ, § 116-125.

50 *"Without having to take a position on the "clean hands" doctrine, the Court considers that …"* Preliminary Objections Judgment of 13 February 2019, Case *Certain Iranian Assets (Islamic Republic of Iran vs. United States of America)*, ICJ, § 122.

51 *"The Applicant itself committed many actions which caused enormous damage to the Islamic Republic of Iran, the Applicant has forfeited the legal right as well as the moral right to expect the Court to uphold any claim for reparation."* Dissenting Opinion of Judge Morozov of 24 May 1980, Case *United States Diplomatic and Consular Staff in Tehran (United States of America vs. Iran)*, ICJ, § 5.

52 Separate Opinion of Judge Shahabuddeen of 14 June 1993, ICJ, Case *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark vs. Norway)*, p. 195.

53 Dissenting Opinion of Judge ad hoc Van den Wyngaert of 14 February 2002, Case *Arrest Warrant of 11.4.2000 (Democratic Republic of the Congo vs. Belgium)*, ICJ, § 35.

54 Dissenting Opinion of Judge Schwebel, Case *Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs. United States of America)*, ICJ, § 268.

55 Ibid., § 269.

56 Ibid.

57 Ibid., § 273, referencing Sir Gerald Fitzmaurice and Oscar Schachter.

58 Dissenting opinion of Vice-President Weeramantry of 2 June 1999, Case *Legality of Use of Force (Serbia and Montenegro vs. Belgium)*, ICJ, P. 184.

3.3 Contributions of the ILC

No less important contribution to the controversy linked to the doctrine of clean hands and its status under international law has been elaborated by the International Law Commission ("ILC"). More specifically, in connection with two prominent topics – State responsibility and diplomatic protection.

With respect to the codification process resulting in the adoption of Draft Articles on State Responsibility for Internationally Wrongful Acts[59] the doctrine has been heavily criticised by several prominent members of the ILC. Firstly, *James Crawford* was of the view that the maxim such as the "clean hands" was new and vague,[60] hence he did not see the reason to include the doctrine in the draft articles, as its existence was rather disputed.[61] In this regard, the Special Rapporteur has taken the view of Rousseau that the doctrine was not a part of customary international law.[62] Another proponent of the restrictive view was *Gerhard Hafner*, who believed in the same line that the doctrine was not a part of general international law at all.[63] At the same time, these views were opposed by *Alain Pellet* who considered the doctrine as a principle of positive international law.[64]

The second time the doctrine has been considered by the ILC, was in connection with the question of diplomatic protection. The doctrine has posed some challenges to the members of the ILC,[65] primarily due to its

59 The so-called ARSIWA was on the agenda of the ILC since 1949, finally endorsed under Special *Rapporteur James Crawford* who has recently passed away.

60 INTERNATIONAL LAW COMMISSION. *Yearbook of the International Law Commission. Documents of the fifty-first session*. Vol. II, Part 1A/CN.4/SER.A/1999/Add.1 (Part 1), 23 July 1999, § 335, p. 83.

61 INTERNATIONAL LAW COMMISSION. *Yearbook of the International Law Commission. Summary records of the meetings of the fifty-first session*. Vol. I, A/CN.4/SER.A/1999, 23 July 1999, § 39, p. 142.

62 INTERNATIONAL LAW COMMISSION. *Yearbook of the International Law Commission. Documents of the fifty-first session*. Vol. II, Part 1A/CN.4/SER.A/1999/Add.1 (Part 1), 23 July 1999, § 336, p. 83.

63 INTERNATIONAL LAW COMMISSION. *Yearbook of the International Law Commission. Summary records of the meetings of the fifty-first session*. Vol. I, A/CN.4/SER.A/1999, 23 July 1999, § 55, p. 167.

64 Ibid., § 66, p. 168.

65 Sir *Ian Brownlie* expressed concerns that the clean hands doctrine was not part of positive international law. INTERNATIONAL LAW COMMISSION. *Yearbook of the International Law Commission. Summary records of the meetings of the fifty-seventh session*. Vol. I, A/CN.4/SER.A/2005, 5 August 2005, § 8, p. 108.

distant link to a diplomatic protection.[66] Nevertheless, what must be stressed is the fact that the ILC recognized the importance of the clean hands doctrine in international law,[67] and in particular, the Special Rapporteur *John Dugard* submitted that *"it was an important principle of international law that had to be taken into account whenever there was evidence that an applicant State had not acted in good faith and that it had come to court with unclean hands"*.[68]

3.4 Other Bodies

It is necessary to underline the fact that the ICJ and the ILC were not the only bodies, where the doctrine of clean hands has been brought into light. The principle has been also triggered in *amicus curiae* briefs,[69] the Prosecutor,[70] before the International Criminal Court. In the same line, the doctrine has been relied on by several judges of the European Court of Human Rights ("ECtHR").[71]

Finally, a similar legal concept has been also utilized by the Court of Justice of the European Union ("CJEU") in *Courage* case, where the CJEU ruled that *"under a principle which is recognised in most of the legal systems of the Member States and which the Court has applied in the past,*[72] *a litigant should not profit from his own unlawful conduct, where this is proven"*.[73] Exactly that case has been deemed

66 INTERNATIONAL LAW COMMISSION. *Yearbook of the International Law Commission. Report of the Commission to the General Assembly on the work of its fifty-seventh session.* Vol. II, Part 2, A/CN.4/SER.A/2005/Add.l (Part 2), 5 August 2005, § 226–236, pp. 50–52.

67 Ibid., § 226, p. 50.

68 Ibid., § 236, p. 52.

69 Submissions Pursuant to Rule 103 (The Israel Forever Foundation) of 16 March 2020, ICC, Pre-Trial Chamber I, Case No. ICC-01/18, Situation in the Palestinian Authority, § 71, 75, 77, 79.

70 Prosecution's response to Mathieu Ngudjolo Chui's request for compensation of 18 September 2015, *Prosecutor vs. Mathieu Ngudjolo Chui*, ICC, Trial Chamber II, Case No. ICC-01/04-02/12, § 5.

71 Separate Opinion of Judge Morenilla of 13 July 1995, *Van der Tang vs. Spain*, ECtHR, Case No. 19382/92, § 6; Separate Opinion of Judge Bonello of 18 January 2001, *Chapman vs. The United Kingdom*, ECtHR, Case No. 27238/95, § 5; Partly Dissenting Opinion of Judge Pellonpää, joined by Judge Zupančič, of 22 March 2001, *K.-H. W. vs. Germany*, ECtHR, Case No. 37201/97, p. 47.

72 The CJEU referred to § 10 of the Judgment of the CJEU of 7 February 1973, *Commission vs. Italy*, Case C-39/72.

73 § 31 of the Judgment of the CJEU of 20 September 2001, *Courage Ltd vs. Bernard Crehan and Bernard Crehan vs. Courage Ltd and Others*, Case C-453/99.

to include the doctrine of clean hands as a general principle,[74] or at least as a "chameleonic principle".[75]

After consideration of the diverse opinions raised either by the multiple international bodies, one may reach the conclusion that none of the aforementioned sources provide an unequivocal inference that the doctrine should be considered as a general principle of law under Art. 38 para. 1 letter c) of the ICJ Statute. What may be satisfactorily concluded is that in light of the above, the question whether the doctrine should be considered as a general principle of law is still unsettled.[76] Neither the ICJ, nor the ILC has expressly recognized the doctrine of clean hands. The same applies for other international judicial organs, with a minor exception of the CJEU, however the judgment has been issued in the context of competition law. At the same time, it must be stressed that none of the international bodies have expressly refused its application, even though they were provided with multiple opportunities to do likewise.[77]

4 Investment Arbitration as a Possible Forum of Application?

The confusion pertaining to the character of clean hands doctrine becomes even more clear in connection with the international investment arbitration, as it is not a foreign concept in this field. It is no surprise, since the doctrine represents an effective strategic defence for the States,

74 GROUSSOT, X. and H. H. LIDGARD. Are There General Principles of Community Law Affecting Private Law? In: BERNITZ, U., J. NERGELIUS and C. CARDNER (eds.). *General Principles of EC Law in a Process of Development: Reports from a conference in Stockholm, 23-24 March 2007, organised by the Swedish Network for European Legal Studies*. Alphen aan den Rijn: Kluwer Law International, 2008, p. 162.

75 HESSELINK, M. W. The General Principles of Civil Law: Their Nature, Roles and Legitimacy. In: LECZYKIEWICZ D. and S. WEATHERILL (eds.). *The Involvement of EU Law in Private Law Relationships*. Oxford/Portland: Hart Publishing, 2013, pp. 161–162.

76 SCHWEBEL, S. Clean Hands, Principle. *Max Planck Encyclopedia of Public International Law* [online]. March 2013, § 3 [cit. 20. 5. 2021]. Available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e18?rskey=11WN80&result=1&prd=MPIL; DUMBERRY, P. The Clean Hands Doctrine as a General Principle of International Law. *Journal of World Investment & Trade*, 2020, Vol. 21, no. 4, p. 492.

77 MOLOO, R. A Comment on the Clean Hands Doctrine in International Law. *Inter Alia: University of Durham Student Law Journal*, 2010, Vol. 7, no. 1/2, p. 43.

early in the proceedings, either connected to the issue of jurisdiction or the admissibility before the tribunal. In this regard, the doctrine has been subject to substantial criticism as to its overall fairness and balance of rights and obligations.[78]

The application of the doctrine by arbitral tribunals has been explained by the scholars as two-fold.[79] Firstly, it may be represented in the bilateral investment treaties ("BITs") in form of the *"in accordance with host State law"* provision and secondly, as a general principle of law.[80]

As was suggested by some authors, the first argument pointing towards the recognition of clean hands doctrine is the investment legality requirement embodied in many BITs.[81] The concrete obligation is usually framed in a way that the investment must be made in accordance with law of the host state.[82] It may be observed that the treaties often include broad definitions of investments, ranging from tangible assets to contractual obligations. The wording and structural placement of the legality requirement

78 HABAZIN, M. Investor Corruption as a Defence Strategy of Host States in International Investment Arbitration: Investors' Corrupt Acts Give an Unfair Advantage to Host States in Investment Arbitration. *Cardozo Journal of Conflict Resolution*, 2017, Vol. 18, no. 3, p. 810.

79 ZWOLANKIEWICZ, A. The Principle of Clean Hands in International Investment Arbitration: What is the Extent of Investment Protection in Investor-State Disputes? *ITA in Review*, 2021, Vol. 3, no. 1, p. 9; see also DE ALBA, M. Drawing the line: addressing allegations of unclean hands in investment arbitration. *Revista de Direito Internacional*, 2015, Vol. 12, no. 1, p. 324.

80 Several scholars have considered the doctrine as a general principle of law in connection with investment disputes, see, for instance, KREINDLER, R. Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine. In: HOBER, K. et al. (eds.). *Between East and West: Essays in Honour of Ulf Franke*. Huntington, New York: Juris, 2010, p. 317; See also DUMBERRY, P. The Clean Hands Doctrine as a General Principle of Law. *Journal of World Investment & Trade*, 2020, Vol. 21, no. 4, pp. 489–527.

81 DUMBERRY, P. and G. DUMAS-AUBIN. The Doctrine of "Clean Hands" and the Inadmissibility of Claims by Investors Breaching International Human Rights Law. *Transnational Dispute Management*, 2013, Vol. 10, no. 1, p. 4; MOLOO, R. A Comment on the Clean Hands Doctrine in International Law. *Inter Alia: University of Durham Student Law Journal,* 2010, Vol. 7, no. 1/2, p. 7.

82 It typically involves a similar wording: *"the investment is made and maintained in accordance with the laws and regulations of the Host State"*, Art. 1 para. 2 Agreement between the Slovak Republic and the United Arab Emirates for the Promotion and Reciprocal Protection of Investments, 22.09.2016; *"The term 'investment' means any kind of asset held or invested either directly or indirectly by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws"*, Art. 1 letter d) Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments, 27. 7. 2010.

in each BIT may differ,[83] nevertheless, by the requirement of legality, the definition of investment is inextricably linked to the scope of BITs. Consequently, the protection afforded by the BIT is then applicable only to those investments that comply with the domestic law of the host State. In cases, where the States opt to defend the claims by relying on the legality of the investments, the tribunals assess the issue in a two-fold way. Firstly, the majority of tribunals address the legality as the question of jurisdiction.[84] Quite a frequent argument coming under the category of jurisdiction is the State's consent to arbitrate, which is an essential precondition for the proceedings.[85]

Despite the fact that many BITs have already incorporated the legality clause and its presence has become more of a standard than the exception, it is important to also examine a situation, when a treaty does not specifically refer to equivalent prerequisites.

The investment tribunals have against this background formed a view that if a treaty does not expressly mention the legality criterion, it may still be implicitly found to be present. A noteworthy example is the case of *Phoenix Action Ltd. vs. the Czech Republic*, where the tribunal held that the *"States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws* […] *and it is the Tribunal's view that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT".*[86] The ICSID[87] Tribunal supported its conclusion by referencing the *Plama vs. Bulgaria* case,

83 It has been ruled that whether the investment falls within the scope of the BIT must be examined not only by relying on the definition of investment *per se*, but also in the context of other provisions of such treaty. Award of the ICSID of 2 August 2006, *Inceysa Vallisoletana, S.L. v Republic of El Salvador*, Case No. ARB/03/26, § 197; See also MOUAWAD, C. and J. BEESS UND CHROSTIN. The illegality objection in investor-state arbitration. *Arbitration International,* 2021, Vol. 37, no. 1, pp. 4–6.

84 Award of the ICSID of 2 August 2006, *Inceysa Vallisoletana, S.L. v Republic of El Salvador*, Case No. ARB/03/26, § 264.

85 Decision on Jurisdiction of the ICSID of 24 February 2014, *Churchill Mining PLC and Planet Mining Pty Ltd vs. Republic of Indonesia*, Case No. ARB/12/14 and 12/40, § 291.

86 Award of the ICSID of 15 April 2009, *Phoenix Action, Ltd. vs. The Czech Republic*, Case No. ARB/06/5, § 101.

87 International Centre for Settlement of Investment Disputes.

which reached a similar conclusion in association with the Energy Charter Treaty that did not contain a legality requirement.[88]

Under that guidance, it seems that the doctrine of clean hands would be able to operate in a variety of scenarios. As was indicated with respect to the comparative analysis and historical roots of the doctrine, it is well suited to address the issues of fraud and corresponding violations of law. Apart from proposals to address violations of human rights,[89] it may be shown on cases related to fraudulent conduct of investor.

The tribunal in the already mentioned case of *Plama* reasoned its finding in light of the introductory note, stating that fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues[90] and more importantly, granting the protection to an investment obtained by deceitful conduct would be contrary not only to the principle *nemo auditur propriam turpitudinem allegans*, but also to international public policy,[91] principle of good faith[92] and *ex turpi causa* defence.[93]

A careful observer would immediately notice that those maxims are forming a demonstration of unclean hands doctrine. The corresponding principles also served as a basis for another landmark decision, *Inceysa vs. El Salvador*, where the tribunal firstly observed that the investment made by Inceysa in the territory of El Salvador via misrepresentation, violated the principle of good faith.[94] Secondly, it must be stressed that the tribunal expressly based its award upon general principles of law,[95] among which the principle *nemo auditur propriam turpitudinem allegans* was found to be violated.[96] However the tribunal also considered a spectrum of other principles that were

88 Ibid, § 101; Award of the ICSID of 27 August 2008, *Energy Charter Treaty (Plama Consortium Ltd. vs. Bulgaria)*, Case No. ARB/03/24, § 138–139.

89 DUMBERRY, P. and G. DUMAS-AUBIN. The Doctrine of "Clean Hands" and the Inadmissibility of Claims by Investors Breaching International Human Rights Law. *Transnational Dispute Management*, 2013, Vol. 10, no. 1, p. 8-10.

90 Award of the ICSID of 27 August 2008, *Energy Charter Treaty (Plama Consortium Ltd. vs. Bulgaria)*, Case No. ARB/03/24, § 139.

91 Ibid., § 143.

92 Ibid., § 144.

93 Ibid., § 146.

94 Award of the ICSID of 2 August 2006, *Inceysa Vallisoletana, S.L. vs. Republic of El Salvador*, Case No. ARB/03/26, § 234.

95 Ibid., § 229.

96 Ibid., § 240.

applicable to that case,[97] and determined that *"the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, nobody can benefit from his own fraud"*.[98]

Likewise, the application may be observed in the scenarios of corruption, for example, in the *Word Duty Free* case, where the tribunal relied on the principle *ex turpi causa non oritur actio*[99] and sharply summarized that *"bribery is contrary to international public policy of most, if not all, States"*.[100] It has furthermore touched upon the question of public policy and ruled that *"the law protects not the litigating parties but the public; or in this case, the mass of tax-payers and other citizens making up one of the poorest countries in the world"*.[101] Such claim then once again resembles the objectives of the clean hands doctrine discussed above.

Moreover, the doctrine has been expressly mentioned by the tribunal in *Fraport*, a case, where the tribunal established that the *"clean hands doctrine, or doctrines to the same effect"* were rules of international law[102] in connection with deliberate violations of legal provisions of the host State.[103]

Unfortunately, the present state of international arbitral law is not that clear, as several other awards point to the other direction. In *Guyana vs. Suriname*, the Permanent Court of Arbitration ("PCA") has ruled that the use of the doctrine has been considered as sparse and its application inconsistent.[104] Secondly, the arbitral tribunal in *Niko Resources* case, similarly

97 Ibid., § 240, Among them were a) *"Ex dolo malo non oritur action"* (an action does not arise from fraud); b) *"Malitiis nos est indulgendum"* (there must be no indulgence for malicious conduct); c) *"Dolos suus neminem relevat"* (no one is exonerated from his own fraud); d) *"In universum autum haec in ea re regula sequenda est, ut dolos omnimodo puniatur"* (in general, the rule must be that fraud shall be always punished); e) *"Unusquique doli sui poenam sufferat"* (each person must bear the penalty for his fraud); f) *"Nemini dolos suusprodesse debet"* (nobody must profit from his own fraud).

98 Ibid., § 242.

99 Award of the ICSID of 4 October 2006, *World Duty Free Company Ltd. vs. The Republic of Kenya*, Case No. ARB/00/7, § 179.

100 Ibid., § 157.

101 Ibid., § 181.

102 Award of the ICSID of 10 December 2014, *Fraport Frankfurt Airport Services Worldwide vs. Philippines*, Case No. ARB/11/12, § 328.

103 DE ALBA, M. Drawing the line: addressing allegations of unclean hands in investment arbitration. *Revista de Direito Internacional*, 2015, Vol. 12, no. 1, p. 329.

104 Award of the PCA of 17 September 2007, Case *Guyana vs. Suriname*, § 418.

as *World Duty Free* concerning the crime of corruption, held that *"the question whether the principle of clean hands forms part of international law remains controversial and its precise content is ill defined"*.[105] Finally, in *Yukos*, the tribunal outright rejected the hypothesis that doctrine of clean hands constitutes a general principle of law.[106] Notwithstanding the fact that the arbitral award has been subject to intense academic scrutiny, the author submits to the view expressed by *Dumberry* that that the reasoning has been to some extent confusing, at least with regards to the terminology employed.[107]

5 Concluding Remarks

Despite the fact that the clean hands doctrine has been wading through the waters of international law for more than a century and has been re-emerging from time to time, the fact remains the same. The jurisprudence related to its applications seems miles away from the cleanness indicated by the name of the doctrine. The author of the paper takes the view that the doctrine of clean hands fulfils all the necessary criteria for it to constitute a general principle of law under Art. 38 para. 1 letter c) of the ICJ Statute. It has been shown by the comparative analysis that its utilisation is not strictly limited to common-law jurisdictions, but operates as well in the civil-law system. While the arbitral awards discussed in the present paper (with some exceptions) do not explicitly refer to the doctrine, the applied maxims correspond to those usually attributed to clean hands doctrine. Last but not least, the objectives and applicable scenarios in the investment arbitration cover those schemes theoretically developed within the framework of clean hands doctrine. Albeit, the evident lack of consensus among scholars, arbiters and judges may persist, the issues connected with the scope of the present paper only highlights the importance of comparative law and the possible challenges it may face in the upcoming years.

105 Decision on Jurisdiction of the ICSID of 19 August 2013, *Niko Resources (Bangladesh) Ltd vs. People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited, Bangladesh Oil Gas and Mineral Corporation*, Case No. ARB/10/11 and Case No. ARB/10/18, § 477.

106 Final Award of the PCA of 18 July 2014, *Hulley Enterprises (Cyprus) Limited vs. Russian Federation*, Case No. AA 226, § 1363.

107 DUMBERRY, P. The Clean Hands Doctrine as a General Principle of International Law. *Journal of World Investment & Trade*, 2020, Vol. 21, no. 4, p. 501.

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Challenges of Arbitrators in Inter-State Cases: A Different Cattle of Fish?

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Abstract

Compared to those in international commercial and investment arbitration, arbitrator-challenge practices in inter-state cases are abnormally rare. The reasons behind the asymmetric practices include the ideology towards the role of arbitrators (authority vs. expertise), the effectiveness of enforcement (whether the award can be executed in domestic courts or whether there exist preconditions), and the unique structure and function of the specific tribunals. By virtue of illustrating the rules and practices of the *ad hoc* tribunal established under Annex VII of the United States Convention on the Law of the Sea, the Iran-United States Claims Tribunal, and the International Court of Justice, the current standard, "justifiable doubts to the impartiality and independence of arbitrators", is not interpreted uniformly and somehow unreasonable. To overcome the phenomenon of fragmentation and other problems, the arbitrator-challenge rules in inter-state disputes should not be treated differently and should be harmonized with rules and case laws developed in international commercial and investment arbitration.

Keywords

Challenge of Arbitrators; Inter-State Arbitration; Impartiality and Independence; Justifiable Doubts Standard.

1 Introduction

The Since the end of the 19th century,[1] international law has developed in a dominant form of juridicalisation and judicialization, of which

1 ORFORD, A. A Global Rule of Law. In: LOUGHLIN, M. and J. MEIERHENRICH (eds.). *The Cambridge Companion to the Rule of Law*. Cambridge: Cambridge University Press, 2021, pp. 538–566.

the conception is that rule of law is based on principle rather than power.[2] Following the Permanent Court of Arbitration ("PCA") establishment, increasing third-party adjudicatory institutions,[3] whether for general or specific purposes, have been involved in inter-state disputes. International adjudication, the most objective and impartial way to settle disputes and its effectiveness, is guaranteed by the balanced composition of the tribunal/bench as a whole[4] together with the required impartiality (subjective factor) and independence (objective factor) of every single arbitrator/judge.[5] Among other things, the "challenge of arbitrators", serving as a procedural tool for parties, is used to remove biased and dependent arbitrators, thereby safeguard the fairness and the validity of the outcome of the proceedings.

However, the frequency asymmetry of questioning arbitrators is common in international arbitration, explicitly speaking, although arbitrators have been routinely challenged in international commercial and investment arbitration,[6]

2 HELFER, R. L. and A. SLAUGHTER. Toward a Theory of Effective Supranational Adjudication. *Yale Law Journal*, 1997, Vol. 107, no. 2, p. 273; See also KALSEN, H. *Peace through law*. Chapel Hill: The University of North Carolina Press, 1944, 155 p.

3 For comprehensive statistics of international and regional courts, see The International Judiciary in Context: A Synoptic Chart, The Project on International Courts and Tribunals. *ELAW* [online]. [cit. 1. 5. 2021]. Available at: https://elaw.org/system/files/intl tribunals synoptic_chart2.pdf; see also MACKENZIE, R. et al. *The Manual on International Courts and Tribunals*. New York: Oxford University Press, 2010, 547 p.

4 For instance, Art. 9 of the Statute of the International Court of Justice requires that the judges as a whole should represent the main forms of civilization and the principal legal systems of the world. The Statute of the International Court of Justice is annexed to the United Nations, of which it forms an integral part.

5 Impartiality and independence highlight different aspects of requirements for arbitrators. As correctly described by Art. 3.1 IBA Guidelines on Conflicts of Interest in International Arbitration: *"Partiality arises when an arbitrator favors one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute. Dependence arises from relationships between an arbitrator and one of the parties, or someone closely connected with one of the parties."*

6 As for treatises, see BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2021, Chapter 12: Selection, Challenge and Replacement of Arbitrators in International Arbitration; TUPMAN, W. M. Challenge and Disqualification of Arbitrators in International Commercial Arbitration. *International and Comparative Law Quarterly*, 1989, Vol. 38, no. 1, pp. 26–52; BOTTINI, G. Should Arbitrator Live on Mars – Challenge of Arbitrators in Investment Arbitration. *Suffolk Transnational Law Review*, 2009, Vol. 32, no. 2, pp. 341–366; PANJABI, R. K. L. Economic Globalization: The Challenge for Arbitrators. *Vanderbilt Journal of Transnational Law*, 1995, Vol. 28, no. 1, pp. 173–184; BERG, A. J. van den. Justifiable Doubts as to the Arbitrator's Impartiality or Independence. *Leiden Journal of International Law*, 1997, Vol. 10, no. 3, pp. 509–520; YU, H. L. and L. SHORE. Independence, Impartiality, and Immunity of Arbitrators – US and English Perspectives. *International and Comparative Law Quarterly*, 2003, Vol. 52, no. 4, pp. 935–968; BASTIDA, B. M. The Independence and Impartiality of Arbitrators in International Commercial Arbitration. *Revista E-Mercatoria*, 2007, Vol. 6, no. 1, pp. 1–15; OGLINDA, B. Key Criteria in Appointment of Arbitrators in International Arbitration. *Juridical Tribune,* 2015, Vol. 5, no. 2, pp. 124–131.

they are seldom questioned in inter-state proceedings. For instance, the PCA Secretary-General has submitted 28 challenges since 1976, none of which filed in inter-state arbitrations.[7] Indeed, up to now only one inter-state arbitration proposed by the state formally challenged the arbitrator, i.e., *the Chagos Marine Protected Area Arbitration (Mauritius vs. the United Kingdom)*, where the tribunal found no case law to invoke and then created its own standards regarding the grounds for challenging in inter-state cases.[8] Besides, not only in *ad hoc* arbitration, but states also appeared careless about the impartiality and independence of judges in the judicial process: only 3 out of 43 cases of recusals of the International Court of Justice ("ICJ") judges[9] were requested by parties,[10] while others are cases of self-recusals *"as a matter of routine"*.[11] The only exception is the Iran-United States Claims Tribunal ("IUSCT"), a "court-like" tribunal dealing with both inter-state claims and private claims.[12] Surprisingly, although the number of private claims is much higher than public claims,[13] 20 out of 22 challenges raised from 1981–2015 were brought by states and 9 out of them were filed

7 GRIMMER, S. The Determination of Arbitrator Challenges by the Secretary-General of the Permanent Court of Arbitration. In: GIORGETTI, C. (ed.). *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals*. Leiden: Brill – Nijhoff, 2015, pp. 83–85.

8 Reasoned Decision on Challenge of the PCA of 1 December 2011, *Chagos Marine Protected Area Arbitration (Mauritius vs. United Kingdom)*, Case No. 2011-03..

9 This number does not include non-participation of judges after 2017, where Peter Tomka was absent in 1 case, Mohamed Bennouna was absent in 2 and James Richard Crawford did not participate in all the 6 cases delivered in 2018. No official document (including the yearbooks) has yet explained the reasons for their absence.

10 Two of the three cases refer to the instance of alleged bias in advisory opinions, which are not binding, and thus only one was brought during contentious proceedings. For details, see Part 2.3.

11 ROSANNE, S. *The Law and Practice of the International Court, 1920-2005*. Leiden: Brill – Nijhoff, 2006, p. 1062.

12 Official introduction to the IUSCT. *Iran-United States Claims Tribunal* [online] [cit. 9. 5. 2021]. Available at: https://iusct.com/introduction/

13 The tribunal now has resolved almost all of the approximately 4,700 private U.S. claims. See Office of the Assistant Legal Adviser for International Claims and Investment Disputes, Iran-U.S. Claims Tribunal. *U.S. Department of State* [online]. [cit. 4. 5. 2021]. Available at: https://www.state.gov/iran-u-s-claims-tribunal/; On the contrary, the IUSCT has only resolved 110 public claims. See IUSCT Cases. *Iran-United States Claims Tribunal* [online]. [cit. 20. 5. 2021]. Available at: https://iusct.com/pending-cases/

in public claims.[14] However, considering the unique purpose, history and characters of this tribunal, and that almost all the challenges occurred under *"rather unusual circumstances"*[15], the frequent atypical challenges in IUSCT cannot represent the general practices in inter-state arbitration.[16] By and large, practices of challenge in inter-state cases were "abnormally rare" compared to those in commercial and investment arbitration. It is hard to believe that arbitrators behave themselves more in inter-states cases than in commercial or investment disputes. There might be some reasons.

Moreover, the grounds for disqualification established in inter-state cases are also worth discussing. On the one hand, the rules concerning arbitrator-challenge in commercial and investment arbitration, such as the substantial grounds and procedural requirements, were exceedingly detailed and explicit. As will be discussed below, 28 possible factual circumstances were summarized by *Gary Born* in commercial practices for finding lack of impartiality.[17] In addition, International Bar Association had published Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines"), in which both general standards and factual circumstances categorized in red, orange, and green lists were provided.[18] Though the IBA Guidelines are not approved as a treaty via due process, it considerably impacts daily commercial and investment arbitration.[19]

14 As will be illustrated in Part 2.2, the challenges of arbitrators are sometimes not filed during a specific case because of the "standing" character of the tribunal. See TEITELBAUM, R. Challenges of Arbitrators at the Iran-United States Claims Tribunal: Defining the Role of the Appointing Authority. *Journal of International Arbitration*, 2006, Vol. 23, no. 6, p. 549: *"unlike an ad hoc commercial arbitration tribunal, allows for general challenges of arbitrators to be initiated by either the United States or Iran at any time."*

15 CAPLAN, L. M. Arbitrator Challenges at the Iran-United States Claims Tribunal. In: GIORGETTI, C. (ed.). *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals*. Leiden: Brill – Nijhoff, 2015, p. 116. See detailed discussion in Part 3.

16 Somehow, the abundant practices of the IUSCT have been totally ignored by both parties and the tribunal in *Chagos Arbitration*.

17 BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2021, pp. 2001–2008. For details, see *infra* note 166.

18 IBA Guidelines on Conflicts of Interest in International Arbitration, Adopted by resolution of the IBA Council on Thursday 23 October 2014. *International Bar Association* [online]. [cit. 2. 5. 2021]. Available at: https://www.ibanet.org/Document/Default.aspx?DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafee8918

19 MOSS, M. The Role of the IBA Guidelines on Conflicts of Interest in Arbitrator Challenges. *Kluwer Arbitration Blog* [online]. 23. 11. 2017 [cit. 10. 5. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2017/11/23/role-iba-guidelines-conflicts-interest-arbitrator-challenges/

On the other, the rules regarding arbitrator-challenge in inter-state cases had never been demonstrated until the *Chagos Arbitration* in 2011, where the tribunal found that it *"does not consider that principles and rules relating to arbitrators, developed in the context of international commercial arbitration and arbitration regarding investment disputes to inter-State disputes"*.[20] According to the tribunal, only the Optional Rules for Arbitrating Disputes between Two States ("PCA Optional Rules"), The Statute of the International Tribunal of the Law of the Sea ("ITLOS") and ICJ Statute can function as "source of law" during inter-state proceedings.[21] Considering the precedential effect of international cases,[22] *Chagos Arbitration* may set the tone for the future. As a result, the reasoning and conclusions given by the tribunal should be discussed rationally and prudently.

This paper is divided into five parts. Following the brief introduction, in Part 2, the current practices and standards regarding the challenge of arbitrators in inter-state cases are examined. Three categories of proceedings, including those before *ad hoc* tribunals, mixed claims tribunals and standing courts were focused. Part 3 tries to illustrate the reasons behind the asymmetric challenge practices. After that, in Part 4, the characters of the current standards are discussed, and the question, why rules in commercial and investment arbitration should not be precluded in inter-state cases, is to be answered. And Part 5 concludes.

2 Current Practices in Inter-State Cases

Three categories of tribunals dealing with inter-state cases will be discussed in this part. The first is the *ad hoc* tribunals established under Annex VII of the 1982 United Nations Convention of the Law of the Sea ("UNCLOS"), composing 3 or 5 arbitrators, each dealing with specific litigation concerning the application and interpretation of the UNCLOS. Arbitrators are appointed

20 Reasoned Decision on Challenge of the PCA of 1 December 2011, *Chagos Marine Protected Area Arbitration (Mauritius vs. United Kingdom)*, Case No. 2011-03, para. 156.

21 Ibid., para. 152–154.

22 As for comprehensive analysis about the precedent in international law, see SHAHABUDDEEN, M. *Precedent in the World Court*. Cambridge: Cambridge University Press, 2007, 245 p.; see also ZEKOS, I. G. Precedent and Stare Decisis by Arbitrations and Courts in Globalization. *The Journal of World Investment & Trade*, 2009, Vol. 10, no. 3, pp. 475–510.

(by parties or the appointing party) from an arbitrator pool (list) nominated by state parties prior.[23] *Chagos Arbitration* is the only case where the challenge to arbitrator has formally been filed among the 15 Annex VII cases, or even among the whole inter-state cases dealt in *ad hoc* tribunals.

The second is the mass mixed claims tribunal, and the IUSCT will be illustrated as a representative. As mentioned above, the IUSCT is entitled to deal with both private and public claims. IUSCT consists of 9 "standing" members,[24] three nominated by Iran and three by the US, with the left three with third-country nationalities appointed by agreement of the six party-appointed arbitrators or the Appointing Authority.[25] Nine arbitrators have been divided into three chambers: one Iranian, one American, and one third-country arbitrator serving as presiding arbitrators. Claims are resolved either by chambers or the full tribunals.[26] The President of the IUSCT is entitled to decide *"the composition of Chambers, the assignment of cases to various Chambers, the transfer of cases among Chambers and the relinquishment by Chambers of certain cases to the Full Tribunal"*.[27]

The third category is the rules and practices of the ICJ, a permanent court consisting of 15 judges covering the "main forms of civilization and the principal legal systems of the world". Strictly speaking, the recusal of judges of a standing court does not fall in the scope of arbitrator-challenge. However, compared to international commercial and investment arbitration, which does not have a judicial settlement mechanism, the practices of standing courts are the most unique and exclusive experiences in inter-state disputes, as stones from other hills[28]. As a result, by reference to the case laws regarding the removal of judges, we may better understand the specific requirements of "impartiality and independence of arbitrators" in inter-state cases.

23 Art. 2 Annex VII UNCLOS.

24 In the founding documents and practices of the IUSCT, adjudicators have three titles: "members", "arbitrators" and "judges".

25 Art. III para. 1 1981 Declaration of the government of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the government of the United States of America and the government of the Islamic Republic of Iran ("Claims Settlement Declaration").

26 Art. III para. 1 Claims Settlement Declaration.

27 Art. 5 1983 Tribunal Rules of Procedure.

28 "Stones from other hills" is one line of verse from the *Book of the Songs*, an anthology of ancient Chinese poetry, meaning "other people's good quality or suggestion whereby one can remedy one's own defects".

2.1 Chagos Arbitration: A Leading Debate

In 2010, Mauritius initiated arbitration against the UK under Annex VII of the UNCLOS, and PCA served as the Registry.[29] Twenty-one days after the PCA transmitting to the Parties the *Declarations of Acceptance and the Statements of Impartiality and Independence* of the five arbitrators, Mauritius stated its intention to challenge the appointment of Judge Greenwood, a party-appointed arbitrator who had acted for the UK several years and was selected by the UK as the new legal adviser during the proceeding. In June 2011, Mauritius submitted its *Memorial on the Challenge* containing the detailed grounds and reasons.[30] After examining the opinions and evidence given by both parties and Judge Greenwood himself, the left four arbitrators, on behalf of the whole tribunal, delivered a reasoned decision in November 2011 in which Mauritius's challenge was denied.[31] Whether Judge Greenwood was actually partial and dependent on UK's government is beyond the discussion of this paper; what is more noteworthy lies in that the parties and the tribunal had a significant debate, unprecedentedly, on the standards of arbitrator-challenge in inter-state cases.

Mauritius contended that the independence and impartiality of arbitrators should be assessed by reference to an objective standard, that *"whether circumstances give rise to justifiable doubts as to the arbitrator's impartiality or independence from the perspective of a reasonable and informed person"*[32], which was named by the tribunal as "Appearance of Bias Standard". More specifically, the appearance of bias did not require an inquiry on whether actual bias of dependence existed.[33] To support its claims, Mauritius relied on (1) international arbitration rules[34],

29 Reasoned Decision on Challenge of the PCA of 1 December 2011, *Chagos Marine Protected Area Arbitration (Mauritius vs. United Kingdom)*, Case No. 2011-03, para. 9. The dispute is regard to the UK's decision to establish a "Marine Protected Area" around the Chagos Archipelago.

30 Ibid., para. 15.

31 Ibid.

32 Ibid., para. 43.

33 Para. 32 Memorial on Challenge.

34 UNCITRAL Arbitration Rules, the PCA's Optional Rules for Arbitrating Disputes Between Two States, and in the respective rules of the Court of Arbitration of the International Chamber of Commerce, the London Court of International Arbitration, the International Centre for Dispute Resolution of the American Arbitration Association, the Arbitration Institute of the Stockholm Chamber of Commerce, IBA Guidelines, UNCITRAL Model Law 1985, Burgh House Principles on the Independence of the International Judiciary, 2011 Resolution of the Institut de Droit International on the Position of the International Judge.

(2) statements of famous professors and judges[35], (3) case laws of international commercial arbitration, investment arbitration and judicial practices[36]. Moreover, Mauritius maintained that the Appearance of Bias Standard has the status of the "general principle of law" under Art. 38 of the ICJ Statute.[37]

However, the UK disagreed with Mauritius and told a different story. First, the UK contended that no textual basis for the standard of "justifiable doubts" existed and that the very standard to justify any given challenge was embedded in the provisions regarding the selection of arbitrators (Art. 2 para. 1 and Art. 3 letter e) of Annex VII).[38] Besides, it further submitted that rules and practices applied by other courts and tribunals dealing with inter-State cases, rather than international commercial and investment arbitration,[39] should be adopted by the tribunal.[40] Since Annex VII arbitration is paralleled with the ICJ and the ITLOS as one of the compulsory dispute settlements, the applicable rules regarding the same matters (such as the disqualification of adjudicators) must be identical in these three forums.[41] Based on the rules and practices of ICJ, ITLOS, and PCIJ,[42] the UK argued that *"the principal test of conflict of interest is that* […] *the arbitrator must not have had any involvement with the actual dispute that is before the arbitral tribunal"*[43] (Specific Prior Involvement Standard). The close past relationship has never been a ground for challenging an arbitrator.[44]

35 Reasoned Decision on Challenge of the PCA of 1 December 2011, *Chagos Marine Protected Area Arbitration (Mauritius vs. United Kingdom)*, Case No. 2011-03, para. 60 – Judge Mensah's stated that *"appearance of bias* […] *which would govern matters before ITLOS should also be applied in an Annex VII arbitration."*

36 Ibid., para. 42.

37 Ibid., para. 58.

38 Ibid., para. 47–50.

39 Response of the UK in *Chagos Marine Protected Area Arbitration (Mauritius vs. United Kingdom)*, para. 2 point v).

40 Ibid., para. 45–46.

41 Ibid., para. 48.

42 Art. 16, 17 and 24 ICJ Statute, Art. 34 Rules of the ICJ, and Art. 8 Statute of ITLOS. As for practices of the ICJ, see Advisory Opinion of the ICJ of 9 July 2004, Case *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, p. 136; Provisional Measures Order of the International Tribunal for the Law of the Sea of 3 December 2001, *MOX Plant Case (Ireland vs. United Kingdom)*.

43 Response of the UK in *Chagos Marine Protected Area Arbitration (Mauritius vs. United Kingdom)*, para. 2 point iii) and 66.

44 Ibid., para. 61.

The tribunal rejected both of them. On the one hand, the tribunal denied the "Specific Prior Involvement Standard" and accepted the "justifiable doubts test" argued by Mauritius since it has been embodied in PCA Optional Rules (Art. 10)[45] and the rules of procedures of many PCA-administered cases.[46] On the other hand, the "justifiable doubts test" does not entail "appearance of bias standard", for the latter derived from private law sources which were not within the sources of international law enumerated in Art. 38 para. 1 of the Statute of the ICJ.[47] As a result, rules developed in international commercial and investment arbitration, particularly the IBA Guidelines, were deemed irrelevant and inapplicable to inter-state cases.[48] Only rules and case law with regard to the qualification of judges or arbitrators applied in inter-state context (Art. 16, 17, 24 and 36 para. 1 of the ICJ Statute; Art. 4 para. 1 of the Rules of the ICJ; Art. 7, 8 and 17 of the Statute of the ITLOS; Art. 6 para. 4, 8 para. 3 and 10 of the PCA Options Rules) were considered.[49] As will be illustrated below, the standards contained in those applicable provisions are more similar to what the UK has argued: the "Specific Prior Involvement Standard".

2.2 IUSCT: UNCITRAL Rules as the Backbone

The IUSCT operates based on three primary instruments, the Declaration of the Government of the Democratic and Popular Republic of Algeria ("IUSCT General Declaration"), the Claims Settlement Declaration of 1981, and the Tribunal's Rules of Procedure ("IUSCT Tribunal Rules").

45 Art. 10 para. 1 UNCITRAL Arbitration Rules 1976 reads: *"Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."*

46 Art. 8 Eritrea-Ethiopia Boundary Commission Rules of Procedure, PCA Case No. 2001-01; Art. 6 Rules of Procedure for the Arbitral Tribunal Constituted Under the OSPAR Convention Pursuant to the Request of Ireland Dated 15 June 2001, PCA Case No. 2001-03; Art. 6 Rules of Procedure for the Tribunal Constituted Under Annex VII to the UNCLOS Pursuant to the Notification of Ireland Dated 25 October 2001, PCA Case No. 2002-01.

47 *"Tribunal is not convinced that the Appearance of Bias Standard as presented by Mauritius and derived from private law sources is of direct application in the present case."* – Reasoned Decision on Challenge of the PCA of 1 December 2011, *Chagos Marine Protected Area Arbitration (Mauritius vs. United Kingdom)*, Case No. 2011-03, para. 167–169.

48 Ibid., para. 156 and 165.

49 In this regard, even public law sources such as Rome Statute and Rules of International Criminal Tribunal for the former Yugoslavia were excluded, since both of them dealt with criminal cases with individuals involved in legal relations. Ibid., para. 153–154.

In particular, Art. III.2 of the Claims Settlement Declaration provides that: *"… Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal* […] *The UNCITRAL rules for appointing members of three-member tribunals shall apply Mutatis mutandis to the appointment of the Tribunal."* [50]

Hence, the IUSCT Tribunal Rules were drafted based on the UNCITRAL Arbitration Rules of 1976 with necessary modification in the form of additional "Notes" accompanying each provision. Regarding arbitrator-challenge, the IUSCT Tribunal Rules offered two grounds: (1) justifiable doubts to the arbitrator's impartiality or independence (Art. 10), and (2) failure to act or perform the arbitrator's functions (Art. 13).[51] Both provisions incorporate the corresponding articles in UNCITRAL Arbitration Rules[52], suggesting that standards developed in international commercial rules can also apply to inter-state claims, particularly in the forum of IUSCT.

In practice, the applicability of UNCITRAL Arbitration Rules and the "justifiable doubts test" has been affirmed since the first challenge initiated by Iran. A few months after the operation of the IUSCT, Judge Mangård made an informal remark during a meeting of the arbitrators in Chamber Three, the content of which was regarded by Iran as *"accusing the Islamic Republic of Iran of condemning executions"* and *"a groundless prejudgment against a political system"*.[53] As a result, Iran argued that Judge Mangård was disqualified from rendering any fair judgment due to the political approach and intended to remove Judge Mangård unilaterally by exercising its sovereign right.[54] In other words, Iran had planned to disqualify Judge Mangård *above and outside* the procedure laid down in the UNCITRAL Arbitration Rules of 1976.[55] The IUSCT disagreed with Iran and found that:

50 Art. III.2 Claims Settlement Declaration.
51 The challenge is subject to the procedural requirement under Art. 11–12 IUSCT Tribunal Rules.
52 See Art. 10 and Art. 13 UNCITRAL Arbitration Rules of 1976.
53 CARON, D. D. and L. M. CAPLAN. *The UNCITRAL Arbitration Rules: A Commentary (with an Integrated and Comparative Discussion of the 2010 and 1976 UNCITRAL Arbitration Rules)*. Oxford: Oxford Commentaries on International Law, 2013, p. 192.
54 Ibid.
55 Ibid.

"[n]either the Claims Settlement Declaration nor any of the other instruments relating to the settlement of disputes between Iran and the United States contains anything that can be interpreted as indicating that alternative means for removing an arbitrator exist. Art. III, paragraph 2 of the Claims Settlement Declaration makes it abundantly clear that the only method by which an arbitrator may be removed from office is through challenge by a party and decision by the Appoint Authority pursuant to Article 11 and 12 of the (1976) UNCITRAL Rules."[56]

Later, Judge Moons, the Appointing Authority, upheld what had found by the Tribunal and further confirmed that: *"[i]f the High Contracting Parties wish to remove a duly Appointed arbitrator from office, the only option open to them* […] *is to use the challenge procedural provided for in articles 10 to 12 of the (1976) UNCITRAL rules …"*[57] Hence, the challenge standard (Art. 10, "justifiable doubts test") and procedure (Art. 11–12) under UNCITRAL Arbitration Rules were consolidated as the exclusive mechanism for seeking to disqualify an arbitrator.[58]

The next question is, what constitutes a justifiable doubt? Neither UNCITRAL Arbitration Rules, nor the additional Notes to the IUSCT Tribunal Rules provide detailed grounds. Even worse, except under three challenges, the targeted arbitrator withdrew from the office,[59] the left 19 challenges were all dismissed by the Appointing Authority.[60] Thus, what

56 IUSCT Decision about the Challenging of Judge Mangard of 26 January 1982, Section V, para. 11.

57 Decision on the objections to Mr. N. Mangard as a Member of the Iran-United States Claims Tribunal, lodged by the Islamic Republic of Iran, delivered by Charles Moons on 3 May 1982. Quoted from CARON, D. D. and L. M. CAPLAN. *The UNCITRAL Arbitration Rules: A Commentary (with an Integrated and Comparative Discussion of the 2010 and 1976 UNCITRAL Arbitration Rules).* Oxford: Oxford Commentaries on International Law, 2013, p. 193.

58 However, not all challenges were filed based on "justifiable doubts" reasons. For example, Iran's challenge against Judge Arangio-Ruiz was based on alleged overall neglect of his duties of arbitrator which constituting a failure to act. Decision of the Appointing Authority on the Challenge by Iran of Judge Arangio-Ruiz of 24 September 1991. Nevertheless, "failure to act" also constitutes a ground to challenge under Art. 13 of the UNCITRAL Arbitration Rules and the IUSCT Tribunal Rules. As a result, the UNCITRAL Arbitration Rules are still respected.

59 Judge Briner withdrew from Case No. 55 due to his close relationship with claimant. Iran withdrew Judge Kashani and Judge Shafeiei due to their physical assault on Judge Nils Mangård.

60 This statistic includes challenges in private claims since both challenges in private and public claims share the same standards. By the same token, the following examples contain all grounds that parties have invoked, including those in private claims.

we can learn from the practices is what does not constitute a justifiable doubt: informal comments on the judicial system of one party[61], violation of particular national law[62], instructing inquiry into the security account[63], specific procedural arrangements[64], the wording used by a targeted arbitrator for self-defense[65], calculated scheme[66], refusal to self-recuse[67], a phone call after the Appointing Authority finishing appointing a new third-country arbitrator[68], breach of confidentiality[69], financial dependence on one party[70], prior involvement as an arbitrator in an ICC arbitration between Iran and a US corporation[71], earlier service as general counsel of the parent corporation of one government[72].

2.3 ICJ: "Stones From Other Hills"

According to the ICJ Statute, judges can be recused from the bench for a particular case by themselves, parties to the dispute, or the President of the Court, but the grounds for disqualification in these three circumstances are quite similar. In the case of voluntary recusals, Art. 24 provides that a judge could decide not to participate in a specific case "for some special reasons", whose meaning has not been interpreted by any normative instruments and can only be clarified in practices. Within 40 cases of self-recusals, at least

61 IUSCT Decision about the Challenging of Judge Mangard of 26 January 1982.

62 Decision of the Appointing Authority on the Third Challenge by Iran to Judge Briner of 25 September 1989.

63 Decision of the Appointing Authority on the Challenge of Judge Skubiszewski of 30 August 1999.

64 Ibid., p. 445.

65 Ibid., p. 450.

66 Joint Decision of the Appointing Authority on the Challenges of Judges Skubiszewski and Arangio-Ruiz of 5 March 2010.

67 Ibid.

68 Decision of the Appointing Authority on the Challenge of Judge Charles Brower of 3 September 2010.

69 See Decision of the Appointing Authority on the Challenge of Judge Broms of 7 May 2001.

70 Decision by the Appointing Authority on the Challenge of Judges Noori, Ameli, and Aghahosseini of 19 April 2006.

71 Decision by the Appointing Authority on the Challenge of Judge Seifi of 3 September 2010.

72 Decision of the Appointing Authority on the Challenge of Judge Noori of 31 August 1990: *"even if his service as Head of the NIOI legal office [the parent corporation of the respondent] and his failure to disclose this to the President of the Tribunal were true, I do not feel this doubt can be termed justifiable doubt.*"

20 of them are raised due to judges' previous involvement in the specific disputes,[73] which is undoubtedly forbidden under Art. 17 of the Statute: *"1. No member of the Court may act as agent, counsel, or advocate in any case. 2. No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity."*[74] Matters are provided in Art. 17 account for the vast majority of "special reason" of Art. 24. Indeed, as *Rosenne* has pointed out, *"there is an obvious potential overlap between disqualification under Art. 17 and a case of a member withdrawing, or being asked to withdraw, under Art. 24"*.[75] On top of the "previous involvement standard", other circumstances considered as "special reasons" are numbered, such as intimate personal relationships with the agent of one party,[76] appointed as *ad hoc* judge during the new round of judge-election.[77]

73 Sir Benegal Rau in *Anglo-Iranian Oil Co*; Lauterpacht in *Nottebohm*; Philip C. Jessup in *Temple of Preah Vihear*; Sir Muhammad Zafrulla Khan in *Barcelona Traction, Light and Power Company, Limited*; Judges Petren and Ignacio-Pinto in *Review of UNAT Judgment No. 158 Advisory Opinion*; Judge Oda in *Aegean Sea Continental Shelf*; Judge Bedjaoui in *Arbitral Award of 31 July 1989 (Guinea-Bissau vs. Senegal)*; Judge Weeramantry in *Certain Phosphate Lands in Nauru*; Dame Rosalyn Higgins and Carl-August Fleischhauer in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*; Tomka in *Gabčíkovo-Nagymaros case*; Dame Rosalyn Higgins in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*; Dame Rosalyn Higgins and Carl-August Fleischhauer in *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*; Simma in *Certain Property*; Dame Rosalyn Higgins in *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*; Judge Simma and Judge Parra-Aranguren in *Maritime Delimitation in the Black Sea*; Judge Hanqin in *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*. The reasons for self-recusal are not always given to the public. See GIORGETTI, C. The Challenge and Recusal of Judges of the International Court of Justice. In: GIORGETTI, C. (ed.). *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals*. Leiden: Brill – Nijhoff, 2015, pp. 18–25; see also JENNINGS, R. Article 24. In: ZIMMERMANN, A. et al. (eds.). *The Statute of the International Court of Justice, A Commentary*. Oxford: Oxford University Press, 2012; COUVREUR, M. P. Article 17. In: ZIMMERMANN, A. et al. (eds.). *The Statute of the International Court of Justice, A Commentary*. Oxford: Oxford University Press, 2012.

74 Art. 17 ICJ Statute.

75 JENNINGS, R. Article 24. In: ZIMMERMANN, A. et al. (eds.). *The Statute of the International Court of Justice, A Commentary*. Oxford: Oxford University Press, 2012.

76 INTERNATIONAL COURT OF JUSTICE. *International Court of Justice Yearbook 1956–1957*. The Hague: International Court of Justice, 1957, p. 86; Judge Jules Basdevant recused himself in *Effect of Awards made by the United Nations Administrative Tribunal (Advisory Opinion)*.

77 INTERNATIONAL COURT OF JUSTICE. *International Court of Justice Yearbook 1984–1985*. The Hague: International Court of Justice, 1985, p. 177; Judge Jennings recused himself in *Application for Revision and Interpretation of the Judgment of 24 February 1982 concerning the Continental Shelf*.

President can also "suggest" one judge to quit the bench based on "some special reason". However, in practice, only in one case did the President "suggest" the judge quit the bench.[78] In the *South West Africa case (Ethiopia & Liberia vs. South Africa)*, the President, Sir Percy Spender, announced in the hearings that Sir Mohammed Zafrullah Khan would not participate in the case, with no official explanation of this decision or statement of any reasons for it.[79]

As for disqualification requested by third parties, Art. 34 para. 2 of the Rules of the Court (ICJ) provides that a party can communicate *confidentially* to the President in writing *"any facts which it considers to be of possible relevance"*[80] to the application of Art. 17 and Art. 24 of the ICJ Statute, and which the parties believe may not be known to the Court. As a result, the "prior involvement standard" (Art. 17) and "some special reason" (Art. 24) also function as the grounds used to challenge the judges by the parties. The case law concerning the disqualifications initiated by the disputed parties is also rare (only 3 cases). In *South West Africa Case (Ethiopia vs. South Africa & Liberia vs. South Africa)*, the respondent South Africa, in a nonpublic notice, intended to challenge the compositions of the Court as a whole.[81] Other two challenges that occurred in the proceedings of the advisory opinions and all of which were filed concerning the application and interpretation of Art. 17 para. 2 of the ICJ Statute. In *Namibia Opinion*, South Africa argued that three judges had acted as representatives of their Governments in United Nations organs dealing with matters concerning South Africa.[82] In *Wall Opinion*, Israel sent a confidential letter to the President, contending

78 Art. 24 para. 2 ICJ Statute.

79 According to the subsequent declarations made by Judge Khan, the President had asked him not to participate in the case because he had at one point been nominated as an *ad hoc* judge by one of the parties, though he had not acted in that capacity. – JENNINGS, R. Article 24. In: ZIMMERMANN, A. et al. (eds.). *The Statute of the International Court of Justice, A Commentary*. Oxford: Oxford University Press, 2012; see also ROSANNE, S. *The Law and Practice of the International Court, 1920-2005*. Leiden: Brill – Nijhoff, 2006, p. 1058.

80 Art. 34 para. 2 ICJ Rules.

81 Order of the ICJ of 18 March 1965, *South West Africa case (Ethiopia & Liberia vs. South Africa)*, pp. 3–4. The Court had the hearing in closed session and the notice sent by South Africa has never been published.

82 Advisory opinion of the ICJ of 21 June 1971, Case *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, pp. 3, 6, 9.

that Judge Elaraby, as an Egyptian diplomat, had been involved in decisions at the General Assembly relevant to the case.[83]

3 Reasons Behind the Asymmetric Practices

This section tries to explore the reasons why states seem "careless" about the impartiality and independence of the arbitrators in inter-state cases proceeded in the arbitral and judicial contexts. Besides, this part also wants to figure out why states are highly motivated to raise challenges in the proceedings of the IUSCT as mixed claims tribunals. Following are reasons that may have an impact on the states' strategies and choices.

3.1 Historical Perspective: Authority vs. Impartiality

Although inter-state arbitration and international commercial arbitration have a long history, the origins of these two are different,[84] as may give rise to different attitudes towards the role of arbitrators. When we observe the inter-polities[85] arbitration practices dating back to the Middle Ages, the arbitrators were every so often the Pope (Holy See), the Holy Roman Emperor[86], ecclesiastics, or rulers of neighboring or neutral states.[87] Their judgments to the disputes were not based on the merits of international law, and frequently with no reasons to their decisions provided. Further, due to their involvement in political matters and intrigues at the time, they hardly could be regarded as independent or objective.[88] As a result,

83 Order of the ICJ of 30 January 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, pp. 3–4.

84 See generally NUSSBAUM, A. *A Concise History of the Law of Nations*. New York: Macmillan, 1954, 376 p.; see also BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2021, pp. 6–67.

85 The notion of "sovereign states" arises after 16th century. – BODIN, J. *Six Books of the Commonwealth (Blackwell's Political Texts)*. New York: Macmillan, 1955, 212 p.

86 BROWER, H. C. Arbitration. *Max Planck Encyclopedias of International Law* [online]. February 2017 [cit. 2. 5. 2021]. Available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e11?rskey=5SQkLI&result=1&prd=MPIL

87 BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2021, p. 12.

88 BROWER, H. C. Arbitration. *Max Planck Encyclopedias of International Law* [online]. February 2017 [cit. 2. 5. 2021]. Available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e11?rskey=5SQkLI&result=1&prd=MPIL

the validity of arbitration in this period was based on the secular and clerical authority of the Pope or the Heads of States other than their expertise or impartiality. It is noteworthy that "adjudication by the Heads" continued to exist after the 1899 and 1907 Hague Conferences when the contemporary arbitral model was established. For instance, the *Clipperton Island Arbitration*, a territorial sovereignty dispute between Spain and Mexico, was decided by Victor Emmanuel III, the King of Italy in 1931.[89]

On the contrary, international commercial/investment arbitration develops in different paths. Commercial arbitration had its beginning with the practices of the market and in the merchant gilds in Middle Ages.[90] Charters of numerous guilds, such as the Company of Clothworkers or the Gild of St. John of Beverley of the Hans House, provided mandatory arbitration of disputes among members.[91] Indeed, the spontaneously formed guilds and fairs, rather than the Pope or the King, were central to the development of commercial arbitral mechanisms.[92] Accordingly, it is the expertise, independence and impartiality of arbitrators, rather than their political authority, that justifies the validity of the decisions. By way of examples, Art. 57 of the ICSID Convention provides that the disqualification of arbitrators should base on a manifest lack of the qualities including "high moral character, recognized competence in the fields of law, commerce, industry or finance, exercising independent judgment" as required by Art. 14 ICSID Convention.[93] Also, the "justifiable doubts to the independence and impartiality" standard were first adopted in commercial arbitration rules at an international level, i.e., the UNCITRAL Arbitration Rules of 1976,

89 Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island. In: *The American Journal of International Law*, 1932, Vol. 26, no. 2, pp. 390–394.

90 WOLAVER, E. S. The Historical Background of Commercial Arbitration. *University of Pennsylvania Law Review*, 1934, Vol. 83, no. 2, p. 133.

91 BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2021, p. 30.

92 Ibid., p. 31.

93 In the Spanish Version, the text refers to "impartiality" not "independence". Since all language versions of the ICSID Convention are equally authentic (ICSID Arbitration Rule 56), there is a general consensus that both requirements (impartiality and independence) are mandatory. CLEIS, N. M. *The Independence and Impartiality of ICSID Arbitrators, Current Case Law, Alternative Approaches, and Improvement Suggestions*. Leiden: Brill – Nijhoff, 2017, pp. 12–13.

a comprehensive set of procedural rules for the conduct of arbitral proceedings arising out of their commercial relationship.[94] The same standard is at present accepted in many investment arbitrations.[95]

However, history is intricate. The dichotomy between the role of arbitrators in inter-state and commercial arbitration in their initial days, i.e., Pope/King vs. Expertise, may not always tell the whole story. It is proposed that even in ancient times, impartiality and independence of arbitrators were central to the state-to-state arbitral process.[96] Besides, in the later Roman Empire, the church also played a leading role in commercial arbitration, with arbitral jurisdiction exercised by Christian bishops.[97] Even though "arbitration by Head/Pope" had an ideological impact on latter inter-state arbitration, such as the absolute authority of the arbitrator must be respected, the *PCA Optional Rules* adopted in 1992, which incarcerates the UNCITRAL Arbitration Rules, has already transformed the role of arbitrators similar to that in commercial arbitration.[98] Anyway, investigating the reasons behind the asymmetric practices from the viewpoints of history just provides one possible answer.

3.2 Enforcement Mechanism of Different Categories of Arbitrations

How can the enforcement mechanism affect the willingness of parties towards the arbitrator-challenge? Two aspects are considered as relevant: first is about the effectiveness of enforcement mechanism, i.e., whether

94 As will be discussed in Part 4, the "justifiable doubts" standard has been widely shared by the domestic arbitration system.

95 See Decision on the Challenge to Mr. Judd L. Kessler of the London Court of International Arbitration of 3 December 2007, *National Grid PLC vs. the Republic of Argentina*, Case No. UN 7949; Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, of the ICSID of 12 August 2010, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa vs. Argentine Republic*, Case No. ARB/07/26, para. 43; Decision on Challenge to Arbitrator of the ICSID of 8 December 2009, *Perenco Ecuador Ltd. vs. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador ("Petro Ecuador")*, Case No. ARB/08/6, para. 54–58.

96 BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2021, p. 10.

97 Ibid., p. 28.

98 *"This provision (Art. 11) replicates Art. 11 of the 2010 UNCITRAL Rules, which improves on the 1976 UNCITRAL Rules by referring expressly to the continuous nature of arbitrators' disclosure obligations."* – BROOKS, W. D. et al. *A Guide to the PCA Arbitration Rules*. Oxford: Oxford University Press, 2014, p. 50.

the arbitral awards can be executed in domestic courts; and second, whether the lack of impartiality and independence of the arbitrator can be used as grounds to annul or deny recognition/implementation of the foreign awards.

3.2.1 Impartiality/Independence as the Perquisite to Enforcement

In international commercial arbitration, arbitrators' lack of impartiality and independence can be a basis for seeking to annul or deny recognizing/enforcing an arbitral award. Although Art. 34 para. 2 of the UNCITRAL Model Law or Art. V of the New York Convention does not include provisions directing specifically at the lack of independence of an arbitrator, the tribunal composed by partial and dependent arbitrators is arguably not constituted in accordance with the parties' agreement or with applicable law, then violating Art. 34 para. 2 letter a) point iv of the UNCITRAL Model Law. It is also proposed that a partial tribunal is inconsistent with conceptions of procedural (or other) public policy required in Art. 34 para. 2 letter b) point 2 UNCITRAL Model Law.[99] Similar conclusions apply to the recognition and implementation of foreign awards in domestic courts because a partial tribunal (1) is not composed in accordance with the parties agreement or the law of the country where the arbitration was seated[100], (2) makes one party unable to present his case[101], and (3) violates mandatory law rules or public policies of the recognition forum[102]. Nevertheless, several states' domestic law directly stipulates the annulment,

99 BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2021, p. 3564.

100 Art. V para. 1 letter d) New York Convention. Art. 13 Arbitration Law of the People's Republic of China provides that *"[a]n arbitration commission shall appoint its arbitrators from among righteous and upright persons"*.

101 Art. V para. 1 letter b) New York Convention. See also Section 4-11 comment f (2019) Restatement of the U.S. Law of International Commercial and Investor-State Arbitration: *"Ordinarily, the requirement that a party has an opportunity to present its case also implies an impartial tribunal that is willing to consider each party's presentation of its case and make a determination based on the parties' factual submissions and legal arguments."*

102 Art. V para. 2 letter b) New York Convention. For instance, Art. 1 Arbitration Law of the People's Republic of China provides that *"this Law is formulated in order to ensure the impartial and prompt arbitration of economic disputes …"*. Accordingly, the impartiality of arbitration is regarded as "public policy" in China and then the Award will be denied recognition.

non-recognition /enforcement rules[103] and a great many foreign awards have been denied for want of impartiality and independence of the arbitrators.[104]

Anyway, in either the annulment and the non-recognition/implementation circumstances, the applicable standards are lower than those applied to remove an arbitrator. It is not sufficient merely to demonstrate "justifiable doubts" about an arbitrator's impartiality or "risks" of arbitrator bias. Instead, to take the exceptional step of denying recognition of an award, an award-debtor must provide clear evidence demonstrating both the likelihood of unacceptable bias and partiality of an arbitrator and the probability that this bias had a material effect arbitral process and tribunal's decision.[105] Evidence of doubts about an arbitrator's impartiality is not sufficient for non-recognition.

Given the enforcement of the foreign awards may be hindered by the judicial review dependent on the lack of impartiality and independence of the arbitrator, the parties may prefer to challenge biased arbitrators at the very beginning of the case as a prophylactic measure because the significant costs, time and human resources spent on it. However, lack of impartiality and independence has never been written in any rules as a prerequisite to executing an award in inter-state cases (neither in *ad hoc* arbitration, nor judicial forums, nor even the mixed claims tribunal). In other words, the quality of arbitrators cannot be used as a reason to annul or deny the enforcement of an award or judgment in inter-state cases. Accordingly, compared to the frequent challenges raised in commercial arbitration, states may feel it unnecessary to challenge arbitrators in inter-state cases.

103 Section 10 letter a) point 2 U.S. Federal Arbitration Act: *"(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration* […] *(2) Where there was evident partiality or corruption in the arbitrators, or either of them"*; See also Art. 237 para. 5 Civil Procedure Law of the People's Republic of China: *"Where the respondent adduces evidence that the arbitration award falls under any of the following circumstances, the people's court shall, upon examination and verification by a collegial bench, issue a ruling not to enforce the arbitration award: The opposing party withholds any evidence to the arbitral institution, which suffices to affect an impartial award."*

104 See, e.g., Judgment of the Cour de cassation of 24 March 1998, *Société Excelsior Film TV vs. UGC-PH*, Case No. 95-17.285; Judgment of Bezirksgericht in Affoltern am Albis of 26 May 1994; Judgment of the District Court of Amsterdam of 27 August 2002, *Goldtron Ltd vs. Media Most BV*, Case No. 02.398 KG; Judgment of the Israeli Central District Court of 15 April 2012, *Vuance Ltd vs. Dep't of Material Provisions of Ministry of Internal Affairs of Ukraine*, Case No. 12254-11-08.

105 BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2021, p. 3939.

3.2.2 Effectiveness of the Enforcement Mechanism

As for investment arbitration proceeded according to the ICSID Convention, if a party fails to comply with the award, the other party can seek to have the pecuniary obligations recognized and enforced in the courts of any ICSID member states *"as if it were a final judgment of a court in that State"*.[106] For cases involving non-party states to the ICSID Convention, the awards are to be recognized and implemented by reference to the New York Convention, according to which the awards of the international arbitrators can be enforced in over 160 countries.[107] It should be noticed that, unlike the international commercial arbitration convention such as the New York Convention or the UNCITRAL Model Law, the ICSID precludes any judicial review/remedy of the domestic courts and does not allow the domestic courts to refuse to implement the awards based on grounds other than those provided in the Convention itself.[108] As described by *Aron Broches*, the ICSID Convention establishes *"a complete, exclusive and closed jurisdictional system, insulated from national law"*.[109] At the end of the day, the losing parties have little control over the final awards when their assets are frozen or paid by the enforcement courts. Thus, every circumstance that may influence the outcome of the decision will cause parties' great attention and every procedural tool of the proceedings will be well-utilized.

However, the arbitral awards of the inter-state tribunal, or even a piece of judgment from a standing court, though normatively binding on the parties,[110] are not enforceable. Unlike international commercial/investment arbitration,

106 Art. 54 para. 1 ICSID Convention. Also, for cases involving non-party states to the ICSID Convention, the award can be recognized and implemented by reference to the New York Convention. See Introduction to Investment Arbitration. *International Arbitration* [online]. [cit. 5. 5. 2021]. Available at: https://www.international-arbitration-attorney.com/investment-arbitration/

107 Contracting States. *New York Arbitration Convention* [online]. [cit. 5. 5. 2021]. Available at: https://www.newyorkconvention.org/countries

108 Art. 53 para. 1 ICSID Convention: *"The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention."*

109 BROCHES, A. Awards rendered pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution. *ICSID Review-Foreign Investment Law Journal*, 1987, Vol. 2, no. 2, pp. 287–288.

110 See Art. 11 Annex VII of the UNCLOS; Art. 59 ICJ Statute; Art. 96 UN Charter; Art. 32 para. 2 PCA Optional Rules for Arbitrating Disputes between Two States.

most inter-state disputes do not involve pecuniary obligations and cannot simply be enforced by a domestic court. Thus, even an award or judgment comes into effect, only through the subsequent/final agreements concluded by disputed parties can the disputes be regarded as being resolved.[111] However, the final agreements are reached by negotiation and every so often, they may not strictly follow the findings and recommendations from the previous judgments or awards.[112] In other words, states have more freedom to choose how to deal with the decision, as the arbitral or judicial settlement is only one part of the strategy.[113] Accordingly, parties still have control over the outcomes of the dispute "settled by the tribunals", by virtue of their economic, political and military power during the post-judicial process. After all, it is not abnormal that the losing parties totally ignore the adverse awards or judgments.[114] In conclusion, the lack of impartiality and independence of the arbitrators, which may only influence the decisions of the awards, is not that important in inter-state arbitration.

The enforcement mechanism of the IUSCT is a different story among inter-state dispute mechanisms. For one thing, the nature of the majority of claims brought before the IUSCT regards assets and pecuniary matters.[115] Even within inter-state cases, the disputes concerning the interpretation

111 A dispute is deemed unsolved when *"the possibility of an agreement between the parties proves to be unrealistic"*. – CONFORTI, B. and C. FOCAREELLI. *Law and Practice of the United Nations*. Leiden: Martinus Nijhoff Publishers, 2010, p. 197; see also BRUNO, S. et al. *The Charter of the United Nations: A Commentary, Volume I*. Oxford: Oxford University Press, 2012, p. 1150.

112 As for detailed research on the relations between judgments and final agreement, see SCHULTE, C. *Compliance with Decisions of the International Court of Justice*. Oxford: Oxford University Press, 2004, 485 p.; see also TUMONIS, V. Adjudication Fallacies: The Role of International Courts in Interstate Dispute Settlement. *Wisconsin International Law Journal*, 2013, Vol. 31, no. 1, p. 41.

113 Several peaceful dispute settlement methods have been provided in Art. 33 UN Charter: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, regional agencies, or arrangements.

114 Dispute between Argentina and Chile concerning the Beagle Channel. In: *United Nations Reports of International Arbitral Awards*, 1998, Vol. 21, p. 53; Judgment of the ICJ of 27 June 1986, *Concerning Militarily and Paramilitary Activities in and against Nicaragua (Nicaragua vs. United States of America)*, p. 14; Award of the PCA of 12 July 2016, *The South China Sea Arbitration (The Republic of Philippines vs. The People's Republic of China)*, Case No. 2013-19.

115 The *IUSCT General Declaration* has five Points in total and four of them relate to assets issues. In addition, according to Art. II Claims Settlement Declaration, the IUSCT has jurisdiction on private claims arising *"out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights."*

and application of the Convention are only half of the official claims relating to the purchase and sale of goods and services.[116] Accordingly, the enforcement mechanism of the IUSCT is similar to the international commercial and investment arbitration that *"[a]ny award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws"*.[117] In order to prevent difficulties in Iran's implementation, the US and Iran governments established a special interest-hearing Security Account beforehand, the funds of which are *"all Iranian deposits and securities in US banking institutions in the United States, together with interest thereon"* [118] and *"are to be used for the sole purpose of securing the payment of, and paying, claims against Iran"*[119]. On top of that, Iran shall promptly make new deposits sufficient to maintain a minimum balance of US $ 500 million in the Account. The NV Settlement Bank of the Netherlands[120] is designated as *"depository of the escrow and security funds"* to ensure the operation of the Security Account *"under the instructions of the Government of Algeria and Central Bank of Algeria"*.[121] Since the implementation of the awards of the IUSCT can be directly enforced and is guaranteed by multiple mechanisms,[122] the challenges against bias arbitrators in prior are of significance relating to the amount of compensation.

3.3 Particular Reasons to the Practices of the ICJ and the IUSCT

Other than the reasons discussed above (the effectiveness of enforcement, etc.), the rare recusals in the ICJ and the frequent challenges in the IUSCT basically boil down to their unique structures and functions.

116 According to the published statistics provided by the website of IUSCT, 33 claims are about "interpretation or performance of the Algiers Declarations" with 77 claims concerning official commercial claims. – Cases. *Iran-United States Claims Tribunal* [online]. [cit. 19. 5. 2021]. Available at: https://iusct.com/cases/

117 Art. VI.3. Claims Settlement Declaration.

118 Para. 6 IUSCT General Declaration.

119 Ibid., para. 7.

120 Decision (DEC 8-A1-FT) of the Iran-United States Claims Tribunal of 17 May 1982, *The Islamic Republic of Iran vs. The United States of America*, Case No. A/1, para. 15.

121 Para. 2 IUSCT General Declaration.

122 The tribunal now has resolved almost all of the approximately 4,700 private U.S. claims. See Office of the Assistant Legal Adviser for International Claims and Investment Disputes, Iran-U.S. Claims Tribunal. *U.S. Department of State* [online]. [cit. 4. 5. 2021]. Available at: https://www.state.gov/iran-u-s-claims-tribunal/

3.3.1 Recusals of Judges in the ICJ

Why states seldom challenge judges in the forum of ICJ? For one thing, ICJ judges are nominated by national groups in the PCA, and elected by the voting process in the General Assembly and Security Council, respectively.[123] It is proposed that a successful election, to some extent, guarantees the good qualities and competence of judges so that to have them decide whether a conflict exists that should prevent them from sitting in a specific case.[124] However, qualities and best knowledge of international law have little to do with the fairness of the judges, and the reputation of the arbitrator is immaterial.[125] In addition, though judges do need to swear at the first public sitting at which the Member of the Court is present,[126] their professed intention to be independent and impartial is also considered irrelevant.[127] Perhaps the most significant reason lies in that, the ICJ consists of 15 sitting judges rather than 5 or 3 in *ad hoc* arbitration. The large scale of the bench is sufficient to accommodate the potential of one or two judges unable to sit without impacting the final outcome of a thoughtfully decided judgment. To put it another way, parties' challenges against one or two judges may have a relatively small impact on the final decisions. That may be the reason considered by South Africa when it chose to challenge the composition of the whole court in the *South West Africa Case*.

3.3.2 Challenges of Arbitrators in the IUSCT

Contrary to the rare practices of challenge in the ICJ and *ad hoc* inter-state tribunal, the frequent challenges brought by states in the IUSCT have some

123 Art. 4 ICJ Statute.

124 GIORGETTI, C. The Challenge and Recusal of Judges of the International Court of Justice. In: GIORGETTI, C. (ed.). *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals*. Leiden: Brill – Nijhoff, 2015, p. 25.

125 See Decision on Challenge to Arbitrator of the ICSID of 8 December 2009, *Perenco Ecuador Ltd. vs. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, Case No. ARB/08/6, para. 62: *"There is nothing in the IBA Guidelines that supports a special deference to the subjective positions of arbitrators based on their level of experience or standing in the international community."*

126 Art. 4.1 ICJ Rules: *"I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."*

127 Decision on Challenge to Arbitrator of the PCA of 17 December 2009, *ICS Inspection and Control Services Limited (United Kingdom) vs. The Republic of Argentina*, Case No. 2010-9, para. 5.

special reasons. First, it should be highlighted that the IUSCT came into existence as one of the measures to resolve the crisis between Iran and the US after the 1979 Tehran hostage event.[128] Two countries have severed diplomatic relations since 1980. As a result, Iran and the US do not have regular or formal channels for inter-governmental dialogues. The external political relations between Iran and the US continued to deteriorate in the following decades, with several armed conflicts. The frequent challenges filed by these two countries during the proceedings represent their poor relations and suspicions.[129] As one of the US Council described, *"the work of the Tribunal at mid-life took place against a political background that hardly seemed conducive to calmness and efficiency"*.[130]

Second, as mentioned before, if looking into the details of each challenge, we may find almost all the challenges brought by Iran and the US have implied purposes or under unique circumstances. On the one hand, since most claims up to billions of dollars were brought against Iran, the Iranian government had little motivation to speed or facilitate proceedings. The reluctance of Iran can also be proved by the conducts of Iranian arbitrators, some of whom have been documented refusing to *"sign awards or absent themselves from deliberations in an attempt to prevent the Tribunal's chambers from completing their work"*.[131] As a result, 11 out of 12 challenges filed by Iran (including those in private claims) were against the third-party arbitrator as part of a strategy to delay proceedings, or even recurrently (7 times) against the President[132] when *"his position required him to make decisions that were potentially adverse to Iran's interests"*[133] to wreak havoc on the work

128 Official introduction to the IUSCT. *Iran-United States Claims Tribunal* [online]. [cit. 9. 5. 2021]. Available at: https://iusct.com/introduction/

129 CAPLAN, L. M. Arbitrator Challenges at the Iran-United States Claims Tribunal. In: GIORGETTI, C. (ed.). *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals*. Leiden: Brill – Nijhoff, 2015, p. 116.

130 CROOK, R. J. The Tribunal at Mid-life: the American Agent's views. In: CARON, D. D. and R. J. CROOK (eds.). *The Iran-United States Claims Tribunal and the Process of International Claims Resolution*. New York: Transnational Publishers, 2000, p. 152.

131 CARON, D. D. and L. M. CAPLAN. *The UNCITRAL Arbitration Rules: A Commentary (with an Integrated and Comparative Discussion of the 2010 and 1976 UNCITRAL Arbitration Rules)*. Oxford: Oxford Commentaries on International Law, 2013, pp. 278–322.

132 Four times against Krzysztof Skubiszewski and three times against Judge Briner.

133 CARON, D. D. and L. M. CAPLAN. *The UNCITRAL Arbitration Rules: A Commentary (with an Integrated and Comparative Discussion of the 2010 and 1976 UNCITRAL Arbitration Rules)*. Oxford: Oxford Commentaries on International Law, 2013, p. 137.

of the Tribunal.[134] On the other hand, the US and its nationals have a very interest in the integrity of the Tribunal's operations. Since they noticed the incorporation of Iranian arbitrators and *"numerous indications of direct ex parte contacts between Iranian respondents and persons inside the Tribunal aimed at influencing the disposition of cases"*[135], they hardly believed in the impartiality and independence of the Iranian arbitrators. Thus, it is not surprising that all the challenges brought by the US side are targeting the Iranian arbitrators. However, perhaps the US and its nationals accepted the inevitable independence of the Iranian arbitrators, and the outcome of a successful challenge is the replacement of another "bias" Iranian arbitrator. The US only addressed arbitrators' conduct that was believed to be fundamentally intolerable, such as physical attacks by arbitrators, breaches of confidentiality of deliberations, and financial dependence, to guarantee the ordinary operation of the Tribunal.

4 The Way Before and Way Beyond: Towards Harmonization

4.1 The Way Before: Unique Characters in Inter-State Arbitrator-Challenge

4.1.1 The Relative High Standard

Until now, no arbitrator has been successfully removed by the challenge process in inter-state cases. The standards applied in inter-state practices are relatively high. As discussed above, in *Chagos Arbitration*, the tribunal adopted the "justifiable doubts standards" embedded in the PCA Optional Rules but at the same time rejected the "appearance of bias" and "specific prior

134 It has also been argued that sometimes the untimely challenges filed by Iran also prove Iran's hesitancy to accept the arbitration, such as Iran's second challenge to Judge Briner that was brought after the majority had signed the English-language version of the award, which is not only used to undermine Judge Briner's leadership, but also to circumvent the finality of the award. See CARON, D. D. and L. M. CAPLAN. *The UNCITRAL Arbitration Rules: A Commentary (with an Integrated and Comparative Discussion of the 2010 and 1976 UNCITRAL Arbitration Rules)*. Oxford: Oxford Commentaries on International Law, 2013, p. 125.

135 CROOK, R. J. The Tribunal at Mid-life: the American Agent's views. In: CARON, D. D. and R. J. CROOK (eds.). *The Iran-United States Claims Tribunal and the Process of International Claims Resolution*. New York: Transnational Publishers, 2000, p. 150.

involvement" standard submitted by Mauritius and the UK respectively. The thing is, what constitutes a "justifiable doubt"? How to identify such a subjective evaluation? The tribunal neglected to demonstrate neither of the questions in the final award and the only reason for the tribunal to accept this standard is that the text of "justifiable doubts" occurs in the PCA Optional Rules. In international commercial arbitration, the "justifiable doubt" is construed as *"the existence of risks or possibilities of partiality rather than requiring a certainty or probability of partiality"*.[136] As for the degree of the risks and possibilities, a mere "appearance" of partiality by an arbitrator, instead of an actual one, is sufficient for disqualification.[137]

This conclusion is consistent with the *Explanation* embedded in the IBA Guidelines, which confirms the standards are *"the use of an appearance test based on justifiable doubts about the arbitrator's impartiality or independence"*.[138] In practices, as concluded by a challenge decision proceeded in PCA: *"In all of the jurisdictions considered by the Working group in formulating the Guidelines, there was agreement 'that a challenge to the immateriality and independence of an arbitrator depends on the appearance of bias and actual bias.' "*[139] Accordingly, the "justifiable doubts" and "appearance of bias" are considered inalienable: the "appearance of bias" constitutes the degree of "doubt".[140] Thus, that the Tribunal in *Chagos Arbitration* separates these two standards by virtue of precluding the applicability of "private standards", actually raises the threshold of arbitrator-challenge in inter-state cases, where the "appearance of bias" is insufficient to disqualify an arbitrator.

The threshold is further increased when the tribunal decided to rely on the rules and practices of the recusal of judges in the judicial forum, i.e., the "prior involvement standard". Historically, the ICJ did not implement

136 BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2021, p. 1911.

137 Ibid., p. 1916.

138 Explanation to General Standard 2, letter b) IBA Guidelines.

139 Decision on Challenge to Arbitrator of the PCA of 8 December 2009, *Perenco Ecuador Ltd vs. Repub. of Ecuador*, Case No. IR-2009/1, para. 43.

140 *" '[A]ppearance of bias'* […] *which would govern matters before ITLOS should also be applied in an Annex VII arbitration."* – Reasoned Decision on Challenge of the PCA of 1 December 2011, *Chagos Marine Protected Area Arbitration (Mauritius vs. United Kingdom)*, Case No. 2011-03, para. 15. Citing the Statement of Judge Thomas A. Mensah, former President and Judge of ITLOS, Annex 1, p. 5.

Art. 17 and Art. 24 ICJ Statute stringently showed a quite tolerant attitude towards the "close relations" between judges and the disputed party. For example, Judge Helge Klaestad (Norway) continued to sit in the *1951 Norwegian Fisheries case (Norway vs. UK)* even though he had been a member of the Supreme Court of Norway that had decided on the compatibility of a baseline with Norwegian law.[141] Similarly, Judges Jules Basdevant (France) and Green Hackworth (US) sat in the *1952 Case Concerning the Rights of Nationals of the United States of America in Morocco (France vs. the US)*. However, they had been legal advisers to their respective ministers of foreign affairs when the case was being addressed at the diplomatic level.[142] Even nowadays, the ICJ pursues a stricter interpretation of Art. 17 ICJ Statute, general participation or involvement will not necessarily entail disqualification of a judge. For instance, as suggested in Part 2, Judge Elaraby, an officer in the Emergency Special Session from which the Advisory Opinion request had emerged, was not considered as "participating in the case".[143] The high threshold of challenge in inter-state cases has been criticized by Judge Thomas Buergenthal, that Art. 17 and 24 ICJ Statute are constructed in a most formalistic and narrow way and "an appearance of bias" should be the standard adopted by the Court.[144]

4.1.2 Appearance of Bias: A General Principle of Law?

In *Chagos arbitration*, Mauritius claims that the principle of "appearance of bias" standard forms the general principle of law and should be regarded as international law sources.[145] The tribunal, in their reasoned decision, ignored responding to this issue. Indeed, it is always hard to prove any legal concept as the *"general principle of law recognized by the community of nations"*[146]

141 COUVREUR, M. P. Article 17. In: ZIMMERMANN, A. et al. (eds.). *The Statute of the International Court of Justice, A Commentary*. Oxford: Oxford University Press, 2012.

142 Ibid.

143 Order of the ICJ of 30 January 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, pp. 3–4.

144 Dissenting Opinion of Judge Buergenthal to the Order of the ICJ of 30 January 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, p. 10.

145 Reasoned Decision on Challenge of the PCA of 1 December 2011, *Chagos Marine Protected Area Arbitration (Mauritius vs. United Kingdom)*, Case No. 2011-03, para. 58.

146 VÁZQUEZ-BERMÚDEZ, M. Second report on general principles of law. *United Nations Official Document System* [online]. [cit. 14. 5. 2021]. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/093/44/PDF/N2009344.pdf?OpenElement

since one should do a comparative analysis and suggest that the very legal concept is at least recognized by *"principal legal systems of the world"*[147] if not all the nations.[148] It is impossible to investigate the challenging standards of every legal system in this paragraph-limited paper. The arbitration rules of China (Chinese law system), United States ("US"), British (Common law system), France, German, Swiss (Continent law system) will be analyzed.

Although the UNCITRAL Model Law would like member states to accept the "justifiable doubts standard"[149], there is only limited judicial authority applying these standards.[150] For example, according to Art. 34 of Arbitration Law of the People's Republic of China, the withdraw of arbitrators must rely on the real or actual circumstances listed in the same Article[151], rather than "justifiable doubts to the arbitrators". In the US, since the focus of the inquiry under the *Federal Arbitration Act* is on the annulment of an award, not the removal of an arbitrator,[152] the threshold of the challenge is very demanding. As concluded by a US Appellate Decision, *"[a]rbitration differs*

147 Ibid., para. 25–27; see also ELLIS, J. General Principles and Comparative Law. *The European Journal of International Law*, 2011, Vol. 22, no. 4, pp. 949–971; see also Judgment of the ICJ of 5 February 1970, *Barcelona Traction, Light and Power Company, Limited,* para. 50; Judgment of the ICJ of 30 November 2010, *Ahmadou Sadio Diallo (Republic of Guinea vs. Democratic Republic of the Congo)*, para. 104.

148 Ibid., para. 28: *"Rather, a more pragmatic approach appears in practice, where States and international courts and tribunals have sought to carry out wide and representative comparative analyses, covering different legal families and regions of the world."* Judge Tanaka was of the view that *"the recognition of a principle by civilized nations* […] *does not mean recognition by all civilized nations"*, see Dissenting Opinion of Judge Tanaka to the Judgment of the ICJ of 18 July 1966, *South West Africa Cases (Second Phase)*, p. 299.

149 Art. 12 para. 2 UNCITRAL Model Law: *"An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties."*

150 BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2021, p. 1895.

151 Art. 34 Arbitration Law of the People's Republic of China provides: *"In one of the following circumstances, the arbitrator must withdraw, and the parties shall also have the right to challenge the arbitrator for a withdrawal: (1) The arbitrator is a party in the case or a close relative of a party or of an agent in the case; (2) The arbitrator has a personal interest in the case; (3) The arbitrator has other relationship with a party or his agent in the case which may affect the impartiality of arbitration; or (4) The arbitrator has privately met with a party or agent or accepted an invitation to entertainment or gift from a party or agent."*

152 The U.S. Federal Arbitration Act only addresses the arbitrators' impartiality in § 10, dealing with the grounds for vacating an award, with § 10 letter a) point 2 providing that an award may be vacated if *"there was evident partiality or corruption in the arbitrators, or either of them"*.

from adjudication, among other ways, because the 'appearance of partiality' ground of disqualification for judges does not apply to arbitrators; only evident partiality, not appearances or risks, spoils an award".[153] Some US courts adopting this analysis have articulated even more demanding standards, holding that, *"[t]he conclusion of bias must be ineluctable, the favorable treatment unilateral"*.[154] In England, Section 24 para. 1 letter a) of the Arbitration Act 1996 is equivalent to Art. 12 of the UNCITRAL Model Law, permitting removal of an arbitrator where circumstances give rise to *"justifiable doubts as to his impartiality"*.[155] However, in practice, a variety of standards, such as "reasonable suspicion", "real likelihood", or "real possibility" of bias have been developed by case law.[156]

In the continental law system, Art. 1456 of the French Code of Civil Procedure provides *"[t]he arbitrator should reveal any circumstance likely to affect his independence or impartiality before accepting his mission"*[157] and prefers a *"definite risk"* of bias. In contrast, the law of Germany, Belgium and the Netherlands parallels Art. 12 para. 2 of the UNCITRAL Model Law,[158] where a German court emphasized that the focus of inquiry was the existence of "justifiable doubts" about an arbitrator's impartiality or independence. The Swedish Arbitration Act is similar to the *Arbitration Act of the People's Republic of China*, where fairly detailed provisions/requirements regarding independence and/or impartiality requirements are contained.[159] But again, those circumstances require actual bias or corruption.

153 Judgment of the US Court of Appeals, Seventh Circuit of 16 July 2004, *Sphere Drake Insurance Limited vs. American General Life Insurance Company*, Case No. 03-3750.

154 See, for example, Judgment of the US Court of Appeals, Third Circuit of 6 March 2013, *James D. Freeman, Appellant vs. Pittsburgh Glass Works LLC; PGW Auto Glass, LLC.*, Case No. 12-2026.

155 § 24 para. 1 and § 33 para. 1 English Arbitration Act 1996.

156 Judgment of the High Court of Justice, Queen's Bench Division, Commercial Court of 19 October 2005, *A.S.M Shipping Ltd of India vs. T.T.M.I Ltd of England*, Case [2005] EWHC 2238 (Comm), para. 39.

157 Art. 1456 French Code of Civil Procedure.

158 § 1036 para. 2 German Arbitration Act: *"An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence."*; *"An arbitrator can be challenged if factual circumstances exist that give rise to justifiable doubts about his impartiality or independence or if he does not have the qualifications agreed upon between the parties."*; Art. 1686 para. 2 Belgian Judicial Code: *"An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his independence or impartiality …"*; Art. 1033 para. 1 Dutch Code of Civil Procedure: *"An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence."*

159 § 8 Swedish Arbitration Act.

Based on the foregone demonstration, it is hardly persuasive that "the appearance of bias" or "justifiable doubts standards" have been recognized by communities of nations and then constitute a general principle of law, which is totally different from the circumstances in international commercial and investment arbitration, where, as discussed above, most arbitration rules, conventions and practices recognize the "appearance of bias" or "justifiable doubts" standards.[160]

4.1.3 The Phenomenon of Fragmentation

The rules and principles of arbitrator-challenge applied in international commercial/investment arbitration, though with slight differences among institutions' rules, are by and large similar, i.e., *"justifiable doubts to the impartiality and independence of arbitrators"*.[161] The central diversity lies in the factual circumstances as justifiable grounds towards the challenge, which can hardly cause fragmentation since the most prestigious scholars and institutions have continued to summarize and revisit the experiences (cases and materials) in practice.[162] However, in inter-state arbitration, the main principles of arbitrator-challenge are not unified in different categories of tribunals. As suggested in Part 2, grounds and procedural requirements applied in the IUSCT are exclusively based on the UNCITRAL Arbitration Rules, which the Annex VII Tribunal precludes. It is worth noticing that, in order to determine what standards are applicable in inter-state arbitration regarding arbitrator-challenge, both parties and the tribunal ignored the rules and practices of the IUSCT. Even if the reason to overview the IUSCT is that no arbitrator has been successfully removed in IUSCT, at least the *Rules of Tribunal* could add more weight to the applicability of UNCITRAL Arbitration Rules. Instead, the IUSCT seemed to be identified as a totally different branch of the arbitral system. Accordingly, the rules of arbitrator-challenge are fragmented, at least in these two tribunals. If this phenomenon continues, it is reasonable to suspect

160 See *supra* note 34.

161 Ibid. As a result, Mauritius argued that *"there is no justification in law or policy for a different or lower standard of arbitral ethics in inter-State arbitrations"*. – Reply of Mauritius in PCA, *Chagos Marine Protected Area Arbitration (Mauritius vs. United Kingdom),* Case No. 2011-03, para. 8.

162 See *infra* notes 166 and 167.

that the rules applied to arbitrator-challenge will keep distinguished in arbitrations initiated by different conventions in different international law fields. The "difficulty of arbitrator-removal" may become an essential factor in the state's choice of court/institution if no jurisdictional issues exist. Namely, states that intend to appoint the biased arbitrator (or have more control over the arbitrators) may submit cases to forums where the standard of arbitrator-challenge is high; or, on the contrary, states that have no interest in continuing the proceedings may choose tribunals where arbitrators are easy to remove as a strategy of delay or disturb.

4.2 The Way Beyond: Harmonizing the Challenge Rules in Public and Private Disputes

The next question is, should the rules of arbitrator-challenge in inter-state cases reconcile with those in international commercial/investment arbitration or with rules of recusal from the judicial system? To refer to this question is to tell the law-applier: "please choose". The Annex VII Tribunal in *Chagos Arbitration* decidedly chose the latter. Some domestic arbitration legislation also provides that arbitrators may be challenged on the same grounds that may be relied on in challenging a national court judge. For example, the 1966 European Convention Providing a Uniform Law on Arbitration provides in Art. 12 that *"[a]rbitrators may be challenged on the same grounds as judges"*.[163]

Nevertheless, the following reasons may suggest that the arbitrary distinction made by the *Chagos arbitration* has several shortcomings and that in inter-state cases, challenge rules may better be harmonized with those developed in private rules. First, as said before, neither the parties and the tribunal has contemplated the rules and practices of the IUSCT, which applies the same UNCITRAL Arbitration Rules to both public and private claims. Suppose the IUSCT adopted the same logic as the tribunal in the *Chagos*. In that case, it is unreasonable to have a higher standard applied to the same arbitrators only because both parties are not nationals. Second, the reason that the tribunal accepted the "justifiable doubt tests" but rejected the "appearance of bias standards" seems that the tribunal only

163 Art. 12 1966 European Convention Providing a Uniform Law on Arbitration; see also Art. 378 Luxembourg Code of Civil Procedure.

regards rules written in the PCA Optional Rules, which apply to inter-state circumstances as relevant.[164] However, the 1992 PCA Optional Rules is drafted modeled on the UNCITRAL Arbitration Rules of 1976 and the challenge rules are almost the same (Art. 9–12).[165] It makes no sense that the tribunal applies rules in such a formalistic manner that only bases on the title of the Convention rather than the substantial rules.

Third, by reference to the practices and rules of standing courts, the tribunal was actually using underdeveloped practices to interpret more immature ones. As showed above, the only rule applied regarding the recusal of judges is the "prior involvement standard", the threshold of which is relatively high and only in three cases did the party tried to challenge the judges but failed. As for the ITLOS, although the normative rules are quite similar to the ICJ Statute, since its establishment, no judges have been challenged yet. However, the grounds for the challenge in international commercial and investment arbitration are much maturer. Twenty-eight circumstances have been summarized by *Gary Born* in commercial arbitration as "justifiable

164 However, the Rules of Procedure concluded by Mauritius and the UK expressly refer to *"justifiable doubts as to his/her impartiality or independence"*, but the Tribunal ignored those wordings without giving any reasons. – Art. 6 Rules of Procedure in PCA, *Chagos Marine Protected Area Arbitration (Mauritius vs. United Kingdom)*, Case No. 2011-03.

165 Besides, in 2012, the PCA has adopted the PCA Arbitration Rules 2012, the newest set of procedural rules consolidating four prior sets of PCA procedural rules which parties may use for the arbitration of disputes involving various combinations of states, state-controlled entities, intergovernmental organizations, and private parties. The PCA Arbitration Rules 2012 have been updated in light of the 2010 revisions to the UNCITRAL Arbitration Rules and the PCA's experience with its existing procedural rules and the UNCITRAL Arbitration Rules of 1976. However, the PCA Arbitration Rules 2012 do not replace the previous PCA Rules listed above, which remain valid and available. As for more discussion on the PCA Arbitration Rules 2012, see BROOKS W. D. et al. *A Guide to the PCA Arbitration Rules*. Oxford: Oxford University Press, 2014, pp. 49–57; The challenge standard is still modeling the UNCITRAL Arbitration Rules of 2010.

doubts" to the impartiality and independence of the arbitrator.[166] The IBA Guidelines also provides "red", "orange", and "green" lists of conducts that are well-accepted in international arbitration practices. The Secretariats of the ICSID and the UNCITRAL are most recently collaborating on a Draft Code of Conduct for Adjudicators in International Investment Disputes (Version Two), providing applicable principles and provisions addressing matters including independence and impartiality.[167] If those circumstances influence the fairness of arbitrators in commercial/investment arbitration, they may also affect the objectivity and independence of arbitrators participating in inter-state arbitration. Sometimes the most experienced arbitrators may frequently participate in public and private disputes, and it is hardly persuasive to argue that the conduct/condition of one arbitrator is unbiased in one but biased in the other. Logically, it is irrational, as well as regrettable, if all those experiences are neglected.

166 Including: Judge in Own Cause, Arbitrator's Financial Interest in the Dispute; Arbitrator's Prior Involvement in the Dispute; Arbitrator's Present Employment by Party; Arbitrator's Business Dealings with Party; Arbitrator's Personal or Family Relationship with Party; Arbitrator's Current Representation of Party; Arbitrator's Law Firm's Current Representation of Party; Arbitrator's Relationship with Counsel to Party; Prior Representation of Part; *Ex Parte* Contacts During Arbitration; Interviews of Arbitrators; Arbitrator's Actions or Expressions of Opinion During Arbitration; Recurrent Arbitral Appointments by Same Party, Appointments in Related Proceedings, Issue Conflicts, Arbitrator's Service as A Mediator, Relationship Between Arbitrators, Improper Conduct by Arbitrator(s) vis-à-vis the Parties, Arbitrator's Representation Adverse to a Party to the Arbitration, Arbitrators' Relationship With Witness, Public Expressions of Opinion, Involvement in Previous Matters Raising Same or Similar Legal Issues, Professional Organizations and Communities, Effect of Removal of One Arbitrator on Other Arbitrators, Non-Disclosure of Conflict, Law Firm "Conflicts", Barristers' Chambers, Relevance of "Affiliates" of Parties. The circumstances summarized by Gary Born include some matters provided in IBA Guidelines. – BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2021, pp. 2001–2028.

167 Art. 3 Draft Code of Conduct for Adjudicators in International Investment Disputes (Version Two) provides that: *"In particular, Adjudicators shall not: (a) be influenced by self-interest, fear of criticism, outside pressure, political considerations, or public clamor; (b) be influenced by loyalty to a Treaty Party to the applicable treaty, or by loyalty to a disputing party, a non-disputing party, or a non-disputing Treaty Party in the proceeding; (c) take instruction from any organization, government or individual regarding the matters addressed in the IID; (d) allow any past or existing financial, business, professional or personal relationship to influence their conduct or judgment; (e) use their position to advance any personal or private interest; or (f) assume an obligation or accept a benefit during the proceeding that could interfere with the performance of their duties."*

Another question is, since Art. 287 of UNCLOS *"gives States the option alternatively to submit a case to ITLOS, the ICJ, or arbitration under Annex VII"*[168], should the rules concerning challenge under Annex VII be regarded as *lex specialis*? Otherwise, *"different conditions would apply to the independence and impartiality of adjudicators in the third forum (arbitration under Annex VII) in comparison with the ICJ or ITLOS"*.[169] Notwithstanding, the arbitration mechanism and international adjudication are totally different. As discussed in Part 2, the judges of ICJ have been nominated by states groups and elected by both the General Assembly and the Security Council with special care to the area distribution. Judges can sit on the bench for nine years with the probability to be re-elected and accordingly are less controlled by the states nominating them. Also, the ICJ Statutes and Rules of Court give judges the privilege of immunity.[170] On the contrary, none of those advantages apply to *ad hoc* arbitrators. Arbitrators in inter-state arbitrations have been appointed by parties on an *ad hoc* basis to hear a specific case involving specific parties and even been paid by the parties.[171] Moreover, the difference in the number of adjudicators will cause the weight of each to be different: the smaller the number, the greater the personal voice. To make it difficult for biased arbitrators to be challenged may have a worse impact on the fairness of the arbitration than that of the judicial proceedings since the weight of the views of any particular judge is diluted. In summary, the rules about the challenge of Annex VII arbitration should not be seen as *lex specialis* in line with rules or practices of a standing court.

5 Concluding Remarks

Several preliminary conclusions may be drawn from the preceding discussion:

1. Comparing to those in international commercial and investment arbitration, the practices of "arbitrator-challenge" in inter-state cases (including party-raised recusals of judges in the ICJ) are rare. Besides, no arbitrators or judges have been successfully challenged by states.

168 Art. 287 UNCLOS.

169 Reasoned Decision on Challenge of the PCA of 1 December 2011, *Chagos Marine Protected Area Arbitration (Mauritius vs. United Kingdom)*, Case No. 2011-03, para. 168.

170 Art. 18 ICJ Statute.

171 Generally, the "expense and costs" clause of the arbitration is provided in the Rules of Procedure of each case.

2. The ideology towards the role of arbitrators (authority vs. expertise), the effectiveness of enforcement (whether it can be executed in domestic courts or whether there exist preconditions), and the special structure and function of the specific tribunal together formulate the "willingness of parties" to raise the challenge against the adjudicators.
3. The frequent challenges raised by states in public claims of the IUSCT are affected by the poor political relations between the parties, the commercial nature of the claims, and the comprehensive enforcement mechanism. Besides, most challenges are filed under rather unusual circumstances or with unique litigate purposes.
4. The "justifiable doubts to arbitrators' lack of the impartiality and independence" is the standard adopted by both the Annex VII tribunal and the IUSCT. The ICJ prefers "prior involvement standard".
5. By virtue of precluding rules applicable to private disputes, referring to Rules and Practices of the ICJ and the ITLOS, and separating the "appearance of bias" element from "justifiable doubts standard", the Annex VII tribunal actually takes a higher standard than that in the IUSCT, international commercial and investment arbitration, which mostly adhere to the "appearance of bias" standard.
6. Thus, currently, the principles and rules regarding "arbitrator-challenge" in inter-state cases are not uniformed, but somewhat fragmented.
7. The arbitrator-challenge rules in inter-state disputes should not be treated differently. Instead of referring to the rules applied in the judicial forum, the laws concerning arbitrator-challenge in inter-state cases should be harmonized with international commercial and investment arbitration, where the rules, studies, and practices are much more mature and comprehensive.

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"Rules of Law" and Lex Mercatoria Determination Under the Auspice of ICC Arbitration

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Abstract

The ICC arbitration, being one of the most common ones in international commercial arbitration, is also one of the most benevolent to the application of supranational substantive rules, including the *lex mercatoria*. While it has not always been the case, since 1998, the arbitrators may less focus on complex reasoning as to why the *lex mercatoria* might be applicable, and rather may fully concentrate on the rightful adjudication of the dispute. This article presents a summary of changes in ICC arbitration stance on the applicability of *lex mercatoria*, as voiced by the permission to *inter partes* elect, or *ex post* determine, substantive *"rules of law"* rather than just a *"law"*. Connotations of ICC jurisprudence towards applicable *lex mercatoria* and its relationship to state law is also discussed and evaluated.

Keywords

ICC; Arbitration; Lex Mercatoria; Rules of Law; Lex Arbitri.

1 Introduction

International commercial arbitration is deemed to provide many opportunities for the parties involved. To name a few, confidentiality, case management, no appeal process or ultimate benefit of wide recognition and enforcement under the New York Convention. Nowadays, the parties to the International Chamber of Commerce ("ICC") arbitration are also given broad discretion to choose applicable rules of law, rather than just a state law. Should they absent in exercising such an opportunity, the arbitrators must select an appropriate set of substantive rules to apply to the dispute's merits.

This paper discusses the application of *lex mercatoria* being one of the said rules of law in the ICC arbitration. While not the only possible rules of law to be chosen, the *lex mercatoria* prove difficult to foresee the extent to which it will be applied – particularly considering its non-unified reflection in the current doctrinal approach.

This paper will analyze the ICC jurisprudence immanently before the point of ICC Rules 1998[1] entry into force and following as well as the newly taken approach to the choice of law after ICC Rules 1998, as retained throughout the years and mirrored in Art. 21 para. 1 ICC Rules 2021[2].

The second chapter of this paper presents a general overview of French *lex arbitri* to the ICC which allowed for the change in perception of substantive applicable law – from state law to the *"rules of law"*.

The third chapter then presents the various paths to the substantive *lex mercatoria* pursuant ICC Rules 1988[3], rules which mark the last time the parties, arbitrators respectively, were bound to elect solely the applicable state law.

The fourth chapter will then firstly present the current stance on the applicability of *lex mercatoria*, focusing on the changes following ICC Rules 1998 entry into force. Secondly, the application of *lex mercatoria* in cases of its explicit or interpreted choice, in the absence of a choice of law, and cases of choice of state law will be assessed and evaluated.

Following the aforementioned, one should become aware that the scope of *lex mercatoria* application will ultimately vary based on who is in charge of the choice of law determination. A choice which, when not exercised properly, might convey more problems than benefits. It will be presented that a simple *lex mercatoria*, as the law of international trade, may become an unforeseen double-edged sword.

2 Background of the ICC Arbitration

To tackle the doctrinal approach which gives rise to the applicability of transnational law, one must follow the French roots of ICC arbitration.

1 ICC Rules of Arbitration, in force as from 1 January 1998.
2 ICC Rules of Arbitration, in force as from 1 January 2021.
3 ICC Rules of Arbitration, in force as from 1 Januray 1988.

Arbitral proceedings before the ICC will be conceptually oscillating somewhat between contractual and mixed theory.[4] The ICC arbitration, wherever the place of arbitration is, has its seat in France. Hence French law is the *lex arbitri* and conferred by French national law the tribunal(s) enjoy a large discretion to determine the applicable law. The ICC thus tends to be more amenable to the application of transnational law as a transnational dispute resolution independent of the state.[5] The differentiation of the theories[6] has a major impact on specific procedural issues and the state's role in relation to arbitration.[7]

Concerning the *"rules of law"*, Art. 1511 of the French Code of Civil Procedure provides for the application of the *lex electa* or appropriate rules of law in the absence of choice, however taking into account the commercial practice at all times.[8] This embodied power is currently reflected in Art. 21 para. 1 and 2 ICC Rules 2021. The presumption of choice of a set of rules, not a choice of state law, thus gives parties the option to elect applicable law other than state law.[9] The explicit use of the phrase *"rules of law"* instead of mere *"law"*, as employed in the past in ICC Rules 1988, is purposely aimed at removing the restriction of the necessity to choose state law[10] and, therefore, the necessity to strictly apply conflict of laws rules[11]. According

4 ROZEHNALOVÁ, N. *Instituty českého mezinárodního práva soukromého*. Praha: Wolters Kluwer, 2016, p. 234.

5 ROZEHNALOVÁ, N. Hlavní doktríny ovládající rozhodčí řízení. In: SEHNÁLEK, D. et al. (eds.). *Dny práva – 2009 – Days of Law*. Brno: Masaryk University, 2009, p. 1860.

6 LEW, J. D. M. *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*. Dobbs Ferry: Oceana Publications, 1978, p. 52 et seq.

7 ROZEHNALOVÁ, N. Hlavní doktríny ovládající rozhodčí řízení. In: SEHNÁLEK, D. et al. (eds.). *Dny práva – 2009 – Days of Law*. Brno: Masaryk University, 2009, pp. 1858–1860.

8 *«Le tribunal arbitral tranche le litige conformément aux règles de droit que les parties ont choisies ou, à défaut, conformément à celles qu'il estime appropriées. Il tient compte, dans tous les cas, des usages du commerce."*

9 GAILLARD, E. and J. SAVAGE (eds.). *Fouchard Gaillard Goldman on International Commercial Arbitration*. The Hague: Kluwer Law International, 1999, p. 802.

10 FRY, J., S. GREENBERG and F. MAZZA (eds.). *The Secretariat's Guide to ICC Arbitration*. Paris: International Chamber of Commerce, 2012, p. 222, para. 3–760; EISEMANN, F. Le nouveau règlement d'arbitrage de la Chambre de commerce internationale. *Droit et pratique du commerce international*, 1975, Vol. 1, no. 3, pp. 355–356.

11 NAÓN, G. and A. HORACIO. Choice-of-law Problems in International Commercial Arbitration. In: *Recueil des cours 2001*. Leiden/Boston: Martinus Nijhoff Publishers, 2001, Vol. 289, p. 213.

to the ICC, *"rules of law"* attracts an infinite number of sources, including, but not limited to, transnational commercial law, which is also synonymous to general principles of international commercial law or *lex mercatoria*[12], UPICC[13], PECL[14], INCOTERMS[15], or other applicable sources of public international law (i.e., in the investment arbitration). The parties are therefore free to elect *lex mercatoria* as applicable law. An election which is ought to be upheld by the tribunal. The same then goes for the tribunal itself, if not instructed otherwise by the parties.

The following chapters of this paper will examine (**a**) the situation regarding application of *lex mercatoria* in the ICC arbitration prior to the ICC Rules 1998 entry into force, and (**b**) current stance on the *lex mercatoria* application as the applicable law in cases of explicit choice and in absence of choice, in which the parties thus delegate the power of applicable law determination to the tribunal discretion. Secondly, the influence of *lex mercatoria* to otherwise applicable state law will be assessed (irrespectively whether applicable via parties' choice or determined by the tribunal).

3 Negative Choice of Law Prior to the ICC Rules 1998

While it nowadays seems that the use of *lex mercatoria* as the applicable law to the contract in ICC arbitration is, without a doubt, possible, it has not always been the case. Before ICC Rules 1998, neither the parties nor arbitrators had the liberty to either elect or designate *lex mercatoria*[16] as the applicable law to be applied to the merits of the dispute. Then applicable Art. 13 para. 3 ICC Rules 1988 postulated that the *"… parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute"*[17] and that in the case of absence of such determination made by the parties, the arbitrators shall *"… apply the law designated as the proper law by the rule of conflict which he deems*

12 JOLIVET, E. La jurisprudence arbitrale de la CCI et la lex mercatoria. *International Chamber of Commerce Digital Library* [online]. 29. 4. 2001 [cit. 25. 5. 2021]. Available at: https://library.iccwbo.org/dr-noaccount.htm?reqhref=/Content/dr/ARTICLES/ART_0462.htm

13 UNIDROIT Principles of International Commercial Contracts.

14 Principles of European Contract Law.

15 International Commercial Terms.

16 Or any other non-state or transnational law.

17 Art. 13 para. 3 ICC Rules 1988.

appropriate".[18] More than ever has the choice of *lex mercatoria* as the applicable law depended on the arbitrator's enthusiasm towards the applicability of transnational law.[19]

An evident scepticism may be seen in *ICC Award No. 9419*[20], in which the arbitrator evaluated the existing school of supranational *lex mercatoria*. Nevertheless, from his own perspective inclined to find no such law existing and refused to apply it to the subject matter of the dispute. The arbitrator's internal view thus established a predominance in dispute decision.

One of the landmark cases in which the *lex mercatoria* found its way to the merits of the dispute has been the *ICC Award No. 7375*[21]. The dispute concerned the sale of certain air defence radar equipment under nine different contracts concluded during the period of 1971 and 1978 between Iranian and American parties. The ICC Rules 1988, in the absence of a choice of law, allowed the tribunal to determine the applicable law based on an appropriate conflict of laws rule. The tribunal has undergone two different methods in determining the applicable law, even though that by a majority of arbitrators it was deemed only the subjective test holds the key for the right answer for determining the proper law.[22] By an objective approach[23], the law of Maryland/USA was to be determined as the proper law based on the conflict of laws rule of closest connection. However, after applying the objective approach, the tribunal proceeded to determine

18 Ibid.

19 TOTH, O. *The lex mercatoria in theory and practice*. Oxford: Oxford University Press, 2017, p. 210; NAÓN, H. G. *Choice-of-law Problems in International Commercial Arbitration*. Heidelberg: Mohr Siebeck, 1992.

20 ICC Award No. 9419 (1998). Final 9419. In: *ICC International Court of Arbitration Bulletin*, 1999, Vol. 10, no. 2, p. 105.

21 ICC Award No. 7375 (1996). The Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran vs. Westinghouse Electric Corporation, ICC Case No. 7375/CK, Award on Preliminary Issues of 5 June 1996. *JUS MUNDI* [online]. [cit. 25. 4. 2021]. Available at: https://jusmundi.com/en/document/decision/en-the-ministry-of-defence-and-support-for-armed-forces-of-the-islamic-republic-of-iran-v-westinghouse-electric-corporation-award-on-preliminary-issues-wednesday-5th-june-1996

22 Ibid., para. 241.

23 *"Objective approach does not look at hypothetical or implied intentions the parties may or might have (but failed to express with the required clarity) but will come in with purely objective criteria for determining the legal regime or provisions that is/are to be applied. The objective approach thus rests on the conviction (or hypothesis) that a determination derived from 'hard facts' (rather than from possibly vague intentions of the parties) may provide more certainty and foreseeability and, in an overall analysis, lead to a more appropriate determination of the applicable law."* – Ibid., para. 242.

the parties' intent, assessing that the absence of an express choice of law did not equate to the absence of an implied choice.

The tribunal assessed that the absence of a choice of law *"must be viewed as a "shouting silence", at least an "alarming silence", "un silence inquiétant"; thus, a silence which must ring a bell and requires the tribunal to look "behind" so as to understand why the Parties have failed to include the obvious"*[24] and must be deemed an expression of the unwillingness to submit to the law of the other party. Thus, the absence of a choice of law is an implied negative choice of law[25], thus an integral part of the contract and implied exclusion of the respective contracting parties' national laws. Since such implied choice of law prohibits the use of the law of one of the contracting parties and the objective test has led to selecting the law of one of the parties, the objective approach determination, therefore, could not be used.

Therefore, the tribunal was forced to select alternative applicable law, for which the tribunal evaluated law of a neutral country, the *tronc commun* doctrine, and the *lex mercatoria*.[26] The tribunal also noted that the implied negative choice did not empower the tribunal to rule as an *amiable compositeur*, according to principles of equity or *ex aequo et bono*.[27] After its evaluation, the tribunal has chosen the *lex mercatoria* as the only solution that objectively and fairly preserves both parties' rights and subjective expectations. The tribunal, by admitting the existence of an implied negative choice of law, avoided the need to apply a conflict of laws determination. *Obiter dictum* was this approach appropriated in *ICC Award No. 8540*[28] when established the legitimate possibility of applying the *lex mercatoria* as the applicable law in situations of absence of a choice of law in which determining the applicable state law would prove difficult, notably in cases where the law of the closest relationship cannot be determined.[29]

24 Ibid., para. 277.
25 Ibid., para. 283.
26 Ibid., para. 286 et seq.
27 Ibid., para. 318.
28 ICC Award of 4 September 1996, No. 8540. *UNILEX* [online]. [cit. 20. 4. 2021]. Available at: http://www.unilex.info/principles/case/644
29 *"In an international commercial transaction such as this contract between and, where the Parties have not indicated the applicable law and where there are many disparate connections to many different municipal systems of law, we are of the opinion that international arbitrators are fully justified to turn to general principles of law."* – Ibid.

It is also necessary to say that such circumventing of the arbitrator's inherent duty represented by Art. 13 para. 3 ICC Rules 1988 in determining the *lex mercatoria* as the applicable law, as shown in *ICC Award No. 7375*, is no longer necessary. Current ICC Rules 2021 refrain from the need to apply the law designated by the proper conflict of laws rules. Rather it allows to *"… apply the rules of law which it [arbitral tribunal] determines to be appropriate"*.[30] Nevertheless, such an approach could be applied to Art. 28 para. 2 of the UNCITRAL Model Law.

Similarly, yet with lesser persuasiveness, the tribunals approached the determination of the *lex mercatoria* as the applicable law through Art. 13 para. 5 ICC Rules 1988.[31] Art. 13 para. 5 ICC Rules 1988 stipulates that notwithstanding Art. 13 para. 3 ICC Rules 1988 the tribunal *"… shall take account of the provisions of the contract and the relevant trade usages"*.[32] In *ICC Award No. 8502*[33], the disputed purchase agreement contained a choice of INCOTERMS 1990 for regulation of price matters and UCP 500[34] for regulation of *force majeure*. The tribunal has interpreted these choices, given the absence of a choice of other applicable law. The Parties have expressed their mutual intention to have their relationship governed by general principles of international trade. Similarly, in *ICC Award No. 9474*[35], the tribunal assessed that should individual contracts in a complex contractual relationship be subjected to non-state sectoral regulations (e.g., CISG[36] and UCP 600[37]), such conduct is an indication of the exclusion of state law not only to the individual contracts but also to the complex contractual relationship (main contract), without being explicitly identified as excluded in the latter one. Should the sector regulation fail to regulate all questions

30 Art. 21 para. 1 ICC Rules 2021.

31 ERDEM, H. E. The role of trade usage in ICC arbitration. In: DERAINS, Y. and L. LÉVY (eds.). *Liber Amicorum en l'honneur de Serge Lazareff*. Paris: Editions A. Pedone, 2011, p. 250.

32 Art. 13 para. 5 ICC Rules 1988.

33 ICC Award No. 8502 (1996). Final 8502. In: *ICC International Court of Arbitration Bulletin*, 1999, Vol. 10, no. 2, p. 72 et seq.

34 Uniform Customs and Practice for Documentary Credits (1993 Revision).

35 ICC Award No. 9474 (1999). ICC International Court of Arbitration (Paris) 9474. *UNILEX* [online]. [cit. 12. 4. 2021]. Available at: http://www.unilex.info/principles/case/690

36 United Nations Convention on Contracts for the International Sale of Goods.

37 Uniform Customs and Practice for Documentary Credits (2007 Revision).

of law of the main contract, then the *lex mercatoria* ought to be the applicable law. An analogous approach has been taken in case *ICC Award No. 7235*.

Therefore, as to the implied choice, it should be noted that ICC arbitration practice allows (without any major problem) the presumption of the choice of *lex mercatoria* through a negative choice of law due to multiple factors – the existence of an international element; absence of a weaker party; and the will of the parties to denationalise the dispute by the prorogation of arbitration.[38] By denationalising the dispute, the parties express the neutrality of their contractual relationship's substantive and procedural framework, which allows the tribunal to elect applicable transnational law.[39]

4 *Lex Mercatoria* as an Applicable Law After the ICC Rules 1998

Although needed to find a way around the obligation to use conflict-of-law rules in the past, the approach of ICC arbitration has nonetheless changed. The change was neither doctrinal, nor statutory. The change was merely a reinforcement of the parties' intentions, which is generally and widely accepted in arbitration[40], provided by the ICC within the boundaries of mandatory laws of its *lex arbitri*. As presented in chapter 2, nowadays, the tribunal need not rely on complex reasoning as to what extent the parties implied *lex mercatoria* or whether trade usage may cover the whole adjudication. Following ICC Rules 1998 stipulating in its Art. 17 para. 1 that parties *"… shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute"*[41] and in a case of the absence of choice of law

38 BERGER, K. P. International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts. *American Journal of Comparative Law*, 1998, Vol. 46, no. 1, pp. 144–145.

39 ICC Award No. 7110 (1998). Partial 7110. In: *ICC International Court of Arbitration Bulletin*, 1999, Vol. 10, no. 2, p. 47.

40 UNITED NATIONS. *UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT. Dispute Settlement International Commercial Arbitration. 5.5 Law Governing the Merits of the Dispute*. Geneva & New York: United Nations, 2005, p. 8; also cf. Art. 35 para. 1 UNCITRAL Arbitration Rules as adopted in 2013; Art. 6 ILI (Institute of International Law) Resolution of 12 September 1989; Art. 15 OHADA (Organisation pour l'Harmonisation en Afrique du Droit des Affaires) Uniform Act on Arbitration 11/3/99.

41 Art. 17 para. 1 ICC Rules 1998.

the tribunal *"… shall apply the rules of law which it determines to be appropriate"*[42] current ICC Rules 2021 in its entirety of Art. 21 para. 1 do not differ.

4.1 Explicit and Interpreted Choice of *Lex Mercatoria*

In cases of an explicit choice of *lex mercatoria*, thus omitting any state law, the parties indicate their expectations of the law being unencumbered by norms without an internationally accepted commercial practice support. The advantage sought is a uniform application independent of the peculiarities of individual national orders reflecting international business needs, allowing for a useful exchange between systems that are sometimes overly associated with conceptual differences, and hence seeks fair and pragmatic solutions to particular situations.[43]

Regarding the interpreted choice, it is established that explicit choice of international law, unless agreed otherwise by the parties during the arbitral proceedings, amounts to the election of *lex mercatoria* as a law applicable to international private contracts.[44]

In cases of cumulation of applicable laws, a perfect interpretation of the choice-of-law clause is necessary to determine the parties' legitimate expectations. A parallel choice of state law and *lex mercatoria*, with the corrective of reasonable assumptions in the light of the objectives and intentions of the contract, amounts to a duty of arbitrator to use those sources of law to determine individual applicable rules. The arbitrator thus needs to determine which norms of the chosen national law correspond to generally accepted rules of the international private law as only such norms may be the applicable law. The corrective of the parties' reasonable assumptions represents a threshold for determining the applicable norms. In *ICC Award No. 8264*, the tribunal compared provisions of the chosen Algerian law against generally accepted principles to determine the application

42 Ibid.

43 ICC Award No. 8385, Clunet 1997. *TRANS-LEX.org* [online]. [cit. 19. 4. 2021]. Available at: https://www.trans-lex.org/208385; CRAIG, W. L., W. W. PARK and J. PAULSONN. *International Chamber of Commerce Arbitration*. Dobbs Ferry: Oceana Publications, 2000, pp. 332–334; ICC Award No. 14208/14236 of 2008. Partial 14208/14236. In: *ICC International Court of Arbitration Bulletin*, 2013, Vol. 24, no. 2, p. 70.

44 ICC Award No. 12111 (2003). Partial 12111. In: *ICC International Court of Arbitration Bulletin*, 2010, Vol. 21, no. 1, p. 78.

of each provision. Moreover, the tribunal reasoned that the individually chosen sources of law do not possess a primacy of application over each other. Therefore, general principles of law and international commercial practice expressed in the UPICC can be applied to the subject matter of the dispute without their reflection in the chosen Algerian law.[45] Should the parties agree on the complementary and supplementary application of general principles of international law and trade usages, the tribunal will use those solely to question not regulated by the applicable state law.[46] The state law shall prevail in cases of contradictory regulation between general principles of international law and trade usages and chosen state law.[47]

While it might be common to use trade usage or *lex mercatoria* to fill gaps in state law, should the parties elect *lex mercatoria*, question unregulated by *lex mercatoria* must be settled by other means of adjudication. In *ICC Award No. 11018*, the tribunal instructed to use UPICC 2004 as the applicable law. Contrary to its latter version, UPICC 2004 did not contain an express regulation for invalidity of contract on the grounds of illegality. For such an instance, the tribunal needed to find a suitable solution outside the chosen applicable law.[48] The arbitrators thus proceeded to determine adjacent standards and chose the French law due to its complex regulation of the subject matter.[49]

In cases of ambiguous choice-of-law clause, the tribunal might refrain from a sole determination of the applicable law. In the case of *ICC Award No. 9474*[50], the arbitration clause contained a provision instructing the tribunal to decide *"fairly"*, which could be confused with decision pursuant *ex aequo et bono*. Both parties accepted the tribunal's proposal to apply *"the general standards and rules of international contracts"*. In their submissions, the parties pleaded and relied

45 ICC Award No. 8264 (1999). Final 8264. In: *ICC International Court of Arbitration Bulletin*, 1999, Vol. 10, no. 2, p. 62 et seq.

46 ICC Award No. 7365 (1997). ICC International Court of Arbitration, Paris 7365/FMS. *UNILEX* [online]. [cit. 10. 4. 2021]. Available at: http://www.unilex.info/principles/case/653

47 Ibid.

48 ICC Award No. 11018 (2002). ICC International Court of Arbitration 11018. *UNILEX* [online]. [cit. 17. 4. 2021]. Available at: http://www.unilex.info/principles/case/1420

49 JOLIVET, E. L'Harmonisation du Droit OHADA des Contrats: L'Influence des Principes d'Unidroit en Matiere de Pratique Contractuelle et D'Arbitrage. *Uniform Law Review*, 2008, Vol. 13, no. 1–2, p. 143.

50 ICC Award No. 9474 (1999). ICC International Court of Arbitration (Paris) 9474. *UNILEX* [online]. [cit. 12. 4. 2021]. Available at: http://www.unilex.info/case.cfm?id=690

on international treaties (CISG) as well as on codifications of the *lex mercatoria* (UPICC, PECL, UCC), from which the tribunal then drew its conclusions.

Also, while a state court is bound to supplement the CISG with an applicable state law pursuant a conflict-of-law provisions following the Art. 7 para. 2 CISG, an arbitral tribunal is not bound in the same fashion. In the case of *ICC Award No. 11849*, the tribunal determined *lex mercatoria* to be the applicable law under the rules of private international law based on Art. 17 para. 1 ICC Rules 1998.[51]

4.2 Absence of Choice of Law

The absence of a choice of law represents an advanced level of uncertainty regarding the outcome of the applicable law. Any choice of law represents a determination of the material sources available for determining the applicable rules as an expression of the parties' expectations to control the issues of residual rights, obligations, and risk allocation.[52] Should parties absent in choice of law the tribunal must resort to other means of determination. Modern arbitral procedural rules regulate the applicable law determination pursuant tribunal's discretion.[53] Arbitrators, therefore, tend to decide based on the parties' legitimate expectations rather than applying the conflict of laws rules, following the obligation to act as an agent of parties' intended purpose of the contractual relationship at the time of contracting[54], as well as having to pay due attention to what the intended purpose was, or would have been,

51 Ibid.; ICC International Court of Arbitration 11849. *UNILEX* [online]. [cit. 12. 4. 2021]. Available at: http://www.unilex.info/case.cfm?id=1159; BERG, A. J. van den. *Yearbook Commercial Arbitration Volume XXXII*. Alphen aan den Rijn: Kluwer Law International, 2008, p. 153.

52 ELCIN, M. *Lex Mercatoria in International Arbitration Theory and Practice*. Florence: European University Institute, 2012, p. 185.

53 Art. 21 para. 1 ICC Rules 2021; cf. Art. 22.3 LCIA ("London Court of International Arbitration") Arbitration Rules 2020; Art. 27 para. 1 SCC ("Stockholm Chamber of Commerce") Arbitration Rules 2017; Art. 31 para. 1 ICDR ("International Centre for Dispute Resolution") International Arbitration Rules 2014; Art. 24.2 DIS ("Deutsche Institution für Schiedsgerichtsbarkeit") Arbitration Rules 2018; Art. 27 para. 2 VIAC ("Vienna International Arbitral Centre") Vienna Rules of Arbitration 2018; Art. 36.1 HKIAC ("Hong Kong International Arbitration Centre") Administered Arbitration Rules 2018.

54 LA SPADA, F. The Law Governing the Merits of the Dispute and Awards ex Aequo et Bono. In: KAUFMANN-KOHLER, G. and B. STUCKI (eds.). *International Arbitration in Switzerland: A Handbook for Practitioners*. Den Haag: Kluwer Law International, 2004, p. 130.

in determining the applicable law had the parties addressed the issue[55]. Arbitrators are thus empowered to apply various methods of applicable law determination, including the preferential application of trade usage, to the extent that such application does not breach public policy. Two main approaches observed by the ICC jurisprudence are (**i**) indirect cumulation of conflict of law provisions or (**ii**) direct choice (*voie directe*).

4.2.1 Indirect Cumulation of Conflict of Law Provisions

In instances of the indirect cumulation approach, an assessment is made into the applicable conflict of laws rules that form a part of the legal systems related to the subject matter of the dispute.[56] Related legal systems are then any state laws linked to the dispute (e.g., the law of the parties' habitual residence, the place of performance of the contract, the place of the transaction). The tribunal thus seeks the probable legitimate expectations of the parties by combining the conflict of laws rules of several laws. More precisely, what expectations they had and could have had if they had not abstained from choosing the applicable law. This method is a common method used in ICC arbitration. It has the advantage of legitimising the designated applicable law through an accumulation of legal orders that, by their conflict of laws rules, lead to the same applicable law.[57]

The indirect cumulation approach is often based not only on conflict of laws rules of related jurisdictions but also on conflict of laws rules representing a *"general trend"* of private international law – conflict of laws rules generally accepted in state laws, international organisations or in international treaties.[58] This approach possesses the advantage of introducing the maximum amount of an international element into the dispute, with the consequence

55 ICC Award No. 7110 (1998). Partial 7110. In: *ICC International Court of Arbitration Bulletin*, 1999, Vol. 10, no. 2, p. 47.

56 GAILLARD, E. and J. SAVAGE (eds.). *Fouchard Gaillard Goldman on International Commercial Arbitration*. The Hague: Kluwer Law International, 1999, p. 872.

57 CRAIG, W. L., W. W. PARK and J. PAULSONN. *International Chamber of Commerce Arbitration*. Dobbs Ferry: Oceana Publications, 2000, p. 326.

58 *ICC Award No. 7329 (1994)*, in which the tribunal used Hague Convention of 1978 and Rome Convention to establish the *"general trend"* although neither of them has been applicable to the merits of the dispute; BERG, A. J. van den. *Yearbook Commercial Arbitration Volume XV*. Alphen aan den Rijn: Kluwer Law International, 1990, p. 70; ICC Award of 1998, No. 9420.

of eliminating the narrow application of a rule of law which, by its nature, may not be predominant for the subject matter of the dispute.[59] This approach might be deemed to form a separate approach, resembling rather the discretionary determination of conflict-of-law rule[60] pursuant UNCITRAL Model Law or Art. 13 para. 3 last sentence ICC Rules 1988.[61] While providing great freedom to the tribunal, it may lead to the application of unpredictable conflict-of-law rules. In *ICC Award No. 12494*, the Rome I Regulation was used to determine conflict-of-law rule that was accepted on an international level, therefore subsuming it under international custom, even for situations in which the parties were not domiciled in, or otherwise connected to, the EU.[62]

The use of conflict of laws rules in the indirect cumulation approach must lead to a selection of applicable state law, excluding the possibility of applicable *lex mercatoria*.[63] The *lex mercatoria* can, however, function as a supplementary law based on the *lex arbitri*. The tribunal in *ICC Award No. 5314*[64] has determined the Massachusetts law to be the applicable law based on the closest relationship conflict-of-laws rule. However, the tribunal has determined that the *lex mercatoria* is part of the applicable law as a supplementary law under the obligation set out in Art. 13 para. 5 ICC Rules 1988. *Lex mercatoria* may also play a role in the interpretation

59 CRAIG, W. L., W. W. PARK and J. PAULSONN. *International Chamber of Commerce Arbitration*. Dobbs Ferry: Oceana Publications, 2000, p. 327.

60 ICC Award No. 17507 (2016). Final 17507. In: *ICC Dispute Resolution Bulletin*, 2016, Vol. 27, no. 1, p. 125.

61 GAILLARD, E. 2018 LALIVE LECTURE: The Myth of Harmony in International Arbitration. *ICSID Review – Foreign Investment Law Journal*, 2019, Vol. 34, no. 3, p. 564.

62 MAYER, P. The Laws or Rules of Law Applicable to the Merits of a Dispute and the Freedom of the Arbitrator. In: DERAINS, Y. and L. LÉVY (eds.). *Is Arbitration only As Good as the Arbitrator? Status, Powers and Role of the Arbitrator*. Paris: International Chamber of Commerce, 2011, p. 54.

63 BRIGGS, A. *The Conflict of Laws*. Oxford: Oxford University Press, 2013, p. 28.

64 ICC Award of 1988, No. 5314; BERG, A. J. van den. *Yearbook Commercial Arbitration Volume XX*. Alphen aan den Rijn: Kluwer Law International, 1995, p. 38 et seq.

of intention, the conduct of the parties, and the individual provisions of the contract.[65]

4.2.2 Direct Approach (*Voie Directe*)

The direct approach (*voie directe*)[66] is described as the latest and prevailing phase of evolution in the international approach to the applicable law determination in arbitration.[67] Giving the arbitrator the discretion to choose the applicable law, thereby replacing the conflict-of-laws rule entirely.[68] Mechanical conceptual subsumptions prove to be insufficient in the arbitration setting[69], and cross-border relationships require more attention than conflict-of-laws rules can in many cases offer.[70] *Ipso facto* direct approach is not bound by conflict-of-laws norms, which are a manifestation of national sovereignty.[71] The direct approach can lead, within the limits of *lex arbitri*, to the application of either state law or *lex mercatoria*. Therefore, from the perspective of litigation, the approach in applicable law determination according to (i)

65 INTERNATIONAL BAR ASSOCIATION. *Perspectives in Practice of the UNIDROIT Principles 2016, Views of the IBA Working Group on the practice of the UNIDROIT Principles 2016*. London: International Bar Association, 2019, p. 231; also, BERG, A. J. van den. *Yearbook Commercial Arbitration Volume XXXIV*. Alphen aan den Rijn: Kluwer Law International, 2009, pp. 82–83.

66 TOTH, O. *The lex mercatoria in theory and practice*. Oxford: Oxford University Press, 2017, p. 206; LEW, J. D. M., L. A. MISTELIS and S. KRÖLL. *Comparative International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2003, pp. 434–436; GAILLARD, E. and J. SAVAGE (eds.). *Fouchard Gaillard Goldman on International Commercial Arbitration*. The Hague: Kluwer Law International, 1999, pp. 876–877; BORN, G. B. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2014, pp. 2646–2647; GAILLARD, E. The Role of the Arbitrator in Determining the Applicable Law. In: HILL, D. R. and L. W. NEWMAN (eds.). *The Leading Arbitrators' Guide to International Arbitration*. Huntington: Juris Publishing, 2014, pp. 456–457.

67 DERAINS, Y. and E. A. SCHWARTZ. *A guide to the ICC rules of arbitration*. Hague: Kluwer Law International, 2005, p. 240.

68 BĚLOHLÁVEK, J. A. *Rome Convention – Rome I Regulation*. Huntington: Juris Publishing, 2010, p. 414.

69 PETSCHE, M.A. International Commercial Arbitration and the Transformation of the Conflict of Laws Theory. *Michigan State Journal of International Law*, 2010, Vol. 18, no. 3, p. 453; GOODE, R. Rule, Practice, And Pragmatism In Transnational Commercial Law. *International & Comparative Law Quarterly*, 2005, Vol. 54, no. 3, p. 543.

70 BLESSING, M. Choice of Substantive Law in International Arbitration. *Journal of International Arbitration*, 1997, Vol. 14, no. 2, p. 42.

71 LEW, J. D. M. Relevance of Conflict of Law Rules in the Practice of Arbitration. In: BERG, A. J. van den. (ed.). *Planning Efficient Proceedings, The Law Applicable in International Arbitration X, Vienna, 1994*. Alphen aan den Rijn: Kluwer Law International, 1994, p. 447.

the subjective will of the parties, and (ii) in the absence of (i) the objective mechanical application of the forum conflict-of-laws rules, ICC arbitration has moved to a modern approach in which the subjective will of the parties still prevails, but in its absence, the determination of the applicable law through the arbitrator's objective discretion comes into play.[72]

While prior to ICC Rules 1998 was the tribunal forced to provide abstract reasoning as to the extent of implicit choice should it want to apply the *lex mercatoria*, the direct approach allows for the undisguised application of *lex mercatoria*. In *ICC Award No. 9875*, the tribunal considered it difficult to find decisive factors qualifying any state law as applicable to the contract, thus revealed the inadequacy of the choice of a domestic legal system to govern a case concerning licencing agreement performed worldwide. The tribunal thus found the most appropriate "rules of law" to be applied to the merits of this case to be those of the *lex mercatoria*, that is the rules of law and usages of international trade.[73] The analogical outcome is observed in *obiter dictum* of *ICC Award No. 8540* relating to a pre-bid agreement for which a non-disclosure agreement ("NDA") has been concluded. Whereas the pre-bid agreement in dispute absented in choice of law, the NDA stipulated applicable New York law. The tribunal assessed that choice of law in supportive contracts ought to amount to the most proper applicable law in the main contract. Furthermore, the tribunal stated: *"In an international commercial transaction such as this contract between and, where the Parties have not indicated the applicable law and where there are many disparate connections to many different municipal systems of law, we are of the opinion that international arbitrators are fully justified to turn to general principles of law."*[74] Since the supportive contractual relationships provided the needed connection to state law, *lex mercatoria* was merely used to provide rules for trade usages. It can thus be inferred that in cases where subordinate contractual agreements do not exist and the closest relationship cannot be properly

72 TOTH, O. *The lex mercatoria in theory and practice*. Oxford: Oxford University Press, 2017, p. 206.

73 ICC Award No. 9875 (1999). ICC International Court of Arbitration 9875. *UNILEX* [online]. [cit. 1. 5. 2021]. Available at: http://www.unilex.info/principles/case/675

74 ICC Award No. 8540 (1996). ICC International Court of Arbitration, Paris 8540. *UNILEX* [online]. [cit. 17. 5. 2021]. Available at: http://www.unilex.info/principles/case/644

determined due to the balance of the synallagmatic obligation, the tribunal is entitled to determine the applicable *lex mercatoria*.[75]

4.3 Choice of State Law

In the case of a parties' choice of applicable state law, the arbitrator's ability to adjudicate under the *lex mercatoria* will be severely limited.

In *ICC Award No. 9473*, the tribunal outlined the difference between the arbitrator vis-à-vis the judge when the arbitrator does not possess the mandate nor function of applying and developing the law in question. Considering Art. 13 para. 5 ICC Rules 1988 presenting the necessity of considering contractual arrangements, the tribunal determined the need to apply the doctrine of parties' legitimate expectations, thus refusing to apply the state law that is contrary to the text and objectives of the contract itself.[76]

Correspondingly, the question of whether the arbitrator, unlike the judge, may neglect the distinction between dispositive and mandatory provisions of the chosen state law arises. In the sense of ICC arbitration, the arbitrator assesses the appropriateness of the chosen rules of law. Hence, shall a mandatory rule of chosen law be contrary to trade usage or contract itself, such a rule ought to be replaced by another rule which, considering the doctrine of legitimate expectations of the parties, takes precedence. However, this position might eventually infringe on the duty to issue an award that is materially enforceable pursuant the New York Convention. The ICC jurisprudence hence settled on respecting the differentiation of mandatory provision of the chosen law. An arbitration, which has no *lex fori* of its own[77] and derives its inherent jurisdiction from the parties' will[78], is not tasked with

75 ICC Award of 2004, No. 13012; JOLIVET, E. L'Harmonisation du Droit OHADA des Contrats: L'Influence des Principes d'Unidroit en Matiere de Pratique Contractuelle et D'Arbitrage. *Uniform Law Review*, 2008, Vol. 13, no. 1–2, p. 137; Partial and Final 9875. In: *ICC International Court of Arbitration Bulletin*, 2001, Vol. 12, no. 2, p. 97.

76 NAÓN, G. and A. HORACIO. Choice-of-law Problems in International Commercial Arbitration. In: *Recueil des cours 2001*, Leiden/Boston: Martinus Nijhoff Publishers, 2001, Vol. 289, p. 276.

77 BANSAL, S. The Dampening Effect of 'Foreign' Mandatory Laws. *Asian International Arbitration Journal*, 2018, Vol. 14, no. 2, pp. 168–169.

78 CORDERO-MOSS, G. Limitations on Party Autonomy in International Commercial Arbitration. In: *Recueil des cours 2014*, Leiden/Boston: Martinus Nijhoff Publishers, 2015, Vol. 372, pp. 129, 194.

guardianship of public policy mandatory rules of foreign state law[79] but the law chosen by the parties.[80] However, such obligation does not *a priori* preclude the possibility of reflecting other mandatory norms. Choice of law is not unlimited and may be subject to transnational public policy[81] or other mandatory rules[82]. The arbitrator may particularly take note of mandatory norms of the state of enforcement of the award[83], notably including the place where the enforcement is presumed through legitimate expectations – the habitual residence of the losing party[84].

The possibility of regulation of existing relations according to norms outside the chosen law seems to be excluded in cases of explicit choice of applicable state law.[85] The choice of the state law leads to an agreement on its application with all probable consequences, including idiosyncratic norms present at the time of contracting. Unlike in the absence of a choice of law, the arbitrators do not possess the discretion to substitute the chosen applicable state law.[86] *"Where parties have agreed on a substantive law, the arbitral tribunal must respect that choice. If it fails to do so, this might be considered as a failure to conduct the procedure in accordance with the parties' agreement, which would undermine*

79 CARDUCCI, G. The Impact of the EU 'Rome I' Regulation on International Litigation and Arbitration, A-National Law, Mandatory and Overriding Rules. *ICC International Court of Arbitration Bulletin*, 2011, Vol. 22, no. 2, p. 35; HOLTZMANN, H. M. and J. E. NEUHAUS. *A Guide to the UNCITRAL Model Law on International Commercial Arbitration. Legislative History and Commentary*. Alphen aan den Rijn: Kluwer Law International, 1995, p. 764.

80 ICC Award No. 16981 (2012). Final 16981. In: *ICC Dispute Resolution Bulletin*, 2016, Vol. 27, no. 1, p. 119; LEW, J. D. M. *Transnational Public Policy: Its Application and Effect by International Arbitration Tribunals*. Madrid: CEU Ediciones, 2018, p. 11.

81 TERAMURA, N. *Ex Aequo et Bono as a Response to the 'Over-Judicialisation' of International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2020, pp. 141–143; cf. ICC Award no. 15972 (2011). Final Award in Case 15972. In: *ICC Dispute Resolution Bulletin*, 2016, Vol. 27, no. 1, p. 92.

82 ICC Award No. 16981 (2012). Final 16981. In: *ICC Dispute Resolution Bulletin*, 2016, Vol. 27, no. 1, p. 120.

83 ICC Award No. 15977 (2011). Partial Award in Case 15977. In: *ICC Dispute Resolution Bulletin*, 2016, Vol. 27, no. 1, p. 95; TERAMURA, N. *Ex Aequo et Bono as a Response to the 'Over-Judicialisation' of International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2020, p. 138.

84 ICC Award No. 11761 (2003). Final Award in Case 11761. In: *ICC Dispute Resolution Bulletin*, 2016, Vol. 27, no. 1, p. 112.

85 ICC Award No. 9029 (1999). Final 9029. In: *ICC International Court of Arbitration Bulletin*, 1999, Vol. 10, no. 2, p. 88.

86 Ibid., p. 90.

the enforceability of a subsequent award." [87] While this notion might be theoretically correct, the need to reflect contractual provisions and trade usages through ICC Rules *"requires the arbitral tribunal to place the parties' contract, if any, centre stage in the resolution of contractual disputes.* […] *contractual terms are often considered to have greater importance than legal requirements and technicalities".*[88] This is not to say that applicable law needs to provide merits for the application of trade usage. On the contrary. In *ICC Award No. 8873*, the tribunal assessed whether a provision allowing the predominant use of trade usages must be present in the chosen applicable law or whether a restrictive approach as in *ICC Award No. 9029* ought to be exercised. The contract concluded between a Spanish and a French entity contained a choice of Spanish law. While one party proposed Spanish law as the applicable law solely for matters not governed by trade usages and provisions of the contract itself pursuant Art. 13 para. 5 ICC Rules 1988, the other party proposed the primacy of Spanish law without regard to trade usages due to the absence of a statutory provision of Spanish law to apply trade usages predominantly. The tribunal assessed, based on Art. 13 para. 5 ICC Rules 1988 and Art. VII, second sentence European Convention on International Commercial Arbitration 1961 that explicit mandate in state law needs not be present. The European Convention on International Commercial Arbitration 1961, through its ratification in the states of both parties' habitual residence, constitutes a direct unified rule of their respective state laws. The tribunal thus applied trade usage preferentially to the chosen applicable law within the limits of the mandatory rules of the Spanish law.

5 Conclusion

Before the ICC Rules 1998 entry into force, applicable law outside the framework of the relevant conflict of laws rules was not a legitimate choice. However, even the explicit wording did not prevent arbitrators from applying the applicable *lex mercatoria*. By assessing the absence of a choice of law as an implicit negative choice, the arbitrators escaped the need for

87 FRY, J., S. GREENBERG and F. MAZZA (eds.). *The Secretariat's Guide to ICC Arbitration*. Paris: International Chamber of Commerce, 2012, p. 220, para. 3–752.

88 Ibid., p. 228, para. 3–777.

a secondary determination of the applicable law; hence there was no obligation to apply the applicable conflict-of-laws rules. Nonetheless, this workaround became obsolete under the ICC Rules 1998 as arbitrators are free to choose the applicable *lex mercatoria* in full compliance with the Rules and French *lex arbitri*. At the same time, the use of the *lex mercatoria*, especially if not directly chosen by the parties, always depends on the arbitrator's subjective optimism towards supranational law. Just as an arbitrator may always find a way and reason to apply the *lex mercatoria*, he too may find a way to the contrary despite an express choice given by the parties. The non-appellate setting of international commercial arbitration is thus tested and might prove to be the parties' downfall as non-compliance with chosen applicable law does not constitute a legitimate defence under Art. V of the New York Convention.

Prior to ICC Rules 1998, in cases in which the arbitrators did not evade the conflict of laws determination through an implicit negative choice, the indirect cumulation approach was the common practice. This approach allows the arbitrator's ideas about the general trend of private international law to be applied, as he is not forced to apply solely the conflict-of-law rules with a direct relationship to the subject matter of the dispute or the parties themselves. On the contrary, the arbitrator may use any fitting conflict-of-law rules, including those which become available after the effectiveness of the parties' contract. Conversely, a contemporary shift from conflict-of-law determinations towards the *voie directe* method is evident as *voie directe* is believed to be more responsive to the specificities of international arbitration.

One aspect, however, never changed. Either by ICC Rules 1988 or ICC Rules 1998, ICC Rules 2021, respectively, trade usage may be superior to the chosen or determined applicable state law. This fact follows not only the arbitration practice but also most state laws and international treaties.

The parties will as to the hierarchy of applicable sources of law is also an important factor. A different approach may arise when the parties choose the *lex mercatoria* in parallel with state law, another when the *lex mercatoria* is subordinate to state law. In the former case, the state law is most likely to be applied to the extent that it is consistent with international practice,

with state norms inconsistent with that international practice being replaced by other *lex mercatoria* norms. In the latter, even state law norms inconsistent with general international practice will be used, and the *lex mercatoria* will be applied solely in cases where the chosen state law fails to sufficiently regulate the legal issue, e.g., the foreseeability of damages arising from breach of contract. Another manifestation of parties' intent may be the relevant conduct in related contractual relationships. The choice of applicable *lex mercatoria* in the related contracts to the main contract may be deemed to be an implicit choice of the *lex mercatoria* for the whole relationship.

While it is presumed that ICC arbitrators will follow the parties' intention regarding the applicable *lex mercatoria*, one could be surprised how much the outcome relies on either the misunderstanding to the scope of *lex mercatoria* or the arbitrator's subjective views of such. The parties should always pay great attention to the thorough specification of the applicable law, its sources, and its relationship to the otherwise applicable state law(s). As one is careful of explicit prorogation of the dispute settlement to the arbitration body, the question of substantive rules of law should not be a question to be settled once the dispute arises. A diligent contractual relationship contains the distribution of rights, obligations, and risk as to the date of conclusion. It is in all parties' interest to be aware of the possible outcome. Every *ex post* adjudication made by the arbitrator as to the substantive aspects will bring surprises to every party involved.

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Sources of Transnational Public Policy in International Commercial Arbitration

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Abstract

The paper deals with transnational public policy in international commercial arbitration. Firstly, the distinction between national and international public policy and the application of these types of public policy in arbitration are presented. Secondly, a characterization of transnational public policy is given so that the paper can discuss the question – what are the sources of transnational public policy. In the last part, the application of transnational public policy is then inferred from the existence of international conventions, from the *lex mercatoria* and from deciding as *amiable compositeur*.

Keywords

Transnational Public Policy; National Public Policy; International Public Policy; International Commercial Arbitration; International Conventions; Lex Mercatoria; Amiable Compositeur.

1 Introduction

Public policy (in the sense of private international law) is relatively widely applied in international arbitration. Some issues, such as consideration of national and international public policy, seem to be clearly answered. This is not true for the so-called transnational public policy that is associated with international arbitration. Its existence is accepted by the majority, but opposing views are also heard. The aim of this contribution is to analyze the concept of transnational public policy and to give an answer to the following question – from what is transnational public policy inferred, or whether it has any legal basis. For this purpose, the following structure is chosen. Firstly, the distinction between national and international public policy and their application in international arbitration is outlined. The paper then deals with the concept of transnational public policy, its nature and

content. In the final part, the article discusses the sources of transnational public policy – from which its content can be deduced. The paper deals mainly with international commercial arbitration; international investment arbitration, because of its particularities, is considered only where it is deemed appropriate with regard to the aim of this contribution.

2 The Notion of National and International Public Policy

Before I proceed to analyze the concept of transnational public policy, first, I regard as necessary to make a brief comment on the concepts of national and international public policy *(ordre public interne, ordre public international).*[1] National public policy comprises mandatory rules of an individual legal order which cannot be modified by agreement of the parties. It applies only in situations that have a relation with the law of the forum. International public policy is used in relations with a cross-border element,[2] that is the reason why it is referred to as international public policy from the point of view of its purpose, but at the same time it remains a national or domestic institute because it protects the most important values of a particular forum,[3] or more precisely its principles which must be unreservedly insisted on.

There are three mutually interconnected rules regarding the relation between national and international public policy: 1) what is not national public policy cannot be international public policy; 2) what is national public policy is not necessarily international public policy; 3) what is international public policy must necessarily be national public policy.[4] Thus, it can be summarized that international public policy is based on national public policy. When the authorities of a particular state use public policy as a ground for refusal of a foreign judgment or of a foreign arbitral award, they apply international public policy. However, these authorities are able to define "their" public policy in this way and to determine its content and the way of its application.[5]

1 The distinction is made according to the French approach to the concept of public policy.

2 See, e.g., CLAVEL, S. *Droit international privé.* Paris: Dalloz, 2018, pp. 156–157.

3 GUILLAUMÉ, J. Ordre public international – Notion d´ordre public international. *JurisClasseur Droit international*, 2018, fasc. 534-10, p. 4.

4 GUILLAUMÉ, J. *Le droit international privé en tableaux*. Paris: Ellipses, 2017, p. 77.

5 In general, see GUILLAUMÉ, J. Ordre public international – Notion d´ordre public international. *JurisClasseur Droit international*, 2018, fasc. 534-10, pp. 24, 29.

The first question is whether the arbitrator has a possibility or an obligation to apply or to take into account national or international public policy. The answer seems to be resolved and it differs when considering the public policy of the state where the arbitration proceedings take place and the public policy of the state where the arbitral award is to be recognized and enforced.

It is well known that arbitrators do not have *lex fori* and are therefore not obliged to take into consideration the public policy of the state where the arbitration proceedings take place. It would be inappropriate to apply the concept of the public policy of the place of arbitration proceedings, as *Bogdan* points out, particularly when the place of arbitration proceedings is fortuitous and unrelated to the dispute. Moreover, it would be very difficult for arbitrators from foreign countries to understand the public policy of the state where the proceedings take place.[6] Arbitrators are not guardians of public policy, nor are they invested by the state to apply its mandatory rules. Arbitrators should nevertheless be encouraged to do so in order to "survive" international arbitration as an institution.[7]

In international arbitration, the application of national public policy is relevant only if the applicable law governing the dispute is determined by the parties.[8] Arbitrators do not administer justice on behalf of any particular state and are therefore not obliged to enforce national mandatory rules other than those chosen by the parties. In other words, the arbitrator must apply those rules (mandatory rules) of the governing law of the contract *(lex contractus)*, while it is not clear whether the arbitrator must or may apply those rules of the place of performance or enforcement of the award.[9]

However, the arbitrator should render an award that is enforceable in the state where recognition or enforcement of the award is sought, so that the general

6 BOGDAN, M. Private International Law as Component of the Law of the Forum. General Course on Private International Law. In: *Recueil des cours 2010*, Leiden: Brill – Nijhoff Publishers, 2011, Vol. 348, p. 192.

7 MAYER, P. Mandatory rules of law in international arbitration. *Arbitration International,* 1986, Vol. 2, no. 4, pp. 285–286.

8 SEELIG, M. L. The Notion of Transnational Public Policy and Its Impact on Jurisdiction, Arbitrability and Admissibility. *Annals FLB – Belgrade Law Review*, 2009, Vol. 57, no. 3, p. 120.

9 Final Award of ICC of 2016, Case No. 16981, point 197 and 198; RENNER, M. Towards a Hierarchy of Norms in Transnational Law? *Journal of International Arbitration,* 2009, Vol. 26, no. 4, p. 540.

courts have no reason to refuse the recognition of a foreign award. For that reason, the arbitrator should take into account the public policy of that state – international public policy.[10] This is not only the case when the arbitrator decides on the basis of the chosen or designated state law, but also in situations where he arbitrates on the basis of non-state body of law, such as the *lex mercatoria*, or when deciding as *amiable compositeur* or *ex aequo et bono*. Even in these cases, international public policy constitutes limits to arbitrating, as it should be taken into consideration in order for the arbitral award to be recognized and enforced in the state of enforcement.[11]

Contradiction with the public policy of the state where recognition and enforcement of the arbitral award is sought constitutes also a ground for refusal of the arbitral award according to the most important international convention in the field of arbitration – the United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[12] This ground is applied *ex officio* by the state courts. Under the wording of the New York Convention, it is a matter of the public policy of the state of the forum, but most jurisdictions recognize that a mere breach of national law is unlikely to be a ground to refuse recognition or enforcement on the basis of public policy.[13]

The New York Convention refers the public policy of the state where recognition and enforcement of the arbitral award is sought, but it is the international public policy that is intended. This can be supported by reference to both case law and literature. *Bělohlávek* states that in the case of international public policy

10 SEELIG, M. L. The Notion of Transnational Public Policy and Its Impact on Jurisdiction, Arbitrability and Admissibility. *Annals FLB – Belgrade Law Review*, 2009, Vol. 57, no. 3, p. 120; KOSSUTH, L. Transnational (or Truly International) Public Policy and International Arbitration. In: SANDERS, P. (ed.). *Comparative Arbitration Practice and Public Policy in Arbitration. ICCA Congress Series.* Alphen aan den Rijn: Kluwer Law International, 1987, p. 273.

11 See ROZEHNALOVÁ, N. Právo rozhodné v řízení před mezinárodními rozhodci. In: ROZEHNALOVÁ, N., J. VALDHANS and T. KYSELOVSKÁ. *Právo mezinárodního obchodu včetně problematiky mezinárodního rozhodčího řízení.* Praha: Wolters Kluwer ČR, 2021, p. 484.

12 Art. V para. 2 letter b) New York Convention.

13 Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). *UNCITRAL Secretariat* [online]. 2016, p. 243 [cit. 11. 8. 2021]. Available at: https://newyorkconvention1958.org/pdf/guide/2016_Guide_on_the_NY_Convention.pdf#page=251; SEELIG, M. L. The Notion of Transnational Public Policy and Its Impact on Jurisdiction, Arbitrability and Admissibility. *Annals FLB – Belgrade Law Review*, 2009, Vol. 57, no. 3, p. 120.

it is mainly a matter of taking into consideration the nature of international conventions which bind states to a certain procedure, particularly in the field of recognition or enforcement.[14] *Drličková* also justifies the application of international public policy in the New York Convention by the international nature of the Convention.[15] From the point of view of case law, an ICSID arbitral award (Case No. ARB/00/7) can be mentioned. This case states, with reference to the New York Convention and the UNCITRAL Model Law 1985, that foreign arbitral awards should be subject to a narrow concept of public policy, by which is meant international public policy. However, this is not a "supranational" principle, but a national public policy applied to foreign arbitral awards. The definition of the content and the application remains to each State.[16] With regard to the interpretation of the concept of public policy in the New York Convention, the question arises whether this concept should be interpreted autonomously.

Bonomi summarizes the arguments for and against as follows. The explicit reference to the law of the state of enforcement and the absence of a definition of public policy are reasons against an autonomous interpretation of public policy in the New York Convention, although *Bonomi* partially refutes both of these arguments. The need for a uniform interpretation, the goals of the New York Convention and the practice of the contracting states are reasons for an autonomous interpretation of public policy. If an autonomous interpretation is rejected, reference to the law of the court of enforcement will jeopardise any attempt to a uniform interpretation. *Bonomi* therefore assumes that the New York Convention requires an autonomous concept of public policy. On the other hand, it does not imply a reference to transnational or truly international public policy.[17] *Bonomi* summarizes

14 BĚLOHLÁVEK, A. J. *Evropské a mezinárodní insolvenční řízení. Komentář k Nařízení Evropského parlamentu a Rady (EU) č. 2015/848 o insolvenčním řízení.* Praha: C. H. Beck, 2020, p. 694.

15 DRLIČKOVÁ, K. *Vliv legis arbitrii na uznání a výkon cizího rozhodčího nálezu*. Brno: Masaryk University, 2013, p. 157.

16 Award of the ICSID of 4 October 2006, Case No. ARB/00/7 (World Duty Free Company vs. Republic of Kenya), point 138.

17 BONOMI, A. Chapter 13: The Concept of Public Policy under the 1958 New York Convention: An Autonomous Interpretation? In: FERRARI, F. and F. ROSENFELD (eds.). *Autonomous versus domestic concepts under the New York Convention*. Alphen aan den Rijn: Kluwer Law International, 2021, pp. 319–328.

the various approaches of the general courts to the application of public policy under Art. 5 para. 2 letter b) of the New York Convention[18] and concludes that there is insufficient uniformity to support the claim that this article of the New York Convention is to be interpreted in conformity with the doctrine of transnational public policy. On the other hand, courts may incorporate international or supranational elements into their public policy.[19]

As mentioned, the state or its authorities constitute the content of international public policy. However, the same cannot be said of transnational public policy which has emerged precisely in connection with international arbitration and which is the subject of the analysis in the following chapter.

3 Transnational Public Policy: Notion and Content

The concept of transnational public policy was introduced by *Pierre Lalive*.[20] *Lalive* states, in the introduction to his article, that the existence, content and role of public policy considered as a truly transnational public policy is a question that is unclear, difficult to grasp, and controversial. He adds that a truly international public policy is more appropriately called transnational, although such a designation is used, in his view, only out of convenience.[21]

From the point of view of designation, some authors do not distinguish between transnational and truly international public policy (*ordre public véritablement* or *réellement international* in French), while others do. To the first category belongs, for example, *Fadlallah* who writes about this public policy that we can call it truly international, transnational, the general principles

18 See also TRAKMAN, L. E. Aligning State Sovereignty with Transnational Public Policy. *Tulane Law Review,* 2018, Vol. 93, no. 2, pp. 230–231.

19 BONOMI, A. Chapter 13: The Concept of Public Policy under the 1958 New York Convention: An Autonomous Interpretation? In: FERRARI, F. and F. ROSENFELD (eds.). *Autonomous versus domestic concepts under the New York Convention.* Alphen aan den Rijn: Kluwer Law International, 2021, p. 340.

20 MAYER, P. Chapter 2: Effect of International Public Policy in International Arbitration. In: LEW, J. D. M. and L. A. MISTELIS (eds.). *Pervasive Problems in International Arbitration.* Alphen aan den Rijn: Kluwer Law International, 2006, p. 62. It should be added that prior to this year, French publications commonly worked with the concept of a truly international public policy. For example, BATIFFOL, H. *Droit international privé.* Paris: Libraire générale de droit et de jurisprudence, 1970, p. 353.

21 LALIVE, P. Ordre public transnational (ou réellement international) et arbitrage international. *Revue de l'Arbitrage*, 1986, no. 3, p. 330.

of civilized nations, or whatever we want.[22] The second category includes, for example, *Guillaumé* who states that truly international public policy refers rather to international public policy in the sense of the law of nations – as the International Court of Justice referred to *(ius cogens)*. Transnational public policy is used by arbitrators in international trade in a transnational legal order.[23] Both concepts are similarly distinguished by *Mayer*. Truly international public policy means public policy that belongs to public international law. He gives the example of sanctions in the form of embargoes by the Security Council of the United Nations. He distinguishes it from international public policy applied in private international law.[24]

For the purposes of this paper, I will use the term transnational public policy. It is not about the designation, but mainly about the characterization of this institute. The base is that transnational public policy is separate from the particular legal system created by the state or states.[25] It is a set of legal principles that do not belong to the law of a particular state[26] or that transcend one particular legal system.[27] The arbitrator is not an authority of the state and therefore it is neither easy nor satisfactory for him to rely on the public policy of a particular state. He needs to have his own public policy.[28] It is the arbitrator himself who discovers it without limitation.[29] Indeed, the arbitrator must in no way violate the principles of arbitration proceedings on which there is broad consensus in the international community.

22 FADLALLAH, I. L'ordre public dans les sentences arbitrales. In: *Recueil des cours 1994,* Leiden: Brill – Nijhoff Publishers, 1996, Vol. 249, p. 384.

23 GUILLAUMÉ, J. Ordre public international – Notion d´ordre public international. *JurisClasseur Droit international*, 2018, fasc. 534-10, p. 30.

24 MAYER, P. Chapter 2: Effect of International Public Policy in International Arbitration. In: LEW, J. D. M. and L. A. MISTELIS (eds.). *Pervasive Problems in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2006, p. 61.

25 SEELIG, M. L. The Notion of Transnational Public Policy and Its Impact on Jurisdiction, Arbitrability and Admissibility. *Annals FLB – Belgrade Law Review*, 2009, Vol. 57, no. 3, p. 122.

26 MAYER, P. Chapter 2: Effect of International Public Policy in International Arbitration. In: LEW, J. D. M. and L. A. MISTELIS (eds.). *Pervasive Problems in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2006, p. 62.

27 BRABANDERE, E. de. The (Ir)relevance of Transnational Public Policy in Investment Treaty Arbitration – A Reply to Jean-Michel Marcoux. *Journal of World Investment & Trade,* 2020, Vol. 21, no. 6, p. 849.

28 Ibid.

29 FADLALLAH, I. L'ordre public dans les sentences arbitrales. In: *Recueil des cours 1994,* Leiden: Brill – Nijhoff Publishers, 1996, Vol. 249, p. 384.

That international consensus will most often result from a detailed examination of the legal systems of the various states or from the existence of international treaties.[30] It is an international consensus on universal standards and accepted norms of conduct applied in all fora.[31] Arbitrators often base their decisions on universal standards such as good morals, ethics of international trade or explicitly transnational public policy. However, it is necessary to objectively assess the rule constituting transnational public policy when identifying such a rule through international conventions, comparative law, and arbitral awards.[32] It is needed to ask how broad such a consensus should be. The mere existence of transnational conventions or resolutions condemning a certain practice such as corruption does not necessarily signify a broad consensus that an arbitrator could use as a justification for applying public policy. It is not just the existence, but also the extension and transparency of such a consensus.[33]

Which values or rules constitute the content of transnational public policy is difficult to determine, or even unnecessary in advance, as it depends on the circumstances of the dispute and the values of the arbitrator.[34] In general, the content is filled with vague terms and concepts such as the fundamental rules of natural law, the principles of universal justice, *ius cogens* or the general principles of morality accepted by civilized nations.[35] However, the vagueness of transnational public policy should not be a reason to reject this concept, since even the international public policy of a particular state in classic private international law is a vague concept,[36] both in definition and content.

30 MAYER, P. Chapter 2: Effect of International Public Policy in International Arbitration. In: LEW, J. D. M. and L. A. MISTELIS (eds.). *Pervasive Problems in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2006, p. 63.

31 Award of the ICSID of 4 October 2006, Case No. ARB/00/7 (World Duty Free Company vs. Republic of Kenya), point 139.

32 Ibid., point 141.

33 KREINDLER, R. H. Approaches to the Application of Transnational Public Policy by Arbitrators. *Journal of World Investment & Trade,* 2003, Vol. 4, no. 2, p. 246.

34 BREKOULAKIS, S. Transnational Public Policy in International Arbitration. In: SCHULTZ, T. and F. ORTINO (eds.). *The Oxford Handbook of International Arbitration.* Oxford: Oxford University Press, 2020, p. 126.

35 Ibid.

36 LALIVE, P. Ordre public transnational (ou réellement international) et arbitrage international. *Revue de l'Arbitrage*, 1986, no. 3, p. 364.

More recent literature also points out that transnational public policy has nowadays acquired a more precise meaning in the form of legal rules or legal principles, particularly as case law and positive law (both at the national and international level) cover areas where they were previously abstract legal concepts.[37] According to *Bělohlávek*, transnational public policy represents another category of public policy, under which fall principles on which there is an international consensus, such as universal standards and norms that must be unreservedly observed. He adds that its use is manifested in the application of the *lex mercatoria*.[38]

The aforementioned existence of the *lex mercatoria* and the attempt to create a united normative system is closely related to transnational public policy. Even at a time of doubt if transnational public policy existed, this possible doubt was justified by *Lalive* in the 1980s as follows: if an arbitrator defines and applies international trade usages and other non-state rules, why should it be more difficult to uncover the existence of transnational public policy?[39] International trade usages and non-state norms are considered part of the *lex mercatoria*.[40] As *Fadlallah* points out, arbitrators do not have a forum, but they have a law – a law created by the arbitrators themselves, or by those who conduct international commerce. By this he means the *lex mercatoria*, whose legitimacy is derived from the state's recognition of the *lex mercatoria*.[41]

It is necessary to put the question whether the *lex mercatoria* – which is also called transnational law – represents a normative system from which the nature of transnational public policy can be inferred. If the institute of public policy (in whatever form) is to be applied, there must exist a legal system. National and international public policy protects the principles and

37 BREKOULAKIS, S. Transnational Public Policy in International Arbitration. In: SCHULTZ, T. and F. ORTINO (eds.). *The Oxford Handbook of International Arbitration*. Oxford: Oxford University Press, 2020, p. 134.

38 BĚLOHLÁVEK, A. J. *Rozhodčí řízení, ordre public a trestní právo. Komentář*. Praha: C. H. Beck, 2008, p. 54.

39 LALIVE, P. Ordre public transnational (ou réellement international) et arbitrage international. *Revue de l'Arbitrage*. 1986, no. 3, p. 332.

40 ROZEHNALOVÁ, N. Mezinárodní obchodní transakce. In: ROZEHNALOVÁ, N., J. VALDHANS and T. KYSELOVSKÁ. *Právo mezinárodního obchodu včetně problematiky mezinárodního rozhodčího řízení*. Praha: Wolters Kluwer ČR, 2021, pp. 149–151.

41 FADLALLAH, I. L'ordre public dans les sentences arbitrales. In: *Recueil des cours 1994*. Leiden: Brill – Nijhoff Publishers, 1996, Vol. 249, pp. 382–383.

rules of a particular state legal system which have the character of public policy. Similarly, truly international public policy is a part of international law as a legal system – that part which cannot be violated by an agreement between two states. Hence the question whether there is a legal system distinct from states and from international law that imposes on subjects an obligation to respect principles that have the character of transnational public policy. That is why it is important to determine for the nature of transnational public policy whether or not it is a part of a legal system and whether such a legal system is the *lex mercatoria.*[42] The above will be analyzed in a separate chapter.

Although the existence of a transnational public policy is often discussed, there are those who either partially or completely do not recognize this concept. *De Brabandere* belongs to the former category. He recognizes the relevance of transnational public policy in international commercial arbitration or in investor-state arbitrations (the so-called contract-based arbitrations), but he does not recognize it in arbitrations based on investment treaties (the so-called treaty-based arbitrations).[43]

Pryles falls into the latter category. According to *Pryles* arbitrators must apply internationally accepted procedural norms (among them equality of parties, adjudication the dispute in accordance with the proof, independence and impartiality of the arbitrators), but it would not be desired for them to also apply transnational public policy. It could be used to cancel a contract valid under its governing law or to modify the obligations undertaken by the parties to the contract. If the parties expressly choose the applicable law, the arbitrator has no power to deviate from the chosen law and apply transnational public policy.[44] Others regard the foregoing as the essence

42 MAYER, P. Chapter 2: Effect of International Public Policy in International Arbitration. In: LEW, J. D. M. and L. A. MISTELIS (eds.). *Pervasive Problems in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2006, p. 63.

43 BRABANDERE, E. de. The (Ir)relevance of Transnational Public Policy in Investment Treaty Arbitration – A Reply to Jean-Michel Marcoux. *Journal of World Investment & Trade,* 2020, Vol. 21, no. 6, p. 849. For his reasons for the irrelevance of transnational public policy in the field of investment treaty arbitration, see p. 852 et seq. of that article. Given the particularities of international investment treaty arbitration, I do not deal with the reasons in this paper.

44 PRYLES, M. Reflections on Transnational Public Policy. *Journal of International Arbitration,* 2007, Vol. 24, no. 1, pp. 4 and 7.

of the application of public policy – its application means that arbitrators should disregard the *lex contractus* on a particular matter that would contradict transnational public policy.[45]

Pryles further explains that if a dispute arising from a contract is related to bribery, corruption, or slavery, then in effect all legal systems do not allow such contracts to be enforced. And if they did, the general courts would refuse to recognize and enforce such an arbitral award. As for less clear examples, such as labour or environmental rules, it is likely that arbitrators from different parts of the world will not approach these issues the same way. The argumentation still remains – if these issues are incorporated into the applicable law, the arbitrator will apply them, or there is the possibility to refuse recognition and enforcement on the grounds of contradiction with the public policy of the state. The arbitrators' discretion to take into consideration transnational public policy principles undermines the legal certainty that is essential for international trade. Certainty could be undermined by an arbitrator who changes what follows from the applicable law on the basis of a reference to transnational public policy whose content is vague itself.[46] *Mayer* also ponders whether to use transnational public policy or the mandatory rules of a given state. In some cases, it is suitable to apply the *lex contractus,* especially when the mandatory rule of the state is present in the *lex contractus*. The question is if such a mandatory rule is present in the law of another state that has not been chosen by the parties, such as *loi de police*. Then transnational public policy is appropriate, especially if the protected principle is universally recognized and at the same time there is no doubt that this principle has been violated.[47]

Pryles partly admits the relevance of transnational public policy in cases where the arbitrator is empowered to decide as *amiable compositeur* or *ex aequo et bono*, or where the arbitrator is empowered to choose "rules of law" as distinct

45 BRABANDERE, E. de. The (Ir)relevance of Transnational Public Policy in Investment Treaty Arbitration – A Reply to Jean-Michel Marcoux. *Journal of World Investment & Trade,* 2020, Vol. 21, no. 6, p. 850 and the reference to the literature listed there.

46 PRYLES, M. Reflections on Transnational Public Policy. *Journal of International Arbitration,* 2007, Vol. 24, no. 1, p. 6.

47 MAYER, P. Chapter 2: Effect of International Public Policy in International Arbitration. In: LEW, J. D. M. and L. A. MISTELIS (eds.). *Pervasive Problems in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2006, pp. 67–69.

from "law", or in a contract subject to the *lex mercatoria*. However, even in these cases, the arbitrator should consider equitable ensuring of rights and obligations rather than transnational public policy.[48]

In the foregoing, there can be seen several initial points from which to consider the derivation of the application of transnational public policy, or from what legal system it can be derived. International consensus on the values to be protected by transnational public policy can be inferred from the existence of international conventions. It may also infer from the existence of the *lex mercatoria*. Finally, transnational public policy may be applied in proceedings in which arbitrators are empowered to decide as *amiable compositeur* or *ex aequo et bono*.

4 Transnational Public Policy: Derivation of Its Application

4.1 Derivation From the Existence of International Conventions

International consensus may result from a detailed examination of the legal systems of different states or from the existence of international treaties.[49] A typical example is corruption. In such cases, the application of transnational public policy can be inferred from the existence of international treaties.

The conclusion of a contract with an illicit object, in particular a contract of corruption or bribery, is contrary to transnational public policy. The prohibition of corruption is explicitly stated in a number of international and regional conventions. Most of these conventions concern illegal payments to public officials, so there is no doubt about the existence of transnational public policy. However, not so many international conventions concern the prohibition of private commercial bribery, i.e., with agents or employees of prospective business partners to secure an advantage over other competitors.[50] Just as national laws take different positions on that issue.

48 PRYLES, M. Reflections on Transnational Public Policy. *Journal of International Arbitration,* 2007, Vol. 24, no. 1, pp. 5 and 7.

49 MAYER, P. Chapter 2: Effect of International Public Policy in International Arbitration. In: LEW, J. D. M. and L. A. MISTELIS (eds.). *Pervasive Problems in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2006, p. 63.

50 BREKOULAKIS, S. Transnational Public Policy in International Arbitration. In: SCHULTZ, T. and F. ORTINO (eds.). *The Oxford Handbook of International Arbitration*. Oxford: Oxford University Press, 2020, pp. 134–138.

In particular, where intermediary and lobbying agreements are involved, it is questionable whether there is a transnational public policy prohibiting such agreements. Arbitrators cannot artificially look into political or ethical consensus in order to apply transnational public policy if such a consensus is absent or is present only in certain national laws and judgments.[51]

The derivation of transnational public policy from international conventions was also made by the ICSID in the famous decision *World Duty Free Company vs. Republic of Kenya*. The arbitral tribunal concluded that it could not recognize claims based on contracts of corruption or contracts obtained by corruption. In doing so, the tribunal referred to domestic laws and international conventions relating to corruption, as well as to decisions made by general courts and arbitral tribunals on corruption. Bribery is contrary to the international public policy of most, if not all, states, in other words, contrary to transnational public policy.[52] The arbitral tribunal has reviewed international arbitral awards, national case law and international legal instruments to conclude that there is a transnational public policy in relation to corruption and bribery. The arbitral tribunal thus avoided non-legal considerations such as morality, good morals, or principles of universal justice.[53] *Brekoulakis* appreciates this, since, in his view, the legal concept of public policy, including transnational public policy, comprises only legal norms in the form of legal rules or legal principles, free from morality or good morals.[54]

However, it is not only corruption that could be the reason for the application of transnational public policy, but there are also other areas that can be included in criminal law, namely drug trafficking, trade in weapons of war between private persons, trade in stolen art objects, trade in human organs, terrorism,

51 Ibid., pp. 138–140.

52 Award of the ICSID of 4 October 2006, *World Duty Free Company vs. Republic of Kenya*, Case No. ARB/00/7, point 157.

53 BREKOULAKIS, S. Transnational Public Policy in International Arbitration. In: SCHULTZ, T. and F. ORTINO (eds.). *The Oxford Handbook of International Arbitration*. Oxford: Oxford University Press, 2020, pp. 131–132.

54 Ibid., p. 128.

genocide, slavery, or piracy.[55] There are international conventions on these areas which are common to at least most legal systems. However, they represent a relatively narrow area of substantive international criminal law.[56] Corruption and contracts concluded for criminal purposes could be included into the transnational concept of public policy, namely substantive public policy.[57]

If we proceed from the notion that transnational public policy consists of principles and values on which there is an international consensus, then its application can be derived from the existence of international conventions that are recognized by all or most states. There will be no doubt where international conventions prohibit certain criminal activities. There can be doubt where international conventions regulate private relations with a cross-border element and where the violation of a rule does not have a criminal nature.

The international conventions regulating international air carriage may serve as an example. The Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929, known as the Warsaw Convention, currently has 152 contracting parties[58], and the Convention for the Unification of Certain Rules for International Carriage by Air done at Montreal on 28 May 1999, known as the Montreal Convention, currently has 137 contracting parties[59]. Both

55 LALIVE, P. Ordre public transnational (ou réellement international) et arbitrage international. *Revue de l'Arbitrage*. 1986, no. 3, p. 341; KREINDLER, R. H. Approaches to the Application of Transnational Public Policy by Arbitrators. *Journal of World Investment & Trade,* 2003, Vol. 4, no. 2, p. 246; MAYER, P. Chapter 2: Effect of International Public Policy in International Arbitration. In: LEW, J. D. M. and L. A. MISTELIS (eds.). *Pervasive Problems in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2006, p. 63.

56 KREINDLER, R. H. Approaches to the Application of Transnational Public Policy by Arbitrators. *Journal of World Investment & Trade,* 2003, Vol. 4, no. 2, p. 246.

57 FERIS, J. and S. TORKOMYAN. Impact of Parallel Criminal Proceedings on Procedure and Evidence in International Arbitration: Selected ICC Cases. *ICC Dispute Resolution Bulletin* [online]. 2019, no. 3 [cit. 12. 8. 2021]. Available at: https://library.iccwbo.org/

58 Contracting Parties to the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 and the Protocol Modifying the Said Convention Signed at the Hague on 28 September 1955. *International Civil Aviation Organization* [online]. [cit. 30. 8. 2021]. Available at: https://www.icao.int/secretariat/legal/List%20of%20Parties/WC-HP_EN.pdf

59 Contracting Parties to the Convention for the Unification of Certain Rules for International Carriage by Air Done at Montreal on 28 May 1999. *International Civil Aviation Organization* [online]. [cit. 30. 8. 2021]. Available at: https://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf

Conventions allow for disputes to be settled by arbitration under certain conditions.[60] Both Conventions contain an article which renders null and void and legally ineffective those provisions in the contract between the parties which tend to relieve the carrier of liability or to fix a lower limit than that which is laid down in the Convention.[61] In my view, this article in the Convention, which prescribes the invalidity and ineffectiveness of the provision as a sanction, represents a rule that must be unreservedly insisted on. For that reason, then, this rule can be considered to have the character of public policy. Given that these international conventions are binding on 137 or 152 States, there is an apparent international consensus on the rules laid down in the Conventions. In other words, a majority international consensus is present. In such a case, the arbitrators could refer to transnational public policy if the private contract contains the prohibited provision mentioned above. Provided that the parties submit the contract to the legal regime of the Convention in question, or the arbitrators conclude to apply the Convention in question to the dispute between the parties in the absence of a choice of law by the parties. It should also be noted that it depends on which approach to arbitration prevails in a particular country (jurisdictional vs. contractual doctrine, alternatively mixed type).

Another example is the United Nations Convention on Contracts for the International Sale of Goods ("CISG") which currently has 94 contracting parties.[62] Deriving the application of transnational public policy from the CISG entails several problematic points. Firstly, most of the provisions of the CISG, apart from the final provisions and Art. 12, are non-mandatory in nature[63] and thus cannot have the character of public policy. The principles on which the CISG is based and which are expressly or implicitly mentioned or implied in the CISG, such as the principle of the autonomy of the will of the parties, the principle of good faith, the prohibition of abusive exercise of rights or the prohibition of inconsistent conduct,

60 Art. 32 Warsaw Convention, Art. 34 Montreal Convention.

61 Art. 23 Warsaw Convention, Art. 26 Montreal Convention.

62 Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG). *United Nations* [online]. [cit. 30. 8. 2021]. Available at: https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status

63 TICHÝ, L. *CISG (Úmluva OSN o smlouvách o mezinárodní koupi zboží).* Praha: C. H. Beck, 2017, p. 5.

may then go against public policy.[64] Secondly, the CISG can be considered as part of the *lex mercatoria* (transnational law). This is discussed in more detail in the following subchapter.

Human rights are also considered part of transnational public policy.[65] Arbitrators can condemn conduct that violates international human rights standards. Leaving aside the discussion whether human rights are natural law or whether they are recognized by civilized nations, the fact remains that they are contained in international conventions and declarations.[66] For example, the International Covenant on Civil and Political Rights is binding on about 170 countries. It can be said that there is a clear consensus of states resulting from this convention to respect human rights.

Arbitrators can thus rely on positive law (even if they are not bound by it) when resolving a dispute, particularly on the existence of international conventions from which an international consensus can be inferred, which is the basis of transnational public policy. Another possibility is to derive transnational public policy from the *lex mercatoria*.

4.2 Derivation From the Existence of the *Lex Mercatoria*

It has been indicated above that transnational public policy is often invoked in the context of the *lex mercatoria*. Answering the question of what the nature of transnational public policy is thus depends on answering the question of what is the nature of the *lex mercatoria*, a question at least as difficult. If the *lex mercatoria* represents a normative legal system, then it will constitute a source for the application of transnational public policy. A discussion on the determination of the *lex mercatoria* in this sense would go far beyond the length of this paper, so only some views are briefly presented.

64 Ibid., pp. 64–65.

65 TRAKMAN, L. E. Aligning State Sovereignty with Transnational Public Policy. *Tulane Law Review,* 2018, Vol. 93, no. 2, p. 261; LALIVE, P. Ordre public transnational (ou réellement international) et arbitrage international. *Revue de l'Arbitrage*, 1986, no. 3, p. 359; RENNER, M. Towards a Hierarchy of Norms in Transnational Law? *Journal of International Arbitration,* 2009, Vol. 26, no. 4, p. 542 and the literature listed there.

66 TRAKMAN, L. E. Aligning State Sovereignty with Transnational Public Policy. *Tulane Law Review,* 2018, Vol. 93, no. 2, p. 218; LALIVE, P. Ordre public transnational (ou réellement international) et arbitrage international. *Revue de l'Arbitrage*, 1986, no. 3, p. 359.

Lex mercatoria is a set of non-state rules. It is questionable whether these rules can constitute a legal system. *Mayer* believes that the *lex mercatoria* does not constitute such a legal system, but only a set of non-binding legal rules. A legal system is constituted not only by legal rules, but also by judges and executive authorities, which the *lex mercatoria* lacks.[67] These opinions of the rejection of the *lex mercatoria* as a comprehensive legal system appear in the literature.[68] For *Lalive*, on the other hand, it is irrelevant whether the *lex mercatoria* constitutes a legal system. In practice, neither the parties nor the arbitrators are interested in whether the principles applied in arbitration proceedings constitute a system or not. Nor is it relevant whether it is a complete system, since even national legal systems are not complete.[69] It is sometimes stated that part of transnational public policy is the non-dispositive core of the *lex mercatoria.*[70]

Another approach is to attribute a supranational character to the *lex mercatoria*, where this character is closer to the uniform substantive rules of unifying international conventions.[71] In other words, not to treat the *lex mercatoria* on the dichotomy of state vs. non-state law, but as a supranational law. In this view, the *lex mercatoria* regulates a certain type of contractual obligations without ensuring completeness of regulation. Any gaps in the regulation are filled by internal principles or by otherwise determined internal rules. Then the CISG can be seen as part of the *lex mercatoria.* It is an internationally recognized standard where the arbitrator is entitled to use these norms even if they have not been chosen by the parties. The arbitrator thus determines the most appropriate substantive rule – a rule that is widely known in international trade, both to the parties to the contract of sale and to the arbitrators themselves.[72] In the same way, it could be concluded that

67 MAYER, P. Chapter 2: Effect of International Public Policy in International Arbitration. In: LEW, J. D. M. and L. A. MISTELIS (eds.). *Pervasive Problems in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2006, pp. 63–64.

68 See GRODL, L. *Transnacionalismus v lex mercatoria a jeho projevy v soudobé rozhodčí praxi.* Rigorous thesis. Brno: Masaryk University, 2021, p. 17 and the literature listed there.

69 LALIVE, P. Ordre public transnational (ou réellement international) et arbitrage international. *Revue de l'Arbitrage*. 1986, no. 3, p. 365.

70 RENNER, M. Towards a Hierarchy of Norms in Transnational Law? *Journal of International Arbitration,* 2009, Vol. 26, no. 4, p. 541.

71 GRODL, L. *Transnacionalismus v lex mercatoria a jeho projevy v soudobé rozhodčí praxi.* Rigorous thesis. Brno: Masaryk University, 2021, p. 96.

72 Ibid., pp. 44–46, 96, 100.

part of the supranational character of the *lex mercatoria* are, for example, the aforementioned international conventions regulating air carriage. If the arbitrator is dealing with a dispute concerning the international carriage of goods and the parties have not chosen the applicable law (or their contract is not subject to the regime of the Montreal/Warsaw Convention), the arbitrators may conclude that the Warsaw or Montreal Convention would be the most appropriate way to resolve the dispute concerning the application of the uniform substantive rules.

If this supranational character is attributed to the *lex mecatoria*, the result of the application of unifying international conventions is the same as if we inferred an international consensus from these international conventions. In this sense, the derivation of the application of transnational public policy is intertwined. In addition to the aforementioned uniform laws (such as the CISG) or public international law (here, for example, several of the provisions of the 1969 Vienna Convention on Treaties reflect the common core of legal systems), the *lex mercatoria* includes the general principles of law, the rules of international organisations, customs and usages, standard form contracts, and reporting of arbitral awards.[73] In this regard, it is worth noting the general principles of law on which there is a consensus in most jurisdictions, leaving aside the minor differences between each principle.[74] Such fundamental principles include the interpretation of a contract in good faith[75] or the autonomy of the will of the parties.[76] Regardless whether or not the *lex mercatoria* constitutes a normative legal system, general principles of law permeate the entire law and need to be taken into account, including in arbitration proceedings.

73 LANDO, O. The Lex Mercatoria in International Commercial Arbitration. *The International and Comparative Law Quarterly*, 1985, Vol. 34, no. 4, pp. 749–751; ROZEHNALOVÁ, N. Mezinárodní obchodní transakce. In: ROZEHNALOVÁ, N., J. VALDHANS and T. KYSELOVSKÁ. *Právo mezinárodního obchodu včetně problematiky mezinárodního rozhodčího řízení*. Praha: Wolters Kluwer ČR, 2021, pp. 149–151.

74 TERAMURA, N. *Ex Aequo et Bono as a Response to the 'Over-Judicialisation' of International Commercial Arbitration*. 2018, doctoral thesis, UNSW Australia, Faculty of Law, p. 107.

75 Ibid.

76 ROZEHNALOVÁ, N. Mezinárodní obchodní transakce. In: ROZEHNALOVÁ, N., J. VALDHANS and T. KYSELOVSKÁ. *Právo mezinárodního obchodu včetně problematiky mezinárodního rozhodčího řízení*. Praha: Wolters Kluwer ČR, 2021, p. 150; LALIVE, P. Ordre public transnational (ou réellement international) et arbitrage international. *Revue de l'Arbitrage*. 1986, no. 3, pp. 350–351.

4.3 "Derivation" From Deciding as *Amiable Compositeur* or *Ex Aequo Et Bono*

Deciding as *amiable compositeur*, *ex aequo et bono*, or according to equity principles are ways in which arbitrators may resolve a dispute. These ways are sometimes seen as synonymous, at other times they are distinguished. They have in common seeking of equity or fairness. For the purposes of this paper, I perceive these approaches to arbitrating as synonymous.

It is possible to start from the definition of *Loquin* who characterized *amiable compositeur* as a clause by which the parties waive their right to the protection or the benefit of legal rules and authorize the arbitrator to decide the dispute without necessarily applying legal rules.[77] Although arbitrators may decide on the basis of equity, public policy constitutes limits to their decision-making. Arbitrators must apply rules of public policy, both substantive and procedural. In particular, it is the procedural rules that are generally admitted by all national laws, such as equality of treatment or the right to be heard. The aim of respecting these rules is to prevent arbitrators from making arbitrary decisions.[78] I will add the position of *Teramura* for *ex aequo et bono* decision-making that these public policy rules overlap with mandatory rules of law – norms that cannot be contractually excluded by the parties, even if the arbitrator is empowered to decide *ex aequo et bono*. These are mandatory rules of the *lex arbitri* and the law of the obvious place of enforcement of arbitral awards. The purpose is to render an enforceable arbitral award.[79]

Then, there is a situation where the arbitrator does not decide according to the law and the legal rules, but according to his (or her) feelings about what should be a fair and just solution. Since the arbitrator does not have to decide according to the chosen or determined applicable law, he also lacks a source from which to infer the application of transnational public policy. However, he has transnational public policy at his disposal, and nothing prevents him to invoke it if the arbitrator, in his discretion, feels that he should

77 KIFFER, L. Nature and Content of Amiable Composition. *International Business Law Journal,* 2008, no. 5, p. 626.

78 Ibid., p. 633.

79 TERAMURA, N. *Ex Aequo et Bono as a Response to the 'Over-Judicialisation' of International Commercial Arbitration*. Doctoral thesis. UNSW Australia, Faculty of Law, 2018, pp. 163–165.

take it into consideration. In general, it should be noted that in order for an arbitrator to decide a dispute as *amiable compositeur*, he must be authorized to do so by the parties.[80] The parties to the dispute – professionals of international trade – must be aware that in such a case they have given the arbitrator also the authority to apply transnational public policy.

At this stage, it is useful to recognize the concept of transnational public policy, not only its existence as such and its existence based on legal rules, but also its existence based on non-legal principles such as good morals or morality.

4.4 Hierarchy of Norms

Before concluding, it is necessary to make a brief comment on the hierarchy of norms. If the arbitrator decides as *amiable compositeur*, then it is not necessary to deal with the hierarchy of norms. The arbitrator may apply those rules that, in his discretion, lead to an equitable and fair solution, including transnational public policy. It is sometimes stated that in making decisions as *amiable compositeur* arbitrators can rely on transnational public policy as a positive source of mandatory rules.[81]

In the case of derivation from the *lex mercatoria* or the existence of international conventions (which may have a transnational character), such a hierarchy of norms needs to be determined. This was the subject of *Renner's* article. He examined the hierarchy of norms in the practice of international arbitration at the ICC, ICSID, and the Uniform Dispute Resolution Policy of the Internet Corporation for Assigned Names and Numbers with reference to the arbitral awards. Regarding the ICC, he concludes that *"transnational public policy stands at the top of a hierarchical order of norms, as it is supposed to trump the parties' choice of law and (internationally) mandatory norms of any domestic legal order alike"*.[82] The hierarchy of norms in international commercial arbitration at the ICC is therefore as follows: transnational public policy, then internationally mandatory domestic rules

80 For example, Art. 21 para. 3 ICC Arbitration Rules or Art. 22 para. 4 LCIA Arbitration Rules.

81 RENNER, M. Towards a Hierarchy of Norms in Transnational Law? *Journal of International Arbitration,* 2009, Vol. 26, no. 4, p. 542.

82 Ibid., p. 552.

and finally other national or non-national rules that are at the parties' free disposal.[83]

The primacy of transnational public policy is also justified in the literature as follows. Rules or norms that can be considered part of transnational public policy are accepted by the international community. Arbitrators have a duty to the international community so they should refuse to apply any mandatory rules that are contradictory to transnational public policy.[84] Of course, the basis remains the arbitration clause and the parties' choice of law. Even in these situations, the arbitrator may apply transnational public policy if it has been violated. If there is a lack of chosen law, then the arbitrator also considers transnational public policy when determining the law. Transnational public policy may be seen as a higher good, regardless of the law chosen or otherwise determined.[85]

5 Conclusion

Transnational public policy is an institute that is closely connected to arbitration. It is an institute that arbitrators can invoke in the course of arbitration proceedings. However, it is not an institute that would be applied after arbitration proceedings by the general courts, i.e., in the stage of recognition and enforcement of a foreign arbitral award. The public policy invoked by the general courts as a ground for refusing recognition and enforcement of an arbitral award is international public policy and protects the values and principles of the state of enforcement. Arbitrators do not have a forum. Unlike general courts, they do not protect the interests of a particular state but protect the interests, principles, and values of the international community. By not having a forum, arbitrators can invoke public policy that transcends the borders of one or more states. Therefore, arbitrators should be given the possibility to apply "their" public policy, which is called transnational.

83 Ibid., p. 543.

84 TERAMURA, N. *Ex Aequo et Bono as a Response to the 'Over-Judicialisation' of International Commercial Arbitration.* Doctoral thesis. UNSW Australia, Faculty of Law, 2018, p. 156.

85 FAZILATFAR, H. Transnational Public Policy: Does It Function from Arbitrability to Enforcement. *City University of Hong Kong Law Review,* 2012, Vol. 3, no. 2, pp. 303 and 306.

Although there are opposing views, the existence of transnational public policy seems to be admitted by the majority. Arbitrators are entitled to decide a dispute on the basis of an authorization of the parties, but this authorization has its limits given by the transnational public policy. The basic characteristic is the same as the characteristic of public policy in classical private international law – protection of the principles and values that must be unreservedly insisted on. In international arbitration, arbitrators protect principles on which there is an international consensus, regardless of the jurisdictional or contractual approach to arbitration in a given country. However, the question remains, on which this paper has sought to answer – what is the source of transnational public policy.

Firstly, international consensus can be inferred from positive law – from the existence of international conventions. If international conventions are accepted or ratified by a large number of states, it can then be concluded that there is an international consensus on the legal norms contained therein. And some of these legal norms may have the character of provisions that must be unreservedly insisted on (prohibition of corruption, human rights, but also some provisions of conventions that regulate exclusively private relations with a cross-border element).

Secondly, transnational public policy may result from the existence of the *lex mercatoria* – transnational law whose existence is generally accepted. It is also through the *lex mercatoria* that we can reach the application of international conventions if we attribute to the *lex mercatoria* a supranational character. Further, the general principles of law, on which there is an international consensus, are part of the *lex mercatoria* (for example, autonomy of the will of the parties, good faith, etc.). If we are seeking international consensus in the components of the *lex mercatoria*, there is no need to follow up whether or not the *lex mercatoria* constitutes a normative legal system. However, if the *lex mercatoria* is considered to be a normative legal system, then we can infer the existence of transnational public policy from that system without seeking or examining the existence of an international consensus.

Thirdly, a separate category is deciding as *amiable compositeur* or *ex aequo et bono*. These types of arbitrating do not need to be supported by rules of law.

Thus, there is no source from which to infer transnational public policy. However, it is clear from the nature of the deciding as *amiable compositeur* that the arbitrator may consider it fair to apply transnational public policy to the dispute in question. If the parties have given the arbitrator the authority to rule as *amiable compositeur*, they must be aware that the arbitrator may apply transnational public policy.

In the third mentioned case, it is not necessary to deal with the hierarchy of norms. In the first two cases, we can accept the position that if some norms have been accepted by the international community, then the provision must not be against those transnational norms. If they are, transnational public policy applies and takes precedence over other norms.

In conclusion, the question of the sources of transnational public policy is not finally answered nor comprehensively grasped.

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Regulation of Arbitration Agreements Under New York Convention

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Abstract

Subjects of international commercial transactions conclude arbitration agreements that are governed by New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This article aims to analyze the regulation of arbitration agreements under New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This includes the understanding of an arbitration agreement itself and the requirements for its formal and material validity. Moreover, the Czech Regulation of arbitration agreements will be considered.

Keywords

Arbitration; Arbitration Agreement; New York Convention.

1 Introduction

United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") is the most successful multilateral instrument in the field of international trade law and the courts around the world have been applying and interpreting the Convention for over fifty years.[1] *"The purpose of New York Convention is to promote international commerce and the settlement of international disputes through arbitration. It aims at facilitating the recognition and enforcement of foreign arbitral awards and the enforcement of arbitration agreements."*[2]

1 INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION. ICCA's Guide to the Interpretation of the 1958 New York Convention. *ICCA* [online]. 2011, p. 5 [cit. 5. 5. 2021]. Available at: https://www.arbitration-icca.org/iccas-guide-interpretation-1958-new-york-convention

2 Ibid., p. 15.

New York Convention requires courts of contracting states to give effect to private agreements to arbitrate and to recognize and enforce arbitration awards made in other contracting states. Private agreements to arbitrate – arbitration agreements – are regulated in Art. II of New York Convention.[3] This provision defines what constitutes an arbitration agreement and determines requirements for its formal and material validity.

This article aims to describe the regulation of arbitration agreements under New York Convention based on case law and the doctrine. Thus, the article shall analyze the understanding of an arbitration agreement under New York Convention as well as the requirements on its formal and material validity. Moreover, the Czech regulation which applies in matters non-governed by New York Convention will be taken into account.

2 Understanding of Arbitration Agreements Under New York Convention

New York Convention defines an arbitration agreement as: *"An agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."*[4]

The main characteristic feature of an arbitration agreement is that it constitutes an arrangement regarding the dispute resolution process.[5] An arbitration agreement represents a contract according to which parties submit their dispute to arbitration.[6]

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3 KRONKE, H. et al. *Recognition and enforcement of foreign arbitral awards: a global commentary on the New York convention*. Austin: Wolters Kluwer, 2010, p. 48.

4 Art. II para. 1 New York Convention.

5 BORN, B. G. *International commercial arbitration*. Alphen aan den Rijn: Kluwer Law International, 2014, p. 251; see also DOBIÁŠ, P. and M. MALACKA. *Obchodní podmínky v mezinárodním obchodním styku*. Praha: Leges, 2019, p. 117; see also RŮŽIČKA, K. K otázce právní povahy rozhodčího řízení. *Bulletin advokacie,* 2003, no. 5, p. 34; see also RŮŽIČKA, K. *Mezinárodní obchodní arbitráž*. Praha: Prospektum, 1997, p. 14; see also ROZEHNALOVÁ, N. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. Praha: Wolters Kluwer Česká republika, 2013, pp. 124, 172.

6 BORN, B. G. *International commercial arbitration*. Alphen aan den Rijn: Kluwer Law International, 2014, pp. 239, 241; see also RŮŽIČKA, K. *Mezinárodní obchodní arbitráž*. Praha: Prospektum, 1997, p. 24.

To begin with, there must be a dispute to invoke the applicability of such agreement.[7] The Permanent Court of Arbitration ("PCA") in its judgment of 30 August 1924 *(The Mavrommatis Palestine Concessions)* stipulated that*: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."*[8] The term dispute is interpreted widely – it applies to both existing and future disputes.[9] *"Arbitration does not apply to the resolution of other types of issues, such as the negotiation or formulation of contractual terms, the formation of commercial ventures, or the expression of abstract legal or other opinions outside the context of a dispute."*[10] Moreover, the dispute must fall within the scope of an arbitration agreement.[11]

Next, Art. II para. 1 of New York Convention contains a requirement that the dispute must have arisen *"in respect of a defined legal relationship, whether contractual or not"*.[12] An arbitration agreement under New York Convention

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7 BĚLOHLÁVEK, J. A. *Arbitration: Principles & particularities*. Chişinău: Eliva Press, 2020, p. 1; see also BORN, B. G. *International commercial arbitration*. Alphen aan den Rijn: Kluwer Law International, 2014, pp. 239, 241; see also DOBIÁŠ, P. and M. MALACKA. *Obchodní podmínky v mezinárodním obchodním styku*. Praha: Leges, 2019, p. 117; see also RŮŽIČKA, K. K otázce právní povahy rozhodčího řízení. *Bulletin advokacie*, 2003, no. 5, p. 34; see also RŮŽIČKA, K. *Mezinárodní obchodní arbitráž*. Praha: Prospektum, 1997, pp. 14, 24.

8 Judgment of the PCA of 30 August 1924, Case *The Mavrommatis Palestine Concessions*.

9 INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION. ICCA's Guide to the Interpretation of the 1958 New York Convention. *ICCA* [online]. 2011, p. 56 [cit. 5. 5. 2021]. Available at: https://www.arbitration-icca.org/iccas-guide-interpretation-1958-new-york-convention; see also MIČINSKÝ, I. *Dohovor o uznaní a výkone cudzích rozhodcovských rozhodnutí: (New York, 1958): komentár*. Bratislava: Wolters Kluwer, 2016, p. 54; see also UNCITRAL. UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). *United Nations* [online]. 2016, p. 48 [cit. 5. 5. 2021]. Available at: https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf; see also WOLFF, R. *New York Convention: convention on the recognition and enforcement of foreign arbitral awards of 10 June 1958: article-by-article commentary*. München: C. H. Beck, 2019, p. 111.

10 BORN, B. G. *International commercial arbitration*. Alphen aan den Rijn: Kluwer Law International, 2014, p. 251.

11 INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION. ICCA's Guide to the Interpretation of the 1958 New York Convention. *ICCA* [online]. 2011, p. 48 [cit. 5. 5. 2021]. Available at: https://www.arbitration-icca.org/iccas-guide-interpretation-1958-new-york-convention

12 UNCITRAL. UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). *United Nations* [online]. 2016, p. 49 [cit. 5. 5. 2021]. Available at: https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf

must relate to a specific legal relationship that can be either contractual or in tort.[13] Thus, New York Convention expressly admits an arbitration agreement to concern non-contractual disputes, such as disputes involving claims of tort (delict) or breach of statutory protections.[14]

New York Convention further requires an arbitration agreement to concern *"a subject matter capable of settlement by arbitration"*.[15] The subject matter is arbitrable when there is no mandatory jurisdiction of a national court.[16] New York Convention itself does not define which kinds of disputes are arbitrable – this question must be assessed by national law as there are considerable differences among jurisdictions as to the arbitrability of various subject matters.[17]

13 INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION. ICCA's Guide to the Interpretation of the 1958 New York Convention. *ICCA* [online]. 2011, p. 19 [cit. 5. 5. 2021]. Available at: https://www.arbitration-icca.org/iccas-guide-interpretation-1958-new-york-convention; see also KRONKE, H. et al. *Recognition and enforcement of foreign arbitral awards: a global commentary on the New York convention*. Austin: Wolters Kluwer, 2010, p. 49; see also MIČINSKÝ, Ľ. *Dohovor o uznaní a výkone cudzích rozhodcovských rozhodnutí: (New York, 1958): komentár*. Bratislava: Wolters Kluwer, 2016, p. 54; see also WOLFF, R. *New York Convention: convention on the recognition and enforcement of foreign arbitral awards of 10 June 1958: article-by-article commentary*. München: C. H. Beck, 2019, p. 112.

14 BORN, B. G. *International commercial arbitration*. Alphen aan den Rijn: Kluwer Law International, 2014, p. 341; see also ROZEHNALOVÁ, N. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. Praha: Wolters Kluwer Česká republika, 2013, p. 126; see also WOLFF, R. *New York Convention: convention on the recognition and enforcement of foreign arbitral awards of 10 June 1958: article-by-article commentary*. München: C. H. Beck, 2019, p. 112.

15 KRONKE, H. et al. *Recognition and enforcement of foreign arbitral awards: a global commentary on the New York convention*. Austin: Wolters Kluwer, 2010, p. 68; see also RŮŽIČKA, K. *Mezinárodní obchodní arbitráž*. Praha: Prospektum, 1997, p. 15.

16 KRONKE, H. et al. *Recognition and enforcement of foreign arbitral awards: a global commentary on the New York convention*. Austin: Wolters Kluwer, 2010, p. 68.

17 BĚLOHLÁVEK, J. A. *Arbitration: Principles & particularities*. Chişinău: Eliva Press, 2020, p. 33; see also KRONKE, H. et al. *Recognition and enforcement of foreign arbitral awards: a global commentary on the New York convention*. Austin: Wolters Kluwer, 2010, p. 68.

Finally, it is presumed in case-law[18] and literature[19] that the principle of separability applies to an arbitration agreement under New York Convention. The principle of separability is a fundamental legal principle governing the autonomy of international arbitration agreements and it is one of the general principles of arbitration upon which international arbitrators rely.[20] This principle implies that the validity of the main contract does not affect the validity of the arbitration agreement contained therein and vice versa. The principle of separability further entails that the main contract and the arbitration agreement may be governed by different laws.[21]

3 Form of Arbitration Agreements Under New York Convention

According to Art. II para. 1 of New York Convention an arbitration agreement must be *"in writing"*.[22] According to Art. II para. 2 of New York Convention: *"The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange*

18 Judgment of the Supreme Court in Madras, India, of 29 October 2008, *Ramasamy Athapan and Nandakumar Athappan vs. Secretariat of Court, International Chamber of Commerce*; see also Judgment of the Court of Appeal in England and Wales of 24 January 2007, *Fiona Trust vs. Privalov*; see also Judgment of the U.S. Court of Appeals, Third District, of 26 June 2003, *China Minmetals Import & Export Co. vs. Chi Mei Corporation*.

19 BLACKABY, N. et al. *Redfern and Hunter on international arbitration*. Oxford: Oxford University Press, 2009, p. 147; see also BORN, B. G. *International commercial arbitration*. Alphen aan den Rijn: Kluwer Law International, 2014, pp. 355, 356; see also FOUCHARD, P. et al. *Fouchard, Gaillard, Goldman on international commercial arbitration*. The Hague: Kluwer Law International, 1999, pp. 201, 202; see also INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION. ICCA's Guide to the Interpretation of the 1958 New York Convention. *ICCA* [online]. 2011, p. 63 [cit. 5. 5. 2021]. Available at: https://www.arbitration-icca.org/iccas-guide-interpretation-1958-new-york-convention; see also WOLFF, R. *New York Convention: convention on the recognition and enforcement of foreign arbitral awards of 10 June 1958: article-by-article commentary*. München: C. H. Beck, 2019, pp. 151, 187.

20 FOUCHARD, P. et al. *Fouchard, Gaillard, Goldman on international commercial arbitration*. The Hague: Kluwer Law International, 1999, p. 196.

21 BORN, B. G. *International commercial arbitration*. Alphen aan den Rijn: Kluwer Law International, 2014, p. 834; see also INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION. ICCA's Guide to the Interpretation of the 1958 New York Convention. *ICCA* [online]. 2011, p. 40 [cit. 5. 5. 2021]. Available at: https://www.arbitration-icca.org/iccas-guide-interpretation-1958-new-york-convention; see also KRONKE, H. et al. *Recognition and enforcement of foreign arbitral awards: a global commentary on the New York convention*. Austin: Wolters Kluwer, 2010, p. 51.

22 Art. II para. 1 New York Convention.

of letters or telegrams."[23] New York Convention thus sets a "*maximum*" standard that precludes the Contracting States from requiring additional or more demanding formal requirements under national laws (e.g., a particular typeface or size, made in a public deed or have a separate signature, etc.).[24]

At first, according to the wording of Art. II para. 2 of New York Convention an arbitration agreement is formally valid if signed by both parties.[25] Moreover, it was confirmed in case law that the reference to standard terms and conditions that contain an arbitration agreement complies with the formal requirements established by Art. II para. 2 of New York Convention if the main contract refers to standard terms and conditions which are attached to it and the other party could reasonably take note of general terms' and conditions' content.[26]

As a result, courts refuse to enforce an arbitration agreement against a party that has not signed it.[27] United States ("U.S.") Court of Appeals

23 Art. II para. 2 New York Convention.

24 BORN, B. G. *International commercial arbitration*. Alphen aan den Rijn: Kluwer Law International, 2014, pp. 667, 668; see also INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION. ICCA's Guide to the Interpretation of the 1958 New York Convention. *ICCA* [online]. 2011, p. 43 [cit. 5. 5. 2021]. Available at: https://www.arbitration-icca.org/iccas-guide-interpretation-1958-new-york-convention; see also WOLFF, R. *New York Convention: convention on the recognition and enforcement of foreign arbitral awards of 10 June 1958: article-by-article commentary*. München: C. H. Beck, 2019, p. 11.

25 INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION. ICCA's Guide to the Interpretation of the 1958 New York Convention. *ICCA* [online]. 2011, p. 45 [cit. 5. 5. 2021]. Available at: https://www.arbitration-icca.org/iccas-guide-interpretation-1958-new-york-convention; see also WOLFF, R. *New York Convention: convention on the recognition and enforcement of foreign arbitral awards of 10 June 1958: article-by-article commentary*. München: C. H. Beck, 2019, p. 102.

26 Judgment of the Supreme Court in Queensland, Australia, of 27 June 2000, *Commonwealth Development Corp vs. Montague*; see also Judgment of the U.S. District Court for Western District of Washington of 19 May 2000, *Bothell vs. Hitachi Zosen Corp*.; Born, however, provides that: *"These provisions (Art. II para. 1 of New York Convention) preclude Contracting States from imposing discriminatory or idiosyncratic rules of substantive validity on international arbitration agreements. Under these standards, the better view is that a blanket rule of national law, invalidating any arbitration agreement incorporated by a general reference to another instrument, would be invalid."* – BORN, B. G. *International commercial arbitration*. Alphen aan den Rijn: Kluwer Law International, 2014, p. 820; see also MIČINSKÝ, Ľ. *Dohovor o uznaní a výkone cudzích rozhodcovských rozhodnutí: (New York, 1958): komentár*. Bratislava: Wolters Kluwer, 2016, p. 53.

27 UNCITRAL. UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). *United Nations* [online]. 2016, p. 53 [cit. 5. 5. 2021]. Available at: https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf

in its decision of 29 July 1999 (*Kahn Lucas Lancaster, Inc. vs. Lark International Ltd*) and Supreme People's Court in the People's Republic of China in its decision of 3 August 2009 (*Concordia Trading B.V. vs. Nantong Gangde Oil Co., Ltd.*) refused to enforce an arbitration agreement on the ground that only one party had signed it.[28]

It was, however, held by some courts that a tacit acceptance[29] of an arbitration agreement should be considered as sufficient for the purposes of Art. II para. 2 of New York Convention.[30] Moreover, certain authorities claim that an arbitration agreement not satisfying the written form requirement of Art. II para. 2 of New York Convention is formally valid where the party contesting the validity of the arbitration agreement violates the principle of good faith.[31]

Secondly, it stems from the wording of Art. II para. 2 of New York Convention that the formal requirement is satisfied if an arbitration agreement[32] is contained in an exchange of letters or telegrams.[33] It has been

28 Judgment of the Supreme People's Court in China of 3 August 2009, *Concordia Trading B.V. vs. Nantong Gangde Oil Co., Ltd.*; see also Judgment of the U.S. Court of Appeals, Second District, of 29 July 1999, *Kahn Lucas Lancaster, Inc. vs. Lark International Ltd.*

29 E.g., contract offer containing an arbitration agreement is sent by a party to the other who does not reply but nonetheless performs the contract.

30 In case-law Judgment of the U.S. Court of Appeals of the 20 June 2003, *Standard Bent Glass Corp. vs. Glassrobots OY*; In literature BORN, B. G. *International commercial arbitration*. Alphen aan den Rijn: Kluwer Law International, 2014, p. 687; see also INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION. ICCA's Guide to the Interpretation of the 1958 New York Convention. *ICCA* [online]. 2011, p. 49 [cit. 5. 5. 2021]. Available at: https://www.arbitration-icca.org/iccas-guide-interpretation-1958-new-york-convention; see also MIČINSKÝ, P. *Dohovor o uznaní a výkone cudzích rozhodcovských rozhodnutí: (New York, 1958): komentár*. Bratislava: Wolters Kluwer, 2016, p. 53.

31 This would be the case, for example, if a party does not object to arbitration agreement initially, but rather waits for the enforcement proceedings, etc. In case-law the Judgment of District Court for Nevada of 13 July 2002, *Formostar, LLC, et al. vs. Henry Florentius, et al.*; In literature BORN, B. G. *International commercial arbitration*. Alphen aan den Rijn: Kluwer Law International, 2014, pp. 691, 692; see also KRONKE, H. et al. *Recognition and enforcement of foreign arbitral awards: a global commentary on the New York convention*. Austin: Wolters Kluwer, 2010, p. 85; see also UNCITRAL. UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). *United Nations* [online]. 2016, p. 54 [cit. 5. 5. 2021]. Available at: https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf

32 Or an arbitration clause incorporated in a contract.

33 Art. II para. 2 New York Convention.

generally held by the courts that letters or telegrams need not be manually signed.[34]

Art. II para. 2 of New York Convention covers the means of communication used in 1958.[35] It is, however, common nowadays that an arbitration agreement is concluded by using modern means of communication, such as e-mails, faxes, data messages, etc.[36] *"Article II(2) is one of the provisions of the Convention that has aged the least gracefully, due to technical developments and the changing needs of international trade."*[37]

Therefore, in 2006 UNCITRAL adopted a Recommendation regarding the interpretation of Art. II para. 2 and Art. VII para. 1 of New York Convention.[38] The recommendation advocates interpreting Art. II para. 2 of New York Convention in a way that the circumstances described therein are

34 In case-law the Judgment of Tribunal Federal in Switzerland of 16 January 1995, *Compagnie de Navigation et Transports SA vs., Msc. Mediterranean Shipping Company SA*; see also the Judgment of Supreme Court in India of 1 October 2008, *M/S Unissi (India) Pvt Ltd vs. Post Graduate Institute of Medical Education and Research*; see also Judgment of the U.S. Court of Appeals, Third Circuit, of 20 June 2003, *Standard Bent Glass Corp. vs. Glassrobots OY*; In literature BORN, B. G. *International commercial arbitration*. Alphen aan den Rijn: Kluwer Law International, 2014, p. 680; see also MIČINSKÝ, Ľ. *Dohovor o uznaní a výkone cudzích rozhodcovských rozhodnutí: (New York, 1958): komentár*. Bratislava: Wolters Kluwer, 2016, p. 56; see also ROZEHNALOVÁ, N. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. Praha: Wolters Kluwer Česká republika, 2013, p. 171; see also WOLFF, R. *New York Convention: convention on the recognition and enforcement of foreign arbitral awards of 10 June 1958: article-by-article commentary*. München: C. H. Beck, 2019, p. 126.

35 INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION. ICCA's Guide to the Interpretation of the 1958 New York Convention. *ICCA* [online]. 2011, p. 50 [cit. 5. 5. 2021]. Available at: https://www.arbitration-icca.org/iccas-guide-interpretation-1958-new-york-convention; see also ROZEHNALOVÁ, N. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. Praha: Wolters Kluwer Česká republika, 2013, p. 172.

36 KRONKE, H. et al. *Recognition and enforcement of foreign arbitral awards: a global commentary on the New York convention*. Austin: Wolters Kluwer, 2010, p. 74, 75; see also ROZEHNALOVÁ, N. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. Praha: Wolters Kluwer Česká republika, 2013, p. 172.

37 KRONKE, H. et al. *Recognition and enforcement of foreign arbitral awards: a global commentary on the New York convention*. Austin: Wolters Kluwer, 2010, p. 74.

38 PAULSSON, M. *The 1958 New York Convention in Action*. Alphen aan den Rijn: Kluwer Law International, 2016, p. 84; see also UNCITRAL. Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session. *New York Arbitration Convention* [online]. 2016 [cit. 5. 5. 2021]. Available at: http://www.newyorkconvention.org/11165/web/files/document/1/5/15978.pdf

not exhaustive.[39] Moreover, contracting states are encouraged (with reference to the more-favourable-right provision of Art. VII para. 1 of New York Convention) to allow any interested party to avail itself of rights it may have, under the law or international treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.[40] In other words, national courts are advised to assess the formal validity of an arbitration agreement according to less stringent formal requirements available under their national laws or international treaties.[41] Besides, national legislation should not be applied if its requirements are stricter than those of Art. II para. 2 of New York Convention.[42]

The recommendation further advocates taking into account international legal instruments when assessing the formal validity of arbitration agreements, such as the UNCITRAL Model Law on International Commercial Arbitration,[43] the UNCITRAL Model Law on Electronic

39 UNCITRAL. Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session. *New York Arbitration Convention* [online]. 2016 [cit. 5. 5. 2021]. Available at: http://www.newyorkconvention.org/11165/web/files/document/1/5/15978.pdf; see also ROZEHNALOVÁ, N. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. Praha: Wolters Kluwer Česká republika, 2013, p. 172; see also RYŠAVÝ, L. Form of Arbitration Agreement in a Comparative Perspective. *International and Comparative Law Review*, 2020, no. 2, p. 49; see also WOLFF, R. *New York Convention: convention on the recognition and enforcement of foreign arbitral awards of 10 June 1958: article-by-article commentary*. München: C. H. Beck, 2019, p. 128.

40 UNCITRAL. Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session. *New York Arbitration Convention* [online]. 2016 [cit. 5. 5. 2021]. Available at: http://www.newyorkconvention.org/11165/web/files/document/1/5/15978.pdf

41 UNCITRAL. UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). *United Nations* [online]. 2016, p. 51 [cit. 5. 5. 2021]. Available at: https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf

42 KRONKE, H. et al. *Recognition and enforcement of foreign arbitral awards: a global commentary on the New York convention*. Austin: Wolters Kluwer, 2010, pp. 45, 46; see also MIČINSKÝ, Ľ. *Dohovor o uznaní a výkone cudzích rozhodcovských rozhodnutí: (New York, 1958): komentár*. Bratislava: Wolters Kluwer, 2016, p. 57.

43 UNCITRAL. UNCITRAL Model Law on International Commercial Arbitration. *United Nations* [online]. 1985 [cit. 5. 5. 2021]. Available at: https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf

Commerce,[44] the UNCITRAL Model Law on Electronic Signatures, and the United Nations Convention on the Use of Electronic Communications in International Contracts.[45]

Thus, the requirement of an arbitration agreement contained *"in the exchange of letters or telegrams"* is interpreted widely as including modern means of communication.[46] Moreover, less stringent national legislation or international treaties should be applied to assess the formal validity of arbitration agreements.[47]

4 Substantive Validity of Arbitration Agreements Under New York Convention

An arbitration agreement must be materially valid to have legal effects.[48] Art. II para. 3 of New York Convention thus provides that: *"The court*

44 UNCITRAL. UNCITRAL Model Law on Electronic Commerce. *United Nations* [online]. 1986 [cit. 5. 5. 2021]. Available at: https://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf

45 UNCITRAL. Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session. *New York Arbitration Convention* [online]. 2016 [cit. 5. 5. 2021]. Available at: http://www.newyorkconvention.org/11165/web/files/document/1/5/15978.pdf

46 In case-law Judgment of the Court of Appeal in Manitoba of 11 December 2002, Case Sheldon Proctor vs. Leon Schellenberg. In literature BORN, B. G. *International commercial arbitration*. Alphen aan den Rijn: Kluwer Law International, 2014, pp. 688, 689; see also INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION. ICCA's Guide to the Interpretation of the 1958 New York Convention. *ICCA* [online]. 2011, p. 50 [cit. 5. 5. 2021]. Available at: https://www.arbitration-icca.org/iccas-guide-interpretation-1958-new-york-convention; see also KRONKE, H. et al. *Recognition and enforcement of foreign arbitral awards: a global commentary on the New York convention*. Austin: Wolters Kluwer, 2010, pp. 82, 83; see also UNCITRAL. UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). *United Nations* [online]. 2016, p. 55 [cit. 5. 5. 2021]. Available at: https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf; see also WOLFF, R. *New York Convention: convention on the recognition and enforcement of foreign arbitral awards of 10 June 1958: article-by-article commentary*. München: C. H. Beck, 2019, p. 125.

47 UNCITRAL. UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). *United Nations* [online]. 2016, p. 51 [cit. 5. 5. 2021]. Available at: https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf

48 ROZEHNALOVÁ, N. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. Praha: Wolters Kluwer Česká republika, 2013, pp. 130, 164; see also KRONKE, H. et al. *Recognition and enforcement of foreign arbitral awards: a global commentary on the New York convention*. Austin: Wolters Kluwer, 2010, pp. 49, 50.

of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." [49]

The term *"null and void"* encompasses all cases in which an arbitration agreement was defective or invalid from the outset for reasons such as fraud or fraudulent inducement, duress, unconscionability, illegality, or mistake.[50] U.S. Court of Appeals in its decision of 9 July 2012 *(St. Hugh Williams vs. NCL (Bahamas) LTD., d.b.a. NCL)* held that the term *"null and void"* refers to the situations in which an arbitration agreement was *"obtained through those limited situations, such as fraud, mistake, duress, and waiver, constituting standard breach-of-contract defences that can be applied neutrally on an international scale"*.[51]

"Inoperative" arbitration agreement is an agreement that has ceased to have effects due to waiver, revocation, repudiation, termination of the arbitration agreement, or failure to comply with jurisdictional time limits prescribed by the arbitration agreement.[52] Supreme Court in Melbourne in its decision

49 Art. II para. 3 New York Convention; see also UNCITRAL. UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). *United Nations* [online]. 2016, p. 69 [cit. 5. 5. 2021]. Available at: https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf

50 BORN, B. G. *International commercial arbitration*. Alphen aan den Rijn: Kluwer Law International, 2014, p. 841; see also INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION. ICCA's Guide to the Interpretation of the 1958 New York Convention. *ICCA* [online]. 2011, p. 52 [cit. 5. 5. 2021]. Available at: https://www.arbitration-icca.org/iccas-guide-interpretation-1958-new-york-convention; see also UNCITRAL. UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). *United Nations* [online]. 2016, p. 70 [cit. 5. 5. 2021]. Available at: https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf; see also WOLFF, R. *New York Convention: convention on the recognition and enforcement of foreign arbitral awards of 10 June 1958: article-by-article commentary*. München: C. H. Beck, 2019, pp. 190, 191.

51 Judgment of the U.S. Court of Appeals, Eleventh Circuit, of 9 July 2012, *St. Hugh Williams vs. NCL (Bahamas) LTD., d.b.a. NCL*.

52 BĚLOHLÁVEK, J. A. *Arbitration: Principles & particularities*. Chișinău: Eliva Press, 2020, p. 60; see also BORN, B. G. *International commercial arbitration*. Alphen aan den Rijn: Kluwer Law International, 2014, p. 842; see also KRONKE, H. et al. *Recognition and enforcement of foreign arbitral awards: a global commentary on the New York convention*. Austin: Wolters Kluwer, 2010, pp. 104, 105; see also INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION. ICCA's Guide to the Interpretation of the 1958 New York Convention. *ICCA* [online]. 2011, p. 52 [cit. 5. 5. 2021]. Available at: https://www.arbitration-icca.org/iccas-guide-interpretation-1958-new-york-convention; see also PAULSSON, M. *The 1958 New York Convention in Action*. Alphen aan den Rijn: Kluwer Law International, 2016, p. 72; see also WOLFF, R. *New York Convention: convention on the recognition and enforcement of foreign arbitral awards of 10 June 1958: article-by-article commentary*. München: C. H. Beck, 2019, p. 193.

of 31 August 2005 *(La Donna Pty Ltd vs. Wolford AG)* held that an unequivocal choice to pursue litigation through application for security costs causes the arbitration agreement to be inoperative.[53]

The expression *"incapable of being performed"* involves cases where the arbitral process cannot be set in motion for reasons such as the death of the arbitrator, the vagueness of arbitration agreements, etc.[54] High Court in Madras in its decision of 29 October 2008 *(Ramasamy Athapan and Nandakumar Athappan vs. Secretariat of Court, International Chamber of Commerce)* held that the term *"incapable of being performed"* applies in the situations in which an arbitration agreement ceases to have effects due to unforeseeable circumstances.[55] The expression *"incapable of being performed"* further covers cases of pathological arbitration agreements.[56]

Thus, according to Art. II para. 3 of New York Convention, a court of a contracting state may avoid its obligation of referral to arbitration if it finds the putative arbitration agreement null and void, inoperative, or incapable of being performed.[57] The language of Art. II para. 3 of New York Convention establishes the presumptive validity of international

53 Judgment of the Supreme Court in Melbourne of 31 August 2005, *La Donna Pty Ltd vs. Wolford AG*.

54 In case-law Judgment of the Court of Appeal in England and Wales of 3 December 1980, *Janos Paczy vs. Haendler & Natermann GmbH*.; In literature BĚLOHLÁVEK, J. A. *Arbitration: Principles & particularities*. Chişinău: Eliva Press, 2020, p. 60; see also BORN, B. G. *International commercial arbitration*. Alphen aan den Rijn: Kluwer Law International, 2014, p. 844; see also KRONKE, H. et al. *Recognition and enforcement of foreign arbitral awards: a global commentary on the New York convention*. Austin: Wolters Kluwer, 2010, p. 107; see also INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION. ICCA's Guide to the Interpretation of the 1958 New York Convention. *ICCA* [online]. 2011, p. 53 [cit. 5. 5. 2021]. Available at: https://www.arbitration-icca.org/iccas-guide-interpretation-1958-new-york-convention; see also UNCITRAL. UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). *United Nations* [online]. 2016, pp. 72, 73 [cit. 5. 5. 2021]. Available at: https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf

55 Judgment of the High Court in Madras of 29 October 2008, *Ramasamy Athapan and Nandakumar Athappan vs. Secretariat of Court, International Chamber of Commerce*.

56 A pathological arbitration agreement is an arbitration agreement that refers to a non-existent arbitral tribunal (a non-existing an arbitrator), or an arbitration agreement that does not contain sufficiently specific information on how the arbitrator should be elected.

57 BORN, B. G. *International commercial arbitration*. Alphen aan den Rijn: Kluwer Law International, 2014, p. 839.

arbitration agreements, implying that the burden of proof of invalidity is on the party resisting recognition and enforcement of such agreements.[58]

New York Convention, however, does not specify which law governs the substantive validity of an arbitration agreement.[59] Some commentators suggested determining the material validity of an arbitration agreement by the law to which the parties have subjected it or, failing any indication thereon, by the law of the arbitral seat, pursuant to Art. V. para. 1 letter a) of New York Convention. Even though this provision regulates the process of recognition and enforcement of arbitration agreements, it has been confirmed in literature[60] and case-law[61] that this provision may be used to assess the material validity of an arbitration agreement even before the recognition and enforcement phase. According to some authors, the material validity of an arbitration agreement should be assessed by the law governing the contract as a whole.[62]

58 Ibid, pp. 839, 745; see also KRONKE, H. et al. *Recognition and enforcement of foreign arbitral awards: a global commentary on the New York convention*. Austin: Wolters Kluwer, 2010, p. 102.

59 BORN, B. G. *International commercial arbitration*. Alphen aan den Rijn: Kluwer Law International, 2014, p. 493; see also KRONKE, H. et al. *Recognition and enforcement of foreign arbitral awards: a global commentary on the New York convention*. Austin: Wolters Kluwer, 2010, p. 53; see also PAULSSON, M. *The 1958 New York Convention in Action*. Alphen aan den Rijn: Kluwer Law International, 2016, p. 68.

60 In literature see BĚLOHLÁVEK, J. A. *Arbitration: Principles & particularities*. Chişinău: Eliva Press, 2020, p. 31; see also BORN, B. G. *International commercial arbitration*. Alphen aan den Rijn: Kluwer Law International, 2014, pp. 494, 495; see also INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION. ICCA's Guide to the Interpretation of the 1958 New York Convention. *ICCA* [online]. 2011, p. 51 [cit. 5. 5. 2021]. Available at: https://www.arbitration-icca.org/iccas-guide-interpretation-1958-new-york-convention; see also KRONKE, H. et al. *Recognition and enforcement of foreign arbitral awards: a global commentary on the New York convention*. Austin: Wolters Kluwer, 2010, pp. 53, 54; see also PAULSSON, M. *The 1958 New York Convention in Action*. Alphen aan den Rijn: Kluwer Law International, 2016, p. 68.

61 In case-law see Judgment of the High Court in Switzerland of 20 December 1990, *A SA vs. I SA*; see also the Judgment of the Court of Appeal in Genoa of 3 February, *Della Sanara Kustvaart - Bevrachting & Overslagbedrijf BV vs. Fallimento Cap. Giovanni Coppola srl, in liquidation*.

62 INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION. ICCA's Guide to the Interpretation of the 1958 New York Convention. *ICCA* [online]. 2011, p. 51 [cit. 5. 5. 2021]. Available at: https://www.arbitration-icca.org/iccas-guide-interpretation-1958-new-york-convention; see also KRONKE, H. et al. *Recognition and enforcement of foreign arbitral awards: a global commentary on the New York convention*. Austin: Wolters Kluwer, 2010, p. 55.

5 Matters Assessed by National Laws: Czech Law

In the previous part, it was mentioned that New York Convention itself does not regulate the substantive validity of an arbitration agreement and that it must be assessed by national laws.

According to Art. 117 para. 1 of the Act No. 91/2012 Coll., on Private International Law ("Czech PILA"): *"The admissibility of an arbitration contract is assessed in accordance with Czech law. The other requisites of the arbitration contract are assessed in accordance with the body of laws of the state in which the arbitration award is to be issued."*[63] The provision in its second sentence refers to "other requisites of the arbitration contract" – this term encompasses, among others, matters related to the substantive validity of an arbitration agreement.[64] According to the provision of Art. 117 para. 1 of the Czech PILA the substantive validity of an arbitration agreement shall be determined by the law of the state in which the arbitration award is issued.[65] Should the arbitration award be issued in the Czech Republic, the substantive validity of an arbitration agreement is to be determined by Czech law – specifically by the Czech Act No. 89/2012 Coll, Civil Code.[66]

"In practice, it will be mainly a question of the existence of the parties' consent to the arbitration agreement and its substantive validity, i. e. whether there has been the expression of the will of the parties in relation to the arbitration agreement (whether the arbitration agreement exists at all) and whether there has been an error, fraud, undue pressure or other conduct which according to the applicable law affects the of the arbitration agreement."[67] What is more, the question of the substantive validity of an arbitration agreement involves the case-law of the Czech Supreme Court according to which: *"If the arbitration agreement does not contain a direct appointment of an ad hoc arbitrator or a specific method of his or her determination, and if it only refers to the arbitration rules issued by a legal entity which is not a permanent arbitral tribunal established by law, such arbitration agreement is invalid."*[68]

63 Art. 117 para. 1 Czech PILA.
64 BŘÍZA, P. et al. *Zákon o mezinárodním právu soukromém*. Praha: C. H. Beck, 2014, pp. 683–690.
65 BELLOŇOVÁ, P. et al. Zákon o mezinárodním právu soukromém: Komentář [online]. *ASPI. Wolters Kluwer* [cit. 25. 6. 2021]. Available at: http://www.aspi.cz
66 Ibid.
67 BŘÍZA, P. et al. *Zákon o mezinárodním právu soukromém*. Praha: C. H. Beck, 2014, pp. 683–690.
68 Judgment of the Supreme Court of the Czech Republic of 11 May 2011, Case 31 Cdo 1945/2010.

To sum up, the Czech law governs the substantive validity of an arbitration agreement provided that the arbitration award is issued in the Czech Republic.

What is more, the Art. 117 para. 1 of the Czech PILA stipulates that the admissibility of an arbitration contract is assessed in accordance with the Czech law.[69] Admissible arbitration contracts are those that are arbitrable – arbitrability[70] means the possibility to establish the jurisdiction of the arbitrators by entering into an arbitration agreement.[71] The Art. 117 para. 1 of the Czech PILA prescribes the application of Czech law to assess whether an arbitration agreement is arbitrable or not.[72] *"The reason is that disputes the submission of which to arbitration is prohibited under Czech law, must be excluded from hearing and resolution in arbitral proceedings."*[73]

Czech law governs the question of arbitrability in Art. 2 para. 1 and 2 of the Act No. 216/1994 Coll., on Arbitration and Enforcement of Arbitral Awards which states that: *"(1) The parties are free to agree that their property disputes, except disputes arising from the consumer contracts, the enforcement of decisions and except incidental disputes, which would otherwise fall within the jurisdiction of the courts or which are subject to arbitration under special laws, shall be decided by one or more arbitrators or by a permanent arbitration institution (arbitration agreement. (2) The arbitration agreement will be valid if the law allows the parties to resolve the subject matter of their disputes by settlement."*[74]

According to this provision the arbitrability requires the simultaneous fulfilment of the following conditions: (i) existence of a property[75] dispute,

69 Art. 117 para. 1 Czech PILA.

70 An exhaustive definition of the term "arbitrability" exceeds the scope of this article.

71 BĚLOHLÁVEK, J. A. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Juris, 2013, p. 64; see also BŘÍZA, P. et al. *Zákon o mezinárodním právu soukromém*. Praha: C. H. Beck, 2014, pp. 683–690; see also ROZEHNALOVÁ, N. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. Praha: Wolters Kluwer Česká republika, 2013, p. 143.

72 BĚLOHLÁVEK, J. A. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Juris, 2013, p. 1734.

73 Ibid.

74 Art. 2 para. 1 and 2 Act No. 216/1994 Coll., on Arbitration and Enforcement of Arbitral Awards.

75 See the definition of the term "property dispute" in ROZEHNALOVÁ, N. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. Praha: Wolters Kluwer Česká republika, 2013, pp. 147, 148.

(ii) a subject matter capable of settlement, (iii) the resolution of the dispute would otherwise fall within the jurisdiction of a court or is subject to arbitration under a special law,[76] (iv) the dispute does not arise in connection with enforcement proceedings, incidental disputes, and consumer disputes.[77]

Thus, the disputes that are considered as arbitrable under Czech law are disputes arising out of relative property rights (obligations) as well as absolute property rights (disputes arising out of easements, retention rights, and liens),[78] labour law disputes having property nature,[79] disputes concerning bill of exchange/promissory notes,[80] non-contractual disputes having property nature (arising out of breach of intellectual property rights, breach of competition rules, transport accidents, etc.),[81] as well as disputes which are subject to arbitration under special laws (selected disputes which fall within the jurisdiction of the Energy Regulatory Office, disputes in telecommunications subject to the decision-making power of the Czech Telecommunication Office, as well as disputes handled the Industrial Property Office).[82]

Contrastingly, disputes not having property nature, incidental disputes, inheritance disputes, consumer disputes, disputes concerning the enforcement of decisions, disputes that are not capable of settlement (e.g., matters of personal status) do not fall within the jurisdiction of civil courts and cannot be settled in arbitration.[83]

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76 This condition refers to the jurisdiction of civil courts excluding criminal and administrative matters.

77 BĚLOHLÁVEK, J. A. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Juris, 2013, pp. 137, 138.

78 Ibid., p. 151; see also ROZEHNALOVÁ, N. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. Praha: Wolters Kluwer Česká republika, 2013, p. 149.

79 BĚLOHLÁVEK, J. A. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Juris, 2013, p. 171; see also PAŘÍZEK, I. Směnka a rozhodčí řízení. *Právní rozhledy,* 2002, no. 1, pp. 6–16; see also ROZEHNALOVÁ, N. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. Praha: Wolters Kluwer Česká republika, 2013, pp. 149, 150.

80 BĚLOHLÁVEK, J. A. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Juris, 2013, p. 172.

81 KOVÁČOVÁ, L. and J. VALDHANS. Arbitrabilita sporů z mimosmluvních závazků. In: SEHNÁLEK, D. et al. (eds.). *Dny práva – 2009 – Days of Law*. Brno: Masaryk University, 2009, pp. 1925–1926.

82 BĚLOHLÁVEK, J. A. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Juris, 2013, p. 155.

83 BELLOŇOVÁ, P. et al. *Zákon o mezinárodním právu soukromém: Komentář*. Wolters Kluwer. Available at: http://www.aspi.cz [cit. 25. 6. 2021]; see also BĚLOHLÁVEK, J. A. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Juris, 2013, pp. 137, 138.

6 Conclusion

An arbitration agreement under New York Convention constitutes an agreement whereby parties submit their dispute to a nongovernmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in arbitration. New York Convention requires the dispute to fall within the scope of the arbitration agreement and to be arbitrable.

Next, an arbitration agreement must relate to a specific legal relationship that can be either contractual or in tort. Moreover, it is presumed that the principle of separability – which implies that the validity of the main contract does not affect the validity of the arbitration agreement contained therein, and vice versa – applies to an arbitration agreement under New York Convention.

Regarding the formal validity of an arbitration agreement under New York Convention, it must be an agreement *"in writing"*. This requirement shall be interpreted liberally as including modern means of communication. What is more, less stringent national legislation or international treaties shall be applied to assess the formal validity of arbitration agreements.

An arbitration agreement under New York Convention must be substantially valid to have legal effects. If a national court finds the putative arbitration agreement null and void, inoperative, or incapable of being performed, it may avoid its obligation of referral to arbitration. The material validity of an arbitration agreement is usually determined by the law to which the parties have subjected it or, failing any indication thereon, by the law of the arbitral seat.

Czech law governs the substantive validity of an arbitration agreement provided that the arbitration award is issued in the Czech Republic. Moreover, Czech law determines matters that are capable of settlement in arbitration.

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Comfortable Satisfaction Before the Court of Arbitration for Sport: Consistency Despite Differences?

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Abstract

The Court of Arbitration for Sport's privileged position lends considerable authority to its adjudication practice, which gives rise to a number of principles that are subsequently adopted into general application. One of these principles is the standard of proof referred to as "comfortable satisfaction". However, its application raises several theoretical and practical issues. An analysis of publicly available awards shows that there are different approaches to this standard across arbitral panels, which, in the eyes of theory, considerably affect the process of evidence. This contribution therefore seeks to present these different approaches against the backdrop of an analysis of available awards and academic debates, and to answer the question of whether these differences, translated into practice, cause inconsistencies within decision-making practice.

Keywords

Court of Arbitration for Sport; Lex Sportiva; Standard of Proof; Comfortable Satisfaction; Variable Approach; Constant Approach; Consistency.

1 Introduction

The Court of Arbitration for Sport ("CAS") is arguably the most well-known specialized arbitration institution in the world. It represents an independent pinnacle of sports arbitration that serves as a platform for binding dispute resolution of cases related directly or indirectly to the world of sport. Its extraordinary status is associated with forming an autonomous law referred

to as *lex sportiva*.[1] The scope of this concept varies from author to author.[2] However, it is beyond any doubt that the CAS utilizes, within the scope of its operation, general[3] as well as sport-specific legal principles.[4] These principles are either borrowed from existing legal regulations, or created and formed by the CAS itself (which affects future regulatory framework).

One of the principles that have been introduced into the world of sports arbitration by the CAS is a standard of proof referred to as "comfortable satisfaction". Its emergence is generally associated with an award dating back to the year 1996. The year 2021 thus marks a quarter of a century of its application in the realm of sports-related arbitration. Throughout this period, it has been subject to lengthy discussions not only among scholars, but also among practicing lawyers and athletes acting as parties to CAS proceedings. Eventually, it has made its way to become a universally accepted standard for doping and other disciplinary proceedings. Its role is even so significant that it is at times regarded as a constituent part of the aforementioned *lex sportiva*.[5]

This contribution first outlines the methods of determining the applicable standard of proof in proceedings before the CAS. The following section is devoted to a succinct introduction of the development of the comfortable satisfaction standard of proof and of the position it occupies in the domain of sports arbitration. The third part seeks to assess how the comfortable satisfaction standard fits into the framework of doping and other disciplinary proceedings, and whether it strikes a reasonable balance of the interests involved. The fundamental objective of this contribution is to assess, through

1 IOANNIDIS, G. The Influence of Common Law Traditions on the Practice and Procedure Before the Court of Arbitration for Sport (CAS). In: DUVAL, A. and A. RIGOZZI (eds.). *Yearbook of International Sports Arbitration 2015*. The Hague: T. M. C. ASSER PRESS, 2016, pp. 28–29.

2 DUVAL, A. Lex Sportiva: A Playground for Transnational Law. *European Law Journal*, 2013, Vol. 19, no. 6, p. 827.

3 *Foster* excludes general legal principles from the concept of *lex sportiva*, claiming that they apply *"as a matter of the rule of law in sport"*. – FOSTER, K. Lex Sportiva and Lex Ludica: the Court of Arbitration for Sport's Jurisprudence. *Entertainment and Sports Law Journal* [online]. 27. 6. 2016 [cit. 28. 5. 2021]. Available at: https://www.entsportslawjournal.com/article/id/722/

4 CASINI, L. The Making of a Lex Sportiva: The Court of Arbitration for Sport "Der Ernährer". *SSRN* [online]. 6. 6. 2010 [cit. 28. 5. 2021]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1621335&download=yes

5 Award of the CAS of 27 July 2018, Case 2017/A/5003, para. 175.

an analysis of publicly available CAS awards and scholarly discussions, whether the comfortable satisfaction standard is treated uniformly across different arbitral panels, or whether there are diverging treatments that would entail practical implications for decision-making practice.

2 Standard of Proof and Its Determination Before the CAS

The fundamental premise for this section is that all arbitration proceedings before the CAS have their seat in Lausanne, Switzerland. This applies to ordinary proceedings[6], *ad hoc* Olympic divisions[7], as well as the CAS Anti-Doping Division[8], regardless of the place of the hearing or the place where the Olympic Games are held.

The seat of arbitration provides the fundamental legal framework for international sports-related arbitration that is to be found in the Swiss Private International Law Act[9] ("IPRG"). Procedural issues are in general regulated by Art. 182 IPRG. This provision favors and promotes party autonomy by allowing the parties to the proceedings to *"directly or by reference to rules of arbitration regulate the arbitral procedure; they may also subject the procedure to the procedural law of their choice"*.[10] Should the parties not avail themselves of the opportunity to regulate procedural issues, *"it shall be fixed, as necessary, by the arbitral tribunal either directly or by reference to a law or rules of arbitration"*.[11]

In the context of arbitration proceedings conducted before the CAS, this framework results in the application of the corresponding provisions of the Code of Sports-related Arbitration ("CAS Code").[12] Although the CAS

6 *"The seat of CAS and of each Arbitration Panel (Panel) is Lausanne, Switzerland."* – R28 CAS Code.

7 *"The seat of the ad hoc Division and of each Panel is in Lausanne, Switzerland. The arbitration is governed by Chapter 12 of the Swiss Act on Private International Law."* – Art. 7 CAS Arbitration Rules for the Olympic Games.

8 *"The seat of CAS ADD and each Arbitration Panel is Lausanne, Switzerland."* – A3 Arbitration Rules CAS Anti-Doping Division.

9 Federal Act on Private International Law of 18 December 1987 (original: Bundesgesetz über das Internationale Privatrecht vom 18. Dezember 1987).

10 Art. 182 para. 1 IPRG.

11 Art. 182 para. 2 IPRG.

12 R27 CAS Code; RIGOZZI, A. and B. QUINN. Evidentiary Issues Before CAS. *SSRN* [online]. 30. 5. 2014 [cit. 30. 5. 2021]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2438570

Code contains a thorough regulation of procedural issues, the question of the applicable standard of proof remains a gap in its construction. Neither the CAS Code, nor Chapter 12 IPRG contain an explicit provision to this effect. It is therefore necessary to turn again to Art. 182 IPRG and to seek a solution primarily in an agreement between the parties to the dispute. This agreement will generally be embodied in the athlete's admission to the respective association. The athlete's affiliation to the association obliges them to abide by the rules laid down in its internal regulations. These regulations regularly contain explicit provisions on the applicable standard of proof in disciplinary proceedings. These stipulations are generally upheld[13], without prejudice to the traditional constraint of public policy. This practice, however, implies that associations are free to adopt different standards of proof for these issues, unless there is an overarching regulation, such as, for instance, the World Anti-Doping Code ("WADC") for disciplinary doping cases. These conclusions were endorsed by the Panel in the *Köllerer* case stating: *"There is no universal (minimum) standard of proof for match-fixing offenses.* […] *While the Panel acknowledges that consistency across different associations may be desirable, in the absence of any overarching regulation, each association can decide for itself which standard of proof to apply, subject to national and/or international rules of public policy. The CAS has neither the function nor the authority to harmonize regulations by imposing a uniform standard of proof, where* […] *an association decides to apply a different, specific standard in its regulations."*[14]

Should the applicable regulations contain no explicit provision stipulating the applicable standard of proof, it is then for the arbitral panel to determine it for the case at hand, in compliance with Art. 182 para. 2 IPRG.[15]

As for the applicable standards of proof, adjudicating authorities utilize essentially two standards of proof. On the one hand, it is the "beyond a reasonable doubt" standard that acts as a correlate of the principle of *in dubio pro reo* and that is therefore traditionally applied in criminal law cases. On the other hand, civil law proceedings generally apply the "balance

13 Award of the CAS of 24 February 2012, Case 2011/A/2426, para. 81; Award of the CAS, Case 2011/A/2625, para. 152.

14 Award of the CAS of 23 March 2012, Case 2011/A/2490, para. 29.

15 Award of the CAS of 2 August 2017, Case 2016/A/4871, para. 127; Award of the CAS of 29 September 2016, Case 2016/A/4558, para. 70; Award of the CAS of 17 July 2020, Case 2018/A/6075, para. 46.

of probabilities" standard. In the realm of sports, internal disciplinary regulations of several sports associations and federations stipulate different standards of proof referred to as "personal conviction" or "comfortable satisfaction". It is the latter standard that forms the central part of this contribution which aims to assess whether it receives uniform application across different CAS arbitral panels, or whether there are material differences in its treatment that might hinder or upset the CAS' endeavour to harmonize international sports adjudication.

3 The Status of the Comfortable Satisfaction Standard Before the CAS

The origins of the comfortable satisfaction standard of proof in sports arbitration before the CAS date back to the year 1996. At that time, the first ever CAS *ad hoc* division was established to resolve disputes arising in the course of the Games of the XXVI Olympiad held in Atlanta, Georgia (USA). A total of 10 318 athletes participated[16], several of whom tested positive for a substance called bromantane.[17] Although statistics report only seven cases of positive doping findings[18], it is possible (or even likely) there were many more. The reason for such a low number may have been the underdeveloped fight against doping at the time, as well as the use of methods that were unable to detect certain substances. In addition to that, the International Olympic Committee ("IOC") feared not only actions taken by athletes themselves but also the economic consequences of losing sponsors due to the tarnished image.[19]

16 Atlanta 1996. *Olympic Channel Services S.L. 2021* [online]. [cit. 28. 5. 2021]. Available at: https://olympics.com/en/olympic-games/atlanta-1996

17 Due to the increase in the number of positive findings, some authors and athletes referred to the Atlanta Games as *"Growth Hormone Games"*. – HOLT, R. I. G., I. EROTOKRITOU-MULLIGAN and P. H. SÖNKSEN. The history of doping and growth hormone abuse in sport. *Growth Hormone & IGF Research*, 2009, Vol. 19, no. 4, p. 321; Others perceived them as *"a carnival of sub-rosa experiments in the use of performance-enhancing drugs"*. – MORGAN, W. J. Fair is Fair, Or Is It?: A Moral Consideration of the Doping Wars in American Sport. *Sport in Society*, 2006, Vol. 9, no. 2, p. 177.

18 Doping Cases at the Olympics. *Encyclopaedia Britannica* [online]. [cit. 30. 5. 2021]. Available at: https://sportsanddrugs.procon.org/doping-cases-at-the-olympics/

19 BELL, R. It's Time to Work Together to Stop Doping in Sports [online]. *The Sport Journal* [cit. 28. 5. 2021]. Available at: https://thesportjournal.org/article/its-time-to-work-together-to-stop-doping-in-sports/

The CAS *ad hoc* division in Atlanta handled a total of six cases[20], two of which concerned positive findings and the question of the applicable standard of proof. With regard to, and perhaps influenced by, the below outlined discussion on the nature of disciplinary doping proceedings, the Panel first stated in general terms that *"the standard of proof of the ingredients necessary to establish the offence of doping is greater than a mere balance of probabilities but less than a standard which may be expressed as proof beyond reasonable doubt"*.[21] This conclusion recognized the specific nature of doping proceedings as well as the drastic consequences of the sanctions imposed. The Panel went on and clarified that *"the ingredients must be established to the comfortable satisfaction of the Court having in mind the seriousness of the allegation which is made"*.[22] The Panel further elaborated on this last condition by stating that *"the more serious the allegation being considered the greater is the degree of evidence which is required to achieve the requisite degree of comfortable satisfaction necessary to establish the commission of the offence"*.[23]

The presented findings instantly found their place in the case law of the CAS. Arbitral panels and arbitrators readily applied the established standard and its rationale in doping and other disciplinary proceedings where the regulations of the respective associations failed to explicitly provide for the applicable standard of proof. This may be illustrated by the case of four young professional swimmers who tested positive for the presence of a prohibited substance. Throughout the proceedings, they relied on the application of the criminal standard of beyond a reasonable doubt. The Panel, however, flatly rejected this claim and explicitly referred to the CAS *ad hoc* division award OG/96/003-004 and the comfortable satisfaction standard of proof developed therein. In addition, the Panel expressly stated that *"to adopt a criminal standard is to confuse the public law of the state with the private law of an association"*.[24] This again is to be understood as a reflection of the theoretical debate outlined below. Other awards fundamentally followed this line of reasoning.

20 History of the CAS. *Court of Arbitration for Sport* [online]. [cit. 24. 5. 2021]. Available at: https://www.tas-cas.org/en/general-information/history-of-the-cas.html

21 Award of the CAS Ad Hoc Division – Atlanta 1996 of 4 August 1996, Case OG/96/003-004, p. 17.

22 Ibid.

23 Ibid., p. 18.

24 Award of the CAS of 22 December 1998, Case 98/208, para. 13.

At that time, however, the comfortable satisfaction standard suffered one fundamental drawback. Its application was limited only to cases where the regulations of the respective associations did not explicitly provide for the applicable standard of proof. This caused fragmentation in decision-making, since the conclusion of a potential anti-doping rule violation in relation to the applicable standard of proof depended on the athlete's affiliation to the respective association.[25] This state of affairs was undesirable in view of the intensifying fight against doping in professional sport and the endeavour to harmonize this fight across federations.

A turning point in this development was achieved with the adoption of the WADC in 2003, in effect since 2004, which represents the overarching regulation for doping proceedings. Although the WADC has already undergone four amendments since its adoption, the applicable standard of proof has remained unchanged. The WADC provides the following general definition: *"The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt."*[26] It is clear from the wording of this provision that the WADC draws inspiration not only from the OG/96/003-004 award, but also from the constant CAS case law that utilized this standard prior to the adoption of the WADC. This fact led *Straubel* to conclude that it is the CAS that developed this standard and that will continue its refinement, despite its embedment in the WADC.[27]

The comfortable satisfaction standard is, however, not limited to anti-doping rule violation proceedings only. Other disciplinary proceedings in the realm of sport utilize this standard as well, despite the absence of any overarching

25 For example, *Straubel* illustrated that the International Association of Athletics Federations (IAAF) utilized the standard of beyond a reasonable doubt, whereas the International Swimming Federation (FINA) used the preponderance of the evidence standard. – STRAUBEL, M. Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better. *Loyola University Chicago Law Journal*, 2005, Vol. 36, no. 4, p. 1266.

26 Art. 3.1 WADC.

27 STRAUBEL, M. Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better. *Loyola University Chicago Law Journal*, 2005, Vol. 36, no. 4, p. 1266.

regulation as in the case of doping. In the previous part of this contribution, it was mentioned that internal regulations of some associations provide for a standard referred to as "personal conviction"[28]. Nevertheless, the CAS case law has concluded that *"in practical terms, this standard of proof of personal conviction coincides with the "comfortable satisfaction" standard widely applied by CAS panels in disciplinary proceedings* […] [and therefore] *the Panel will give such a meaning to the applicable standard of proof of personal conviction"*.[29] This reasoning has never been contested.[30] Quite on the contrary, the consistency of these conclusions has led to amendments in the formulation of the applicable standard of proof in favor of the comfortable satisfaction. Take as an example the FIFA (International Federation of Association Football) Disciplinary Code whose 2019 edition provides for the comfortable satisfaction standard[31], whereas the 2017 edition speaks of deciding *"on the basis of their personal convictions"*.[32]

It is apparent from this brief outline that the comfortable satisfaction standard has, over the years, become an integral part of the CAS adjudication across disciplinary proceedings.

4 Comfortable Satisfaction on the Verge of Criminal and Civil Law Aspects of Sports Disciplinary Proceedings

The question of the applicability of criminal law principles in doping and other disciplinary proceedings has been a hotly debated and controversial issue among scholars.[33] Although the present author believes that the resolution of this controversy has already become part of the settled case law, it is still possible to come across relatively recent awards and scholarly articles addressing this question. For the purposes of the present contribution,

28 In French *"intime conviction"*.

29 Award of the CAS of 24 February 2012, Case 2011/A/2426, para. 88.

30 Supporting these conclusions, e.g., Award of the CAS of 8 March 2012, Case 2011/A/2425; Award of the CAS of 21 March 2014, Case 2013/A/3323; Award of the CAS of 5 December 2016, Case 2016/A/4501; Award of the CAS of 24 August 2017, Case 2016/A/4831; Award of the CAS of 9 February 2018, Case 2017/A/5086; Award of the CAS of 27 July 2018, Case 2017/A/5003.

31 Art. 35 para. 3 FIFA Disciplinary Code 2019.

32 Art. 97 para. 3 FIFA Disciplinary Code 2017.

33 DOWNIE, R. Improving the Performance of Sport's Ultimate Umpire: Reforming the Governance of the Court of Arbitration for Sport. *Melbourne Journal of International Law*, 2011, Vol. 12, no. 2, p. 82.

the author considers it appropriate to pay attention to this discussion, as its conclusions allow us to assess how the comfortable satisfaction standard fits into the framework of international sports arbitration. Should the scholars and case law come to the conclusion that criminal law principles should be applied by analogy in disciplinary proceedings, it would inevitably lead to the application of the principles of *in dubio pro reo* and its inherent correlate of the standard of beyond a reasonable doubt. On the other hand, a purely civil law perception of disciplinary proceedings would preclude any consideration of higher procedural standards to be applied. Consequently, the civil law standard of "on the balance of probabilities" should apply.

The civil law perception emphasizes the relationship between the athlete and the respective association, characterizing it as a contractual relationship. Sports associations are civil law entities, and an athlete becomes a member of such an association once they submit to the regulations of the association they want to be part of. It may be objected that this relationship lacks the element of voluntariness, since the athlete is left with no choice. If they want to participate as a professional in the given sport, they have no choice but to become a member of the respective association. However, such a conclusion cannot suppress the existence of a contractual civil law relationship between the athlete and the association.[34] The violation of the association's regulations that the athlete bound themselves to abide by, as well as the subsequent disciplinary proceedings thus necessarily take place in the sphere of the law of associations, that is civil law. This conclusion was expressly followed in an advisory opinion, stating: *"It is generally accepted that an association may impose disciplinary sanctions upon its members if they violate the rules and regulation of the association. The jurisdiction to impose such sanctions is based upon the freedom to associations to regulate their own affairs.* […] *Disciplinary sanctions imposed by associations are subject to the civil law and must be clearly distinguished from criminal penalties."*[35] Moreover, the famous decision of the Swiss Federal Tribunal ("SFT") in *Gundel vs. FEI (International Equestrian Federation)* declared the civil

34 For instance, Award of the CAS of 9 July 2001, Case 2001/A/317, para. 26 states – *"As a preliminary remark the Panel wishes to clarify that the legal relations between an athlete and a federation are of a civil nature and do not leave room for the application of principles of criminal law."*

35 Advisory opinion of the CAS of 21 April 2006, Case 2005/C/976&986, para. 125, 127; Award of the CAS of 15 July 2008, Case 2008/A/1583&1584.

law nature of disciplinary sanctions, since *"it is generally accepted that the penalty prescribed by regulations represents one of the forms of penalty fixed by contract* […] [and therefore] *has nothing to do with the power to punish reserved by the criminal courts"*.[36] This decision served as a basis for several CAS panels concluding that *"consequently only civil law standards and civil procedural standards can apply to any review of penalties imposed by associations, which include doping sanctions"*.[37] Other panels have also drawn inspiration from the SFT's decision[38], concluding *inter alia* that the CAS is not a criminal court and therefore cannot apply criminal law[39], or that the application of the criminal law standard of beyond a reasonable doubt *"is to confuse the public law of the state with the private law of an association"*.[40]

In opposition to the purely civil law perception stand views that point out similarities with certain aspects of criminal law regulation. These are mostly focused on sanctions that are imposed in sports disciplinary proceedings. The primary objective of these sanctions is to punish conduct that is contrary to disciplinary rules, a feature typical of criminal law penalties.[41] The penal character of the sanctions imposed is also perceived when analyzing the functions pursued by these penalties. While civil law emphasizes redress of the damage caused, the sanctions imposed as a result of disciplinary proceedings aim at taking away the undue advantage gained and at punishing the offender.[42] These objectives bespeak of the repressive function

36 DOWNIE, R. Improving the Performance of Sport's Ultimate Umpire: Reforming the Governance of the Court of Arbitration for Sport. *Melbourne Journal of International Law*, 2011, Vol. 12, no. 2, p. 82.

37 Award of the CAS of 28 January 2002, Case 2001/A/345, para. 21.

38 Award of the CAS of 22 March 2002, Case 2001/A/337, para. 27 – *"there is no room to apply concepts of criminal law such as the presumption of innocence or the standard of proof of beyond reasonable doubt"*; Award of the CAS of 13 November 2006, Case 2006/A/1102&1146, para. 52 – *"disciplinary sanctions imposed by associations are subject to the civil law and must be clearly distinguished from criminal penalties"*; Award of the CAS of 25 November 2009, Case 2009/A/1912&1913, para. 55 – *"the standard of proof beyond reasonable doubt is typically a criminal law standard that finds no application in anti-doping cases"*.

39 Award of the CAS Ad Hoc Division – Nagano 1998 of 12 February 1998, Case OG 98/002, para. 26.

40 Award of the CAS of 22 December 1998, Case 98/208, para. 13; Award of the CAS of 7 June 1999, Case 98/211, para. 26.

41 SOEK, J. The Legal Nature of Doping Law. *The International Sports Law Journal*, 2002, Vol. 1, no. 2, p. 3.

42 Ibid., p. 5.

of the sanctions imposed.[43] Take as an example a case of a professional athlete who is found guilty of an anti-doping rule violation. In this case, the WADC allows for several sanctions to be imposed, *inter alia* disqualification of individual results[44], ineligibility[45], forfeited prize money[46], and fines[47]. Such sanctions often not only prevent an athlete from practicing their trade, but also damage their reputation which inevitably brings with it substantial economic consequences in the form of loss of sponsors. Thus, although these sanctions are not imposed as a consequence of a violation of criminal law, their impact on the athlete might be harsher than, for instance, the imposition of a suspended sentence by a criminal court.[48] This reasoning led *Soek* to conclude: *"There must be no misunderstanding over the fact that disciplinary doping law is not criminal law and will never be criminal law, but in the framework of the law of associations it is a kind of criminal law, at least, a system of imposing sanctions that should have criminal law principles and concepts applied to it."*[49]

All of the above resulted in the pronouncement of a quasi-criminal nature of disciplinary proceedings. Arbitrators and the respective arbitral panels recognize this specificity by concluding that *"because of the drastic consequences of a doping suspension on the athlete's exercise of his/her trade it is appropriate to apply a higher standard than the general standard required in civil procedure, namely simply having to convince the court on the balance of probabilities"*.[50] Recognition of this specific nature is also expressed in the WADC that explicitly states:

43 ZAKSAITE, S. and H. RADKE. The Interaction of Criminal and Disciplinary Law in Doping-Related Cases. *The International Sports Law Journal*, 2014, Vol. 14, no. 1–2, p. 117.

44 Art. 10.1 WADC.

45 Art. 10.2–10.7 WADC.

46 Art. 10.11 WADC.

47 Art. 10.12 WADC.

48 TARASTI, L. Interplay Between Doping Sanctions Imposed by a Criminal Court and by a Sport Organization. *The International Sports Law Journal*, 2007, Vol. 7, no. 3–4, p. 16.

49 SOEK, J. The Legal Nature of Doping Law. *The International Sports Law Journal*, 2002, Vol. 1, no. 2, p. 6; It is important to note that some countries criminalize doping-related offences, either as doping *per se*, or as a crime of possession or use of specified substances. This line of the problem must, however, be separated from the regulation of disciplinary proceedings. Nevertheless, this does not preclude the possibility of dealing with the same conduct in both proceedings without infringing the *ne bis in idem* principle. – TARASTI, L. Interplay Between Doping Sanctions Imposed by a Criminal Court and by a Sport Organization. *The International Sports Law Journal*, 2007, Vol. 7, no. 3–4, p. 16.

50 Award of the CAS of 28 January 2002, Case 2001/A/345, para. 22; Award of the CAS of 23 January 2003, Case 2002/A/385, para. 10.

"Sport-specific rules and procedures, aimed at enforcing anti-doping rules in a global and harmonized way, are distinct in nature from criminal and civil proceedings. They are not intended to be subject to or limited by any national requirements and legal standards applicable to such proceedings, although they are intended to be applied in a manner which respects the principles of proportionality and human rights."[51]

There is another pragmatic reason for rejecting the criminal law standard of proof that goes hand in hand with another characteristic feature of doping proceedings, namely the strict liability principle. Its application is based on the fact that private law associations do not possess competence that would allow them to obtain evidence to an extent comparable to that of the police or prosecution in criminal cases. This fact has been considered on a number of occasions in CAS awards in which the panels pointed out the limited investigatory powers of these bodies and stressed the proper consideration of this limitation when assessing evidence.[52]

Based on the above, the present author considers the comfortable satisfaction standard to be a solution that strikes a reasonable balance between the interests of the respective sports associations on the one hand, and the interests of the athletes on the other hand. Such a construction fits well within the framework of sports disciplinary proceedings.

5 Treatment of the Comfortable Satisfaction Standard by the CAS

It has been pointed out in the previous sections of this contribution that the "comfortable satisfaction" standard has developed into the primary and generally accepted standard of proof applied in doping and other disciplinary proceedings before the CAS. At the same time, it has been held that its construction reflects the specific nature of these proceedings and, in conjunction with other principles applied, strikes a reasonable balance of competing interests.

51 World Anti-Doping Code 2021. *World Anti-Doping Agency* [online]. Pp. 17–18 [cit. 30. 5. 2021]. Available at: https://www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf

52 E.g., Award of the CAS of 23 January 2003, Case 2002/A/385, para. 11; Award of the CAS of 16 November 2018, Case 2018/A/5511, para. 675.

However, as will be seen below from the analysis of publicly available awards that address in greater detail the issue of the applicable standard of proof, despite its origins in CAS adjudication and efforts to apply this standard uniformly, it may be observed that the question of its interpretation is not uniform across different CAS panels. The aim of this section is therefore to analyze selected awards, present the different ways of dealing with this standard and then assess whether the existing differences in its treatment have any practical implications for the outcome of the decision-making process.

5.1 Two Conceptions of the Comfortable Satisfaction Standard

5.1.1 Variable

The first conception of the comfortable satisfaction considers it a variable standard. This approach implies that the level of proof required varies depending on the seriousness of the case at hand. The starting point for this approach is the definitions articulated in a plethora of CAS awards rendered by various arbitral panels, as well as the definition provided for in the WADC. The definition reads: *"The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel,* ***bearing in mind the seriousness of the allegation which is made****. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt."* [53]

The sentence in bold serves as the main argument for this approach. Its proponents argue that the requirement to give due consideration to the allegations made is tantamount to saying that the more serious the allegation, the higher level of proof will be required by the arbitral panel to achieve its comfortable satisfaction. Conversely, less serious allegations under this concept require a lower degree of proof for the panel to be comfortably satisfied. Such a variable concept is therefore dependent on the nature of the particular case and does not permit an *a priori* determination of whether the standard will be closer to the criminal standard of beyond a reasonable doubt, or whether it will approximate the civil standard on the balance of probabilities.

53 Art. 3.1 WADC.

One of the first publicly available CAS awards to explicitly adopt the variable approach to the comfortable satisfaction standard concerned the dispute between *Sivasspor Kulübü vs. UEFA (Union of European Football Associations)*. The Turkish football club *Sivasspor* was found ineligible for the 2014/15 UEFA European League and was fined for match-fixing in which several players and club officials were involved. According to the applicable regulations, as well as in conformity with the consent expressed when signing the Admission Criteria Form, the comfortable satisfaction standard was applied to the case. The Panel first pointed out that the applicable regulations did not provide for a definition of this standard and that it would therefore rely on the settled case law of other CAS panels. Eventually, the Panel, bearing in mind the requirement to consider the seriousness of the allegation made, stated: *"It follows from the above that this standard of proof is then* ***a kind of sliding scale****, based on the allegations at stake: the more serious the allegation and its consequences, the higher certainty (level of proof) the Panel would require to be comfortable* [sic] *satisfied."*[54] These conclusions have been repeated on a number of occasions, often with explicit reference to this award.[55]

Different expression of the same concept may be illustrated by the case *Farnosova vs. IAAF (International Association of Athletics Federations) & ARAF (All Russia Athletics Federation)*. This case concerned an alleged anti-doping rule violation based on the athlete's biological passport, an indirect method that allows conclusions to be drawn about the use of a prohibited substance or method based on the analysis of a set of samples collected over a certain period of time. Although the Panel did not refer to the applicable standard as to a sliding scale, it concluded that *"it clearly follows from the applicable provision that the applicable standard of proof* ***is flexible****. The threshold that the IAAF must meet is higher depending on the seriousness of the allegation".*[56]

Another group of cases is represented by awards that likely follow the variable approach, without explicitly stating so. Support for this claim

54 Award of the CAS of 3 November 2014, Case 2014/A/3625, para. 132.

55 Award of the CAS of 2 September 2014, Case 2014/A/3628, para. 123; Award of the CAS of 24 September 2020, Case 2017/A/5444, para. 257 – This award considers the variable conception to be a *"well-established CAS jurisprudence"*; Award of the CAS of 1 February 2019, Case 2018/O/5667, para. 86; Award of the CAS of 1 February 2019, Case 2018/O/5668, para. 90.

56 Award of the CAS of 27 July 2018, Case 2017/A/5045, para. 84.

may be found in the wording of their conclusions. The most prominent examples may be cases that equate the comfortable satisfaction standard and the criminal standard of beyond a reasonable doubt in cases of particularly serious allegations.[57] Another example is provided by the CAS award in Case 98/211 which explicitly refers to the test adopted by the *ad hoc* division in Atlanta and further concludes: *"The Panel further accepts that, inasmuch as an allegation of manipulation includes an element of mens rea and attributes dishonesty to an athlete (whereas other doping offenses may be ones of strict liability), such an allegation bespeaks an extremely high degree of seriousness."*[58] This conclusion, in the light of the comparison with anti-doping rule violation cases governed by the strict liability principle, marks the Panel's inclination towards the variable concept of the comfortable satisfaction standard.

The last conclusion leaves open the question of whether, in relation to the concept of the comfortable satisfaction standard, it is permissible to classify within a certain group of disciplinary proceedings, for instance among individual anti-doping rule violations. As an example, consider the case of the German speedskater *Pechstein* who faced doping charges on the basis of a biological passport analysis. *Pechstein* argued that, given the seriousness of the allegation made, the applicable standard of proof should have reached a very high degree, approximating the criminal law standard of beyond a reasonable doubt. The Panel first concluded that the application of the criminal law standard of proof finds no place in disciplinary doping proceedings. The present author finds this statement to be unfortunate (though essentially true), as *Pechstein* did not invoke a direct application of the criminal law standard, but merely the comfortable satisfaction standard reaching such a degree that would only approach the beyond a reasonable doubt standard. However, the Panel further noted: *"Obviously, the Panel is mindful of the seriousness of the allegations put forward by the ISU but in the Panel's view,* ***it is exactly the same seriousness as any other anti-doping case*** *brought before the CAS and involving blood doping;* ***nothing more, nothing less****."*[59] In the author's view, these conclusions indicate inclination towards flexibility within the comfortable satisfaction

57 See section 5.1.2.
58 Award of the CAS of 7 June 1999, Case 98/211, para. 27.
59 Award of the CAS of 25 November 2009, Case 2009/A/1912&1913, para. 55.

standard. However, it may be asked whether these conclusions suggest an approach that distinguishes between different proceedings or types of disciplinary violations (e.g., match-fixing, corruption, doping) and classifies them into categories. Is there then, within the category given, the same level of proof required to meet the comfortable satisfaction standard? May this hypothetical approach be seen as a combination of the variable (between different categories) and the constant (within each category) approach?

5.1.2 Can the Comfortable Satisfaction Standard Be Equated to the Standard of Beyond a Reasonable Doubt?

If adoption of the variable approach to the comfortable satisfaction standard is assumed, another important question arises, which is largely related to the discussion outlined above about the nature of disciplinary proceedings and the corresponding application of criminal law principles. Can the comfortable satisfaction standard in cases of extremely serious allegations reach a level that is essentially equivalent to the beyond a reasonable doubt standard?

This situation may be illustrated by the cases of *Montgomery and Gaines vs. USADA (United States Anti-Doping Agency)*. These cases were ground-breaking for the CAS as they were the first ever doping cases based solely on circumstantial evidence. The accused athletes had never tested positive for the presence of a prohibited substance.

Before the evidence adduced could be assessed, the question of the applicable standard of proof had to be resolved. This issue itself generated a fiery debate due to the change in the applicable standard around that time. Another bone of contention was the question of the relevant point in time to be considered. During the proceedings before the USADA and the CAS, the comfortable satisfaction standard was applied by the panels, since it was already explicitly enshrined within the WADC at that time. The athletes and their attorneys disdained the shift to this lower standard, since the formerly applicable regulations provided for the criminal law standard of beyond a reasonable doubt. This standard applied even at the time of the alleged anti-doping rule violation, leading some to argue that *"this*

is the classic case of moving the goal line in the middle of the game".[60] This view was based on a decision rendered by the U.S. Supreme Court that considered the questions of burden of proof and standard of proof to be substantive law rules that could not be applied retroactively.[61] However, the Panel declined to follow this view on the substantive law nature of the standard of proof rule.

The Panel addressed the issue of the applicable standard of proof extensively during the third preliminary hearing before reaching a decision on the merits. From the wording of the conclusions of that decision, it appears as if the Panel rejected any significance in the distinction between the different standards of proof, stating that the debate on the standard of proof *"looms larger in theory than practice"*[62] and that there is not *"necessarily a great gulf between proof in civil and criminal matters"*[63]. *Greene*, however, pointed out the panel's failure to clearly state the applicable standard of proof.[64] In its decision on procedural and evidentiary issues, the panel merely stated that *"even if the so-called 'lesser', 'civil' standard were to apply – namely, proof on the balance of probability, or, in the specific context in which these cases arise, proof to the comfortable satisfaction of the Panel bearing in mind the seriousness of the allegation which is made* […] *– an extremely high level of proof would be required to 'comfortably satisfy' the Panel that Respondents were guilty of the serious conduct of which they stand accused"*.[65] This statement could be seen as indicating that the Panel preferred to apply the criminal law standard of beyond a reasonable doubt. Another point of view might construe it to mean that the Panel's intention was merely to demonstrate the absence of any practical difference between those standards in the particular case. The ambiguity of these conclusions

60 ROBBINS, L. OLYMPICS; Lower Standard of Proof Angers Athletes and Lawyers. *The New York Times* [online]. 15. 6. 2004 [cit. 30. 5. 2021]. Available at: https://www.nytimes.com/2004/06/15/sports/olympics-lower-standard-of-proof-angers-athletes-and-lawyers.html

61 CAS Decision on Evidentiary and Procedural Issues of 4 March 2005 in Case 2004/O/645, p. 21.

62 Ibid., p. 24.

63 Ibid., p. 25.

64 GREENE, P. J. USADA vs. Montgomery: Paving a New Path to Conviction in Olympic Doping Cases. *Maine Law Review*, 2007, Vol. 59, no. 1, p. 164.

65 CAS Decision on Evidentiary and Procedural Issues of 4 March 2005 in Case 2004/O/645, p. 24.

remained throughout the proceedings, as even the decision on the merits circumvented the issue by stating that *"the Panel has* ***no doubt*** *in this case, and is* ***more than comfortably satisfied****, that M. committed the doping offence in question"*.[66] However, the reference to the comfortable satisfaction standard in this conclusion may, in the author's view, be seen as a reference to a starting point that has been met or even surpassed beyond reasonable doubt.

Should we agree with the above, it would seem that the answer to the question posed in the title of this section is clear. If an allegation is extremely serious, then even the comfortable satisfaction standard rises to such a high level that it becomes indistinguishable from the standard of beyond a reasonable doubt. The same conclusion was reached by the Panel in the case of *Tyler Hamilton* who committed an anti-doping rule violation when he tested positive for the presence of transfused blood without the necessity of medical intervention. In relation to the applicable standard of proof, the Panel concluded that *"since the issue in such cases involves the continued livelihood of a dedicated athlete, the comfortable satisfaction standard may not be much different from the standard of beyond a reasonable doubt"*.[67] Parts of the reasoning of the decision on evidentiary and procedural issues in the case of *Montgomery* are reproduced also in other cases, e.g., CAS 2007/A/1286, CAS 2007/A/1288, CAS 2007/A/1289.[68]

There are, however, cases that refuse to follow the proposition that there is no difference between the comfortable satisfaction and the beyond a reasonable doubt standard. The award in the *Essendon* case may serve as an example. The Panel in that case rejected the above-mentioned submissions that *"there is no material difference between proof beyond a reasonable doubt and proof of comfortable satisfaction* […] [since] *the dictum in CAS 2004/O/645 relied upon by the AFL was manifestly and expressly case specific"*.[69]

The present author is of the opinion that the *Montgomery* and *Gaines* cases were indeed unique and that their conclusions regarding the applicable standard of proof were influenced by the criminal background of those

66 Award of the CAS of 13 December 2005, Case 2004/O/645, para. 11.
67 Award of the CAS of 10 February 2006, Case 2005/A/884, para. 47.
68 Award of the CAS of 4 January 2008, Case 2005/A/1286 & 1288 & 1289.
69 Award of the CAS of 11 January 2016, Case 2015/A/4059, para. 105.

and related cases. Moreover, the precise determination of the applicable standard of proof remains uncertain. Should the conclusions presented be read as implying that the criminal standard of beyond a reasonable doubt was applied, such an approach would have to be considered doctrinally incorrect, as it would not only be inconsistent with the specific disciplinary nature of the CAS proceedings, but would also fail to follow the manner in which applicable standard of proof is determined in the CAS proceedings.[70] If, on the other hand, it is assumed that the Panel utilized the comfortable satisfaction standard as a starting point, the present author argues that it is still erroneous to equate this standard to the proof of beyond a reasonable doubt because it fails to take into consideration other specific elements, including, e.g., the limited investigatory powers of associations that would hinder the fight against doping. Moreover, the definition provided for in Art. 3 para. 1 WADC clearly states that the comfortable satisfaction standard is in all cases less than proof beyond a reasonable doubt.

5.1.3 Constant

The second fundamental approach treats the comfortable satisfaction standard as a constant one. This view is founded on the assumption that it is a fixed standard that lies somewhere between the beyond a reasonable doubt and the balance of probabilities standard. Thus, in contrast to the variable approach, the seriousness of the allegation made does not affect the required level of proof necessary to achieve comfortable satisfaction. Yet even in this case it is not clear where exactly this standard lies.

This approach may be illustrated by the case of *Legkov vs. IOC*. Alexander Legkov is a professional Russian cross-country skier who participated in the Sochi Olympic Games. Urine samples collected in the course of the Games neither indicated the presence of any prohibited substance, nor did they indicate any other anti-doping rule violation. However, the allegations made against the athlete were part of the infamous doping scandal. The objective of the proceedings against Legkov was therefore to prove his involvement in the doping scheme.

70 The applicable regulations in that case explicitly incorporated provisions of the WADC, including its comfortable satisfaction standard of proof.

The arbitral panel utilized the comfortable satisfaction standard of proof in conformity with the constant CAS jurisprudence, including its emphasis on consideration of the seriousness of the allegations made. In this case, however, this requirement was perceived differently from the above-mentioned variable perception regarding the necessary level of proof. The Panel was aware of the existence of this approach to the comfortable satisfaction standard and for that reason reiterated its conclusions that the comfortable satisfaction is a kind of sliding scale. Nevertheless, the Panel rejected this assertion, stating that *"it is important to be clear that the standard of proof itself is not a variable one. The standard remains constant, but inherent within that immutable standard is a requirement that the more serious the allegation, the more cogent the supporting evidence must be in order for the allegation to be found proven."*[71] In other words, on the one hand, the Panel acknowledges the need to consider the seriousness of the allegations made, but on the other hand, it rejects that this consideration should translate into an increase or decrease in the level of proof required. According to the Panel, the seriousness of the allegations shall be reflected in the evidence adduced to support the party's claims. Thus, the constant approach to the comfortable satisfaction standard may be broadly defined as an approach whereby flexibility and consideration of seriousness of the allegations do not take place on a scale between different standards of proof but within the applicable standard itself, that is immutable in terms of the level of proof required, but its fulfillment requires varying degrees of cogent evidence. The more serious the allegations, the more cogent the evidence presented must be. Only then is it possible for the panel to pronounce its comfortable satisfaction.

According to the Panel, the concept of *"cogent evidence"* is to be understood as evidence that is clear, logical, and persuasive.[72] Among other things, this statement suggests that the amount of evidence presented should not be considered a primary factor in adjudication. On the other hand, it is possible that persuasiveness of the evidence may arise precisely from the totality of the evidence presented, particularly if that evidence is circumstantial in nature. This is particularly evident in cases of a concealed doping scheme

71 Award of the CAS of 23 April 2018, Case 2017/A/5379, para. 706.
72 Ibid., para. 605.

where the arbitral panel concluded that the existence of a doping scheme is constructed in such a way as to conceal the evidence of its existence as much as possible. The more successful the scheme, the less direct evidence available for disciplinary proceedings. These conclusions were consistently applied, particularly in proceedings against athletes participating in the Olympic doping scheme[73] but also in a number of other cases[74].

Not all cases advocating the constant approach explicitly follow the above conclusions. Nevertheless, it is possible to draw similar conclusions from their own wording. For instance, in case *UCI (International Cycling Union) vs. T. & OCS (Olympic Committee of Slovenia)*, it was stated: *"Application of the standard to any particular set of facts may produce different results depending on those facts. But the standard itself is uniform, irrespective of the facts."*[75] Other cases may not be as explicit but their inclination towards the constant approach may be inferred from their emphasis on the cogency of the evidence presented. This may be illustrated by the case of *Dobud vs. FINA (International Swimming Federation),* where the Panel concluded that *"the less probable the matter sought to be proved to that standard, the more cogent must be the evidence to prove it"*.[76]

6 Consistency Despite Theoretical Differences?

From the foregoing, it is apparent that different approaches to a single standard of proof may indeed be distinguished within CAS awards. It is beyond any doubt that the differences in these approaches should, from a theoretical point of view, be reflected in the practice of decision-making. That is because the variable approach has the effect of increasing or decreasing the required level of proof, which would imply that in cases of very serious allegations, higher demands will be placed on the relevant associations

73 E.g., Award of the CAS, Case 2017/A/5423; Award of the CAS of 11 July 2018, Case 2017/A/5426; Award of the CAS, Case 2017/A/5429; Award of the CAS of 30 November 2018, Case 2017/A/5436; Award of the CAS of 30 November 2018, Case 2017/A/5440; Award of the CAS of 11 July 2018, Case 2017/A/5468; Award of the CAS of 12 September 2018, Case 2017/A/5474; Award of the CAS of 7 November 2018, Case 2018/A/5504; Award of the CAS of 16 November 2018, Case 2018/A/5511 and other.

74 E.g., Award of the CAS of 8 December 2014, Case 2014/A/3630.

75 Award of the CAS of 21 April 2011, Case 2010/A/2235, para. 26.

76 Award of the CAS of 15 March 2016, Case 2015/A/4163, para. 72.

to reach the necessary level, which in turn will provide greater protection to the accused athletes, as the required level of proof will not be so easily met. Conversely, the constant approach remains immutable in terms of the level of proof, which may be met with resentment from the athlete's perspective in cases of serious allegations, as there is no differentiation in terms of the level of proof with regard to the seriousness of the allegations.

However, the present author argues, based on the analysis of selected CAS awards, that these different doctrinal perceptions of the comfortable satisfaction standard do not have practical implications for the conclusions reached by CAS arbitral tribunals.

The author finds support for this conclusion primarily in the dominant position of the CAS as an internationally recognized arbitral institution, which seeks to ensure, *inter alia*, the uniformity in decision-making, as well as legal certainty for all parties involved and compliance with the requirement of equal treatment. According to *Foster*, requirement of consistency is represented by the formulation of general principles that should be applied to all sports associations, i.e., by an attempt to harmonize standards.[77] This observation may be applied to some extent to the comfortable satisfaction standard, which originated in the CAS decision-making practice and has developed from its occasional application to the position of a general standard of proof applied in disciplinary proceedings.

However, formal application of a single standard of proof must be subsequently supported by the decision-making practice of the CAS. This is facilitated by the second aspect of consistency, i.e., in its uniform application through referring to and adopting the conclusions of existing decisions.

It is already apparent from the first glance that CAS awards and respective arbitral panels make numerous references to earlier awards. This has led many scholars to *"recognize the practice as evidence of an emerging lex sportive"*.[78] CAS practice regarding the issue of explicit references to earlier awards has

77 FOSTER, K. Lex Sportiva and Lex Ludica: The Court of Arbitration for Sport's Jurisprudence. *Entertainment and Sports Law Journal* [online]. 27. 6. 2016 [cit. 28. 5. 2021]. Available at: https://www.entsportslawjournal.com/article/id/722/

78 BERSAGEL, A. Is There a Stare Decisis Doctrine in the Court of Arbitration for Sport? An Analysis of Published Awards for Anti-Doping Disputes in Track and Field. *Pepperdine Dispute Resolution Law Journal*, 2012, Vol. 12, no. 2, pp. 189–190.

itself undergone considerable development since its inception. *Kaufmann-Kohler* reproduces the findings of conducted surveys by noting that, of all the publicly available awards issued between 1986 and 2003, only one in six awards cited previous cases, whereas since 2003 almost every award contains one or more references to conclusions reached by previous panels.[79] This is undoubtedly due to the significant increase in the caseload before the CAS.[80] The official statistics show that out of the total of 7,869 cases[81], only 581 of them were issued in the former period, whereas the latter period accounts for 7,288 cases.[82]

However, it must be borne in mind that finding support in previous CAS awards is not a manifestation of a binding doctrine of precedent, in the sense known, for example, in common law countries. In this respect, *Blackshaw* considers this practice of CAS arbitral panels to be guided rather by the interests of comity and legal certainty.[83] After all, the (non-) existence of a formally binding doctrine of precedent has been addressed several times by CAS awards themselves. Perhaps the most apposite is the conclusion reached in the CAS Award in Case 97/176, which was also reproduced in the CAS Award in Case 2008/A/1545: *"In arbitration there is no stare decisis. Nevertheless, the Panel feels that CAS rulings form a valuable body of case law and can contribute to strengthen legal predictability in international sports law. Therefore, although not binding, previous CAS decisions can, and should, be taken into attentive consideration by subsequent CAS panels, in order to help developing legitimate expectations among sports bodies and athletes."*[84] A number of other awards also follow these basic propositions.[85] Yet, one can also find in the doctrine a view

79 KAUFMANN-KOHLER, G. Arbitral Precedent: Dream, Necessity or Excuse? *Arbitration International*, 2007, Vol. 23, no. 3, p. 365.

80 In particular, there has been a massive increase in the number of appeal procedures since 2004, when the WADC came into effect.

81 This is a figure indicating the total number of cases, including *ad hoc* proceedings, mediation, and consultation procedures.

82 CAS Statistics 1986–2020. *Court of Arbitration for Sport* [online]. [cit. 24. 5. 2021]. Available at: https://www.tas-cas.org/fileadmin/user_upload/CAS_statistics_2020.pdf

83 BLACKSHAW, I. Towards a 'Lex Sportiva'. *The International Sports Law Journal*, 2011, Vol. 11, no. 3–4, p. 141.

84 Award of the CAS of 16 July 2010, Case 2008/A/1545, para. 53, with explicit reference to Award of the CAS, Case 97/176, para. 40.

85 E.g., Award of the CAS of 13 March 1997, Case 96/149, para. 19; Award of the CAS of 7 July 2008, Case 2008/A/1574, para. 33; Award of the CAS of 28 June 2004, Case 2004/A/628, para. 73.

according to which this practice of CAS panels *"demonstrates the existence of a true stare decisis doctrine within the field of sports arbitration"*.[86] Other authors, in light of the conclusions reached by CAS awards, liken this practice more to the doctrine of *jurisprudence constante*.[87] What is indisputable, however, is that the actual functioning of the CAS panels' adjudication is built on consistency in form and content.

7 Conclusion

In the light of these conclusions, the present author considers that the fundamental question of this contribution may be answered by stating that the existing doctrinal differences in the perception of the comfortable satisfaction standard do not undermine the uniformity and consistency of CAS adjudication and are therefore not particularly problematic in practice.

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86 KAUFMANN-KOHLER, G. Arbitral Precedent: Dream, Necessity or Excuse? *Arbitration International*, 2007, Vol. 23, no. 3, p. 366.

87 BERSAGEL, A. Is There a Stare Decisis Doctrine in the Court of Arbitration for Sport? An Analysis of Published Awards for Anti-Doping Disputes in Track and Field. *Pepperdine Dispute Resolution Law Journal*, 2012, Vol. 12, no. 2, p. 190.

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Comparison of ICC Expert Report vs. ICC Arbitration Award

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Abstract

The aim of the paper is to compare the ICC Expert proceedings and ICC Arbitration within alternative dispute resolution services provided by the International Chamber of Commerce. These two proceedings are widely used contractually in conjunction, however their outcomes and effectiveness pursuant to the legal framework of the Slovak Republic differ. We aim to outline the important factors to consider when choosing these methods of dispute resolution and their particularities. This contribution will contrast the legal nature of ICC Expert Reports and ICC Arbitration Awards and their respective recognition and enforceability in the Slovak Republic.

Keywords

International Chamber of Commerce; Expert Determination; Arbitration; Alternative Dispute Resolution.

1 Introduction

The International Chamber of Commerce ("ICC") plays a crucial role in business relationships as the largest international non-governmental organization aimed at promoting international trade and commerce.[1] The ICC offers a variety of alternative dispute resolution services through the International Centre for ADR ("Centre") which is a separate body within the ICC, such as mediation, services related to experts and neutrals, dispute board members and documentary instruments dispute resolution expertise. Expert determination is a process of private dispute resolution, in which parties

1 CHOVANCOVÁ, K. *International Commercial Arbitration.* Bratislava: Bratislavská vysoká škola práva, 2009, p. 114.

to a contract agree to refer certain issues or questions to an expert to ascertain.[2] In contrast arbitral proceedings are supervized by the ICC International Court of Arbitration ("the Court"), a separate arbitration body of the ICC. The Court is responsible for ensuring the application of ICC Rules of Arbitration and carries out the administration of the arbitration proceedings.[3] Both expert determination and arbitration arise from the contractual freedom and agreement of the parties. They are forms of alternative dispute resolution which may or may not result in a binding decision; however, the recognition and enforceability of such decisions differ. These two proceedings can overlap, as an expert might be appointed during arbitration. The paper firstly introduces the ICC Expert Rules and the differences between services relating to experts provided by the Centre. It discusses the legal nature of the Expert Report in the Slovak Republic, it's recognition and enforcement. The second part summarizes arbitration pursuant to the ICC Rules of Arbitration and introduces legal aspects of the arbitral award. The third section introduces the usage of multi-tiered dispute resolution clauses and their risks in the condition of the Slovak Republic and lastly a comparison of some aspects of the two methods follows.

2 ICC Expert Rules

Expert determination might be an effective tool for resolution of a dispute for a significantly lower cost than arbitration or judicial proceedings, if the dispute is settled by a binding determination the parties voluntarily comply with. Expert determination might also be a preliminary or parallel step to pursuing claims in arbitration or judicial proceedings.[4] It can be used

2 SANTENS, A. A. Expert Determination Clauses in Contracts Providing for International Arbitration: What Happens when the Expert's Decision is Not Final and Binding? *Arbitration International,* 2007, Vol. 23, no. 4, p. 687.

3 Art. 1 Appendix I ICC Rules of Arbitration 2021. *International Chamber of Commerce* [online]. [cit. 25. 3. 2021]. Available at: https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/

4 ROGERS, J. and M. BUCKLE. Arbitrating M&A disputes. How the arbitration landscape has changed and where technology might take it next. *Norton Rose Fulbright International Arbitration Report* [online]. [cit. 25. 3. 2021]. Available at: https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/knowledge-pdfs/emea_15747_newsletter__international-arbitration-report-_issue-13.pdf?la=en&revision=6271a007-2aa1-4f13-a15e-0d3251677fdb

in a variety of areas – technical matters in construction or engineering sectors, valuation in mergers & acquisitions, disputes regarding intellectual property or interpretation of a contract. The majority of the requests for the provision of expert services by the ICC in 2019 related to technical, financial or legal expertise and came from the energy and construction sectors.[5]

2.1 Types of Expert Proceedings

The Centre offers services related to the experts and neutrals, for the purpose of this paper the focus shall be solely on the expert proceedings (however, most of the elements mentioned apply to neutrals as well). For the further analysis of the nature of expert report, a distinction must be made between the types of expert proceedings the Centre offers. Confidentiality of information and documents is ensured in all types of proceedings, which is an accommodating rule given the commercial nature of disputes and thus the need for protection of know-how or any disclosures made. There are three services provided by the Centre:

1. Proposal of experts; and
2. Appointment of experts; and
3. Administration of expert proceedings.

2.1.1 Proposal of Experts

Under the ICC Rules for the Proposal of Experts and Neutrals, the Centre may receive a request for proposal of an expert from any person.[6] The Centre shall process the request if the non-refundable filing fee has been paid. Afterwards the Centre proceeds to propose an expert, it's role under the Expert Rules however ends upon the notification of such proposal.[7] Given the nature of this service, the Centre's responsibilities are limited to the proposal of an expert. The parties requesting an expert are not bound

5 2019 ICC Dispute Resolution Statistics. *International Chamber of Commerce* [online]. P. 20 [cit. 28. 3. 2021]. Available at: https://iccwbo.org/publication/icc-dispute-resolution-statistics/

6 Art. 1 Section 1 ICC Rules for the Proposal of Experts and Neutrals. *International Chamber of Commerce* [online]. [cit. 15. 3. 2020]. Available at: https://iccwbo.org/dispute-resolution-services/experts/proposal-experts-neutrals/rules-for-the-proposal-of-experts-and-neutrals/ ("ICC Rules for the Proposal of Experts and Neutrals").

7 Art. 2 para. 1. ICC Rules for the Proposal of Experts and Neutrals.

by the proposal, they may decide to not use the proposed expert. The legal nature of expert findings is at the discretion of the parties and the Centre is not entitled to scrutinize the expert findings.

2.1.2 Appointment of Experts

The appointment of experts by the Centre is based on a submitted request for the appointment of an expert accompanied by a non-refundable filing fee. The appointment process is subject to the ICC Rules for the Appointment of Experts and Neutrals. The Centre shall only process such request in case it is based on mutual agreement between the parties for the appointment of an expert by the Centre, or where the Centre is otherwise satisfied that there is a sufficient basis for appointing an expert.[8] The agreement to provide the Centre appointing authority in case of a dispute or any situation needing an expert evaluation may be included in a contract between parties. A clause providing for the Centre as appointing authority for experts must be drafted clearly to reflect the agreement between the parties and their will to have an expert appointed for *ad hoc* expert proceedings not administered by the ICC. After the submission of the request for appointment of an expert by one of the parties (or more parties or jointly by all of the parties), the Centre proceeds to appoint an expert. The Centre's role is limited to the appointment of an expert and ends upon notification of such appointment.[9] The only exception to the beforementioned rule is when a party files a written objection asserting that the expert does not have the necessary attributes, is not fulfilling the expert's functions or is not independent or impartial. In such case the Centre may replace the expert after having considered the observations of the expert and the other party or parties.[10] The appointment made by the Centre is binding on the parties. The administration of the expert proceedings and the nature of the expert findings are subject to rules separate from the ICC.

8 Art. 1 ICC Rules for the Appointment of Experts and Neutrals. *International Chamber of Commerce* [online]. [cit. 25. 3. 2021]. Available at: https://iccwbo.org/dispute-resolution-services/experts/icc-rules-appointment-experts-neutrals/rules-for-the-appointment-of-experts-and-neutrals/ ("ICC Rules for the Appointment of Experts and Neutrals").

9 Art. 3 ICC Rules for the Appointment of Experts and Neutrals.

10 Art. 3 para. 5 ICC Rules for the Appointment of Experts and Neutrals.

2.1.3 Administration of Expert Proceedings

The administration of expert proceedings is regulated by the ICC Rules for Administration of Expert Proceedings. The request for the administration of expert proceedings may be submitted by one or more parties, accompanied by the non-refundable filling fee.[11] The Centre shall only process such request in case it is based on mutual agreement between the parties for the administration of expert proceedings by the Centre, or where the Centre is otherwise satisfied that there is a sufficient basis for administering the expert proceedings. The date of filling the request is considered to be the date of commencement of the expert proceedings.[12] In the ICC expert proceedings the parties may jointly nominate an expert to be confirmed by the Centre or the Centre shall appoint an expert in the absence of such joint nomination. The expert shall set out the expert's mission in a written document, setting out *inter alia* the procedure to be followed by the expert and a list of the issues on which the expert shall make findings in the expert's report.[13] The expert report is the final document containing the expert's findings on disputed matter. The expert is obliged to submit a draft report to the Centre for scrutiny, however the Centre may not affect the expert's liberty of decision, solely modify the form of the report or draw attention to points of substance.[14] Unless otherwise agreed by all of the parties, the expert's report shall be admissible in any judicial or arbitral proceedings in which all of the parties thereto were parties to the administered expert proceedings in which such report was prepared.[15]

Two eventualities may arise in relation to the expert report:

1. The expert's findings shall be non-binding in the absence of an agreement between the parties to the contrary; or
2. The report shall be contractually binding upon the parties in case all the parties expressly agree in writing.[16]

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11 Art. 1 ICC Rules for the Administration of Expert Proceedings [online]. *International Chamber of Commerce* [cit. 25. 3. 2021]. Available at: https://iccwbo.org/dispute-resolution-services/experts/administration-experts-proceedings/rules-for-the-administration-of-expert-proceedings/ ("ICC Rules for the Administration of Expert Proceedings").

12 Art. 1 para. 6 ICC Rules for the Administration of Expert Proceedings.

13 Art. 6 para. 2 ICC Rules for the Administration of Expert Proceedings.

14 Art. 9 para. 1 ICC Rules for the Administration of Expert Proceedings.

15 Art. 8 para. 3 ICC Rules for the Administration of Expert Proceedings.

16 Art. 8 para. 2 ICC Rules for the Administration of Expert Proceedings.

Even if the expert report is non-binding, the parties may use it in their further recourse to either national courts that have jurisdiction or in case of a valid arbitration agreement or clause in arbitral proceedings. The benefits of expert proceedings administered by the Centre are undoubtedly the institutionalization of the proceeding allowing for scrutiny of the report, adhering to a timeline, confidentiality of information and initiation of steps needed to encourage the expeditious completion by the Centre.[17] The procedure is also highly flexible to the needs of the parties, as the ICC Rules for Administration of Expert Proceedings serve more as a framework than actual procedural rules. The costs for expert determination are significantly lower than the costs of ICC arbitration, though both are set according to the amount in dispute.[18]

2.2 ICC Expert Report

Any reference to a binding expert report hereinafter refers to a report which is agreed to be contractually binding upon the parties. The binding expert report constitutes a contractually resolution of a matter between parties. If the findings contained in the binding expert report are not respected by one of the parties, the other party may seek enforcement of the binding expert report in judicial proceedings or arbitration like a breach of contract. The action to follow depends on the agreement between the parties, from which the dispute arose from. The enforceability of the binding expert report is thus limited, and further action is required by the parties, either in court or in arbitration. Though the expert report is binding, it does not constitute *res judicata* and cannot be enforced under Slovak law. There are no direct legal remedies against expert determination (apart from a claim against an expert), and it cannot be appealed.[19] However in proceedings administered by the Centre, experts shall not be liable for any act or omission, except to the extent such limitation of liability is prohibited by applicable law.[20] Depending on the agreed procedural rules for the expert, the determination

17 Preamble ICC Rules for the Administration of Expert Proceedings.

18 Art. 2 ICC Rules for the Administration of Expert Proceedings.

19 HOMBURGER, B. G. M&A disputes and expert determination: getting to grips with the issues. *Thomson Reuters Practical Law* [online]. 1. 3. 2010, p. 3 [cit. 4. 4. 2021]. Available at: https://content.next.westlaw.com/4-502-2504?__lrTS=20201031133601433&transitionType=Default&contextData=(sc.Default)&firstPage=true

20 Art. 5 para. 3 ICC Rules for the Administration of Expert Proceedings.

does not require the use of adjudicative procedures, instead it relies on the expert's investigation and expertise.[21] The disputed matter frequently involves narrowly-defined and circumscribed factual or technical issues, contrary to arbitration, which seeks to resolve broader legal disputes, where a contract or statutory protection has been breached and what consequences follow.[22] If the parties agree that the expert report shall not be binding, it may serve as a guidance in further recourse. If the parties agreed on arbitration for settlement of their dispute following an expert determination, the expert report may serve as a basis for rendering the final ICC award, however the clauses can be drafted in a way that the arbiter is not obliged to take the expert report into consideration.

3 ICC Arbitration

3.1 ICC Arbitration Rules

A party wishing to have recourse to arbitration under the ICC Rules of Arbitration shall submit its request for arbitration to the Secretariat of the International Court of Arbitration of the ICC and pay the filling fees.[23] Pursuant to the Slovak Act No. 244/2002 Coll., on Arbitration, as amended ("Slovak Act on Arbitration"), the disputes that can be a matter of arbitration are set out as all disputes concerning legal relationships eligible for a settlement agreement, including disputes on the existence of a legal relationship or legal title, can be dealt with in arbitration. The following cannot be resolved by arbitration (i) disputes regarding the creation, change or termination of ownership rights and other rights in rem in respect of real property, (ii) disputes regarding personal status, (iii) disputes regarding compulsory enforcement of decisions, (iv) disputes arising in the course of insolvency proceedings and restructuring proceedings and (v) disputes arising from consumer contracts.[24] The arbitration is commenced on the date

21 BORN, G. B. *International Arbitration: Law and Practice.* Alphen aan den Rijn: Kluwer Law International, 2012, p. 8.

22 Ibid.

23 Art. 4 para. 1 ICC Rules of Arbitration 2021. *International Chamber of Commerce* [online]. [cit. 25. 3. 2021]. Available at: https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ ("ICC Rules of Arbitration 2021").

24 § 1 para. 2 Slovak Act on Arbitration.

of receipt of the request for arbitration.[25] The Court shall appoint or confirm arbitrators and the constitution of the arbitral tribunal. The arbitral tribunal draws up terms of reference (similar to expert's mission), containing *inter alia* summary of the parties' respective claims and relief sought by the parties, list of issues to be determined, particulars of the applicable procedural rules and the place of the arbitration. The ICC Rules of Arbitration do not limit the parties' choice of place of arbitration, language of the arbitration nor the governing law, as the choice of these enacts the parties' agreement to arbitrate their dispute. Choosing a neutral place of arbitration, meaning that the parties choose a country that is not a country of origin or domicile of neither party, is a great benefit of arbitration.[26] Even if the parties select a place of arbitration in a country of origin or domicile of one of the parties, this choice should not interfere with and not appear to impair the neutrality of the proceedings or that of the arbitral tribunal.[27] The place of arbitration is a crucial factor for determining whether an arbitration award shall be considered domestic or non-domestic and thus the applicable procedure for recognition and enforcement. The place of arbitration may differ from the place of hearings, meetings or deliberations of the arbitral tribunal.[28]

3.2 ICC Award

The final decision of the arbitral tribunal is the award. The award must be submitted to the Court in draft form and the Court may intervene as to the form of the award or draw attention to points of substance, without affecting the arbitral tribunal's liberty of decision.[29] In certain circumstances an interim, partial or additional award may be issued. Every award shall be binding on the parties. The parties by submitting the dispute to arbitration under the ICC Rules of Arbitration, accept to carry out any award without delay and shall be deemed to have waived their right

25 Art. 4 para. 2 ICC Rules of Arbitration 2021.

26 SCHERER, M. The Place or 'Seat' of Arbitration (Possibility, and/or Sometimes Necessity of its Transfer?) – Some Remarks on the Award in ICC Arbitration No. 10'623. *ASA Bulletin*, 2003, Vol. 21, no. 1, p. 115.

27 LALIVE, P. The Transfer of Seat in International Arbitration. In: NAFZIGER, J. A. R. and S. SYMEONIDES (eds.). *Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren*. Ardsley, New York: Transnational Publishers, 2002, p. 515.

28 Art. 18 para. 2 ICC Rules of Arbitration 2021.

29 Art. 34 ICC Rules of Arbitration 2021.

to any form of recourse insofar as such waiver can validly be made.[30] For a significant period, considering the Court was established in 1923, one of the key benefits of arbitration before the Court was non-publicity. In contrast proceedings before national courts are generally public (as is the case in Slovakia, save for exceptions). Nonetheless, the ICC will publish awards and procedural orders online starting from 2021 to promote greater transparency.[31] The parties will be notified prior to publication and shall have an opportunity to object to publication and request for unnecessary data to be de-identified.[32] The ICC aims to enhance transparency, while not compromising confidentiality of the parties' data. The awards will be published, free of charge through the search engine Jus Mundi.[33] As for confidentiality of the arbitration, the ICC Rules of Arbitration only impose obligations on the Court members, the arbitral tribunal can make orders to ensure confidentiality of the proceedings and protection of trade secrets. However, it can only do so based on a request of one of the parties.[34] The time limit for rendering the award is 6 months from signing of terms of reference (which may be prolonged if necessary).[35] Nevertheless, the average duration of proceedings in 2019 was 26 months.[36] To form ICC arbitration into a faster and more streamlined process in case of smaller disputes, the ICC introduced expedited procedure provisions ("EPP") in 2017, which apply to arbitrations where (i) the amount in dispute does not exceed US $ 2,000,000,[37] (ii) the arbitration agreement was concluded after

30 Art. 35 para. 6 ICC Rules of Arbitration 2021.

31 ICC Data Privacy Notice for ICC Dispute Resolution Proceedings. *International Chamber of Commerce* [online]. [cit. 28. 3. 2021]. Available at: https://iccwbo.org/dispute-resolution-services/icc-data-privacy-notice-for-icc-dispute-resolution-proceedings/

32 Ibid.

33 Publication of ICC arbitral awards with Jus Mundi. *International Chamber of Commerce* [online]. [cit. 30. 4. 2021]. Available at: https://iccwbo.org/dispute-resolution-services/arbitration/publication-of-icc-arbitral-awards-with-jus-mundi/

34 Art. 22 ICC Rules of Arbitration 2021.

35 Art. 31 para. 2 ICC Rules of Arbitration 2021.

36 2019 ICC Dispute Resolution Statistics. *International Chamber of Commerce* [online]. P. 17 [cit. 28. 3. 2021]. Available at: https://iccwbo.org/publication/icc-dispute-resolution-statistics/

37 Art. 30 para. 2 ICC Rules of Arbitration 2021 and Art. 1 para. 2 Appendix VI ICC Rules of Arbitration 2021. *International Chamber of Commerce* [online]. [cit. 25. 4. 2021]. Available at: https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ ("Appendix VI ICC Rules of Arbitration 2021").

1 March 2017;[38] and (iii) the parties have not opted out of the expedited procedure provisions.[39] The parties may also opt in to the EPP regardless of the amount in dispute or date of conclusion of the arbitration agreement.[40] Under the EPP in order to streamline the arbitration there is no requirement for the terms of reference, there is a possibility of deciding without an oral hearing and the appointment of a sole arbitrator is an option, notwithstanding any contrary provision of the arbitration agreement.[41] The time for rendering an award is 6 months from the date of the case management conference (which may also be prolonged if necessary). However, from the 50 awards rendered under the EPP in 2019, 37 were rendered withing the 6-month time limit.[42]

3.3 ICC Award Recognition and Enforcement

The ICC Award is a final decision on the merits of the case and there is no option to appeal the final award. Judicial review of arbitration awards is in the most developed countries narrowly limited to issues of jurisdiction, due process and public policy.[43] When assessing the recognition and enforcement of the ICC Award, we will focus on the United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") as well as the Slovak national legislation. The New York Convention applies to the recognition and enforcement of arbitral awards made in the territory of a state other than the state, where the recognition and enforcement of such awards are sought, as well as to awards not considered as domestic awards in the state where their recognition and enforcement are sough.[44] It is applicable in 168 contracting states, thus making arbitral awards freely recognizable and enforceable (apart from limitations set by Art. V).

38 Art. 30 para. 3 letter a) ICC Rules of Arbitration 2021.
39 Art. 30 para. 3 letter b) ICC Rules of Arbitration 2021.
40 Art. 30 para. 2 letter b) ICC Rules of Arbitration 2021.
41 Art. 2 and 3 Appendix VI ICC Rules of Arbitration 2021.
42 2019 ICC Dispute Resolution Statistics. *International Chamber of Commerce* [online]. P. 16 [cit. 30.4.2021]. Available at: https://iccwbo.org/publication/icc-dispute-resolution-statistics/
43 BORN, G. B. *International Arbitration: Law and Practice.* Alphen aan den Rijn: Kluwer Law International, 2012, p. 16.
44 Art. 1 para. 1 New York Convention.

Pursuant to the Slovak Act on Arbitration, a foreign arbitral award is an award by which it has been decided in arbitration on the merits and was issued in the territory of a state other than the Slovak Republic.[45] This paragraph stipulates the place of issuance as a conflict criterion. Although the law does not define the term issued in relation to foreign arbitral awards, it is necessary to consider § 34 para. 3 concerning domestic arbitral awards, according to which the place of issue is linked to the place of arbitration, regardless of where the arbitral award was signed, from where it was sent or where it was delivered to the participants in the arbitration proceedings.[46] Therefore, if the place of arbitration is outside the territory of the Slovak Republic, the arbitral award issued in this proceeding will be considered as a foreign arbitral award. As previously stated, the ICC Rules of Arbitration do not limit the parties' choice of the place of arbitration. The New York Convention does not provide a procedural framework for the recognition or enforcement of arbitral awards (except for the formalities of the application set out in Art. 4). In this respect, the regulation is left to national legislation. Pursuant to the Slovak Act on Arbitration, foreign arbitral awards do not need to be recognized by special decisions (save for the below mentioned exceptions). A foreign arbitral award is considered recognized once the court having jurisdiction to enforce takes notice of the award as if it were a domestic arbitral award.[47] Recognition is a preliminary issue in the issuance of an enforcement order and once recognized the award is considered *res judicata* under Slovak law. A foreign award might be recognized by a separate order, based on a request of a party to the arbitration, however this only applies to awards which do not need to be enforced. The third way of recognising a foreign award is when the foreign award is used in a judicial proceeding before the courts of the Slovak Republic. For example, if it was decided by an arbitral award, that party A is not obliged to compensate party B for a claim, and party B petitions the Slovak court (considering it has jurisdiction) regarding the same claim. The court shall recognize the award if none of the obstacles for recognition are present, either at the request

45 § 46 para. 1 Slovak Act on Arbitration.

46 GYÁRFÁŠ, J. et al. *Zákon o rozhodcovskom konaní. Komentár*. Bratislava: C. H. Beck, 2017, pp. 635–658.

47 § 49 para. 1 and 2 Slovak Act on Arbitration.

of the party B in case of obstacles stipulated by the New York Convention in Art. V section 1, or ex officio by the court in case of obstacles prescribed in Art. V section 2.[48] The proceeding will be terminated because the foreign award will be recognized as *res judicata*.

The grounds for refusing recognition or enforcement of foreign awards in the Slovak Act on Arbitration correspond to Art. V of the New York Convention and Art. 36 of UNCITRAL Model Law. Recognition of foreign arbitral awards of non-contracting states of the New York Convention will be recognized in the Slovak Republic based on reciprocity.[49] Recognition or enforcement of an arbitral award may be refused only at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that: (i) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.[50] The parties in the arbitration proceedings cannot, within the framework of their contractual autonomy, agree that the award will be recognized and enforced

48 § 49 para. 1 Slovak Act on Arbitration.
49 LYSINA, P. et al. *Medzinárodné právo súkromné*. Bratislava: C. H. Beck, 2016, p. 491.
50 Cf. Art. V para. 1 New York Convention.

despite the existence of one of the above-mentioned defects in the Slovak Republic.[51] Notwithstanding parties can choose to deliberately comply with an award which may not be formally recognized and enforced, although this scenario sounds unlikely, but might occur in an instance where the parties wish to maintain commercial relationships for future cooperation.

Otherwise, the recognition and enforcement may only be refused if the court where recognition or enforcement is sought finds that the subject-matter of the dispute is not capable of settlement by arbitration under the Slovak law (arbitrability was previously mentioned above); or the recognition or enforcement of the award would be contrary to the public policy of Slovakia. Contravention of public policy is thus one of the few grounds for refusing the recognition or enforcement of a foreign award.[52] The Slovak Act on Arbitration does not define public policy, however Act No. 97/1963 Coll., on Private International Law and Rules of International Procedure states, that the legal regulation of a foreign state may not be applied if the effects of such an application were contrary to those principles of the social and governmental system of the Slovak Republic and its legal system the compliance with which must be unconditionally insisted upon. The principles may be found in the Slovak constitution, or other legal acts.[53] It is insufficient that the principles are violated, the violation must be of a certain level and intensity and construed narrowly.[54]

4 Escalation Clauses

Multi-tiered dispute resolution clauses (or escalation clauses) are a type of clauses by which the parties agree that if a dispute arises between them, they will go through different procedures such as negotiation, mediation or expert determination and then, if necessary, the dispute can

51 GYÁRFÁŠ, J. et al. *Zákon o rozhodcovskom konaní. Komentár.* Bratislava: C. H. Beck, 2017, pp. 635–658.

52 Report on the Public Policy Exception in the New York Convention. *IBA Subcommittee on Recognition and Enforcement of Arbitral Award* [online]. [cit. 11. 4. 2020]. Available at: https://www.ibanet.org/Document/Default?DocumentUid=C1AB4FF4-DA96-49D0-9AD0-AE20773AE07E

53 LYSINA, P. et al. *Medzinárodné právo súkromné.* Bratislava: C. H. Beck, 2016, p. 131.

54 TOMKO, J. and Z. VALENTOVIČ. *Medzinárodné právo súkromné (Všeobecná časť).* Bratislava: Univerzita Komenského v Bratislave, 1978, p. 99.

escalate to arbitration.[55] Due to the multi-tiered clauses the parties may be obliged to make some effort to settle the dispute amicably, prior to going to arbitration or litigation. If the parties agree to resolve their dispute first in expert proceedings and then escalate the dispute to arbitration, the arbitral tribunal should determine whether the obligation to go through expert determination was satisfied before the submission of request for arbitration. Escalation clauses are frequently used in commercial contracts; however, they may cause issues in practice. An example of a multi-tiered dispute resolution clause combining expert determination and arbitration follows: *"In the event of any dispute arising out of or in connection with [clause X of the present contract], the parties agree to submit the dispute, in the first instance, to administered expert proceedings in accordance with the Rules for the Administration of Expert Proceedings of the International Chamber of Commerce. After the International Centre for ADR's notification of the termination of the administered expert proceedings, the dispute, if it has not been resolved, shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration."*[56]

If we consider a case, where a dispute between parties is first referred for expert determination under the administration of the ICC, agreed that the findings may be later a matter of arbitration, assuming the parties do not comply with the expert report or no settlement is reached, the dispute escalates to arbitration. Possible issue might be non-compliance with the obligation to settle the dispute amicably in expert proceedings prior to escalation of the dispute. There have been cases in which the courts held that where the parties have agreed upon a procedure of dispute resolution, which has been made a condition precedent for invoking the arbitration clause, then

55 PRYLES, M. Multi-Tiered Dispute Resolution Clauses. *Journal of International Arbitration* [online]. 2001, Vol. 18, no. 2, pp. 159–176 [cit. 10. 4. 2021]. Available at: https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/18.2/336061

56 Suggested clauses referring to the ICC Rules for the Administration of Expert Proceedings. *International Chamber of Commerce* [online]. [cit. 10. 4. 2021] Available at: https://iccwbo.org/dispute-resolution-services/experts/administration-experts-proceedings/suggested-clauses-referring-to-the-icc-rules-for-the-administration-of-expert-proceedings/

it is required to be followed before filing an application for arbitration.[57] Therefore failure to comply with a mandatory expert determination can be used as a means of challenging the jurisdiction of the tribunal on the basis that compliance is a prerequisite to arbitration. There is no case law available in the Slovak Republic regarding multi-tiered dispute resolution clauses thus their enforceability has not been tested. It can be estimated that the Slovak courts would not see non-compliance with expert determination first as a bar in seeking proceedings due to the prescription of rights. Since the statutory period of limitation begins at the time of *actio nata* – the day that the subjective right could be first exercised in judicial or arbitral proceedings,[58] not filing a request for expert determination and going directly to judicial proceedings or arbitration could be the only way for a party to secure that their claim is not statute barred. Another aspect to consider is the binding effect of the expert report, if agreed, on the arbitral tribunal's decision making.

5 ICC Expert Report vs. ICC Arbitral Award

5.1 Procedure, Independence, Impartiality and Party Appointment

Expert determination is more favourable in terms of maintaining commercial relationships with the other party, as the procedure is less antagonistic than arbitration.[59] Procedure in expert determination is governed by expert's mission and underlying contract between parties, thus allowing more freedom to adjust procedure according to the needs of parties. ICC Rules of Arbitration provides a more detailed procedural framework, nonetheless, respecting the autonomy of parties the rules may be altered.[60] During both proceedings the parties may interfere with the appointment

57 Judgment of the Supreme Court of India of 26 October 2005, *S.B.P. & Co vs. Patel Engineering Ltd. & Anr*, Case No. 4168/2003; Order of Rajasthan High Court of 11 October 2012, *Simpark Infrastructure Pvt. Ltd. vs. Jaipur Municipal Corporation*, Case No. 27/2011.

58 § 101 Slovak Act No. 40/1964 Coll., Civil Code.

59 VALASEK, M. and F. WILSON. Distinguishing Expert Determination from Arbitration: The Canadian Approach in a Comparative Perspective. *Arbitration International*, 2013, Vol. 29, no. 1, p. 64.

60 Art. 19 ICC Rules of Arbitration 2021.

of experts or arbiters and have the ability appoint either experts or arbiters they deem as fitting for their case (i.e., experts/professionals in a given field, or with experience in a certain type of dispute). Interference with the composition of a decision-making body makes these ADR methods more flexible to the needs of the parties. With regards to impartiality and independence of experts, parties are able to agree on waiving these requirements, allowing for more involvement with either party.[61] However, the impartiality and independence of arbiters is considered mandatory under the ICC Rules of Arbitration.[62]

5.2 Valid Clause Effect on Judicial Proceedings

Another aspect to consider is the effect of a valid expert determination or arbitration clause on judicial proceedings in Slovakia. According to Slovak Civil Procedure, the court is only obliged to stop proceedings in case of a valid arbitration agreement (solely based on the objection of the defendant, if the defendant does not object, the court will continue the proceedings regardless of the existence of the arbitration agreement). On the contrary, the binding agreement between parties to refer the dispute to an expert does not have the same effect as an arbitration agreement.

5.3 Statutory Period of Limitation

According to the Slovak Civil Code, if the creditor exercises his right with a court or other competent authority during the limitation period and properly continues in the commenced proceedings, the limitation period shall be tolled from the moment of the exercise during the proceedings.[63] A competent authority other than a court may be an arbitral tribunal, however an expert does not constitute a competent authority for the purposes of suspending the period of limitation. Therefore, choosing expert determination alone may be insufficient for a party to secure their right is not statute-barred. However, by filing a request for arbitration and continuing in the proceedings, the period of limitation is tolled.

61 Art. 4 para. 1 ICC Rules of Arbitration 2021.
62 Art. 11 para. 1 ICC Rules of Arbitration 2021.
63 § 112 Slovak Act No. 40/1964 Coll., Civil Code.

5.4 Liability

Both experts and arbiters are safeguarded by the respective rules of the ICC and their liability is limited to the extent allowed by applicable law.

5.5 Binding Effect and Publicity

While the binding effect of expert reports depends on the will of the parties, the arbitral award's binding nature is compulsory under the ICC Rules of Arbitration. The expert determination is not a public procedure and by extension the final expert report is also not published. As a result, the parties enjoy confidentiality and privacy during expert determination at all stages. Conversely arbitration before the Court has been generally private and the awards were not publicly available. As stated before, the ICC is changing the rules on publishing of awards to facilitate greater transparency in the process of arbitration and the awards can become publicly available, though parties have an option to opt-out or have their data redacted/pseudonymised. Only awards, orders or dissenting and/or concurring opinions may be published, so arbitration proceedings remain predominantly private as opposed to judicial proceedings.

5.6 Recognition and Enforceability

Expert determination results in a decision (mostly) on a specific issue of a technical, scientific or related business matter between the parties, the decision may be binding or non-binding on the parties. The binding expert report can be generally enforceable in some jurisdictions, however that is not the case pursuant to the laws of the Slovak Republic. Since enforceability of the expert report is based on national laws that apply to the disputed contract, there is no guarantee of enforcement as there is in case of an award. The party bound by the findings in the expert report can take recourse in judicial or arbitral proceedings and therefore prolong the length of the dispute. In practice, in order to enforce an expert determination in any country, a party must resort to whatever procedure is available to the parties to enforce their respective contractual obligations.[64] The expert report

64 VALASEK, M. and F. WILSON. Distinguishing Expert Determination from Arbitration: The Canadian Approach in a Comparative Perspective. *Arbitration International*, 2013, Vol. 29, no. 1, p. 68.

does not receive the advantages under the New York Convention. There is a need for further action if the other party does not comply with the expert report, either in judicial or arbitral proceeding, depending on the jurisdiction of the disputed contract. Whereas the arbitral award is directly recognizable and enforceable domestically in the seat of arbitration or internationally under the New York Convention without any unnecessary burden on the parties. The grounds for challenging the award are limited to jurisdiction, due process and the protection of ordre public, thus the award is final, binding and no further remedy is available. The parties should be mindful of enforcement possibilities in the international context.

5.7 Res judicata

Though the expert report is binding, it does not constitute *res judicata* and cannot be directly enforced under Slovak law. Nonetheless, when the award is recognized in the Slovak Republic, the award is considered *res judicata* under Slovak law.

5.8 Time and Cost

The time for rendering a final award is set at six months from the signature of the terms of reference, but this limit can be extended and as stated, the average duration of the proceeding is 26 months.[65] If the expedited procedure under the EPP applies, the time for rendering an award is 6 months from the date of the case management conference, making arbitration before the ICC significantly faster. As for the overall costs, both methods require the same five thousand USD filling fee, but when comparing a claim in the same amount disputed (e.g., 200 000 USD), expert determination expenses are set significantly lower than the arbitration costs. Expert determination can seem cheaper than arbitration, however the need for subsequent judicial/arbitral proceedings and further costs must be considered. Additionally, when the expedited procedure applies, the costs are reduced quite significantly.

65 2019 ICC Dispute Resolution Statistics. *International Chamber of Commerce* [online]. P. 17 [cit. 28. 3. 2021]. Available at: https://iccwbo.org/publication/icc-dispute-resolution-statistics/

6 Conclusion

Alternative dispute resolution mechanisms provided by the ICC are in demand due to their institutionalised nature, procedural economy, resources and professionalism. The involvement of ICC with regard to expert proceedings depends on the service chosen by the parties. Expert determination is used because of the faster, more flexible and cheaper procedure, but the legal consequences of the expert report must be considered on a national level based on applicable law, as there is no international agreement providing for the enforcement of expert reports. Expert determination is a contractual mechanism the final result of which is not protected in the same light as arbitral awards. Arbitration before the Court is more extensive, however arbitral awards benefit from the New York Convention and are more suited for a final, binding and enforceable resolution of the dispute. Parties should consider multi-tiered clauses including expert determination and arbitration as the process of expert determination, if unsuccessful, may prolong the overall time for resolving the dispute with an enforceable award. The applicable law and possible statutory periods of limitation must be contemplated when choosing the right method for dispute resolution.

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Analysis of Civil Law Consequences of Corruption Under the Czech Law in the Light of International Commercial Arbitration

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Abstract

This paper analyzes the civil law consequences of corruption of the contractual parties assessed in international commercial arbitration under the Czech law applicable to the merits of the dispute. The act of corruption is under most jurisdictions considered as a criminal offence. However, it can have a great legal impact on the contracts tainted by corruption, especially with the regard to its validity. There are two categorize of such contracts, one providing for corruption, and one procured by corruption. As stipulated in this paper, such activities are common in international trade nowadays. Therefore, it is important to clarify whether a particular national legislation draws adequate private law consequences to deter and punish potential perpetrators of corruption.

Keywords

Bribery; Corruption; International Commercial Arbitration; Invalidity of the Contract.

1 Introduction

The international commercial arbitration is a generally accepted method of resolving disputes arising in connection with international commercial transactions that exists alongside court proceedings and alternative dispute resolution methods. A fundamental feature of arbitration is that the jurisdiction of arbitrators is dependent, *inter alia*, on the manifested autonomy of the will of the parties to submit the arising conflict to arbitration. The nature of this method of dispute resolution is, above all, private and based on confidentiality.

At the same time it gives the parties a wide margin of discretion as to the rules to be followed in the proceedings or applicable on the merits of the dispute which is consistent with the principle of the autonomy of the will which is strongly manifested in such proceedings. The primary, but not the only source of the arbitrator's power is the will of the parties as reflected in the arbitration agreement. It is however limited by applicable laws which play an important role especially in disputes tainted by corruption.

On the other hand, the autonomy of the will of the parties is directly related to the freedom of conduct which may not always be legal. Unfortunately, today, despite international efforts, we are experiencing an increase in illegal economic activities, the aim of which may be to abuse the powers entrusted to them in order to achieve their own private gain.[1] If this behaviour exceeds the limits of legality which, however, may not be immediately apparent in today's globalized era, it could be categorized as corrupt.

Corruption, as well as its various forms, is generally considered a criminal offence. Despite of that there is no uniform definition of this behaviour and therefore its punishment is not easy. Moreover, different states take different approaches when regulating different forms of corruption.[2] In general, we can agree that corruption undermines the integrity of international trade, creates a dangerous link between business and organized crime, distorts competition and helps to perpetuate corrupt regimes in third world countries. The fight against corruption is an established part of public order and it must be respected even in an area that is not based on the principles of public law and the state apparatus. That is in the resolution of disputes before arbitrators.

In the area of commercial transactions and in the private sphere, such efforts are increasingly common. This is not to say that the new millennium brought corrupt behaviour that did not exist before. On the contrary. It did exist but it was not so widespread, or, in many cases, it was not even known. Therefore, the field of arbitration has also had to respond to these rising

1 Corruption Perceptions Index. *Transparency International* [online]. 2018 [cit. 1. 5. 2020]. Available at: https://www.transparency.org/files/content/pages/2018_CPI_Executive_Summary.pdf

2 BONELL, M. J. and O. MEYER (eds.). *The Impact of Corruption on International Commercial Contracts*. Cham: Springer International Publishing AG, 2015, p. 7.

trends. Indeed, exclusion from the jurisdiction of the courts can very easily be abused by parties to cover up their behaviour. The reason why parties might do this is the privacy and generally broad-based confidentiality. Parties see arbitration as a safe harbor for illegal activity or for resolving disputes arising out of or in connection with contracts affected by such activity. This makes the fear of arbitration abuse all the more pertinent.

The aim of this paper is to analyze the civil law consequences of corruption that the arbitral tribunal may draw in relation to disputed arising out of contracts tainted by corruption. The subject matter of the dispute itself is not the act of corruption, but rather a breach of obligations specified in the contract. The claim that is brought before the arbitrator must always relate to the contract to which the arbitration clause or arbitration agreement is tied. The claim must be arbitrable under the applicable law and the arbitrator may only decide on the civil law consequences.[3]

Corrupt conduct thus arises independent of the contract. However, its act has legal consequences for contracts that are concluded as a result of it but also for contracts that are concluded for the purpose of providing, for example, a bribe. These legal consequences must be drawn by the arbitral tribunal based on the law applicable to the merits of the dispute. This paper will analyze the legal consequences of corruption that apply to contracts afftected by it under the Czech law.

Against this background, this paper is divided into 5 chapters starting with the characterization of the corrupt practices that occur in front of the arbitral tribunal. We see strong support in fight against corruption on international level, therefore we will examine the corrupt legal framework. From the international perspective we will move to the Czech national legislation and analyze the national concept of corruption from the perspective of criminal and civil law. Last but not least, we will proceed to analyze civil law consequences that an arbitrator may apply in the event of a finding of corrupt behaviour in a dispute.

3 VALDHANS, J. Consequences of Corrupt Practices in Business Transactions (Including International) in Terms of Czech Law. In: BONELL, M. J. and O. MEYER (eds.). *The Impact of Corruption on International Commercial Contracts*. Cham: Springer International Publishing AG, 2015, pp. 111–112.

2 Characteristics of Corrupt Practices in International Trade

Corruption cannot be seen as a phenomenon that affects only a particular state. On the contrary, corrupt practices are transnational phenomenon that affect societies around the world, and international cooperation is therefore essential to prevent and punish them. Corrupt behaviour has been encountered in perhaps every country in the world to date, even on a daily basis. The 187 States Parties[4] to the United Nations Convention against Corruption ("UNCAC") recognize that corruption poses serious problems and threats to the stability and security of societies.[5] According to International Transparency's annual Corruption Perceptions Index, more than 120 countries, about 2/3 of the world's countries, struggle with high levels of corruption (0 – most corrupt, 100 – least corrupt). The Czech Republic, for example, is not among them. It scored 54 points for 2020, according to the index. For comparison, the Czech Republic had 56 points for 2019, and 48 for 2013. The consequences of corruption in the public sector are very serious. They affect not only the economic status and economic development of the countries concerned but also human rights, national security, health care and other areas.[6] Therefore, legislative efforts to prevent and combat corruption in the public sector are quite substantial.[7] Similarly, corruption has an impact on the private sector. The latter, however, does not attract as much attention from states and international organizations. This in turn has an impact on the increasing number of cases of corrupt practices that national courts and arbitral tribunals are confronted with.[8]

Despite extensive international, regional, and national efforts to combat corruption, it remains a pervasive problem. This fact should lead to a search for more effective ways of protecting society from its serious consequences.

4 As of 15 June 2021.

5 Preamble UNCAC.

6 SARTOR, M.A. and p.W. BEAMISH. Private Sector Corruption, Public Sector Corruption and the Organizational Structure of Foreign Subsidiaries. *Journal of Business Ethics*, 2020, Vol. 167, pp. 725–726.

7 PAVIĆ, V. Bribery and International Commercial Arbitration – The Role of Mandatory Rules and Public Policy. *Victoria University of Wellington Law Review*, 2012, Vol. 43, p. 664.

8 ARGANDOÑA, A. Private-to-private Corruption. *Journal of Business Ethics*, 2003, Vol. 47, no. 3, p. 253.

The question is therefore, whether the national approach to combating corruption which is primarily based on criminal law is still able to respond adequately to corrupt behaviour that occurs beyond territorial borders. This is partly due to the jurisdictional concepts that national legislators often apply within the framework of criminal law. It is up to national legislators to decide which principle or principles to adopt. This inconsistency and rigid legislation are also behind efforts to find more effective ways to minimize the incidence of corrupt behaviour.

Corrupt behaviour is often hidden behind, at first sight, inconspicuous contractual obligations of the parties. This is primarily because it is the private sector, and primarily civil and contract law which gives parties contractual freedom and thus creates a quasi-safe bubble for illegal transactions. However, civil law can be used as a tool in the fight against corruption. It can respond more effectively to cross-border transactions thanks to private international law standards but also by being able to sanction the assets of actors, including abroad, thanks to the enforceability of decisions of national courts and arbitral tribunals.[9] It is therefore not only criminal law that carries serious legal consequences for wrongdoers.

In the light of international commercial arbitration corrupt conduct may be committed not only by the contractual parties but also by arbitrators or third parties such as witnesses, experts, or interpreters. It is also true that a person may commit it both in the pre-trial stage and during the trial. In the course of the proceedings, the most frequent act of corruption will be on the side of arbitrators or third parties such as witnesses or experts. The first possibility how corruption on the side of the parties may occur and which appears to be more common is that the person committed the offence prior to the commencement of the arbitration proceedings and that the offence only came to light after the dispute resolution process had commenced.[10]

The paper will be focused solely on corrupt conduct that was committed by both or only one of the parties prior to the commencement

9 MAKINWA, A. *Private remedies for corruption: towards an international framework*. The Hague: Eleven International Publishing, 2013, p. 9.

10 PAVIĆ, V. Bribery and International Commercial Arbitration – The Role of Mandatory Rules and Public Policy. *Victoria University of Wellington Law Review*, 2012, Vol. 43, p. 667.

of the arbitration but which only came to light during the arbitration. At the outset, it should be noted that the subject matter of the dispute will never be the corrupt conduct itself. This is because the arbitrators' jurisdiction is based on an arbitration clause that is tied to a particular commercial transaction and only disputes that are arbitrable under the applicable law can be decided. The scope of this clause, i.e., the definition of what disputes will be arbitrated then limits the claims that the parties can pursue in the arbitration. This paper will therefore be focused only on bilateral legal dealings – contracts, that are in some way affected by corruption.

There are two categories of these contracts. The first category is contracts which, by their object of performance, conceal the commission of corruption.[11] In this case, the corrupt practice is hidden behind an otherwise legal act with both parties to the contract being aware that the real purpose is to provide a bribe in order to obtain an advantage. Most often these contracts will have a form of service contracts or contracts of a command type[12], such as agency, commercial representation or commission.

The second category consists of contracts that were concluded as a result of corruption, most often bribery. These commitments are legitimate business transactions. However, their conclusion is preceded by the payment of a bribe which results in an advantage in the form of the conclusion of this specific contract.[13] These will most often be public procurement contracts or other types of contracts which are also concluded with non-state

11 ARMESTO, F. The Effects of a Positive Finding of Corruption. In: BAIZEAU, D. and R. KREINDLER (eds.). *Dossier of the ICC Institute of World Business Law: Addressing Issues of Corruption in Commercial and Investment Arbitration.* Paris: ICC Publishing s.a., 2015, p. 167.

12 For example, the Case No QBCMI 1998/0485/3 of Westacre Investments Inc v. Jugoimport-SDRP Holding Co Ltd decided by the Court of Appeal of England and Wales on 12 May 1995; the case No. 1998 Folio No 1003 of Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd decided by the Supreme Court of England and Wales on 24 May 1995, Swiss Arbitration Decision under Case No. 4A_596/2008 dated 6 October 2009, under Case No. 4A_532/2014 and 4A_534/2014 dated on 29 January 2015, or ICC Case No. 13914 and No. 16090.

13 ARMESTO, F. The Effects of a Positive Finding of Corruption. In: BAIZEAU, D. and R. KREINDLER (eds.). *Dossier of the ICC Institute of World Business Law: Addressing Issues of Corruption in Commercial and Investment Arbitration.* Paris: ICC Publishing s.a., 2015, p. 167.

actors and where strong competition between those interested in obtaining the business transaction is expected.

2.1 Structure of Contracts Tainted or Linked to Corruption

In this subsection, we outline the basic contractual constructs that we briefly introduced in the introduction to this chapter: Company A, a development company, is interested in entering into a service contract with Company B which offers a long-term cooperation on various projects. We assume that both companies are based in different countries. Company A enters into a separate contract with an agent who has the necessary knowledge of the market that Company A is trying to enter. The purpose of the contract is to facilitate the conclusion of the contract between Company B and Company A. In consideration, Company A pays the agent a commission, the amount of which depends on whether the service contract with Company B is concluded and on what Company A's net profits are from the transaction. The agent will offer a bribe to the company B's advisor which will result in the conclusion of the service contract between company A and B. An arbitration clause is an integral part of both contracts which obliges the parties to submit any claim arising out of the contract to an arbitral tribunal (which is specified).

Corrupt conduct will always stand outside the contractual relationships, the disputes from which will be resolved before arbitrators. However, corrupt conduct carries with it legal consequences that also affect contracts tainted by this behavior. These legal consequences on the related legal relationships will depend on the applicable law for the resolution of the merits of the dispute. Procedural issues, in particular the powers and duties of arbitrators, will in turn depend on the law applicable to the arbitration. However, this topic is outside the scope of this paper.

2.2 Definition of Corruption

Despite universal agreement on the seriousness of corrupt behaviour and not only in the field of international trade there is no single definition that defines what constitutes corrupt practice. Despite the global convergence of legal rules, efforts and views condemning corruption, international

society has not come to a sufficient and coherent approach in defining this behaviour. Even in the preparation of international conventions, states and their representatives have not arrived at a single definition. The line between what can be considered legal practice in the sector and what already crosses the boundaries of legality and morality and can be categorized as corrupt behaviour is thus blurred.[14] The main problem is that corruption is an umbrella term for a wide range of practices that include bribes and enrichment at the expense of others in different sectors but also at different levels favoritism, blackmailing or influence peddling. Individual practices do not occur in isolation and in most cases are hidden behind otherwise legal conduct.[15]

In defining corruption, we return to *International Transparency* which defines corruption *as the abuse of entrusted power for private gain*. This definition can apply to both private and public corruption. However, in analyzing and grasping corruption in the public sector, we take the liberty of referring to the definition used by *Sayed*, namely that it is the transfer of money or other values to foreign public officials, either directly or indirectly, for the purpose of obtaining a favorable decision from the public actor in the course of international trade.[16] In the private sector, as mentioned above, the concept of corruption is seen as the abuse of certain powers conferred on an employee by his superior in order to influence a particular corporate decision. The nature and consequences of corruption in both the public and private spheres are the same and constitute an obstacle to the proper functioning of international trade.[17] If we add to this the fact that corrupt behaviour does not have clearly defined definitional features, the treatment of this area in the various legal systems is diversified. Consequently, these regulate some forms as legal or do not recognize some

14 DAVID, V. and A. NETT. *Korupce v právu mezinárodním, evropském a českém*. Praha: C. H. Beck, 2007, p. 15.

15 JENKINS, A. Money laundering, corruption and fraud: The approach of an international law firm. In: KARSTEN, K. and A. BERKELEY (eds.). *Arbitration – Money Laundering, Corruption and Fraud*. Paris: ICC Publishing s.a., 2003, p. 31.

16 SAYED, A. *Corruption in international trade and commercial arbitration*. The Hague: Kluwer Law International, 2004, p. xxvi.

17 ARGANDOÑA, A. Private-to-private Corruption. *Journal of business ethic,* 2005, Vol. 47, no. 3, p. 255.

forms at all.[18] Conduct that is criminal in one country may not be criminal beyond its borders, making international efforts to combat it all the more difficult.[19] It could be said that we can get into a legal vacuum when using this concept and the only clues are the legal definitions of the various forms of corruption that are criminalized in that particular state.

3 The Current Legal Framework Against Corruption – From International to National

Although corruption has always been a major problem affecting development, competition and all trust in institutions, it was only after 1990 that it began to be seriously addressed at the international level.[20] Until then, efforts to combat corruption were more at the national level. The global community began to warn international business that corruption was unacceptable and thus globally prohibited.[21] The international community has managed to reach an admirable consensus in the fight against transnational bribery, a form of corruption. The first significant step has been taken by the Organisation for Economic Co-operation and Development ("OECD"). In 1997, the OECD adopted Convention on Combating Bribery of Foreign Public Officials in International Business Transactions which covers public bribery by individuals and companies.[22] However, it addresses only one side of bribery, namely active bribery. By active we mean the promise, offer or provision of a bribe. It provides for penalties, both criminal and civil where the specific conduct is not criminal in the jurisdiction.[23] The Convention also resolves the conflict of multiple jurisdictions under which these acts could

18 Ibid., p. 256.

19 DAVID, V. and A. NETT. *Korupce v právu mezinárodním, evropském a českém*. Praha: C. H. Beck, 2007, p. 15.

20 PIETH, M. Contractual Freedom vs. Public Policy Considerations in Arbitration. In: BÜCHLER, A. and M. MÜLLER-CHEN (eds.). *Private Law: national – global – comparative, Festschrift fur Ingeborg Schwenzer zum 60. Geburstag*. Bern: Stampfli Velag AG Bern, 2011, p. 1379.

21 FOX, W. Adjudicating Bribery and Corruption Issues in International Commercial Arbitration. *Journal of Energy & Natural Resources Law*. 2009, Vol. 27, no. 3, p. 493.

22 BETZ, K. Economic Crime in International Arbitration. *ASA Bulletin*, 2017, Vol. 35, no. 2, p. 284; see also Art. 1 para. 1 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

23 See also Art. 3 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

be punished.[24] Although the OECD covers only one form of corruption, namely active bribery, it marked a first step to stimulate debate on the scope of punishing corrupt behaviour.

Probably the most remarkable development in the international community was made by the United Nations ("UN") in 2003. The way in which the UN approached the problem of transnational corruption in the UNCAC was somewhat more sophisticated than that of the OECD, and moreover, it was ratified by 187 countries worldwide. The UNCAC can be said to be a kind of superstructure of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted in the OECD. Where the OECD merely recommends to its member states that they prohibit certain bribery-related activities, the UNCAC prohibits those activities directly to the contracting states. This Convention is innovative not only in terms of the acts it criminalizes but also because of its strong focus on prevention, investigation, as well as its emphasis on international assistance and the recovery of the profits derived from these crimes.[25] In addition, the UNCAC creates a relatively strong framework for states parties to adapt their civil law regulations to provide redress for victims of corruption and to draw other civil law consequences, such as the nullity of a contract or the right to rescind a contract.[26]

UNCAC recognized not only the active side of bribery - the individual offering or paying bribes, but also the passive side - the public official accepting or demanding the bribe.[27] Above and beyond this it also explicitly defines embezzlement or other misuse of property by a public figure, trading in influence, abuse of office or position, illicit enrichment, laundering the proceeds of crime, or concealing the commission of the aforementioned acts and, in this context, obstruction of justice.[28] It affects both national and

24 See also Art. 4 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

25 WOUTERS, J., C. RYNGAERT and A. S. CLOOTS. *The Fight Against Corruption in International Law*. Den Haag: T. M. C. Asser Press, 2012, p. 16.

26 Art. 26, 34 and 35 UNCAC.

27 FORTIER, L. Y. Arbitrators, corruption, and the poetic experience: 'When power corrupts, poetry cleanses'. *Arbitration International*, 2015, Vol. 31, no. 3, p. 370; see also Art. 15 UNCAC.

28 See Art. 15–25 UNCAC.

foreign public officials. The UNCAC takes a similar approach to corrupt conduct in the private sector. Thus, both active and passive aspects are equally affected in relation to any person who manages or works in any capacity for a private sector entity or any other person.[29]

Progress in the fight against transnational corruption can also be observed at the regional level. The main actors in these areas have been the Council of Europe, the EU, the Organization of American States[30] and the African Union[31]. For the purposes of this paper, we discuss the European approaches in more details. The Council of Europe has adopted two major conventions on its soil - the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption. They impose obligations on countries that have ratified them to adopt legislative or other measures that penalize active and passive corruption in relation to domestic and foreign public officials, judges, officials in international organizations, as well as in the private sector.[32] The Civil Law Convention on Corruption sets out rules on combating corruption with private law instruments and on the legal consequences. States parties have an obligation to establish a legal framework that would allow persons aggrieved by corrupt conduct to initiate legal proceedings to obtain full compensation for damages. In connection with the above-mentioned documents, the Council of Europe has established a special system for monitoring compliance with all the standards established in the fight against corruption, the Group of States against Corruption that serves as a platform for the exchange of best practices in the fight.

Beyond legally binding instruments, there are also several soft-law instruments that have been developed from private initiatives. One of these is Transparency International and its Corruption Perceptions Index tool, mentioned earlier in this paper which ranks countries according to perceived levels of corruption based on public opinion polls.[33]

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29 See Art. 21 letter a) and b) UNCAC.

30 The Organization of American States adopted in 1996 the Inter-American Convention against Corruption.

31 The African Union adopted in 2003 the African Union Convention on Preventing and Combating Corruption.

32 See Chapter 2 Criminal Convention on Corruption.

33 WOUTERS, J., C. RYNGAERT and A.S. CLOOTS. *The Fight Against Corruption in International Law*. Den Haag: T.M.C. Asser Press, 2012, p. 32.

However, the question is to what extent members of the international community respect anti-corruption rules and what international enforcement mechanism they have already adopted. The core of the argument is that almost all anti-corruption treaties lack an international enforcement mechanism which is left to national laws and courts.[34] All of the above treaties are not self-executing, leading to the need for the reception of the conventions' provisions into domestic law by each state. An example is UNCAC, an international convention that combats corruption and obliges states to adopt the necessary rules and instruments for certain forms of corruption. However, the diversification of state approaches has caused those certain forms of corrupt behaviour may not be criminalized but states are 'merely' required to consider adopting rules to combat them. How the rules from the aforementioned conventions have been reciprocated into Czech legislation will be discussed in the following subsection.

However, leaving this important part of the fight against corruption to each state leads to uneven application of anti-corruption rules between countries, making the whole idea of tackling transnational corruption inadequate. Nevertheless, the existence of a set of anti-corruption rules represents a strong voice from the international community that corruption and its forms are no longer tolerated in international business transactions and that individuals will be punished.

Corrupt behaviour in the private sector is perceived as illegal by most countries, as evidenced not only by national legislation but also by the aforementioned trends at international level. International treaties provide the countries concerned with a basic legal framework that contains the minimum requirements for national legislation. They thus lay down rules on how to approach corrupt behaviour. Each country thus creates a legal framework of regulation that may as a result differ significantly from those of other states, not only in the categorization of offences but also in the regulation of corrupt behaviour across different legal sectors.

Most often arbitral tribunals deal with disputes arising from contracts providing for corruption. Based on the findings below the selected arbitral decisions show that arbitrators have taken a clear position on the legal implications of corrupt

34 FORTIER, L. Y. Arbitrators, corruption, and the poetic experience: 'When power corrupts, poetry cleanses'. *Arbitration International*, 2015, Vol. 31, no. 3, p. 370.

conduct on this type of contract – dismissal of the claims of both parties where the agreement is found to be null and void due to corrupt activities.

In International Chamber of Commerce ("ICC") case 3913, the arbitral tribunal has concluded that the agreement concluded between two companies providing for services consisting of obtaining certain contracts for a fee in the amount of the contracts awarded was actually an agreement providing for "kickbacks". Such agreement was declared by the tribunal as null and void not only under the applicable French law, but under the international public policy as well.[35] The same conclusion was rendered by the arbitral tribunal in ICC case 8891. However, in this case the arbitral tribunal became aware of the bribery based on a witness statement.[36] In case 13914 the arbitral tribunal itself found out indicators of act of corruption regarding the consulting agreements. Therefore, the arbitral tribunal concluded that the purpose of the consulting (and other related) agreement was to provide bribes and such agreement must be therefore declared null and void. Neither party may require performance of the contract nor seek restitution under it.[37] Another case with the same conclusion was brought under French applicable law. The claim was brought by one of the contractual parties for the payment of sum of money based on separate agreements signed, beside other parties, by government of African state. However, the government was subsequently overthrown in civil war. The following government rejected to pay the sum of money arguing that the agreement was void as it had been made in abnormal circumstances to enrich corrupt government leaders. The respondent provided the arbitral tribunal with information and indicators that established a presumption of illegality which the claimant did not rebut. Based on that the arbitral tribunal held that the agreement was null and void and dismissed the claim.[38]

35 CRIVELLARO, A. Arbitration case law on bribery: Issues of arbitrability, contract validity, merits and evidence. In: KARSTEN, K. and A. BERKELEY (eds.). *Arbitration: Money Laundering, Corruption and Fraud.* Paris: ICC Publishing s.a., 2003, p. 120.

36 JOLIVET, E. and C. ALBANESI. Dealing with Corruption in Arbitration: A Review of ICC Experience. *Special Supplement 2013: Tackling Corruption in Arbitration.* 2013, p. 9.

37 Final Award (Extract) of the International Chamber of Commerce of 2013, Case 13914. In: *Special Supplement 2013: Tackling Corruption in Arbitration.*

38 Final Award (Extract) of the International Chamber of Commerce of 2013, Case 12990. In: *Special Supplement 2013: Tackling Corruption in Arbitration.*

3.1 National Anti-corruption Legislation

As at the international level, neither national legislation, in most cases, contain a definition of corruption. Even from a national perspective, it is a generic term that encompasses several unlawful acts. Their common denominator is the abuse of power for undue advantage.[39] National legislation also treats the various forms of corruption primarily as criminal offences.[40] Nevertheless, as stated by *Bonell and Meyer*, corruption in international trade is not only the domain of criminal law but the involvement of other branches of law is also necessary.[41] The UNCAC itself reflects this approach. It obliges States Parties to ensure effective, proportionate and dissuasive civil, administrative and criminal penalties for breaches of measures taken under the UNCAC to combat corruption.[42]

States primarily use criminal law instruments to combat corrupt practices and regulation of corrupt practices through private law instruments is lacking in most countries. An exception is the unfair competition rules which in some jurisdictions also regulate corrupt conduct.[43]

The Czech Republic is a party to all the above-mentioned conventions[44] which it has transposed into national law. In the Czech legal system,

39 See, for example, the legal concept of corruption in the Czech Criminal Code, the Slovak Criminal Code, the Danish Criminal Code or the German Criminal Code. Discussed in more detail: BONELL, M. J. and O. MEYER. The Impact of Corruption on International Commercial Contracts – General Report. In: BONELL, M. J. and O. MEYER (eds.). *The Impact of Corruption on International Commercial Contracts*. Cham: Springer International Publishing AG, 2015, pp. 100, 120, 173.

40 KREINDLER, R. Competence-Competence in the Face of Illegality in Contracts and Arbitration Agreements. In: *Recueil des cours 2012*. Leiden: Brill – Nijhoff Publishers, 2013, Vol. 361, p. 79.

41 BONELL, M. J. and O. MEYER. The Impact of Corruption on International Commercial Contracts – General Report. In: BONELL, M. J. and O. MEYER (eds.). *The Impact of Corruption on International Commercial Contracts*. Cham: Springer International Publishing AG, 2015, p. 1.

42 Art. 12 para. 1 and Art. 26 para. 2 UNCAC.

43 BONELL, M. J. and O. MEYER. The Impact of Corruption on International Commercial Contracts – General Report. In: BONELL, M. J. and O. MEYER (eds.). *The Impact of Corruption on International Commercial Contracts*. Cham: Springer International Publishing AG, 2015, p. 4. As *Bonell* and *Meyer* point out, these jurisdictions include the Czech Republic, Poland and Switzerland. We can also add Slovakia, which, like the Czech Republic, regulates bribery as a specific act of unfair competition.

44 These are the UNCAC, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption.

anti-corruption measures can be divided into two groups. The first is, of course, the norms of criminal law and the second the area of civil offenses. Civil offenses related to corrupt behavior are regulated in the Act No. 89/2012 Coll, the Civil Code ("Czech Civil Code"). It captures one of the forms of corruption, namely bribery as a private offense and one of the special facts of unfair competition.[45] The Czech Civil Code regulates two forms of this behavior, namely active and passive. The factual nature of the active form of bribery consists in the direct or indirect granting of an advantage in order to obtain a certain undue advantage or competitive advantage.[46] Passive, on the other hand, in direct or indirect demand, promise or acceptance of a benefit for the same purpose. Both forms of corrupt behavior can be committed exclusively by a competitor which can be a natural person but more often a legal entity. It will, of course, commit bribery through natural persons who are authorized to represent it, or whose legal acts are attributable to a legal person as a competitor.[47] However, only a natural person can be a person bribed, namely either a member of the statutory or other body of another competitor or his employee. In practice, however, it happens that a legal person is also bribed. In such case, although the factual nature of bribery according to Section 2983 of the Czech Civil Code is not fulfilled, such an act can be assessed according to the general clause.[48]

The specificity of unfair competition according to the Czech Civil Code is that it is based on a combination of the general clause regulated in Section 2976 para. 1 and (demonstrative calculation) of special legal facts according to Section 2976 para. 2 et seq. In order for a conduct to be classified as unfair, it is primarily necessary to fulfill the characteristics of a general clause. Whether it also fulfills the characteristics of any of the particular facts will no longer affect the conclusion that the conduct is unfair.[49] However, bribery as a special factual basis of unfair competition is rarely

45 Section 2976 para. 2 letter e) and Section 2983 Czech Civil Code.
46 ONDREJOVÁ, D. *Občanský zákoník VI. Závazkové právo. Zvláštní část (§ 2055–3014).* Praha: C. H. Beck, 2014, p. 190.
47 BEJČEK, J. et al. *Obchodní právo. Obecná část. Soutěžní právo.* Praha: C. H. Beck, 2014, p. 231.
48 Ibid., p. 231.
49 ONDREJOVÁ, D. § 2976. In: HULMÁK. M. et al. *Občanský zákoník VI. Závazkové právo. Zvláštní část (§ 2055–3014).* Praha: C. H. Beck, 2014, pp. 1769–1789.

sued in court. The reason is precisely that the features of the general clause must be met. Without the fulfillment of the characteristics of the general clause, this is not an unfair competition behavior, even if the conduct fulfills the characteristics of the factual nature of bribery.[50]

The basis of public law affecting corrupt practices is the Act No. 40/2009 Coll., the Criminal Code ("Czech Criminal Code") and the related Czech law on criminal liability of legal persons. As mentioned above, sanctions through criminal law must be understood as the *ultima ratio*, i.e., as the last resort for the protection of society. Related to this is the principle of criminal repression. The essence of this principle is that the criminal liability of the offender and the criminal consequences associated with it can be applied only in cases of socially harmful, where the application of liability under other legislation is not sufficient.[51]

In the special section, the Czech Criminal Code distinguishes between three groups of crimes related to corrupt practices. The first group is the offenses of bribery under Part 3 of Title X which we consider to be corruption in the strict sense. The second group is, according to Part 2 of Title X, the offenses of officials which includes the crime of abuse of power. And the last third group consists of crimes against serious rules of the market economy, where according to Part 3 of Title VI of the Czech Criminal Code we classify violations of competition rules, abuse of position in trade, obtaining an advantage in awarding public contracts, public tenders and public auctions and gossip offenses. Given the stated purpose of this work we will continue to deal only with the legal regulation of bribery offenses, i.e., according to Part 3 of Title X of the Czech Criminal Code, and we will leave offenses related to bribery outside the scope of this paper.

The Czech Criminal Code regulates the criminal offenses of bribery covering the acceptance of a bribe, bribery (i.e., the passive side of a bribe) and indirect

50 Specifically in the case of bribery, this conclusion follows from the decision of the Supreme Court of the Czech Republic of 29 April 2008, Case No. 32 Cdo 139/2008. This decision was subsequently annulled by the Constitutional Court of the Czech Republic in its Constitutional Award of 11 September 2009, Case No. IV. ÚS 27/09. The reason for the annulment was the incorrect legal assessment of the case by the municipal courts, not the refutation of the conclusion that, without the fulfilment of the features of the general clause, there is no unfair competitive conduct.

51 Section 12 para. 2 Czech Criminal Code.

bribery through a third party. In this case, the Czech Criminal Code also regulates bribery in the private sector, on the basis of Council Framework Decision 2002/568/JHA of 22 July 2003 on combating corruption in the private sector. Bribe is defined in Section 334 of the Czech Criminal Code and as an unjustified advantage to which there is no legal claim for a certain person who may be directly bribed or another third party to whom the benefit is given with consent of another person.[52] An unjustified advantage may take the form not only of property enrichment but also of non-property advantage to which the bribed person or another person with the consent of the bribed person has no right. What will be categorized as a bribe depends on the facts of the case. The Supreme Court of the Czech Republic has issued several decisions in this regard, according to which it is true that a sponsorship gift can also be a bribe if the perpetrator's behavior meets the remaining defining features of the bribe.[53]

The criminal offense of accepting, promising or demanding a bribe, i.e., a passive form of corruption, is regulated in Section 331 of the Czech Criminal Code. The object of the crime is, according to para. 1, an interest in the proper and lawful procurement of things of general interest and an interest in the proper performance of business activities. The very promise of accepting a bribe which is so serious and socially dangerous that it is necessary to punish it even without the subsequent acceptance of a bribe actually taking place is also criminal. Stricter rules under para. 2 shall apply to the offender who requests the bribe.

Bribery, on the other hand, is an active form of corruption and is punishable under Section 332 of the Czech Criminal Code. The offence is reversed and the perpetrator is thus a person who himself or through another provides, offers or promises a bribe in connection with the procurement of a matter of general interest or business.

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52 Some authors mention 3 defining features, the third being material enrichment or other non-material advantage. In this case, however, we agree with Bruna's view. The enrichment or advantage is itself an advantage, i.e., the first defining characteristic of a bribe. See BRUNA, E. Problematické aspekty úplatkářských trestných činů (1. část) – úplatek. *Bulletin advokacie*, 2018, Vol. 10, p. 42.

53 Resolution of the Supreme Court of the Czech Republic of 23 February 2011, Case No. 8 Tdo 81/2011.

The last of the bribery offences is so-called indirect bribery under Section 333 of the Czech Criminal Code. This offence relates exclusively to the action of an official person. The very name of the offence suggests that corruption will not be committed directly, i.e., the perpetrator (active or passive) is not directly the official person but another person who can directly or indirectly influence the official person. This brings with it the problem of confusing the offence of indirect bribery (influence peddling) with the lawful activity of lobbying. We speak of the unprohibited activity of lobbying because in the Czech Republic there is no regulation of it yet, and thus no prohibition or authorization of this activity. Applying the principle of everything is permitted that is not prohibited by law, it is thus a permitted activity. There is no legal definition of lobbying yet. This leads to easy confusion with the offence of indirect bribery. The Czech Republic is on its way to regulating this through the government's draft law on lobbying[54] which should set a clear boundary between what is lobbying and what is already a criminal activity.

4 Negative Legal Consequences of Judicial Act

The private law regime is based on the Czech Civil Code which is based on fundamental principles that are relevant in the context of corruption. These are the principle of autonomy of the will and the principle of anything is permissible that is not expressly prohibited. These principles of civil and contractual law give the parties a certain degree of freedom in deciding what the content of their legal relationship will be. Restrictions on the parties' autonomy of will should only be made where there is a legitimate reason.[55] These principles that give freedom of decision encourage the rise of corrupt practices. Therefore, even their application cannot be absolute. The Czech Civil Code thus further establishes the limits of these behaviors, the breach of which is sanctioned by invalidity of the legal act.[56]

54 As of 21 June 2021, the government bill was in its second reading in the Chamber of Deputies of the Parliament of the Czech Republic.

55 LAVICKÝ, P. § 1. In: LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část (§ 1–654). Komentář.* Praha: C. H. Beck, 2014, pp. 1–38.

56 VALDHANS, J. Consequences of Corrupt Practices in Business Transactions (Including International) in Terms of Czech Law. In: BONELL, M. J. and O. MEYER (eds.). *The Impact of Corruption on International Commercial Contracts*. Cham: Springer International Publishing AG, 2015, pp. 111–112.

4.1 Contradiction of Legal Act With Statute and Disruption of Public Order

The basic corrective guiding legal conduct is the law and the prohibitions contained in its norms. Corrupt conduct that fulfils the special offence of bribery under the Czech Civil Code or the criminal offence under the Czech Criminal Code violates the law. It is true that any conduct that violates the prohibition set out in a mandatory norm is contrary to the law.[57] The legal norms that we have analyzed in more detail in chapter 2.1 are (absolutely) mandatory[58], therefore they cannot be deviated from.

The contradiction with the law may be substantive or purposeful.[59] As *Lavický* states, the purpose of a legal act is what the act is done for and what the intent of the parties is to achieve. The purpose is legally significant not only if it is part of the expressed intention but also if the parties to the contract knew about it.[60]

What consequences will be associated with a legal action may be primarily regulated by the norm itself which has been violated by the action. This norm may stipulate that the conduct in question is null and void, or it may stipulate a different legal consequence. The relationship between the general clause contained in Section 580 of the Czech Civil Code and the specific civil law consequence flowing from the legal norm is subsidiary.[61] First, it is necessary to examine whether the consequence of the contradiction is not provided for directly by the norm whose legal conduct is contradicted. If the corresponding norm does not contain a consequence, the general rule in Section 580 of the Czech Civil Code applies.[62]

57 LAVICKÝ, P. § 1. In: LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část (§ 1–654). Komentář.* Praha: C. H. Beck, 2014, pp. 1–38.

58 According to established court practice, *"… any deviation from a certain legal norm considered (per se) as violating good morals, public order or the law regulating the status of persons, such a legal norm can be qualified as (absolutely) mandatory."* See Resolution of the Supreme Court of the Czech Republic of 31 October 2017, Case No. 29 Cdo 387/2016.

59 TELEC, I. Není rozpor se zákonem jako rozpor se zákonem. *Právní rozhledy,* 2004, no. 5, p. 161.

60 HANDLAR, J. § 580. In: LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část (§ 1–654). Komentář.* Praha: C. H. Beck, 2014, pp. 2077–2092.

61 Ibid.

62 Ibid.

The legal consequence under the general regulation is the invalidity of the legal act. However, a contradiction with the law does not in itself automatically render a legal act void. This must be required by the meaning and purpose of the law or legal norm that is violated by the legal act. This approach reflects the principle of the autonomy of the will of the parties. It is necessary first to examine what the meaning and purpose of the law is and only then to decide whether the legal act is void. If there is any doubt as to validity then, in accordance with the rule contained in Section 574 of the Czech Civil Code, the legal act must be viewed as valid rather than void. If the decision maker concludes that the meaning and purpose of the statute is to establish invalidity, it must be determined whether it will be relative or absolute.

The Czech Civil Code distinguishes between absolute and relative nullity. The essence of this division is the interest of protection, i.e., either the interest of a particular person or the public interest. Absolute nullity as a legal consequence occurs according to Section 588 of the Czech Civil Code when a legal act is contrary to the law and manifestly violates public policy or is manifestly contrary to good morals. The law no longer provides for an examination of the purpose and meaning of the law. However, this condition is inferred from the case law of the Supreme Court of the Czech Republic. It is true that if it is necessary to assess the meaning and purpose of a legal norm regulating legal conduct in order for its non-observance to be invalid, it is equally necessary to take that purpose and meaning into account when assessing whether it is a relative or absolute nullity.[63]

The absolute nullity in the event of a breach of the law is also conditional on a manifest disturbance of public order. Thus, only an act that both violates the law and manifestly violates public order will be absolutely void.[64] The concept of public order is a vague concept whose content and meaning is variable over time. The Supreme Court of the Czech Republic has already commented on this concept in more detail several times. He stresses that *"it is a set of rules to be insisted upon without reservation, but unlike good morals, they*

63 Judgment of the Grand Chamber of the Civil and Commercial Chamber of the Supreme Court of the Czech Republic of 10 June 2020, Case No. 31 ICdo 36/2020.

64 HANDLAR, J. § 580. In: LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část (§ 1–654). Komentář.* Praha: C. H. Beck, 2014, pp. 2077–2092.

have their origin in the legal order itself and not in ethics. They are the fundamental principles of value and governance without which a democratic society cannot function and which are the basis for building the rule of law. The draft does not attempt to define public policy - as a criterion limiting the autonomy of the will – in any detail, since this is not possible in a legal norm, just as it is not possible to define good morals in a legal norm. As a rough guide, public order permeates the whole of the law and includes the rules on which the legal foundations of the social order of the local society rest."[65] The Supreme Court understands this term to mean specifically, for example, the interest in the stability of the state or the interest in combating crime. The protection of public order is not left to individuals but is instead an expression of the will of the legislator.[66] A manifest violation of public order is its unambiguity, unmistakability or obviousness of the disturbance of public order by the legal act in question. If that is the case with the legal act under consideration, absolute nullity applies as a legal consequence.[67] On the contrary, relative nullity only arises if the person whose interest is protected raises an objection to the nullity. Until such objection is raised, the legal act is valid. Conversely, if the objection is raised in time, the legal transaction is void *ab initio*.[68]

Undoubtedly, we can also include legal rules in the field of combating corrupt practices as part of public policy. Public policy serves as a check on the observance of values that are fundamental to the state and whose violation cannot be tolerated. The act of a crime which is, moreover, expressly prohibited at international level, thus disturbs public policy.

4.2 Manifest Breach of Good Manners

Absolute nullity also affects legal conduct that manifestly violates good morals. As in the case of public policy, it is a vague concept that has no definition in the legal order even though legislation often works with it.

65 Resolution of the Supreme Court of the Czech Republic of 16 August 2018, Case No. 21 Cdo 1012/2016.

66 TÉGL, P. and F. MELZER. Glosa: K rozhodnutí velkého senátu NS ohledně předpokladu "zjevnosti" porušení dobrých mravů a veřejného pořádku ve smyslu § 588 o. z. *Bulletin advokacie*, 2020, no. 9, p. 63.

67 Judgment of the Grand Chamber of the Civil and Commercial Chamber of the Supreme Court of the Czech Republic of 10 June 2020, Case No. 31 ICdo 36/2020.

68 ZUKLÍNOVÁ, M. Neplatnost na ochranu zájmu určité osoby (tzv. relativní neplatnost). In: DAVID, O., L. DEVEROVÁ et al. *Občanský zákoník: Komentář, Svazek I (§ 1–654)*. Available at: https://www.aspi.cz/products/lawText/13/11656/1/2?rem=586 [cit. 25. 5. 2021].

The legislator has thus left the content of this concept to judicial practice. From the case law[69] it is possible to deduce the basic grasp of good morals as a value that has its origin in normative orders other than law, especially moral, social and cultural norms of a democratic society. This defines the content of behaviors that are generally accepted by society and considered decent and honest.[70] Legal conduct that violates these values cannot be afforded legal protection. The essence of good morals is that they change over time so that they can always fulfil their purpose, and therefore the time and place of the legal conduct must also be taken into account when assessing whether there has been a manifest breach of them.[71] In addition, the law places emphasis on a clear breach of good morals (similar to the requirement of a clear breach of public order). The same conclusion as to what is to be understood by 'manifest' can also be applied in this case. The breach must be clear, unmistakable and obvious.[72]

Care should be taken with "special" categories of good manners, such as good manners of competition. Breach of the morality of competition is one of the features of the general clause. As *Bejček* points out, the good manners of competition cannot be understood as a subset of good manners in general, i.e., within the meaning of Section 1 para. 2 or Section 588 of the Czech Civil Code. On the contrary, it is a category of good morals which is linked to the principles of fair economic and commercial dealings.[73] Not all conduct which will violate the good manners of competition will also violate good manners as a civil law institute.[74]

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69 See, for example, Resolution of the Constitutional Court of Czech Republic of 16 February 2006, Case No. II. ÚS 649/05 or Constitutional Award of 5 June 2012, Case No. IV. ÚS 3653/11.

70 Judgment of the Supreme Court of the Czech Republic of 10 April 2001, Case No. 29 Cdo 1583/2000.

71 Resolution of the Constitutional Court of the Czech Republic of 26 February 1998, Case No. II. ÚS 249/97. Furthermore, see BEJČEK, J. et al. *Obchodní právo. Obecná část. Soutěžní právo.* Praha: C. H. Beck, 2014, p. 219.

72 Judgment of the Grand Chamber of the Civil and Commercial Chamber of the Supreme Court of the Czech Republic of 10 June 2020, Case No. 31 ICdo 36/2020.

73 Judgment of the Supreme Court of the Czech Republic of 10 January 2011, Case No. 23 Cdo 5184/2009.

74 BEJČEK, J. et al. *Obchodní právo. Obecná část. Soutěžní právo.* Praha: C. H. Beck, 2014, p. 217; BĚLOHLÁVEK, A. Neplatnost právního úkonu při porušení dobrých mravů. *Právní rádce*. 2006, no. 1, pp. 21–25.

The universal and general corrective of good morals, however, is secondary in determining the validity of legal conduct. Only if the legal act does not contravene the law can it be assessed from the point of view of breach of good morals. An act may also be invalid on the ground that it violates good morals but does not contravene the law.[75]

4.3 Error Caused by a Third Party That Lead to a Conclusion of the Agreement

Different approach regarding the legal consequences, especially the validity of the agreement procured by corruption, applies under Czech Civil Code in relation to an error that was intentionally caused by other contractual party under Section 583 or Section 584 of the Czech Civil Code or by a third party under Section 585 of the Czech Civil Code.

Generally, an error is based on misconception of a certain fact concerning legal conduct. However, the fact that one of the parties is mistaken cannot in itself be a reason to question the validity of such legal transaction, as this would undermine legal certainty in civil and commercial law. An error renders a legal transaction void only where it would be unreasonable or unfair to insist that the legal transaction be binding on the party who acted in error.[76]

In case the error is caused by other contractual party in a balanced bilateral legal relationship, the arbitral tribunal must consider whether the error was material or immaterial. The material error is an error as to any fact which is decisive for the performance of a legal act.[77] The party that was misled by the other contractual party would take a different decision regarding the conclusion legal act based on the knowledge of the true state of affairs. A material error renders a legal transaction null and void. However, in the case of error, only the interest of the party misled by the other party is protected by the nullity. Therefore, in accordance with Section 586 of the Czech Civil

75 Judgment of the Supreme Court of the Czech Republic of 3 June 2009, Case No. 28 Cdo 3514/2008; As well as VALDHANS, J. Consequences of Corrupt Practices in Business Transactions (Including International) in Terms of Czech Law. In: BONELL, M. J. and O. MEYER (eds.). *The Impact of Corruption on International Commercial Contracts*. Swizerland: Springer International Publishing AG, 2015, p. 113.

76 HANDLAR, J. § 583. In: LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část (§ 1–654). Komentář*. Praha: C. H. Beck, 2014, pp. 2101–2111.

77 Ibid.

Code, it will be a relative nullity which must be duly and timely invoked before the decision-making body.

On the other hand, in case the error is caused by a third party which is not a party to a relationship that was concluded as a consequence of the error, this relationship is valid. Such action may give rise to liability consequences in the relationship between the third party and the person who has been misled but the validity of the relationship concluded in such error is not affected.[78] However, the law provides an exception. In case the other party with whom the misled party has concluded an agreement was involved in the act of the third person or knew or at least must have known thereof, such person is also considered the originator of the error. Consequently, if the error is material then the legal transaction is invalid under Section 586 of the Czech Civil Code and the misled party has a right to invoke the invalidity of the agreement.

In accordance with Section 579 para. 2 of the Czech Civil Code a party whose conduct has rendered a contract concluded as a result of misleading the other party invalid shall be liable to compensate the other party for the damage suffered by the other party if the other party was unaware of the nullity. The purpose of this regulation is to ensure that only the party who did not participate in causing the nullity, because he did not know about it, has the right to a compensation. If a party knows of such defect in a legal act which causes it to be invalid and nevertheless performs the legal act, it is appropriate that he should also bear the consequences of that act.[79]

5 An Assessment of the Impact of Corruption on the Contracts Tainted by This Action

In Chapter 1, we outlined a situation that is quite common[80] in the context of dispute resolution in international arbitration. The difference was made between the contracts providing for corruption and contracts procured

78 HANDLAR, J. § 585. In: LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část (§ 1–654). Komentář.* Praha: C. H. Beck, 2014, pp. 2116–2119.

79 Ibid., pp. 2071–2077.

80 ARMESTO, F. The Effects of a Positive Finding of Corruption. In: BAIZEAU, D. and R. KREINDLER (eds.). *Dossier of the ICC Institute of World Business Law: Addressing Issues of Corruption In Commercial and Investment Arbitration.* Paris: ICC Publishing s.a., 2015, p. 2.

by corruption. Both situations are different and so are the legal consequences that the arbitral tribunal may draw under Czech law.

How can an arbitrator become aware of corrupt behaviour? In the context of disputes arising out of an agent's contract or the service contract, the arbitral tribunal becomes aware of the act of bribe either based on a claim of one of the parties – usually as form of procedural defense, based on a witness statement who witnessed such illegal behaviour, or based on the final decision of a criminal court that the agent (or the advisor) has committed corruption based on the agent's contract. Outside the scope of this paper is gaining knowledge about corruption completely outside of arbitration proceedings.

What legal consequences can the arbitral tribunal draw for the concluded contracts tainted by corruption? In this chapter, we will apply the above conclusions that render legal actions invalid.

5.1 Contracts Providing for Corruption

These are usually the intermediary contracts, the purpose of which is to bribe a third party, allowing the main contract to be concluded. The content of this contract are the usual rights and obligations consisting in the provision of services. However, the purpose of these contracts is to provide an advantage in a form of bribe to a third party, i.e., to commit a criminal offence. These contracts are contrary to the law by their purpose. Moreover, it is conduct which is manifestly disruptive of good morals as well.

The act of bribery can be assessed as a civil offence that fulfils the facts of the general clause of unfair competition as well as the special facts of bribery under the Czech Civil Code or in accordance with the Czech Criminal Code a criminal offence.

Both parties to the contracts pursue a prohibited purpose, namely the provision of a bribe. In such case, Section 588 of the Czech Civil Code would be applicable. The legal transaction, in our case, the agency contract, will be absolutely null and void. In accordance with the principle *nemo turpitudinem suam allegare potest* expressed in Section 579 of the Czech

Civil Code, the person who has caused the nullity cannot claim an advantage from it. The contract will therefore be absolutely void and neither party will be entitled to performance or damages.

5.2 Contracts Procured by Corruption

A somewhat more complex assessment is the impact of corruption on a contract that has been entered into as a result of the act of corruption. In no way does this contract conceal illegal activities. The contract itself is not contrary to law nor good morals in its content or purpose. The question is whether the unlawful conduct of one of the parties which led to the conclusion of the main contract may have an impact on the validity of this contract.

The arbitral tribunal must consider whether Company B knew of the bribe that was provided between the agent and the advisor when it entered into the service contract. If Company B was unaware of the bribe and made its decision to enter into the contract with Company A on the basis of an assessment of whether the required conditions had been met by it, it was misled. That error can be regarded as a material error since it resulted in the selection of a particular service provider who would probably not otherwise have been selected. The originator of the error in this case is Company A which indirectly, through an agent, paid a bribe to the advisor of Company B. Accordingly, the contract is valid. Company B has the right to challenge the invalidity on the ground of material error before the arbitral tribunal. If it does so in due and timely fashion, the contract will be void *ab initio*. In addition, Company B shall be entitled to compensation for any damages incurred in this connection.

6 Conclusion

There are two basic types of contracts that may be concluded and lately disputed in arbitral proceedings – contracts providing for corruption and contracts procured by corruption. The arbitral tribunal may decide only disputes brought by the contractual parties. The tribunal must not only assess its jurisdiction or admissibility of claims but it must in case it becomes aware

of illicit behavior draw legal consequences. Since we are not in the sphere of public law, the arbitral tribunal may draw only civil law consequences under applicable law.

Contracts providing for corruption are considered absolutely invalid therefore all claims arising out of it are dismissed. The real intent of the parties is to bribe in order to achieve an advantage and no protection can be afforded to conduct which merely masks a genuine, unlawful intention, therefore neither party shall be granted with any damages. Since the purpose of such legal act contradicts law and definitely violates the public policy, it must be declared invalid. The outcome of the arbitration in which one of the parties demands performance by the other party based on the contract in question or compensation for damages, will probably by the dismissal of such claims.

On the other hand, the assessment of contracts procured by corruption seems more complex. The contract itself does not cover any illicit behavior. The content and the purpose of the contract is therefore legal and the contract is valid. However, the commission of corruption that preceded the conclusion of such contract may have a great legal impact on its validity. It is necessary to consider whether one of the parties was misled about a matter which led to the contract being concluded. If it is a material error, the contract will be invalid. However, the invalidity must be contested by a party, that was not aware of such behavior. Otherwise, the contract will be valid and the parties will have to perform their obligations. Moreover, the party that caused the invalidity of the contract will not have a right to claim any damages, but on the other hand, it will be liable to compensate the other party for the damage suffered. The purpose of this rule is to ensure that only the party who did not participate in causing the nullity, has the right to a compensation.

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The Crime of Bending the Law From the Point of View of the Arbitrator of the Court of Arbitration and Application Practice

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Abstract

The article deals with the crime of bending the law of arbitrators of the Court of Arbitration in terms of particular features of the subject matter of this newly created crime in the Slovak legislation. The subjective nature of this crime raises the question of a possible collective offender, i.e., the Court of Arbitration consisting of various arbitrators whose conduct results in the collective award. It is also noteworthy to mention the objective side of this subject matter in case of arbitrators lacking law background (even if they are experts in the given field). The aim of this paper is to analyze what conduct of the arbitrator can be subject to criminal punishment or what conduct will demonstrate the elements of arbitrariness from the part of the arbitrator or the Court of Arbitration and what consequences such conduct will have for the award of the Court of Arbitration itself.

Keywords

Crime; Criminal Liability; Arbitrator; Criminal Code; Bending the Law.

1 Introduction

On October 21, 2020, the National Council of the Slovak Republic adopted the proposal of the Act No. 312/2020 Coll., thus amending the Act No. 300/2005 Coll., Criminal Code, and the Act No. 301/2005 Coll., Criminal Procedure Code. Upon amending the Criminal Code, with the effect on October 1, 2021, and in compliance with § 326a of the Criminal Code, the new **crime of bending the law** was legally introduced.

The crime of bending the law has long been contradictory and divided both wide, as well as expert public into its promoters and advocates against its opponents and objectors. However, the question is what consequences the new crime brings to arbitrators and courts of arbitration and what application problems may arise with regard to its establishment into the Slovak legislation? To answer these questions, it is necessary to analyze the facts of the crime of bending the law prescribed by § 326a of the Act No. 300/2005 Coll., Criminal Code ("Slovak Criminal Code") with the first paragraph setting forth that: *"Who in the position of a judge, an associate judge or an arbitrator of the Court of Arbitration intentionally modifies the law in course of decision-making and subsequently harms or gives an advantage to a person, shall be sentenced to one to five years in prison."* [1]

2 Conditions for Criminal Liability of Arbitrators

2.1 The Subject and the Subjective Side of the Crime of Bending the Law

The subject of the crime of bending the law can be a judge, an associate judge, or an arbitrator of the Court of Arbitration. These are all regarded as special subjects. As stated in the explanatory report, the scope of subjects is predefined by the nature of the decision-making of judges as well as by absenting research into court judgments by another executive element. As for arbitrators in the arbitration proceedings, the above-named attributes may also entail the private scope of courts of arbitration.

Analyzing the crime of bending the law from the point of view of the subject raises an interesting question of a possible collective offender in senate judgments or arbitrators of courts of arbitration. Awards of courts of arbitration seem to be much more interesting from the subjective point of view. The person of an arbitrator, who is not required to have any law background, commits the crime of bending the law only when being aware of abusing the legal norm for the purpose of providing an illegitimate advantage or harm to the recipient of the award.

1 § 326a Slovak Criminal Code.

Due to the unique nature of arbitration as well as qualification background imposed on arbitrators, committing the crime of bending the law by the Court of Arbitration is a much more complex topic covering the question of imputability of such judgment to one body (the Court of Arbitration) or alternatively to other subjects (arbitrators) in relation to one proceeding (one judgment) as well as the question of culpability of one body (the Court of Arbitration) or alternatively of other subjects in relation to one proceeding.

The above-named conflict shall be interpreted in accordance with the theoretical background which forms the basis for the Slovak legislation.

The subjective side of the crime of bending the law consists of intentional wrongdoing. This is the main component predefining the criminal liability. The Slovak criminal law applies **the principle of liability for wrongdoing.** This is to say there is no offence or punishment and eventually no criminal liability without wrongdoing. The wrongdoing expresses individual criminal liability because everybody is fundamentally liable only for what they had directly caused. Wrongdoing is an internal **psychological relation of an offender to objective elements of the crime**, i.e., to essential facts of the case.[2] At the same time, we should point out that wrongdoing is built on the rational (intellectual), as well as the willful element.[3]

If the Court of Arbitration adopts the award which, in terms of application of relevant statutes on the given facts of the case, upon using standard interpretational techniques and after taking into consideration the conventional court practice, will demonstrate the arbitrariness, the subjective side attribute against the Court of Arbitration will not be satisfied. The Court of Arbitration as the collective body pursuant to the Act No. 244/2002 Coll., on Arbitration ("Slovak Act on Arbitration") and designed for dispute settlement, shall not possess any wilful or rational element. It is therefore excluded for the Court of Arbitration to create a psychological relation to objective elements of the crime of bending the law and thus meeting the subjective requirement.

2 IVOR, J. et al. *Trestné právo hmotné. Všeobecná časť*. Bratislava: IURA EDITION, 2006, p. 135.
3 ŠÁMAL, P. § 15. In: ŠÁMAL, P. et al. *Trestní zákoník I. § 1–139. Komentář*. Praha: C. H. Beck, 2009, p. 165.

The above-mentioned assumption is also underlined by the principle of individual criminal liability of natural persons governed by § 19 of the Slovak Criminal Code.

In light of the above-mentioned, the existence of excessive, wilful award of the Court of Arbitration requires particular observation of the subjective side of the crime of bending the law especially in relation to all members of the Court of Arbitration. The theory of collective liability for the crime of bending the law shall subsequently mean the presumption of innocence, which is absolutely inadmissible in the rule of law. Therefore, it is crucial to individually assess fulfillment of all elements of facts of the case against arbitrator of the Court of Arbitration.

2.2 The Objective Side of the Crime of Bending the Law and the Possibility of Breach the Right to Defence

As far as the objective side of the facts of the case is concerned, the statutes require wilful application of the law resulting in harm or advantage conferred on another person. *"The German practice of courts emphasises that the absurd interpretation of the law itself is not sufficient but the intentional (wilful) abuse of the law (bending the law) must also occur, i.e. obvious improper application of the law that is likely to give an illegitimate advantage or a disadvantage to a party to the proceeding. A public official shall act in an improper manner, intentionally and wilfully, which means he must admit the possibility that his particular legal opinion is non-consistent (for instance, it does not correspond to previous judgments in the given matter and such change in his opinion has not been properly justified) while being aware of a significant impact of bending the law. Improper and unjust interpretation of the statutes may indicate intentional wrongdoing, which is not necessarily the rule (serious and improper breach of interpretational rules may also be caused by negligence due to a lack of education or experience of a public official)."* [4]

The explanatory report in relation to the objective side specifies that for the criminal liability to be enforced, the arbitrariness in decision-making may in principle be stated by the court having the competence to decide

4 ŠAMKO, P. Trestný čin prekrúcania (ohýbania) práva. *Právne listy* [online]. 26. 4. 2020 [cit. 21. 5. 2021]. Available at: http://www.pravnelisty.sk/clanky/a833-trestny-cin-prekrucania-ohybania-prava

in the given matter (the appellate court, the extraordinary appellate court, the judicial review court, the Constitutional Court of the Slovak Republic, the European Court of Human Rights ("ECtHR"), the Court of Justice of the European Union, etc.) with the exceptions being only those judgments that can be challenged or disputed by remedies and simultaneously showing the above named element of arbitrariness in decision-making.[5]

The explanatory report is the tool of authentic interpretation in terms of elements of the criminal subject matter. However, the authentic interpretation may lead us to an ambiguous situation minimally in relation to the objective side. As the explanatory report shall observe the arbitrariness element in judgments of higher-instance courts, the question still remains whether the civil jurisdiction, administrative jurisdiction, or the Constitutional Court of the Slovak Republic will "decide" on the objective side of the facts of the crime in relation to bending the law, whereas the conclusions of these courts will be binding for law enforcement authorities and criminal courts and in relation to the objective side. The investigation and criminal evidence will only pertain to consequences (harm or unjust advantage). As far as arbitration awards are concerned, in accordance with the unifying statement of the Constitutional Court of the Slovak Republic[6], the Constitutional Court is not eligible to adjudicate on complaints concerning procedures or awards of courts of arbitration, i.e., arbitration awards are not subject to judicial review or may not be disputed (note: the only exception is cancellation of the arbitration award by the court, but the Slovak Act on Arbitration does not allow such award to be disputed due to arbitrariness). Eventually, the award may be reviewed by another Court of Arbitration, but it is highly probable that any conclusions and outcomes expressed by the Court of Arbitration shall not be binding for law enforcement authorities and criminal courts due to the fact that courts of arbitration are not part of the public authority.

If the above-mentioned practice should apply, a number of rights would be breached in relation to subjects of this crime, notably the right

5 Explanatory Report. *Národná rada Slovenskej republiky* [online]. [cit. 23. 5. 2021]. Available at: https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=482301

6 Statement of the Constitutional Court of the Slovak Republic of 18 November 2015, Case PLz. ÚS 5/2015, Constitutional complaints against courts of arbitration.

to effective defence. The point is that the facts of the crime shall contain all elements as requested by the Slovak Criminal Code. In this respect all elements are deemed necessary, equal, and obligatory. Unless all elements of the crime are present, the crime is excluded.[7] As far as the objective side of the crime is concerned, this may be defined by offender's conduct and its consequences. According to criminal law, offender's conduct may be described as the expression of offender's will outwards as an intentional activity focusing on a particular goal. This conduct connects his physical (expression) and psychological (will) element while both of these elements are intertwined. Unless one of these elements is present, the conduct cannot fall within the scope of criminal law.[8] All these facts have to be subject to proper investigation.

The statement about arbitrariness would be based on the legal review of the institution of a lower instance without the possibility for the judge or the arbitrator to express themselves on the reasons that might indicate arbitrariness. One exception might be the complaint procedure before the Constitutional Court of the Slovak Republic where the assumed offender breaching the basic right would express himself on the complaint. The question still remains, however, filing evidence for the benefit of the judge/arbitrator that might possibly be perpetrators of the crime. It is unimaginable for the defence to be excluded in its consequences in relation to one element of the facts of the case (the objective side) with the remainder of the facts of the case being the subject of investigation and criminal evidence. Regarding the fact that for sentencing the offender, all elements of the crime facts have to be satisfied without any doubt including facultative elements, criminal evidence and procedural rights have to be present during the overall criminal proceeding. The Slovak Constitution guarantees the right to defence to everybody against whom the criminal procedure has been initiated.[9]

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7 IVOR, J. et al. *Trestné právo hmotné. Všeobecná časť*. Bratislava: IURA EDITION, 2006, p. 99.

8 ČENTÉŠ, J. et al. *Trestný zákon. Veľký komentár*. Bratislava: Eurokódex, 2020, p. 15.

9 Judgment of the Constitutional Court of the Slovak Republic of 28 April 1999, Case II. ÚS 34/1999 – *"Právo na obhajobu do okamihu nadobudnutia právneho postavenia obvineného sa nezaručuje podľa čl. 50 ods. 3. Je implikované v ochrane podľa čl. 47 ods. 2 ústavy."*

The content of the right to defence needs to be understood *"… as creating conditions for proper application of procedural rights of the accused and his defence lawyer and the legal procedure determined by law enforcement authorities for the purpose of application of each right. This right shall be equally guaranteed across all phases of the criminal procedure. The right to defence consists of a number of consequent legal steps that are intertwined all through the criminal procedure. It refers to the opportunity to express oneself on all facts and circumstances charging the accused, the right to present circumstances, to propose and ensure evidence serving for defence, the right to file motions, petitions and remedies. It may also entail participation in hearings, delivery of correspondence, participation in confrontations, reconstructions as well as any other acts exercised before court when motion has been filed by the prosecutor. This sequence of events makes up the legal framework of defence while providing the possibility for factual fulfillment of defence by expressing ourselves on particular acts."*[10] The right to defence by means of the defence attorney shall not only purport to the main court procedure but, to certain limitations, to the preparatory procedure as well.[11] This has already been stated by the ECtHR in their judgment *Berlinski vs. Poland* where they claimed the breach of the right to defence due to ignoring the request for appointing the defence attorney in course of the preparatory procedure and as the matter of fact, the aggrieved party failed to have the defence attorney for a long time.[12]

In our opinion, excluding the objective side of the crime of the bending the law from the criminal procedure is in contravention to principles of the rule of law.

The above-mentioned conflict, in terms of consolidating the objective side of the facts of the crime of bending the law, has both European[13]

10 Resolution of the Supreme Court of the Slovak Republic of 26 October 2011, Case 1 Tdo V 19/2011.

11 SVÁK, J. *Ochrana ľudských práv (z pohľadu judikatúry a doktríny štrasburských orgánov ochrany práva)*. Žilina: Poradca podnikateľa, 2006, p. 488.

12 Judgment of the ECtHR of 20 June 2002, *Berlíński vs. Poland*, Cases 27715/95 and 30209/96.

13 E.g., Charter of Fundamental Rights of the European Union 2012/C 326/02, Directive No. 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, Directive No. 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, Directive No. 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

and international element[14]. At the same time, we should bear in mind that wording of the EU regulations (see the annotation no. 8 in the footer) is explicit in the meaning that within the EU law, all rights are imputable to suspects as well as the accused.

The right to defense is only one from various attributes of the right to fair trial pursuant to Art. 6 of the Convention on protection of human rights and fundamental freedoms. Art. 6 of the Convention states that everyone is entitled in full equality to a fair hearing. It is noteworthy that the guarantee of the fair hearing is of the procedural nature and shall not be interpreted as the guarantee of any material subjective right. Not the fair judgment but the fair trial serving as a basis for the judgment is guaranteed by Art. 6 of the Convention.[15] In addition thereto, the practice of the ECtHR has defined the background for assessing the fair criminal trial as a whole. In the case *Ibrahim et al. vs. the United Kingdom*[16], the ECtHR pointed out that when assessing the overall court procedure for the purpose of evaluating impacts of procedural flaws in the preparatory procedure on the overall fairness of criminal proceedings, the courts should take into consideration various factors whereas the ECtHR also provided their demonstrative calculation including the claimant's possibility to contest the authenticity of evidence and challenge its application.

Contradiction is widely considered a general legal principle of the procedural law, the rule of natural law governing each single court trial. It is its fundamental principle. If absent, we cannot speak about the procedure because the core of the procedure is confronting two parties each of them being given the opportunity to express their minds, raise objections or challenge arguments or evidence submitted by another party while presenting ours.[17] The subjects to criminal proceedings would be deprived of all the contradiction attributes when it comes to the objective side

14 E.g., The Convention for the Protection of Human Rights and Freedoms as amended by protocols no. 3, 5 and 8.

15 REPÍK, B. *Evropská úmluva o lidských právech a trestní právo*. Praha: Nakladatelství ORAC, 2002, p. 135.

16 Judgment of the ECtHR of 13 September 2016, *Ibrahim and others vs. UK*, Cases 50541/08, 50571/08, 50573/08, 40351/09.

17 REPÍK, B. *Evropská úmluva o lidských právech a trestní právo*. Praha: Nakladatelství ORAC, 2002, p. 147.

of the facts of the crime because the issue of willingness would be decided beyond the scope of powers of criminal jurisdiction.

One of the reasons supporting definite refusal of statements about arbitrariness of a higher-instance court is governed by provisions of § 14 of the Criminal Procedure Code in which the letter p) expressly sets forth that the competence of the Specialised Criminal Court shall not concern the crime of bending the law and therefore the competence of the given court shall only relate to proving all facts of this crime.

In light of the aforementioned, we assume that the statement on arbitrariness of a higher-instance court should be regarded as evidence in the criminal proceedings that the suspect/accused/convict may rebut by another evidence.

It may be interesting to observe in what manner the courts will approach the issue of proving the objective side of the facts of the crime of bending the law. *Šamko*, a judge at the District Court in Bratislava, assumes that courts should consider various expert opinions or expert views by lawyers, universities, think tanks, and many others that clarify their own interpretation of the legal norm. Consequently, the conclusions will differ depending on who will submit such evidence, the accused or the policeman. As a matter of conclusion, *Šamko* adds that expert evidence must be rejected due to the fact that it would mainly focus on legal issues, which is contradictory to the Slovak Criminal Code. To a certain extent, in criminal law the rule of thumb is that the court (or the law enforcement authority in a broader context) knows the law (and the amended legislation) and the court trial should prove what the law really refers to and whether it has not been misused by the judge or the arbitrator in their decision-making.[18] This opinion is widely accepted. Even though it is rather difficult to perceive how the criminal court will be able to make a statement on all legal issues, at the end of the day it will be the judge with appropriate legal background, legal practice, and judicial examination who will issue the corresponding judgment. In this case, the assumption of his maximum professionalism and expertise is highly presumed. What is more, he is able to base his conclusions

18 ŠAMKO, P. Trestný čin prekrúcania (ohýbania) práva. *Právne listy* [online]. 26 4. 2020 [cit. 21. 5. 2021]. Available at: http://www.pravnelisty.sk/clanky/a833-trestny-cin-prekrucania-ohybania-prava

on expert opinions on condition these will be properly verified. The investigator, however, takes a completely different position because he is not subject to any legal education requirements even though he is in charge of assessing fulfilment of the objective side of the crime of bending the law in course of preparatory proceedings – the above-mentioned arbitrariness – and in this respect, he will bring charges against the judge/arbitrator or not. Therefore, we would like to point to the judgment in the case *Salduz vs. Turkey* where the ECtHR emphasized the importance of the investigation stage within preparatory proceedings because the evidence obtained in this manner predefines the framework within which the crime shall be examined.[19]

2.3 Sufficient Qualification of Arbitrators and the Crime of Bending the Law

The question of assessing arbitrariness in application of the legal norm on the given facts of the case by arbitrators at courts of arbitration from the aspect of their legal knowledge and legal background seems to be a bit complex. As mentioned above, arbitrators of courts of arbitration are not subject to any legal education or law practice requirements. Even though contracting parties to the arbitration agreement are expected to choose the persons having sufficient qualification, which is a guarantee of a high-quality and sound decision in the matter, this hypothesis cannot be regarded as automatic. When it comes to objective decision-making, we should distinguish arbitrators of permanent courts of arbitration and *ad hoc* arbitrators. Permanent courts of arbitration still represent institutional enforcement of arbitration activities. As prescribed by the law, permanent courts of arbitration are obliged to issue the statute and rule of procedure. Therefore, permanent courts of arbitration are thought to select their arbitrators on the basis of qualifications and professional criteria for the purpose of building a good will and expertise in the given field. Professionalism of *ad hoc* arbitrators is barely supervized. Arbitration proceedings also relate to those subjects of the law who fail to understand arbitration clauses risking that trust in the contracting partner can easily be broken. Therefore, everybody is eligible to enquire to what extent

19 Judgment of the ECtHR of 27 November 2008, *Salduz vs. Turkey*, Case 36391/02.

the arbitrator's award is regarded as unwarranted due to the fact that he is not an expert in the law and its enforcement, is not familiar with legal doctrines and has never used certain interpretational methods. It is still questionable whether it is possible to apply the *iura novit curia* principle to arbitrators' decision-making. *"The iura novit curia principle does not only mean that the court knows the law but is also aware of the effects the law, as applied and enforced by the court, generates in relation to procedural and material position of the person eligible to court protection of his rights."* [20]

When taking into consideration the element of arbitrariness, this principle may be regarded as the starting point, i.e., the judge cannot plead non-guilty due to improper application of the legal norm by stating he did not know because with regard to the *iura novit curia* principle he could and should have known. Nevertheless, it might be a bit more complex to apply this principle to those judges who lack legal background and did not undergo the strict selection procedure and what is more, they do not represent any central authority or judicial body. On the contrary, it is the private law institute by means of which the crime of bending the law is being introduced, as declared by the explanatory report to the Act No. 312/2020 Coll.

Here applies the general irrebuttable presumption of knowledge of everything what has been published in the Collection of Acts pursuant to the provisions of § 15 of the Act No. 400/2015 Coll., on creation of statutes and the Collection of Acts of the Slovak Republic as amended. Still judges have a different position than arbitrators when it comes to presumption of knowledge of law and legislation. Art. 141 of the Slovak Constitution governs execution of justice in the territory of the Slovak Republic and determines two key features – independence and impartiality. Independence of courts and judges refers to professional independence of judges. If the judge is not sufficiently prepared for qualified interpretation and application of the law, the proper independence of the judge is far from being guaranteed.[21] As justice represents one of key aspects of the public authority, which is separated from other aspects, requirements for high-quality,

20 Report of the Constitutional Court of the Slovak Republic of 20 December 2001, Case I. ÚS 59/00.

21 DRGONEC, J. *Ústava Slovenskej republiky. Komentár*. Šamorín: Heuréka, 2012, pp. 1460–1461.

independent and impartial justice are demonstrated in the number of statutes governing the course of justice, qualification requirements for judges, selection procedures of courts, their disciplinary wrongdoings, etc. The fundamental requirements are specified in the Slovak Constitution. However, these attributes are not merely applicable to arbitrators or courts of arbitration. Even though the Slovak Act on Arbitration in the provision of § 6 para. 3 sets forth the requirements for selection of an independent and impartial arbitrator when being chosen by a specific person or court, we must admit that the control mechanism for fulfilment of this principle or the sanction mechanism are absent. Therefore, the requirement for an independent and impartial arbitrator is declared but the application practice is lagging behind. Competence and jurisdiction of courts is derived from the public authority with specific conditions and requirements for their control and fulfillment being imposed on the execution of justice. On the other hand, competence of the Court of Arbitration is derived from the will of contracting parties subject to arbitration agreement to settle their dispute before the Court of Arbitration.

Therefore, we must admit that in case of arbitrators, the arbitrariness shall be assessed through the prism of their former education and practice, which means the application of the *iura novit curia* principle will be rather restricted.

Arbitrators acting in consumer arbitration proceedings at permanent courts of arbitration take a different position. The specific enactment requires qualification in the field of law, legal practice as well as successful completion of expert examinations.[22] These conditions are similar to those that are requested for exercise of the function of the judge and therefore the application of the *iura novit curia* principle against these arbitrators is reasonable.

Therefore, it will be interesting to observe the future acting of the judge accused of perpetrating the crime of bending the law as the lawmaker did not think of this situation when introducing the new form of the crime. The situation regarding judges is clear – the provisions of § 22 of the Act No. 385/2000 Coll., on judges and associate judges as amended, provide the possibility of temporary suspension of exercise of the function

22 Provisions of § 4 along with § 5 of the Act No. 335/2014 Coll., on consumer arbitration proceedings as amended.

of the judge who is being prosecuted for the premeditated crime. The similar enactment is completely absent in relation to arbitrators, which is dangerous in terms of application of the rule of law. The latest judicial reforms introduced since 2020 have enabled cancellation of the statutes requesting the express consent of the Slovak Constitutional Court to the custody of the judge.[23] Unintentionally, the judges and arbitrators have been placed in the similar position as their custody will be decided by the corresponding court, i.e., the district court or the Specialised Criminal Court.

2.4 The Crime of Bending the Law and Other Legal Professions

In relation to the objective side of the crime of bending the law – the arbitrariness – which is known for the illogical and text and purpose-like contradictory (non-)application or interpretation of the statute, it would be wise to consider whether the lawmaker would not extend the special subject of this crime to other legal professions that are conferred to a greater or lesser extent the competence to decide about rights or obligations. The main reasoning why other subjects of the public authority deciding about rights and obligations are exempt from the scope of this crime, according to the explanatory report, is that exercise of powers of the public or state authority is subject to judicial review.

The Programme Declaration of the Government of the Slovak Republic (2020) states that the Government of the Slovak Republic will seriously consider introducing the crime of bending the law as amended by the German legislation. The similar enactment of the crime of bending the law – Rechtsbeugung – firstly appeared in the German legislation in the 19th century when it only fulfilled the complementary role and its practical application was rather sporadical. The crime of Rechtsbeugung was applied after the fall of the Nazi regime when the German system of criminal jurisdiction had to face former judicial injustice perpetrated by Nazi judges.[24]

23 Poslanci definitívne schválili reformné zmeny v justícii. *Ministerstvo spravodlivosti Slovenskej republiky* [online]. 9. 12. 2020 [cit. 23. 5. 2021]. Available at: https://www.justice.gov.sk/Stranky/aktualitadetail.aspx?announcementID=3060

24 QUASTEN, D. *Die Judikatur des Bundesgerichtshofs zur Rechtsbeugung im NS-Staat und in der DDR*. Berlin: Duncker & Humblot, 2003, p. 13.

The crime of Rechtsbeugung is governed by the provision of § 339 Strafgesetzbuch ("German Criminal Code") providing that: *"Ein Richter, ein anderer Amtsträger oder ein Schiedsrichter, welcher sich bei der Leitung oder Entscheidung einer Rechtssache zugunsten oder zum Nachteil einer Partei einer Beugung des Rechts schuldig macht, wird mit Freiheitsstrafe von einem Jahr bis zu fünf Jahren bestraft."*[25]

As amended by § 339 of the German Criminal Code, this crime may be perpetrated by the judge or any other public official or the arbitrator.[26] The public official refers to a policeman, a notary public, a debt enforcement agent, a mayor, a clerk working in the Land Registry, etc.[27] For instance, prosecutors were found guilty and sentenced under this enactment.[28] When looking for the subject of the crime of bending the law, it is obvious that the Slovak legislation did not follow the path of the German Criminal Code as the special subject of this crime is a bit limited in contrast to the German enactment. The German Criminal Code provides protection of rights to fair judgment in the manner that it affected almost all areas of public authority. The Slovak enactment had been limited exclusively to judicial and arbitrary judgments and neglected judgments in administrative matters. In this respect, the protection of the right to fair judgment is regarded as discriminatory as it does not apply a higher principle to the consequences but served as the background for legislative enactment of this crime.

2.5 Application Problems Which May Arise Regarding to the New Crime of Bending the Law

Introducing the crime of bending the law is crucial to the Slovak legislation. However, as far as its legal enactment and functionality of this institute in practice are concerned, it is possible to identify various areas which are not covered by this enactment, and which are likely to raise issues

25 § 339 German Criminal Code.

26 ŠAMKO, P. Trestný čin prekrúcania (ohýbania) práva. *Právne listy* [online]. 26. 4. 2020 [cit. 21. 5. 2021]. Available at: http://www.pravnelisty.sk/clanky/a833-trestny-cin-prekrucania-ohybania-prava

27 MALIŠKA, M. et al. Vybrané aspekty pripravovanej novely Ústavy Slovenskej republiky v komparatívnej perspektíve. *Národná rada Slovenskej republiky* [online]. [cit. 25. 5. 2021]. Available at: https://www.nrsr.sk/web/Dynamic/Download.aspx?DocID=486819

28 HELLENBART, V. Ohýbanie práva v nemeckej histórii a súdnej praxi. *Denník N* [online]. 4. 5. 2021 [cit. 21. 5. 2021]. Available at: https://dennikn.sk/blog/2371582/ohybanie-prava-v-nemeckej-historii-a-sudnej-praxi/

in practice. As for arbitrators, the enactment does not solve the situation regarding the award of the arbitrator (the Court of Arbitration) who will be lawfully charged with and sentenced for the crime of bending the law. In this aspect, the issue of the award of the arbitrator who was charged with the crime of bending the law is legally solved by the institute of the renewal proceedings application where charging the judge with this crime is governed by the provisions of § 397 letter c) of the Civil Dispute Code[29]. The Slovak Act on Arbitration governs conditions for revoking the arbitration award by means of the motion filed with the general court. This judicial review has certain limitations in terms of legitimate reasons for filing the motion. These are contained in the provisions of § 40 para. 1 of the Slovak Act on Arbitration where we may assume that the similar reason is mentioned in case of proceedings renewal governed by the Civil Dispute Code in relation to crime perpetration yet is not contained within the Slovak Act on Arbitration. When taking into consideration the unifying statement of the Constitutional Court of the Slovak Republic setting forth that the competence of the Constitutional Court of the Slovak Republic is not provided in the matter of complaints against procedures and awards of the Court of Arbitration, then the Slovak legislation really lacks the possibility of cancellation of the legitimate arbitration award of the arbitrator having been sentenced for the crime of bending the law.

The lawmaker should make certain adjustments and take into consideration the fact that the application practice brings situations where the subject of the law will possess effective and enforceable award of the arbitrator (the Court of Arbitration) who will subsequently be charged with the crime of bending the law in the given subject matter. This status is inadmissible.

The legal enactment also lacks the approach against the arbitrator who is subject to criminal proceedings. This legal loophole needs to be filled by similar enactment as the one that is applied to judges in case of criminal prosecution. In our opinion, it would be suitable to modify at least minimum requirements for exercise of the function of the arbitrator in terms of his professional qualification. The fact that arbitrators are not subject to any educational requirements has its basis in the existing enactment where

29 Act No. 160/2015 Coll., on Civil Procedure (Slovak).

arbitrators to consumer proceedings are requested to have legal education, practice, or exams, which we highly appreciate. Certain requirements for education may also be derived from institutionalism of permanent courts of arbitration of corporate bodies. Yet *ad hoc* arbitrators are not subject to any specific requirements. After introducing criminal liability of arbitrators, it has been highly recommended to modify their professional requirements to ensure at least similar conditions for the exercise of arbitration activities and therefore, improve the overall process of arbitration decision-making so as the institute of bending the law would be implemented to the minimum extent possible.

3 Conclusion

As mentioned above, the crime of bending the law has its proper place within the Slovak legal system. It is the newly implemented institute in the criminal law which will need some time to be properly implemented into the legal practice. It is not possible to foresee what position the decision-making practice and practice of courts of the highest judicial authorities will adopt towards the interpretation of particular traits of the facts of this crime. It is obvious, however, that the key aspect will be the interpretation regarding its objective side, more precisely, determining who will assess the objective side in the context of the aforementioned explanatory report and reference to the supervisory authority.

The crime of bending laws refers to protection of the constitutional right to judgment about rights and obligations that will be fair and will not result from intentional application and interpretation of legal norms.[30] As amended by the legality as set forth in § 2 para. 5 of the Criminal Procedure Code, the prosecutor shall prosecute those crimes he was notified of. On the basis of the officiality principle[31], criminal authorities and courts are obliged to act from their official obligation. Therefore, the investigation shall relate to all judgments where arbitrariness occurs as the objective element of the specific crime. Waiting for the higher-instance authority to determine

30 Explanatory Report to the Act No. 312/2020 Coll., on enforcement of the judgment on seizure of property and trusteeship of the seized property as amended.

31 Provisions of § 2 subpar. 6 of the Criminal Procedure Code.

the arbitrariness in the statement of the revoking decision might possibly be explained as not providing the right to fair judgment. In our law practice, we encountered only few judgments where the courts stated the arbitrariness despite the fact that some judgments completely rejected elementary legal bases on which the constitutional system and the legal doctrine supported by judicature are built. Even though the majority of these judgments are revoked, the statement about arbitrariness is absent, which might raise the question regarding the possibility of prosecution of judges/associate judges/arbitrators issuing these judgments.

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The Arbitration Convention as One of the Measures to Eliminate Double Taxation in the European Union and in the Slovak Republic

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Abstract

In the world of taxes, double taxation or double non-taxation represents one of the main problems within international taxation. Fair taxation, which manifests itself as a taxation of incomes in countries where the value is created in the light of legal tax optimization, is an important issue for a lot of international organisations and a relevant topic of innumerable initiatives and statements. In that regard, tax disputes between two or more states arise whose subject is the profit allocation. Such disputes are the main object of the so-called Arbitration Convention, which stipulates international challenge of the present and future of the profit allocation. Secondary subject of this article is to point out other relevant international and national arbitration measures within the European Union and Slovak Republic.

Keywords

Arbitration Convention; Double Tax Treaty; Double Taxation; Mutual Agreement Procedure; Contracting State.

1 Introduction

Fair taxation is an important isser for a lot of international organisations and a relevant topic of innumerable initiatives and statements. One of these are interstate agreements, usually in the form of legally binging documents, the subject of which is the solution of double taxation or double non-taxation problems and the coordination of states in these cases – tax arbitrations. Nowadays, tax disputes can be solved by more than one legal procedure. In this article, we will analyze legal opportunities for tax disputes

arbitration between more than one state within the world connected with the fair redistribution of tax profits of individual states.

The risk of double taxation[1] may arise in respect of many types of incomes – real estates, dividends, interests, licence fees – that are paid from one country to another. The reason behind this is not so difficult to grasp – every single state needs to fund its expenses and tax profits are the best way to do so.[2] Such a tax profit distribution is also connected with the so-called transfer pricing rules. The basis of transfer pricing rules is the requirement to adhere to the arm's length principle in transactions between related parties. According to that, tax disputes arise between two or more states for the tax income of international enterprises which cooperate in more than one county (usually in the form of mother – subsidiary – sister company, etc.). The substance of their existence is expressed at national level in Section 17 para. 5 of the Slovak Act on Income Tax, according to which also the difference by which prices or conditions in controlled transactions (i.e., transactions between the taxpayer and its related parties) differ from prices or conditions that would be applied between unrelated parties in comparable transactions must be included in the taxpayer's tax base. This principle reflects a standard wording of most Double Tax Treaties ("DTT") based on OECD[3] and UN Model Tax Treaties, namely articles corresponding to Art. 9 of both Model Tax Treaties. The importance of the above rules and their thorough application by the respective tax administrations is underlined by the existing conclusions in academic literature which states that the profit shifting in the OECD countries is significant and that the extent of such profit shifting is such that *"on average, a unilateral increase in the corporate tax*

1 According to the double taxation, *Hejl* states, that *"one of the exceptions is the tax paid abroad, which can be set off against the total tax liability according to the rules in law on income taxes or in the relevant double taxation agreement. At the very least, however, this means a non-refundable tax paid abroad, again, regardless of the individual situation of the taxpayer. The above procedure for taxation of profit shares and interest is also common in other countries. Double taxation treaties may set a maximum the amount of the withholding tax rate in the source country which he is required to pay resident of the other state."* See more at: HEJL, F. Zdanění individuálního investora. In: JANOVEC, M. et al. (eds.). *COFOLA 2020.* Brno: Masaryk University, 2020, p. 1017.

2 KŘÍŽOVÁ, T. Způsob propagace zavádění nových daní na příkladu digitální daně. In: JANOVEC, M. et al. (eds.). *COFOLA 2020.* Brno: Masaryk University, 2020, p. 267.

3 The Organisation for Economic Co-operation and Development ("OECD").

rate does not lead to an increase in corporate tax revenues owing to a more than offsetting decline in reported profits." [4]

In the international taxation, firstly, when deciding the tax profits distribution between states, we have to consult a DTT. In our case, we have chosen the Agreement between the Slovak Republic and the Czech Republic for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital ("DTT between Slovak Republic and Czech Republic"). DTTs are concluded with the aim of avoiding double taxation of income and capital without creating opportunities for non-taxation[5] or reduction of taxation through tax evasion or avoidance. In addition, EU has developed its own set of rules that apply to such a dispute resolution, which resulted in creating of another set of laws. In that regard, if we talk about tax dispute resolution, we distinguish i) international level – represented by DTTs, ii) EU level – represented by its own regulation, and iii) national level.

The legal basis for arbitration or dispute resolution is performed through the so-called "mutual agreement procedure" ("MAP"). It is set by DTTs and, on the EU level, by the EU Arbitration Convention[6]. Within the legal framework of the Slovak Republic, Guideline MF020525/2017-724 stipulates the steps to be taken within the mutual agreement procedure ("Slovak Republic guidelines"). Slovak Republic guidelines take part in negotiations on the avoidance of double taxation with several other countries. The particular steps to be taken during MAP also depend on national regulations, which are rather brief and require more detailed guidance. This

4 BARTELSMAN, E. J. and R. BEETSMA. Why pay more? Corporate tax avoidance through transfer pricing in OECD countries. *Journal of Public Economics,* 2003, Vol. 87, no. 9–10, pp. 2225–2252; CHOMA, A., M. KAČALJAK and P. RAKOVSKÝ. Transfer pricing safe harbours in the Slovak Republic. *Financial Law Review*, 2020, no. 17 (1), p. 71.

5 Double non-taxation causes two negative consequences: (1) it deprives Member States of considerable revenue and (2) causes unfair competition between undertakings in the single internal market but also between Member States. See more at BABČÁK, V. Zamyslenie sa nad problémom dvojitého nezdanenia. In: TOMÁŠKOVÁ, E., D. CZUDEK and J. VALDHANS (eds.). *DNY PRÁVA 2018. Část V. – Interakce práva a ekonomie*. Brno: Masaryk University, 2019, p. 9.

6 Convention No. 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises. Joint Declarations ("Arbitration Convention").

is the purpose of the above-mentioned measures of dispute resolutions which focus on several fields, e.g.:

- legal basis for MAP;
- subject matter and purpose of MAP;
- preconditions for initiation of MAP;
- application of the taxpayer for MAP initiation and its essentials;
- the competent authority and communication with other bodies;
- specific steps, deadlines, creation of an advisory commission.

The condition for initiating MAP is not necessarily just the double taxation situation, but situations where there is a risk of double taxation may also be considered. Moreover, it also covers situations when there is an incorrect application of the DTT or the Arbitration Convention in cases of the application of state aid rules or other incentives to business support. However, the aim of MAP is not to facilitate the situations that lead to double taxation and to tax avoidance practices.

In the following text, we will discuss the above-mentioned procedures as the measures to initiate tax arbitration between two or more countries.

2 Double Tax Treaty With the Czech Republic

All DTTs concluded by the Slovak Republic contain provisions on the dispute resolution by agreement, i.e., they implement MAP. These provisions are usually based on Art. 25 of the OECD Model Tax Convention on Income and on Capital (known as OECD Model Convention).[7] At the same time, according to Section 1 para. 2 Act No. 595/2003 Coll., on Income Tax, as amended, *"international treaties take precedence over the law"*.[8]

DTTs are concluded with the aim of avoiding double taxation of income and capital without creating opportunities for non-taxation or reduction

7 Model Tax Convention on Income and on Capital 2017 (Full Version). *OECD* [online]. 25. 4. 2019 [cit. 16. 5. 2021]. Available at: https://www.oecd.org/ctp/model-tax-convention-on-income-and-on-capital-full-version-9a5b369e-en.htm

8 List of DTT that has The Slovak Republic, closed and valid, is located on the website of the Ministry of Finance of the Slovak Republic. Double Tax Treaties. *Ministry of Finance of the Slovak Republic* [online]. [cit. 16. 4. 2021]. Available at: https://www.mfsr.sk/en/taxes-customs-accounting/direct-taxes/income-tax/international-taxation/double-tax-treaties/

of taxation through tax evasion or avoidance. When resolving situations arising from practice, disputes may arise between Contracting States as to the correctness of individual provisions of the respective DTT. Such situations can lead to double taxation despite the existence of a valid DTT. This risk of double taxation exists, for example, in cases where the concerned Contracting States (or rather the financial administrations of those States) interpret the terms of the DTT differently or set out the facts of the case at issue differently. In practice, these discrepancies include for example, determining the tax residence, the establishment and existence of a permanent establishment, as well as the allocation profits of this permanent establishment, different classification of income and different characterization of entities, transfer pricing, etc. To resolve such tax disputes, DTTs also contain provisions that allow the competent authorities of the Contracting States to contact each other directly in order to resolve disputes under MAP.[9]

For the purposes of this article, we have been looking into the DTT between the Slovak Republic and Czech Republic. The competent authorities of the Contracting States shall endeavour to resolve them by agreement the situation of taxable persons subject to taxation which is not in accordance with the relevant DTT. Competent authorities are entitled to communicate directly, without using diplomatic channels. MAP is usually an effective and efficient way of resolving disputes arising from DTTs. In the Slovak Republic, the competent authority for resolving disputes, arising under a DTT, by agreement is the Ministry of Finance of the Slovak Republic ("Ministry of Finance"). The competent authority shall ensure the application of DTT in good faith and within the framework of MAP shall endeavour to reach an agreement with the competent authorities of the Contracting States, in accordance with the principle of equality and transparency.

According to the above-mentioned, the Slovak Republic and the Czech Republic, desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, have agreed to DTT between Slovak Republic and Czech Republic.

9 The provisions on MAP are mainly found in Art. 25 of DTTs.

DTT between Slovak Republic and Czech Republic, in its Art. 24, providing for the so-called "Mutual Agreement Procedure", states: *"Where a person considers that measures of one or both Contracting States result or will result for him in taxation not in accordance with the provisions of this Agreement, he may, irrespective of the remedies provided by the domestic laws of these States, present his case to the competent authority of the Contracting State of which he is a resident, or, if his case comes under Article 23, para. 1, to the competent authority of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Agreement."*[10]

Provided the competent authority considers the objection justified and that it is not itself able to arrive at a satisfactory solution, it shall endeavour to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in compliance with this Agreement.

In the following paragraphs, DTT between Slovak Republic and Czech Republic states: *"Competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts which may arise as to the interpretation or application of this Agreement. They may also consult together in order to eliminate double taxation in cases which are not provided for in the Agreement. The competent authorities of the Contracting States may communicate with each other directly as well as through a common Commission consisting of their representatives for the purpose of reaching an agreement in the sense of the preceding paragraphs."*[11]

According to that, Art. 24 of DTT between Slovak Republic and Czech Republic applies to situations where the taxpayer considers that the measures of one or both Contracting States lead or will lead in his case to taxation which is not in accordance with the provisions of the DTT, while he may, irrespective of the remedies provided by the domestic law of the Contracting States, submit his case to the competent authority of the Contracting State in which he is a resident. According to Art. 24 para. 1, *"the taxpayer is also required to bring the case within three years of the first notification of a measure aimed*

10 Agreement between the Slovak Republic and the Czech Republic on the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital is in the collection of Laws of Slovak Republic No. 238/2003.

11 Ibid.

at taxation which does not comply with the provisions of the DTT".[12] If the competent authority considers the taxpayer's objection to be justified and if it is not itself capable find a satisfactory solution, it will endeavour to resolve the case by mutual agreement with the authorities of the other Contracting State so as to exclude any taxation which is incompatible with the DTT.

In general, DTTs contain provisions of a conflicting nature, so the rule which of the Contracting States is entitled to claim payment of the tax and tax the taxpayer's income or assets has to be laid down. However, it is also necessary to take into account the possibility that a DTT itself may lead to double non-taxation / allow double non-taxation. This will apply to a situation where a DTT contains provision that a certain source of income in the territory of the other State (State of source of income) is not taxed in that territory and its taxation is transferred to the other Contracting State (State of tax residence), DTT does not address the question of whether such income is taxed in the State of tax residence. This may be a situation where the state tax residence on the basis of under its national tax rules cannot tax that income because it is exempt or does not constitute tax. A similar situation occurs when states, through their unilateral measures, exclude certain income from taxation / provide an exemption from tax with the result that this income is not taxed in any of the States concerned. This situation can also be implemented in a DTT, in which case it would be necessary to consider whether states are aware of the legal consequences, i.e., double non-taxation or double deduction.[13]

12 Must be noted that, the specific text of the article in question within the individual DTT may be in some aspects or details different, but as a result of the adoption of the Multilateral Convention to introduce measures to prevent distortions of tax bases and transfers of profits related to tax treaties ("Multilateral Convention" in this footnote), the provisions are unified and add that, in the contracts to be covered, these provisions are possible as a result contractual instrument. Bilateral modifications of valid and effective DTTs resulting from the application of the Multilateral Convention will be notified by means of a notification Ministry of Foreign Affairs and European Affairs of the Slovak Republic in the Collection laws of the Slovak Republic. According to the scope and limitations of this article, we will no longer spread this issue. See Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. *Ministry of Foreign Affairs and European Affairs of the Slovak Republic* [online]. [cit. 15. 5. 2021]. Available at: https://www.slov-lex.sk/static/prilohy/SK/ZZ/2018/339/20181129_4921747-2.pdf

13 BABČÁK, V. Zamyslenie sa nad problémom dvojitého nezdanenia. In: TOMÁŠKOVÁ, E., D. CZUDEK and J. VALDHANS (eds.). *DNY PRÁVA 2018. Část V. – Interakce práva a ekonomie*. Brno: Masaryk University, 2019, p. 36.

3 Arbitration Convention – Procedure to Eliminate Double Taxation in Specific Situations Within the European Union Member States

Another instrument that provides similar possibilities for resolving disputes as a DTT, but only between Member States of the EU, is the Arbitration Convention. The Arbitration Convention was signed on 23 July 1990 and was in force from 1 January 1995 until 31 December 1999 (a period of 5 years). On 25 May 1999, the Council adopted a protocol amending the convention, extending it for further periods of 5 years at a time.[14]

The Arbitration Convention contains, in addition to the possibility of resolving cases by agreement, also the possibility of using an advisory commission (so-called arbitration). It follows from the scope of this Convention that it only resolves disputes between EU Member States and only covers the solution of double taxation situations with respect to:

- transfer pricing,
- the allocation of profits to a permanent establishment.

Arbitration Convention, also known as the intergovernmental convention, introduces a procedure to eliminate double taxation in specific situations. For example, where branches of multinational companies (associated companies) are based in different EU countries and are taxed by more than one EU country as a result of an upward adjustment in its profits in another EU country.[15]

For the effective implementation of the Convention, a so-called "Code of conduct"[16] was drawn up by the EU's Joint Transfer Pricing Forum[17] ("JTPF").

14 Elimination of double taxation (arbitration). *EUR-Lex* [online]. 14. 12. 2017 [cit. 11. 4. 2021]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l26038&from=SK

15 Methodical guidelines of the Ministry of Finance of the Slovak Republic no. MF/020525/2017-724 on procedures under the mutual agreement procedure. *Slovenská komora daňových poradcov* [online]. [cit. 16. 5. 2021]. Available at: https://www.skdp.sk/webnew/main.nsf/0/4be4fb9e06068287c125824100374648/$FILE/Metodické%20usmernenie%20Ministerstva%20financi%C3%AD%20Slovenskej%20republiky.pdf

16 Code of conduct for the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises No. 2006/C 176/02. *EUR-Lex* [online]. 28. 7. 2006 [cit. 16. 5. 2021]. Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:176:0008:0012:EN:PDF

17 Joint Transfer Pricing Forum. *European Commission* [online]. [cit. 16. 5. 2021]. Available at: https://ec.europa.eu/taxation_customs/business/company-tax/transfer-pricing-eu-context/joint-transfer-pricing-forum_en

The JTPF, set up in 2002, assists and advises the European Commission on transfer pricing issues. The code of conduct clarifies aspects such as:

- the scope of the convention,
- the admissibility of a case,
- MAP, and
- the dispute resolution procedures.[18]

The Arbitration Convention is also an international treaty that has taken precedence over national law. Art. 6 of the Arbitration Convention to a large extent replicates the wording of Art. 25 para. 1 and 2 of the OECD Model Tax Treaty. That is the case, *"if an entrepreneur considers that the procedures laid down in the Arbitration Convention have not been complied with, notwithstanding the remedies available under the domestic law of the Contracting States concerned may submit the case (object) to the competent authority of the Contracting State where it is resident or in which it has a permanent establishment. The relevant case must be submitted within three years from the first notification concerning the act which results in it, or will cause double taxation. The first act is considered to be the tax collection."* If the competent authority concludes that the objection is justified and if the competent authority is not able to reach a satisfactory solution himself, he will try to solve the case by bilateral agreement with the competent authority of the Contracting State concerned, with a view to avoid double taxation on the basis of the procedures defined in the Arbitration Convention.[19]

When double taxation arises, the company affected can present its case to the tax authorities concerned. If those authorities cannot solve the problem satisfactorily, they shall seek mutual agreement with the authorities of the EU country where the associated firm is taxed.

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18 Code of conduct for the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises No. 2006/C 176/02. *EUR-Lex* [online]. 28. 7. 2006 [cit. 16. 5. 2021]. Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:176:0008:0012:EN:PDF

19 Art. 6 Arbitration Convention; Methodical guidelines of the Ministry of Finance of the Slovak Republic no. MF/020525/2017-724 on procedures under the mutual agreement procedure. *Slovenská komora daňových poradcov* [online]. [cit. 16. 5. 2021]. Available at: https://www.skdp.sk/webnew/main.nsf/0/4be4fb9e06068287c125824100374648/$FILE/Metodické%20usmernenie%20Ministerstva%20financi%C3%AD%20Slovenskej%20republiky.pdf

If the authorities of these two EU countries are not able to reach an agreement, they present the case to an advisory commission, which suggests a way of resolving the dispute.

Although the tax authorities may subsequently adopt, by mutual agreement, a solution which is different from the one suggested by the advisory commission, they are bound to adopt the commission's advice if they cannot reach an agreement. The commission consists of a chairman, 2 representatives from each of the tax authorities concerned, and an even number of independent members.[20]

3.1 Resolution of Tax Disputes According to DTT or the Arbitration Convention

After the case has been resolved and the agreement approved, the Ministry of Finance will send a final closing letter to the competent authority of the Contracting State.

In the event of an agreement between the competent authorities of the Contracting States, the Ministry of Finance shall immediately inform the taxpayer and the Finance Directorate of the outcome of the agreement. The result of the agreement is binding for the Ministry of Finance, the taxpayer, the Financial Directorate, and the relevant tax administrator that shall take immediate steps to implement the outcome of the agreement. If the agreement results in a solution that changes (reduces) the taxpayer's tax liability in the Slovak Republic, the taxpayer is entitled to file an additional tax return that reflects the result of the agreement between the competent authorities without a time limit, unless the relevant DTT provides otherwise.

If, despite the efforts made, the competent authorities cannot reach an agreement, MAP fails. The taxpayer has no legal right to an agreement between the competent authorities of both Contracting States, except in cases where there is a right to settle cases in an arbitration proceeding (see section above). In this case, the taxpayer and the Finance Directorate will be informed of the failure of the MAP. In cases where the competent

20 Proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union. *EUR-Lex* [online]. 25. 10. 2016 [cit. 1. 5. 2021]. Available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52016PC0686

authorities cannot reach an agreement, but the DTT contains a provision on arbitration, the taxpayer may apply to settle the case in arbitration.[21]

The competent authorities of the participating countries should endeavour to resolve the case by mutual agreement within a period of 24 months. If MAP does not reach a solution within two years, the competent authorities of the participating Contracting States shall, at the request of the taxpayer, designate advisory commission.[22]

The advisory commission shall consist of an independent chairman and two representatives of the competent authority of the Contracting States and an even number of independent persons (usually two) in accordance with Art. 9 para. 1 of the Arbitration Convention. The advisory commission shall deliver its opinion no later than six months from the date on which the matter was referred to it. Pursuant to Art. 12 of the Arbitration Convention, Contracting States shall avoid double taxation within 6 months of the issuance of the opinion of the Advisory Commission. The competent authorities of the Contracting States may agree on another outcome within this period. If no agreement is reached within this period, the competent authorities shall be bound by the opinion of the arbitration panel. For the purposes of these procedures, general principles of the Arbitration Procedure shall be applied in accordance with the Convention and the principles set out in the Code of Conduct for the effective implementation of the Arbitration Convention.[23]

3.2 EU Level – Progressive Council Directive (EU) 2017/1852[24]

In October 2017, the Council adopted Directive on tax dispute resolution mechanisms in the EU which builds on the Arbitration Convention.

21 Methodical guidelines of the Ministry of Finance of the Slovak Republic no. MF/020525/2017-724 on procedures under the mutual agreement procedure. *Slovenská komora daňových poradcov* [online]. [cit. 16. 5. 2021]. Available at: https://www.skdp.sk/webnew/main.nsf/0/4be4fb9e06068287c125824100374648/$FILE/Metodické%20usmernenie%20Ministerstva%20financi%C3%AD%20Slovenskej%20republiky.pdf

22 VALENTE, A. and F. VINCENTI. The importance of mutual agreement procedures in international tax disputes. *International Tax Review* [online]. 24. 3. 2021 [cit. 25. 3. 2021]. Available at: https://www.internationaltaxreview.com/article/b1r2tr3f5sbp5m/the-importance-of-mutual-agreement-procedures-in-international-tax-disputes

23 See Art. 6 and following Art. of Arbitration Convention.

24 Council Directive No. 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union ("Directive on tax dispute resolution"). *EUR-Lex* [online]. [cit. 16. 5. 2021]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L1852&from=EN

The directive's scope is broader than the Convention's and will apply to all taxpayers subject to taxes on income and capital covered by bilateral DTTs and the Arbitration Convention. Over time, the use of the Arbitration Convention may reduce, given the advantages of the directive requiring double taxation to be removed. Directive on tax dispute resolution introduces a similar mechanism, the so-called arbitration, also for other situations of double taxation where it was not possible to resolve the case of double taxation within the specified time by agreement. This instrument is again limited to situations of double taxation between EU Member States and was implemented in the Slovak Republic through legislation. The Council Directive was implemented by 1 July 2019. This Directive has been adopted to the Slovak Republic regulation by the Act No. 11/2019 Coll., on the rules for resolving disputes concerning taxation. We believe that the Czech Republic has adopted this Directive into the similar local act.

As the Directive on tax dispute resolution states, *"the mechanisms currently provided for in bilateral tax treaties and in the Union Arbitration Convention might not achieve the effective resolution of such disputes in all cases in a timely manner. The monitoring exercise carried out as part of the implementation of the Union Arbitration Convention has revealed some important shortcomings, in particular as regards access to the procedure and as regards the length and the effective conclusion of the procedure."*[25] Directive on tax dispute resolution applies to all taxpayers that are subject to taxes on income and capital covered by DTTs and the Arbitration Convention. As it states *"individuals, micro, small and medium-sized enterprises should have less of an administrative burden when using the dispute resolution procedure"*.[26] In addition, the dispute resolution phase should be strengthened. In particular, it is necessary to provide for a time limit for the duration of the procedures to resolve double taxation disputes and to establish the terms and conditions of the dispute resolution procedure for the taxpayers. We must note that despite the existence of this Directive, these problems are still present in practice. There may be several reasons for that. International disputes will always be covered by the necessary knowledge and willingness of states to "return" tax income to taxpayers back, after the final decision was issued,

25 Recital 3 Directive on tax dispute resolution.
26 Recital 7 Directive on tax dispute resolution.

that part of the income should be taxed in another state. In addition, when the problem about taxation between two or more countries arises, effective exchange of information is necessary.[27]

4 Tax Arbitration in Accordance With National Laws

The Ministry of Finance of the Slovak Republic issued the Slovak Republic guidelines in order to ensure uniform application of the processes for MAP. Its main topic applies particularly to i) MAPs which are initiated by the taxpayer based on DTTs, ii) MAP which are initiated by the taxpayer based on the Arbitration Convention and iii) contains formal and factual details of the procedure in the Slovak Republic.[28]

These methodical guidelines apply in particular to:

- MAPs initiated by the taxpayer on the basis of DTT (for example, the DTT with the Czech Republic)
- MAPs initiated by the taxpayer on the basis of the Arbitration Convention, containing the formal and substantive requirements of the procedure in the Slovak Republic.

A contrario, as we have stated above, there is also another local regulation solving the international tax resolution – the Act No. 11/2019 Coll., on the rules for resolving disputes concerning taxation, adopting Directive on tax dispute resolution. Under this Act, tax arbitrations are solved between Slovak Republic and another EU Member State in so far as such disputes arise out of the interpretation and application of DTTs, a State with which the Slovak Republic has concluded a DTT, if these disputes arise from the interpretation and application of the DTT, and with a State with which the Slovak Republic has concluded a DTT in so far as such disputes arise

27 For example, country-by-country reporting and automatic exchange of information, which is part of measure 13 of the BEPS project (base erosion and profit shifting), is a tool whose main objective is to detect possible tax evasion, for which transfer prices are used between related parties. TULÁČEK, M. Výměna zpráv podle zemí jako nástroj k omezení eroze základu daně z příjmů. In: MRKÝVKA, P., D. CZUDEK and J. VALDHANS (eds.). *DNY PRÁVA 2016. Část II. Rekodifikace daní z příjmů (90 let od Engliš ovy daňové reformy)*. Brno: Masaryk University, 2017, p. 355.

28 Slovak Republic transfer pricing profile. *European Commission* [online]. November 2018 [cit. 16. 3. 2021]. Available at: https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/transfer_pricing/forum/profiles/tpprofile-sk.pdf

out of the interpretation and application of the DTT in connection with the adjustment of profits of associated enterprises based on the Arbitration Convention.

5 Conclusions

International MAPs are bilateral procedures to avoid taxation which is not in accordance with the relevant DTT or the Arbitration Convention. This bilateral procedure shall be conducted directly between the competent authorities of both Contracting States, whereas the taxpayer is not a direct participant to this procedure. As we have stated above, some of these procedures must be implemented into domestic regulations, at least when it comes to individual procedural steps and conditions for starting and running the processes.

The subject of the mutual agreement is therefore the settlement of a dispute between tax claims of two Contracting States against the taxpayer so that the resulting tax liability is determined in accordance with the provisions of the relevant DTT or the Arbitration Convention. The result of such an agreement may be reflected in the adjustment of taxpayers' tax liability. The competent authorities are obliged to seek such an agreement. Unfortunately, in practice, there are situations when one or the other Contracting State is not willing to waive its claims and double taxation persists. Such a situation can only be resolved through arbitration which is regulated in the Arbitration Convention and in those DTTs which contain provisions on arbitration. With that said, there is still a potential risk of double taxation in cases where the state will not be willing to helpf within the procedure, or the state will not be willing to adjust its taxpayer's tax liability and let another state to keep this tax profits. Such a persistent risk must be resolved on a case-by-case principle and in good faith. In addition, states must cooperate, and as we can see, international taxation is dependent on the knowledge of international taxation's rules of procedure and must be responsible in matter of double taxation, which is still unsatisfactory condition.

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Possibility of Resolving Individual Labor Disputes in Croatian Law by Arbitration

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Abstract

Given the specificity of labor relations, there are several ways of resolving disputes that may arise from these relations. Besides the regular procedure before the competent national court, i.e., court proceedings, there is also a possibility of an out-of-court or alternative dispute resolution. The paper analyzes arbitration as one of the alternative ways of resolving individual labor disputes and especially the arbitrability of these labor disputes, given a different points of view between case law and legal doctrine. As the norms that regulate the possibility of resolving individual labor disputes are inconclusive and inconsistent in relation to the general rules on arbitration, they do not explicitly answer the question whether the disputes are arbitrable, nor do they clearly define the preconditions for interpreting the arbitrability of these disputes according to the general rules on arbitration. In this sense, the paper analyzes the answers to these open questions, and offers solutions de *lege ferenda* in terms of arbitrability of individual labor disputes according to Croatian law.

Keywords

Alternative Way of Resolving Disputes; Arbitration; Arbitrability; Labor Disputes; Individual Labor Disputes.

1 Introduction

Labor disputes are specific due to the special characteristics of the employment relationship (and above all because of the protective character of the employment relationship) in which the employment relationships differ from other legal relationships, including those that are based on similar appointed contracts that have a specific performance for their subject.

It is precisely the specific characteristics of the labor relationship and its protective character that are the reasons why the way of resolving labor disputes is specifically regulated. Namely, the Labor Act contains special provisions on the settlement of labor disputes, while such provisions are also contained in the Code of Civil Procedure.[1] However, special provisions governing the possibility of resolving individual labor disputes before arbitration are vague in such a way that they do not explicitly indicate whether all individual labor disputes can be resolved before arbitration or certain individual labor disputes due to the protective nature of employment can be resolved only before state courts. In this sense, different legal understandings are taken up both in case law and in legal doctrine. The answer to these open questions should be seen, both in the context of the specific provisions of the Labor Act relating to the possibility of resolving individual labor disputes through arbitration, as well as in the context of the Arbitration Act, which as a general legal regulation of dispute resolution by arbitration is applied in a subsidiary manner to labor disputes, which is the subject of the analysis of this paper.

2 General Characteristics of Employment

The possibility of arbitration as one of the alternative ways of resolving individual labor disputes should definitely be looked from the point of view of specific characteristics that are recognizable for the employment relationship. Namely, in the legal literature, an employment relationship is defined as a social law relationship between an employer and an employee based on their agreement (explicit or implicit, in written or oral form), on the basis of which the employee personally undertakes to carry out certain work according to the instructions and orders of the employer, who is in turn obliged to provide the employee with the necessary means of work, machinery, material, tools, working conditions and compensation (salary)

1 Civil Procedure Act adopted on 8 October 1991 (Official Gazette No. 53/91, 91/92, 112/99, 88/01, 117/03, 88/05, 2/07, 84/08, 96/08, 57/11, 148/11, 25/13, 28/13, 89/14, 70/19) regulates the special litigation proceedings in Art. 433–437, while Art. 382 regulates the possibility of submitting a request for revision of the judgment in a dispute over the existence of an employment contract, i.e., termination of employment or in order to determine the existence of an employment relationship.

for the work performed, respecting the standards provided for by the law, collective agreement and work regulations governing their relationship.[2] In the legal system of the Republic of Croatia, with the entry into force of the Labor Act of 1995[3], the notion of employment as a status relationship was abandoned and civil law approach to employment was accepted.[4] The status approach ignored the contractual dimension of the employment relationship,[5] therefore, such an approach required for the employment relationship to be predominantly regulated by legal norms of a coercive legal nature.[6] The law sets a minimum of rights and obligations under which the contracting parties may not go, unless otherwise regulated by a special regulation, while it is up to the parties to the employment contract to agree on more favourable terms than those arising from the law.

An employment relationship is established by an employment contract, unless otherwise provided by special regulations.[7] It follows from the above that the employment contract is not the only basis for employment, but special regulations stipulate that the legal basis for employment in the civil service is a decision on admission to the civil service[8], that is, the decision

2 BILIĆ, A. *Fleksibilnost i deregulacija u radnopravnim odnosima*. Doctoral dissertation. University of Split, Faculty of Law, 2012, p. 10; Similar to see GRGUREV, I. Ugovor o radu. In: POTOČNJAK, Ž. (ed.). *Radni odnosi u Republici Hrvatskoj*. Zagreb: Pravni fakultet u Zagrebu i Organizator, 2007, p. 12: *"… Employment relationship is a willingly based relationship in which the employee is obliged to carry out the work personally. In doing so, the employee is subject to the instructions of the employer in his work, and the employer has the right to supervise his work."*

3 Labor Act entered into force on 16 June 1995 (Official Gazette No. 38/95, 54/95, 65/95, 102/98, 17/01, 82/01, 114/03, 123/03, 142/03, 30/04, 68/05 – Decision of the Constitutional Court of the Republic of Croatia, 137/04 – consolidated text) ("Labor Act/95").

4 This approach was maintained in the Labor Act 2009 entered into force on 1 January 2010 (Official Gazette No. 149/09, 61/11, 82/12 and 73/13) ("Labor Act/09") and in the Labor Act 2014 entered into force on 7 August 2014 (Official Gazette No. 93/14, 127/17 and 98/19) ("Labor Act").

5 POTOČNJAK, Ž. Sporovi o novom hrvatskom radnom zakonodavstvu. *Revija za socijalnu politiku*, 1994, Vol. 1, no. 1, pp. 37–52.

6 In the status approach the theory prevailed that while regulating the Labor relations public legal intervention by the State should be prioritised in order to protect workers as a weaker side of the Labor relation. See more POTOČNJAK, Ž. Sporovi o novom hrvatskom radnom zakonodavstvu. *Revija za socijalnu politiku*, 1994, Vol. 1, no. 1, p. 41.

7 Art. 10 Labor Act.

8 Art. 52 para. 1 Civil Servants Act adopted on 24 April 2012 (Text No. 1166) (Official Gazette No. 92/05, 140/05, 142/06, 77/07, 107/07, 27/08, 34/11, 49/11, 150/11, 34/12, 49/12 – official consolidated text, 38/13, 37/13, 1/15, 138/15, 102/15, 61/17, 70/19, 98/19) ("Civil Servants Act").

on the selection of candidates[9] (special legal regime of employment). The employment contract, in addition to being the basis for establishing an employment relationship (general employment regime), also serves as a source of law that regulates the rights and obligations arising from that relationship. However, its importance as a source of law is significantly diminished as it often refers to collective agreements and labor regulations in its provisions.[10] In this regard, it should be emphasized that the employment relationship and the employment contract are not synonymous. Namely, the concept of employment covers a wider range of rights and obligations than it arises from the employment contract. In addition to the employment contract, the content of the employment relationship may be regulated by international treaties concluded and ratified in accordance with the Constitution of the Republic of Croatia, collective agreement, workers' council agreement with the employer, labor regulations and legal provisions.[11] With regard to legal provisions, the Labor Act and other regulation determine the minimum rights and obligations below which the contracting parties may not go. The employer, the employee and the workers' council, as well as trade unions and employers' associations, may agree on working conditions that are more favourable for the employee than those stipulated by law, while the employer, employers' associations and trade unions may agree on unfavorable working conditions only if expressly provided by law.[12] If an employment law is regulated differently by the stated sources of law, i.e. in case of conflict in application between several labor law sources, in accordance with the principle *in favorem laboratoris*, the most favorable law will be applied to the employee.[13]

9 Art. 52a Civil Servants Act.

10 Similar to see GRGUREV, I. Ugovor o radu. In: POTOČNJAK, Ž. (ed.). *Radni odnosi u Republici Hrvatskoj*. Zagreb: Pravni fakultet u Zagrebu i Organizator, 2007, pp. 1–2.

11 Art. 8 Labor Act. See more widely BILIĆ, A. *Fleksibilnost i deregulacija u radnopravnim odnosima*. Doctoral dissertation. University of Split, Faculty of Law, 2012, pp. 10–18; GRGUREV, I. Ugovor o radu. In: POTOČNJAK, Ž. (ed.). *Radni odnosi u Republici Hrvatskoj*. Zagreb: Pravni fakultet u Zagrebu i Organizator, 2007, p. 2; TINTIĆ, N. *Radno i socijalno pravo, knjiga prva: Radni odnosi (I)*. Zagreb: Narodne novine, 1969, pp. 345–346.

12 Art. 9 para. 1 and 2 Labor Act.

13 Art. 9 para. 3 Labor Act.

2.1 Essential Elements of the Employment Relationship

There are various legal relations that have labor as a subject, and it is necessary to distinguish such legal relations from employment. Employers sometimes, all in order to avoid coercive protective regulations that protect the worker as a weaker party in the employment relationship (provisions on the protection of workers who are temporarily or permanently incapable of work, on vacations, assumptions in which the employer may cancel employment contract, etc.), conclude other contracts that have labor as a subject. The Labor Act, and in order to combat such behavior, stipulates that if an employer concludes a contract with the employee to carry out a job that, given the nature and type of work and the employer's authority, has the characteristics of the job for which the employment relationship is established, it is considered that the employer has concluded an employment contract with the employee, unless the employer proves otherwise.[14] Precisely according to the essential characteristics of the employment relationship, we will identify its existence, that is, recognize it is an employment relationship. Essential characteristics of the employment relationship are voluntariness, the obligation to perform work personally *(faciendi necessitas)*, subordination to the instructions of the employer (subordination) and payment.[15]

An employment relationship arises only if the parties agree to create such a relationship. The consent, i.e., voluntariness of the parties to that contract is required not only during the establishment, but also for the entire duration of that employment relationship.[16] On the other hand, if the employment relationship is based on an employment contract that would be contrary to the Constitution of the Republic of Croatia, force regulations or morality of the company,[17] i.e., if it is concluded by the use of force against the contracting party, it is null and void.[18]

14 Art. 10 para. 2 Labor Act.

15 See GRGUREV, I. Ugovor o radu. In: POTOČNJAK, Ž. (ed.). *Radni odnosi u Republici Hrvatskoj*. Zagreb: Pravni fakultet u Zagrebu i Organizator, 2007, p. 12; TINTIĆ, N. *Radno i socijalno pravo, knjiga prva: Radni odnosi (I)*. Zagreb: Narodne novine, 1969, p. 355.

16 See more GRGUREV, I. Ugovor o radu. In: POTOČNJAK, Ž. (ed.). *Radni odnosi u Republici Hrvatskoj*. Zagreb: Pravni fakultet u Zagrebu i Organizator, 2007, pp. 12–13; TINTIĆ, N. *Radno i socijalno pravo, knjiga prva: Radni odnosi (I)*. Zagreb: Narodne novine, 1969, pp. 355–357.

17 Art. 322 para. 1 Civil Obligations Act entered into force on 1 January 2006 (Official Gazette No. 35/05, 41/08, 125/11, 78/15 and 29/18) ("Civil Obligations Act").

18 Art. 279 para. 3 Civil Obligations Act.

According to the Labor Act, as one of the fundamental rights and obligations from the employment relationship, the employee is obliged to personally perform the work, according to the instructions of the employer and pursuant to the nature and type of work.[19] Therefore, an employee cannot transfer the obligations arising from that employment relationship to another person, all because the employer wanted that particular employee for his specific skills and knowledge.

It is precisely the element of subordination of employees with the instructions of the employer that most often separates the employment relationship from other legal grounds that have work for their case. In the employment relationship, the employee is obliged to take over the work according to the instructions of the employer.[20] In legal doctrine, subordination can be divided in economic and legal terms.[21] In economic terms, the dependence of employees on the salary they receive for their work from the employer is highlighted as their only source of income. However, economic subordination is not sufficient for a relationship to be considered an employment relationship, because, as it is pointed out, even an economically independent person has all the rights and obligations arising from employment protection regulations after the employment is established.[22] In legal terms subordination can be professional (the worker is obliged to perform the work according to the instructions of the employer) and/or organizational (the employer is authorized to determine the time and the place of work). Thus, for the existence of the element of subordination as an essential characteristic of labor law, not only the economic dependence of employees is sufficient, but legal subordination is also necessary, while professional and organizational subordination of workers to the employer are not necessary to exist simultaneously (cumulatively).[23]

19 Art. 7 para. 1 Labor Act.

20 Ibid.

21 GRGUREV, I. Ugovor o radu. In: POTOČNJAK, Ž. (ed.). *Radni odnosi u Republici Hrvatskoj*. Zagreb: Pravni fakultet u Zagrebu i Organizator, 2007, p. 14; TINTIĆ, N. *Radno i socijalno pravo, knjiga prva: Radni odnosi (I)*. Zagreb: Narodne novine, 1969, pp. 359–364.

22 See STRASSER, R. Abhängiger Arbeitsvertrag oder freier Diensvertrag: Eine Analyse des Kriteriums der persönlichen Abhängigkeit. *Das Recht der Arbeit*, 1992, no. 2, p. 102.

23 GRGUREV, I. Ugovor o radu. In: POTOČNJAK, Ž. (ed.). *Radni odnosi u Republici Hrvatskoj*. Zagreb: Pravni fakultet u Zagrebu i Organizator, 2007, pp. 13–18; TINTIĆ, N. *Radno i socijalno pravo, knjiga prva: Radni odnosi (I)*. Zagreb: Narodne novine, 1969, pp. 359–364.

Also, if the element of payment is missing, it is not an employment relationship. Namely, the fundamental obligation of the employer is to pay the employee a salary for the work performed.[24] The importance of this element stems from the fact that salary data are mandatory content of a written employment contract, i.e. written certificate of concluded employment contract,[25] that is, the contract itself must refer to those sources of law that regulate these issues.[26]

2.2 Protective Character of the Employment Relationship

Whether arbitration is permitted in individual labor disputes should certainly be considered from the aspect of the protective character of the employment relationship. The question arises as to whether the parties to the employment relationship are even able to negotiate arbitration to resolve the individual labor dispute, and whether the parties have the opportunity to regulate the composition, procedure and other issues relevant to the work of arbitration. In answering these questions, one should start from the general principles of civil law which base the freedom to regulate legal relations on the elements of the freedom to establish that relationship (the principle of dispositiveness, i.e., the principle of autonomy)[27] as well as on the elements of freedom to determine the content of that relationship.[28] According to the Obligations Act, the contracting parties independently and freely decide whether to establish a legal relationship, i.e., to conclude a contract and ultimately freely regulate the content of such relationship.[29]

24 According to Art. 7 para. 1 Labor Act: *"The employer is obliged in employment to give the worker a job and pay his salary for the work performed, and the worker is obliged according to the instructions given by the employer in accordance with the nature and type of work, to personally perform the work."*

25 Art. 15 para. 1 subpara. 8 Labor Act.

26 Art. 15 para. 2 Labor Act.

27 The freedom to arrange a mandatory relationship is provided for in Art. 2 Civil Obligations Act *("Road users freely regulate mandatory relations and cannot regulate them contrary to the Constitution of the Republic of Croatia, coercive regulations and the morality of society.")*, while the dispositive character is determined by Art. 11 Civil Obligations Act *("Participants may arrange their mandatory relationship differently than is specified by this Act, unless something else derives from or out of the meaning of a particular provision of this Act.")*.

28 BÄHR, P. *Grundzüge des Bürgerlichen Rechts*. München: Vahlens Lernbücher, 2008, pp. 99–125.

29 See GORENC, V. et al. *Komentar zakona o obveznim odnosima*. Zagreb: RRif plus, 2005, pp. 7–8.

Thus, it follows from the principle of dispositiveness in a civil law context that the legal relationship arises, ceases and changes by the will of legal entities.[30] It is clear that the freedom to establish legal relationship may be limited both in terms of entities that are free to establish a particular legal relationship and in respect of which entities are free to regulate the content of that relationship. Given the specificity of the employment relationship, in which the employee is a weaker contracting party, and because of his protection, but also the public interest in exercising his right to work,[31] legal norms of a protective character established restrictions on freedom of employment and the content of that relationship.

With regard to the freedom of employment, any restrictions should be seen in the light of the restrictions imposed on both the employee and the employer. Namely, no restrictions are provided for the employee when choosing an employer with whom he will establish an employment relationship. Thus, the employee has complete autonomy in this regard. However, from the employer's point of view, labor law provides for certain limitations, that is, in certain cases, the autonomy of the employer when choosing a worker with whom he will establish an employment relationship is limited.[32] The Act on Vocational Rehabilitation and Employment of Persons with

30 See KLARIĆ, P. and M. VEDRIŠ. *Građansko pravo*. Zagreb: Narodne novine, 2009, p. 8.

31 Art. 54 para. 1 Constitution of the Republic of Croatia (Official Gazette No. 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10 and 85/10 and 5/14) ("the Constitution of the Republic of Croatia") guarantees the right to work and freedom of work. In legal doctrine, the right to work is determined as an abstract background right of an individual to require the state to conduct a full employment policy, to protect the ability of every worker to earn a living in the employment relationship he freely established, to organize and run free employment services for all employees, and to organize and conduct professional education. See HEPPLE, B. Security of Employment. In: BLANPAIN, R. (ed.). *Comparative Labor Law and Industrial Relations*. Deventer: Kluwer Law and Taxation Publishers, 1987, p. 475.

32 Among other things, representatives of national minorities have priority under the same conditions in the bodies of local self-government units and regional self-government units under certain assumptions under the same conditions. Art. 22 Constitutional Law on the Rights of National Minorities adopted on 13 December 2002 (Official Gazette No. 155/02, 47/10, 80/10 and 93/11). Also, Art. 67 Collective Agreement of 9 November 2017 for Civil Servants and Employees (Official Gazette No. 112/17, 12/18, 2/19, 119/19 and 66/20) provides that the official and employee, whose work has ceased the need in the state body, are required by that state authority to offer admission to the civil service, i.e., the conclusion of a contract of employment, if within one year the need arises for the performance of the jobs to which the official and employee was assigned at the time when the need for his work ceased.

Disabilities[33] stipulates the obligation of quota employment of persons with disabilities for an employer employing at least twenty workers,[34] while state administration bodies, judicial authorities, state authorities and other state bodies, bodies of local and regional self-government units, and public services, public institutions, extra-budgetary and budgetary funds, legal entities owned or predominantly owned by the Republic of Croatia and units and local and regional self-government, as well as legal entities with public authority, are obliged to give priority to persons with disabilities on equal terms when recruiting.[35] Also, the Law on Croatian Homeland War Veterans and Their Family Members[36] provides for an advantage in the employment of these persons.[37]

As regards the regulation of the content of the labor relations, the protective norms of labor law also provide for restrictions. Thus, the protective norms of labor law, in addition to limiting the contractual autonomy of the parties, in principle set a framework for the regulation of employment relations. Many coercion standards of labor law regulate certain rights and obligations under which contracting parties are not allowed to go.[38] As already noted, the employer, the employee and the workers' council, as well as trade unions and employers' associations, can arrange working conditions that are more favourable for the employee than the conditions standardized by the legal provisions,[39] while the employer, employers' association and trade unions, if permitted by legal provisions, can arrange less favourable

33 Act on Vocational Rehabilitation and Employment of Persons with Disabilities (Official Gazette No. 157/13, 152/14, 39/18 and 32/20) ("Act on Vocational Rehabilitation").

34 Art. 8 Act on Vocational Rehabilitation.

35 Art. 9. Act on Vocational Rehabilitation; See more about the obligation to employ people with disabilities NOVAKOVIĆ, N. Obveza zapošljavanja osoba s invaliditetom i prednosti tih osoba pri zapošljavanju. In: CVITANOVIĆ, I. (ed.). *Aktualnosti u radnim odnosima – 2015*. Zagreb: Novi informator, 2015, pp. 57–73.

36 Law on Croatian Homeland War Veterans and Their Family Members (Official Gazette No. 121/17 and 98/19).

37 Art. 18 para. 1.g subpara. 1 Law on Croatian Homeland War Veterans and Their Family Members, as well as the provisions of Art. 101–104 Law on Croatian Homeland War Veterans and Their Family Members; Regarding the freedom to contract in employment relations, see more in ROŽMAN, K. Neke napomene u vezi slobode ugovaranja u radnim odnosima. *Radno pravo*, 2014, no. 03/14, pp. 16–22.

38 For example, the minimum age of employment (a person under fifteen years of age or a person aged fifteen and over fifteen, and under the age of eighteen who attend compulsory primary education, must not be employed. Art. 19 Labor Act).

39 Art. 9 para. 1 Labor Act.

working conditions by collective agreement than the conditions set by law.[40] Of course, in the case where an employment law is regulated differently in several sources, the most favourable right will apply to the employee.[41]

3 Possibilities of Resolving Individual Labor Disputes

Before specifying how individual labor disputes can be resolved, the question of what is a labor dispute and what types of labor disputes we have should be answered. *"A labor dispute is a state of disagreement on a particular issue or group of issues, on which there is a conflict between employees and employers, or in relation to which employees or employers seek the protection of their rights, or on which employees or employers support other employees or employers in their claims or attitudes."*[42] We divide labor disputes into individual and collective labor disputes. An individual labor dispute is a dispute arising between an employer on the one hand, and an employee or several employees on the other hand, with each employee acting on its own and independently from another employee in the dispute, for the exercise of rights and obligations arising from the employment relationship.[43] On the other hand, a dispute arising between an employer or employers' association and trade unions or trade union associations regarding the regulation of collective employment relationships is a collective labor dispute.[44]

40 Art. 9 para. 2 Labor Act.

41 Art. 9 para. 3 Labor Act. The same was confirmed by case law *"… in competition with contracts of employment and collective agreements, what is more favourable to the worker should be applied, which in this case is a collective agreement."* Judgment of the Supreme Court of the Republic of Croatia of 18 July 2007, Case No. Revr-402/07-2.

42 Resolution Concerning Statistics of Strikes, Lockouts and other Action Due to Labor Disputes adopted by the Fifteenth International Conference of Labor Statisticians. Genova: International Labor Office (Bureau of Statistics). *International Labour Organization* [online]. January 1993, p. 2 [cit. 24. 5. 2021]. Available at: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/normativeinstrument/wcms_087544.pdf: *"A Labor dispute is a state of disagreement over a particular issue or group of issues overwhich there is conflict between workers and employers, or about which grievance is expressed by workers or employers, or about which workers or employers support other workers or employers in their demands or grievances."*

43 DIKA, M. and Ž. POTOČNJAK. Arbitražno rješavanje radnih sporova. In: DIKA, M. (ed.). *Zasnivanje i prestanak radnih odnosa; Rješavanje radnih sporova.* Zagreb: Narodne Novine, 2004, pp. 240–243.

44 Ibid.; In view of the subject matter of Labor disputes, we divide them into legal and interest. More on the division of Labor disputes with respect to the subject matter of the dispute can be seen in Ibid.; DIKA, M., Ž. POTOČNJAK and V. GOTOVAC. Radni sporovi. In: POTOČNJAK, Ž. (ed.). *Radni odnosi u Republici Hrvatskoj.* Zagreb: Pravni fakultet i Organizator, 2007, p. 654; ROZIĆ, I. *Kolektivno radno pravo.* Sarajevo: JP NIO Službeni list BiH, 2013, pp. 121–133; BILIĆ, A. and T. PERKUŠIĆ. Legitimacy of strike – qui, quid, quando et quomodo? *Journal of Law and Social Sciences of the Faculty of Law Josip Juraj Strossmayer University of Osijek*, 2018, Vol. 34, no. 3–4, p. 7.

Regarding the individual labor dispute, the possibility of resolving it by judicial and extrajudicial means is foreseen. The exercise of rights in judicial proceedings in individual labor disputes is specific in relation to other legal disputes. Namely, an employee who considers that his employer has violated any of his or her employment rights may, within a statutory limitation period of fifteen days after the service of the decision infringing his or her right, i.e. since finding out about the violation, require the employer to exercise that infringed right.[45] This address to the employer for the protection of rights constitutes a procedural precondition for initiating court proceedings for the protection of employment rights.[46] If the employer does not comply with the employee's claim within a further period of fifteen days, the employee has the right to request the protection of the infringed right before the competent court within a further statutory limitation period of fifteen days.[47] It should be noted, in particular, that if the law, other regulation, collective bargaining agreement or labor rulebook, foresees the procedure of peaceful resolution of the dispute, the 15-day deadline for filing a complaint with the court will run from the day of completion of that procedure.[48] Those preclusive time limits for obtaining judicial protection do not apply in the case of employees' claims for damages or other monetary claims from employment or to procedures to protect the dignity of the employee.[49] As an option for the out-of-court resolution of the resulting dispute, mediation is envisaged as an alternative to the judicial settlement of the labor dispute, and arbitration, which will be discussed in more detail below.

45 Art. 133 para. 1 Labor Act.

46 The same understanding stems from jurisprudence *"… Namely, the failure of workers to require the exercise of their infringed rights with the employer within the statutory (preclude) period in the application of the provisions of Art. 129 para. 1 and Art. 115 para. 4 Labor Act results in the loss of workers' rights to require the protection of infringed rights before the competent court."* Decision of the Supreme Court of the Republic of Croatia of 15 September 2015, Case No. Revr-1886/14-2.

47 Art. 133 para. 2 Labor Act.

48 Art. 133 para. 4 Labor Act.

49 Art. 133 para. 3 and 5 Labor Act; On the judicial settlement of individual Labor disputes see more in DIKA, M. Sudsko rješavanje radnih sporova. In: DIKA, M. (ed.). *Zasnivanje i prestanak radnih odnosa; Rješavanje radnih sporova.* Zagreb: Narodne Novine, 2004, pp. 131–155; CRNIĆ, I. Sudska zaštita individualnih prava radnika. In: POTOČNJAK, Ž (ed.). *Novine u radnim odnosima: komentar najznačajnijih promjena u radnim odnosima: redakcijski pročišćeni tekst Zakona o radu: pravilnici: o radu, o postupku i mjerama zaštite dostojanstva radnika.* Zagreb: Organizator, 2003, pp. 151–203.

4 Arbitration as an Alternative Way to Resolve Individual Labor Disputes

An alternative way of resolving labor disputes means various procedures that are generally carried out outside the court, in which a third neutral party participates, and depending on the type of proceedings may have a different impact on the result of the dispute itself.[50] As stated in the legal doctrine, these are faster, cheaper and more efficient, i.e., more effective and flexible procedures, and they are all benefits of using alternative methods in resolving labor disputes in relation to judicial settlement.[51] Arbitration as one of the alternative ways of resolving labor disputes constitutes an elected trial in a dispute before an arbitral tribunal.[52] An arbitral tribunal is a non-state judicial body to which the parties amicably entrust the adoption of a arbitral award (a decision on the merits of a dispute), which according to the parties has the power of a final court judgment as well as an enforcement document (if it is condemnatory), and whose authorisation to stand trial derives from the agreement of the parties, as well as its composition, which may be of one or more persons.[53] There are differing views of state and non-state courts regarding the possibility of arbitral settlement of individual labor disputes, i.e., their arbitrability. The concept of arbitrability primarily implies whether the subject matter of the dispute can be dealt with by arbitration (objective arbitrability), and the ability of the party to bring the dispute before

50 GRADAŠČEVIĆ-SIJERČIĆ, J. Sistem alternativnog rješavanja individualnih radnih sporova u Bosni i Hercegovini. In: BIKIĆ, A. (ed.). *Yearbook of the law Faculty of the University of Sarajevo 2019. Vol. LXII*. Sarajevo: Univerzitet u Sarajevu – Pravni fakultet, 2019, p. 326.

51 See POTOČNJAK, Ž. Foreword. In: UZELAC, A. (ed.). *Mirenje u građanskim, trgovačkim i radnim sporovima: Zakon o mirenju, Pravilnik o načinu izbora miritelja i provođenju postupka mirenja s komentarima*. Zagreb: TIM press, 2004, p. 7; GOTOVAC, V. Alternativne metode rješavanja radnih sprova: mirenje i arbitraža. In: DIKA, M. (ed.). *Zasnivanje i prestanak radnih odnosa; Rješavanje radnih sporova*. Zagreb: Narodne Novine, 2004, pp. 185–224; GRADAŠČEVIĆ-SIERČIĆ, J. Sistem alternativnog rješavanja individualnih radnih sporova u Bosni i Hercegovini. In: BIKIĆ, A. (ed.). *Yearbook of the law Faculty of the University of Sarajevo 2019. Vol. LXII*. Sarajevo: Univerzitet u Sarajevu – Pravni fakultet, 2019, pp. 326–327.

52 TRIVA, S. and M. DIKA. *Građansko parnično procesno pravo*. Zagreb: Narodne novine, 2004, p. 851.

53 Ibid.

arbitration, i.e., contracts arbitration (subjective arbitrability).[54] Regarding the arbitrability of individual labor disputes, or whether the subject matter of the dispute can be decided by arbitration, it should certainly be considered from the point of view of the norms of labor law that represent the protective character of the labor relations.

The possibility of resolving labor disputes through arbitration in the Republic of Croatia was made possible even at the time of the conception of the labor relations as a status relation, and the stated possibility was also maintained in the civilist approach.[55] With the development of labor law regulation, the boundaries of arbitrability of labor disputes were also expanded. However, since the provisions of the Labor Act, regarding individual labor disputes, are only partially regulated by the institute of arbitration, certain ambiguities were created in practice. The question of the application of general arbitration law arises on the grounds that the Labor Act does not explicitly refer to other sources of arbitration law as it does with subsidiary application of mandatory law.[56] Likewise, the Labor Act did not exclude the possibility

54 Similar and more seen in: SIKIRIĆ, H. Law applicable to objective arbitrability. In: UZELAC, A., J. GARAŠIĆ and A. MAGANIĆ (eds.). *Djelotvorna pravna zaštita u pravičnom postupku – izazovi pravosudnih transformacija na jugu Europe, Liber amicorum Mihajlo Dika*. Zagreb: Pravni fakultet Sveučilišta u Zagrebu, 2013, p. 495. Also in legal doctrine (TRIVA, S. and A. UZELAC. *Hrvatsko arbitražno pravo*. Zagreb: Narode novine, 2007, p. 22) the view is expressed that arbitrability implies the following questions: - what disputes can be brought before arbitration (objective limits of arbitrability), - which parties may bring their disputes before arbitration (subjective limits of arbitrability), - whether a particular dispute can only be brought before domestic arbitration or whether arbitration abroad (territorial limit of arbitrability) can also be arranged for that dispute, and – whether a particular dispute can only be brought before institutional arbitration or whether it can also be brought before *ad hoc* arbitration (institutional limits of arbitrability). On the other hand, a position was also expressed (BABIĆ, D.A. Proposal for a new regulation of arbitrability in Croatian law on arbitration. In: UZELAC, A., J. GARAŠIĆ and A. MAGANIĆ (eds.). *Djelotvorna pravna zaštita u pravičnom postupku – izazovi pravosudnih transformacija na jugu Europe, Liber amicorum Mihajlo Dika*. Zagreb: Pravni fakultet Sveučilišta u Zagrebu, 2013, pp. 524–527) that comparative arbitration law generally understands arbitrability only as an admissibility of contracting arbitration with respect to the type of dispute.

55 The possibility of arbitration settlement of Labor disputes in Croatian law was introduced by the Labor Relations Act (Official Gazette No. 19/1990, 28/1990, 14/1991, 19/1992, 26/1993, 29/1994, 38/1995). On the arbitration settlement of Labor disputes through arbitration until the entry into force of the Labor Act, see ROZIĆ, I., A. BILIĆ and T. PERKUŠIĆ. Open issues of objective arbitrability of Labor disputes in Croatian law. *Zbornik radova Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse*, 2019, no. 17, pp. 218–222.

56 In these provisions, the Labor Act refers to the subsidiary application of the Civil Obligations Act (Official Gazette No. 53/91, 73/91, 111/93, 3/94, 7/96, 91/96 and 112/99): Art. 8 para. 4, Art. 51 para. 2, Art. 99 para. 3, Art. 106 para. 2, Art. 111 para. 1 Labor Act.

of applying the Arbitration Act,[57] and given the limited number of issues regulated by the Labor Act, it should be concluded that the labor arbitration is subsidiarily subject to the provisions of the Arbitration Act. For this reason, the regulations that standardized labor arbitration will be presented below.

4.1 Arbitration in Individual Labor Disputes Under the Special Legal Regulations of the Labor Act

Regarding individual labor disputes, the Labor Act stipulates that contracting parties may entrust dispute resolution by mutual agreement to arbitration, the composition, procedure and other matters relevant to the work of arbitration may be governed by collective agreement.[58] However, the Labor Act does not define what if these issues are not governed by a collective agreement. Such an undefined and unclear provision leads to the subsidiary application of the provisions of the Arbitration Act, which complements the incomplete provisions of the Labor Act.

Except for individual labor disputes, the Labor Act provides for the possibility of arbitration resolution of the dispute and in the case of dismissal of protected categories of employees, if the workers' council withholds consent to the dismissal of such an employee, and the employer should replace the consent.[59] Also, in the event of a collective labor dispute, the parties may amicably entrust the resolution of the resulting dispute to the arbitration,[60] and arbitration proceedings are provided for determining operations that cannot be terminated during the strike.[61] Given the topic and scope of this paper, only the arbitrability of individual labor disputes will be further analyzed.[62]

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57 Arbitration Act of 28 September 2001 (Official Gazette No. 88/2001) ("the Arbitration Act").

58 Art. 136 Labor Act.

59 Art. 151 Labor Act.

60 Art. 210–212 Labor Act.

61 Art. 214 Labor Act.

62 On the arbitrability of collective Labor disputes see ROZIĆ, I., A. BILIĆ and T. PERKUŠIĆ. Open issues of objective arbitrability of Labor disputes in Croatian law. *Zbornik radova Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse,* 2019, no. 17, pp. 234–237.

4.2 Arbitration in Individual Labor Disputes With Subsidiary Application of the General Rules of the Arbitration Act

The Arbitration Act was entered in 2001 and became a general arbitration act regulating arbitration proceedings in the Republic of Croatia. The said Act regulates the domestic arbitration, jurisdiction and conduct of the courts, both in connection with domestic arbitration[63] and in other cases provided in the Arbitration Act, as well as the recognition and enforcement of arbitration awards.[64] According to the Arbitration Act, an arbitration (a selected trial) is a trial before an arbitral tribunal regardless of whether it is organized, or its activities are provided by an arbitral institution[65] or not,[66] while the arbitral tribunal is defined as a non-state court that draws its authorized trial from the agreement of the parties.[67] Regarding arbitrability, i.e., the possibility of presenting the subject of the dispute before arbitration, the Arbitration Act regulates that parties may arrange domestic arbitration to resolve disputes about the rights they are free to dispose of,[68] and that the parties may agree to bring the dispute before an arbitral tribunal regardless of whether its activities are organised by the arbitral institution or not.[69] Thus, in individual labor disputes, the parties may contract the jurisdiction of institutional arbitral bodies (i.e., the organization and action provided by the arbitral institution) or *ad hoc* arbitral tribunals (i.e., organization and action are provided by the parties themselves). Also, if a special law does not stipulate that a dispute can only be settled by a court in the Republic of Croatia, the parties may also arrange arbitration outside the territory of the Republic of Croatia for disputes with an international character.[70] According to general rules of the Arbitration Act, the parties

63 Domestic arbitration is an arbitration whose place is on the territory of the Republic of Croatia (Art. 2 para. 1 subpara. 1 Arbitration Act).

64 Art. 1 Arbitration Act.

65 An arbitral institution is a legal entity or body of a legal person who organizes and ensures the activities of arbitral tribunals (Art. 2 para. 1 subpara. 4 Arbitration Act).

66 Art. 2 para. 1 subpara. 1 Arbitration Act.

67 Art. 2 para. 1 subpara. 3 Arbitration Act.

68 Art. 3 para. 1 Arbitration Act.

69 Art. 3 para. 3 Arbitration Act.

70 A dispute with an international characteristic is a dispute in which at least one of the parties is a natural person resident or habitually resident abroad or a legal person who is basic under foreign law (Art. 2 para. 1 subpara. 6 Arbitration Act); Art. 3 para. 2 Arbitration Act.

to the arbitration agreement subject to arbitration all or certain disputes that have arisen or may arise between them from a particular legal relationship, contractual or out-of-contract, and an arbitration agreement may be entered into in the form of an arbitral clause in some contract or in the form of a special contract.[71] Only an arbitration agreement concluded in writing is valid.[72] Accordingly, in order for a dispute arising from an individual employment relationship to be resolved through arbitration, a written agreement between the parties to that relationship is required. In the context of the parties' ability to conclude an arbitration agreement, the Arbitration Act stipulates that the ability of natural, legal and other persons to conclude an arbitration agreement and to be parties to a dispute before an arbitral tribunal shall be assessed under the law that applies to them.[73] It also stipulates that citizens of the Republic of Croatia and legal entities under Croatian law, including the Republic of Croatia and local self-government units and regional self-government units, may conclude an arbitration agreement as well as be parties to a dispute before an arbitral tribunal.[74] Parties have a disposition to agree on a number of arbitrators, otherwise the Arbitration Act regulates the appointment of three arbitrators.[75] Under the general rules of the Arbitration Act, the arbitral tribunal may decide on its jurisdiction, as well as any objection to the existence or validity of an arbitration agreement. For this reason, an arbitration clause, which is an integral part of a contract, will be considered as an agreement independent from the other provisions of that contract. The decision of the arbitral tribunal on the nullity of the contract does not automatically mean that the arbitration clause is not valid either.[76] In an individual labor dispute, the parties are authorised to independently regulate the rules of arbitration. Where the rules of procedure are not governed by a collective agreement, or when the parties fail to regulate the rules of procedure, under the

71 Art. 6 para. 1 Arbitration Act.

72 The contract is concluded in writing if it is entered in the documents signed by the parties or if it is concluded by exchanging letters, faxes, telegrams, or other means of telecommunicating that provide written proof of the contract, regardless of whether the parties have signed them (Art. 6 para. 2 Arbitration Act).

73 Art. 7 para. 1 Arbitration Act.

74 Art. 7 para. 2 Arbitration Act.

75 Art. 9 Arbitration Act.

76 Art. 15 para. 1 Arbitration Act.

Arbitration Act, the arbitrators are authorized to regulate the rules of procedure by determining or referring to certain rules, laws or other appropriate means.[77] When deciding on the merits of the case, the arbitral tribunal will decide under the legal rules chosen by the parties as applicable.[78] By equity, the arbitral tribunal may decide only with the express consent of the parties.[79] Since the Labor Act provides nothing in terms of an arbitral award, the general rules of the Arbitration Act are subsidiarily applied in individual labor disputes. Unless otherwise specified by agreement of the parties or by collective agreement, the decision shall be taken by a majority vote.[80] In a situation where a majority of votes are not reached, the reasons for each opinion are again discussed, and if a majority of votes are not reached thereafter,[81] the award is adopted by the Chairman of the Panel.[82] If the parties have not explicitly agreed that the award may be challenged before a higher-level arbitral tribunal, the arbitral tribunal's award against the parties shall have the power of a final court judgment.[83] The Arbitration Act also provides for an action to annul the award as a sort of remedy against the award. The competent court will annul the award if the party who filed the action proves one of the reasons prescribed by the Arbitration Act.[84] Furthermore, the court will annul the award if it finds that the subject matter of the dispute is not arbitrable under the laws of the Republic of Croatia, and if the award is contrary to the public policy of the Republic of Croatia.[85] The court decides on the enforcement of a domestic award, unless it finds *ex officio* that there is one of the reasons for the annulment of the award.[86]

77 Art. 18 Arbitration Act.
78 Art. 27 para. 1 Arbitration Act.
79 Art. 27 para. 3 Arbitration Act.
80 Art. 28 para. 1 Arbitration Act.
81 A ruling is a decision of an arbitral tribunal on the essence of a dispute (Art. 2 para. 1 subpara. 8 Arbitration Act).
82 Art. 28 para. 2 Arbitration Act.
83 Art. 31 Arbitration Act.
84 Art. 36 para. 2 subpara. 1 Arbitration Act.
85 Art. 36 para. 2 subpara. 2 Arbitration Act.
86 Art. 39 Arbitration Act.

5 Do Labor Law Standards which Represent the Protective Character of the Employment Relationship allow Arbitration in Individual Labor Disputes?

From the previously stated in this paper it seems that the Labor Act does not explicitly regulate which individual labor disputes can be resolved by arbitration. In this regard, the answer should be sought in the essential characteristics of the individual labor dispute in the context of the provisions of the Arbitration Act, which, as a general legal regulation, also applies in a subsidiary manner to labor disputes.

As mentioned above, the Arbitration Act governs the arbitrability of disputes by provisions under which the parties may arrange domestic arbitration to resolve disputes about rights they are free to dispose of. Also, the parties may agree to bring those disputes before the arbitral tribunal regardless of whether its activities are organized by the arbitral institution or not. Regarding the international disputes, the parties may also arrange arbitration seated outside the territory of the Republic of Croatia, unless a special law stipulates that such a dispute can only be resolved by a court in the Republic of Croatia.[87] On the other hand, in international disputes, the Arbitration Act, in addition to the assumption that these are rights that the parties can freely dispose of, also provides for a restriction that the exclusive jurisdiction of the courts in the Republic of Croatia is not prescribed for the settlement of disputes. The legal doctrine states that the rights the parties are free to dispose of should be broadly interpreted, in such a way that the dispute is arbitrable if the parties can indirectly or directly dispose of the right out-of-proceedings, or in proceedings, whether court or administrative.[88] Although the Arbitration Act regarding domestic arbitration does not explicitly state the court's exclusive jurisdiction as a limitation of arbitrability, as justified in the legal doctrine, such presumption is logical, and disputes for which the law explicitly provides only judicial protection would not be arbitrable.[89]

87 Art. 3 Arbitration Act.

88 See TRIVA, S. and A. UZELAC. *Hrvatsko arbitražno pravo*. Zagreb: Narode novine, 2007, p. 29.

89 DIKA, M. and Ž. POTOČNJAK. Arbitražno rješavanje radnih sporova. In: DIKA, M. (ed.). *Zasnivanje i prestanak radnih odnosa; Rješavanje radnih sporova.* Zagreb: Narodne Novine, 2004, p. 247.

As regards the possibilities of resolving individual labor disputes through arbitration, legal understandings under both legal doctrine and case law are not in line. Namely, Permanent Arbitration Court at the Croatian Chamber of Commerce as an institutional arbitral body considers, *inter alia*, that the dispute over the admissibility of dismissal is an arbitrable issue,[90] as well as disputes for payment either based on compensation for damages due to an infringement of an obligation under a contract of employment[91] or based on severance pay,[92] and that the above can be referred to in arbitration proceedings. On the other hand, a different position arises from the decisions of the state courts regarding arbitrability of individual labor disputes. Namely, it follows from the state court decisions, primarily the Supreme Court as the highest court in the Republic of Croatia, including the lower courts, that disputes over admissibility of dismissal are not arbitrable on the grounds that the jurisdiction is explicitly prescribed for those kind of disputes, and that the issue of termination of the employment contract

90 By the award of the arbitrator of the Permanent Court of Arbitration at the Croatian Chamber of Commerce of 30 December 2013, Case No. 10. As-P-2011/20, the applicant's request for a finding was rejected *"… that the decision to terminate the employment contract for an indefinite period due to breach of employment obligations / dismissal was conditioned by misconduct of the employee / defendant, which decision was made by the defendant on 19 March 2011 is inadmissible, and that the plaintiff's employment with the defendant has not ceased …".*

91 The Arbitrator's Ruling of the Permanent Court of Appeal at the Croatian Chamber of Commerce of 29 May 2009, Case No. 1000/2010, IS-P-2008/21.

92 The Arbitrator's Ruling of the Permanent Court of Appeal at the Croatian Chamber of Commerce of 3 January 2011, Case No. 1000/2010, IS-P-2009/59.

is strictly regulated.[93] Also, individual labor disputes on the establishment and prohibition of discrimination are not arbitrable, because these are disputes arising from non-contractual relationships.[94] It follows from court decisions that disputes for the payment of salary are not arbitrable,[95] while disputes for damages are arbitrable.[96]

By analysing the provisions governing arbitration in individual labor disputes, as well as the stated understandings of their application in legal doctrine and case law, it should be concluded that those provisions are incomplete and as such inconsistent. Therefore, in order for an individual labor dispute

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93 According to the legal understanding of the Supreme Court of the Republic of Croatia, it is clear that *"… In order to resolve the dispute in order to establish the inadmissibility of the termination of the contract of employment, jurisdiction is explicitly laid down (argument referred to in Art. 133 Labor Act (Official Gazette No. 93/14) ('Labor Act'), and in addition the issue of termination of the contract of employment is governed by strict regulations (Art. 114-130 Labor Act). It follows, therefore, that the dispute to establish the inadmissibility of the termination of the contract of employment and reinstatement is not arbitrable, and that the arbitration clause referred to in Art. 16. of the cited contract of employment is invalid. Further, it must be concluded that the court has jurisdiction to resolve the dispute in question…"* See Judgment of the Supreme Court of the Republic of Croatia of 4 December 2018, Case No. Gž - 23/2018-2. Lower courts have the same approach: *"… As this legal matter is a Labor status dispute in order to establish the inadmissibility of the decision to terminate employment, and to return to work, this is, as assessed by this court, a dispute for which the law explicitly provides only for judicial protection of rights and on a law governed by strict regulations and which the parties are not free to dispose of (arg. referred to in Art. 124 para. 1 and Art. 133 Labor Act). Concludes, the issue of termination of contracts of employment is governed by strict regulations (Art. 114-123 Labor Act) and the 'right to dismiss' parties are not free to dispose (and it is not a mutual termination of the contract of employment) and the arbitration clause is invalid."* See Decision of the County Court in Split of 21 January 2019, Case No. Gž R-26/19-2.

94 Decision of the Zagreb County Court of 30 October 2018, Case No. Gž R-248/2017-4 *"…Since in the present case the subject of the dispute is the finding that the defendant acted in violation of the mandatory provisions prohibiting discrimination, it is a dispute arising from a relationship of a non-contractual character, which by its nature is not an arbitrable dispute* […] *It must be noted to the court of first instance that, due to the complex nature of the Labor relations, in each particular case it should be carefully assessed whether a particular dispute is arbitrable, and that arbitrable would not be merely Labor disputes arising from a relationship of a non-contractual character. For example, it is stated that in disputes relating to the prohibition of discrimination, a dispute on the payment of salary, dismissal of a contract of employment or other issue from individual Labor relations in which the applicant would argue that discrimination infringed some of his employment rights would be arbitrable. In such a dispute, the arbitral tribunal would determine as a preliminary question whether the mandatory anti-discrimination provision was violated and would decide on the merits of the claim on that basis."*

95 Decision of the County Court in Rijeka of 21 March 2018, Case No. Gž R-95/2017-2 *"… payment of salary is not an arbitrable issue…".*

96 Decision of the Zagreb County Court of 5 January 2017, Case No. Gž R-2421/16 *"… As in the present case it is a dispute for damages, such a dispute is arbitrable."*

to be arbitrable, it must be a matter of rights that the parties can freely dispose of, and the law must not prescribe only jurisdiction to resolve such a dispute. Regarding the rights that the parties are free to dispose of, it follows that those individual labor disputes arising from a non-contractual relationship, as well as those disputes over matters exclusively governed by mandatory provisions, would not be arbitrable. However, one should agree with a reasoning set out in the legal doctrine[97] that even the rights arising from mandatory provisions may also be infringed and should be considered arbitrable as such. Accordingly, cases over a fact whether the undisputed rights governed by mandatory provisions have been violated, should also be considered as arbitrable. Thus, from the analysis of the special regulation of the Labor Act and the general regulation of the Arbitration Act, it should be considered that all individual labor disputes are arbitrable, regardless of whether these disputes arise from contract or not, and when it comes to the right governed by mandatory provisions, if it is disputed in a particular case whether that right has been violated. This conclusion is certainly contributed by the fact that labor relations in the Republic of Croatia are based on a civilist approach, in which the regulation of rights and obligations from the employment is predominantly left to party autonomy. Another condition for contracting arbitration to resolve individual labor disputes is the absence of exclusive jurisdiction of the state court. Namely, the Act in its provisions regulating the judicial protection of employment rights does not prescribe the exclusive jurisdiction of the court to resolve individual labor disputes.[98] On the other hand, the provisions of the Labor Act that regulate the possibility of resolution through arbitration of individual labor disputes determine the general arbitrability of such disputes. Appreciating the norms of employment law which constitute the protective character of the labor relations, it should be concluded that, an employee whose

97 See ROZIĆ, I., A. BILIĆ and T. PERKUŠIĆ. Open issues of objective arbitrability of Labor disputes in Croatian law. *Zbornik radova Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse,* 2019, no. 17, pp. 230–231; BABIĆ, D. A. Proposal for a new regulation of arbitrability in Croatian law on arbitration. In: UZELAC, A., J. GARAŠIĆ and A. MAGANIĆ (eds.). *Djelotvorna pravna zaštita u pravičnom postupku – izazovi pravosudnih transformacija na jugu Europe, Liber amicorum Mihajlo Dika*. Zagreb: Pravni fakultet Sveučilišta u Zagrebu, 2013, p. 530.

98 Labor Act in the provisions of Art. 133-135 regulates the judicial protection of employment rights.

employment rights have been violated, can independently decide whether to claim his or her rights before the state court or, assuming employer consent, through arbitration.

Studying the case-law mentioned in this paper, it is evident that the parties mostly agree on the possibility of resolving an individual labor dispute through arbitration through the clauses of the employment contract.[99] Indeed, the Labor Act merely states in its provisions that contracting parties may amicably entrust arbitration with the resolution of a labor dispute and that a collective agreement may regulate the composition, procedure and other issues relevant to the work of the arbitration.[100] Therefore, it follows from the above that the possibility of contracting arbitration to resolve an individual labor dispute through an employment contract is allowed. However, it is clear that the employee, as a weaker contracting party, can hardly refuse a clause providing for the possibility of arbitral settlement of the labor dispute precisely because the employer, as the more dominant party to the contract, can condition it by establishing an employment relationship. Having in mind the protective character provided for by labor law standards, the provisions of the Labor Act should be supplemented *de lege ferenda* in such a way that the possibility of contracting arbitration would be permitted by an arbitral agreement only after the dispute from the individual employment relationship arises.

6 Conclusion

Arbitration, as an alternative way of resolving individual labor disputes, is a select trial before an arbitral tribunal. The provisions of the Labor Act as a special legal source governing the arbitrability of individual labor disputes are flawed and incomplete, and although the Labor Act does not explicitly refer to the application of the general rules on arbitration, labor disputes are subsidiarily governed by the rules of the Arbitration Act.

99 It is similar in the United States where arbitration clauses are often an integral part of contracts of employment. See more JAGTENBERG, R. and A. de ROO. Employment Disputes and Arbitration. An Account of Irreconcilability, With Reference to the EU and the USA. *Proceedings of the Faculty of Law in Zagreb*, 2018, Vol. 68, no. 2, pp. 171–192.

100 Art. 136 Labor Act.

Accordingly, disputes on rights that the parties are free to dispose of are arbitrable, as well as disputes for the resolution of which the exclusive jurisdiction of the state court is not envisaged. Following the research carried out in this paper, it is inevitable to conclude that, as regards both conditions, different views arise both in legal doctrine and case law. For this reason and considering the specificities and protective character of the employment relations, the article 136 the Labor Act, which regulates the possibility of arbitral settlement of individual labor disputes, should be supplemented *de lege ferenda* as follows: - that it prescribes the arbitrability of all individual labor disputes, except those for which the jurisdiction of the state court is expressly prescribed by law, – that the possibility of contracting arbitration is admissible only after the particular employment dispute arises, and – that matters not regulated by this law, collective agreement or agreement of the parties are subject to the general rules of arbitration law. These proposals, the provisions of the Labor Act that standardised the possibility of arbitral settlement of disputes in individual labor relations, would be more consistent and clearly defined. Also, the aforementioned proposals strengthen the position of an employee as a weaker party in the employment relationship, and equalize its party disposition when arranging arbitration, therefore indirectly contributing to a more equal position of the employee and the employer in the employment relationship.

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What We Know, We Don't Know About Macao's Arbitration Framework and the Way Forward

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Abstract

Increasing attention has been drawn recently to the arbitration community after the long-waited call for reform in arbitration regime back in 1996, the new Macao Arbitration Law has finally come into force on 4 May 2020.[1] Still a phenomenon today, Macao SAR is not regarded as a popular destination for arbitration given the very strong competitions of "international" arbitral institutions surrounded in the South-East Asia Region, like Singapore, Hong Kong SAR, and Mainland China, but also probably due to its "imperfect" arbitration system that Macao SAR that was deeply-rooted in the past.

In response to the growth of international commercial arbitration cases worldwide, Macao SAR has tried hard to ameliorate in a number of ways without giving up its share in the arbitration market. Indeed, one good example is the reform of the latest Macao Arbitration Law in 2019. However, this may not serve as a "panacea" to bring any instant changes in arbitration, and promotion of Macao SAR as a "user-friendly" seat for arbitration may require time and joint effort from every stakeholder to make that happen. This paper will revisit the evolution of the Macao's arbitration system and its latest development, the potential challenges that pose to Macao SAR, a brief introduction of local arbitral institutions, as well as the likely concerns that the arbitral institutions and arbitration users may face when it comes to the choice for the place of arbitration.

Keywords

Arbitration; Macao Arbitration Law; UNCITRAL Model Law.

1 Law No. 19/2019. The new Macao Arbitration Law has been promulgated on 5 November 2019. The Decree-Law No. 29/96/M and Decree-Law No. 55/98/M have been abolished after the new legislation was introduced as of the date.

1 Introduction

Settling commercial and cross-border disputes by means of international arbitration is neither a new resolution mechanism nor novel practice in many parts of the world. To date, many research outputs related to international commercial arbitration have placed a lot of emphasis talking about the arbitration regimes with reference to common law jurisdictions like UK, Singapore, and Hong Kong SAR, or civil law jurisdiction like Mainland China. So far, there were very limited academic reviews and international journal articles that examine the latest development of arbitration mechanism, specifically in Macao SAR, let alone the new Macao Arbitration Law 2019.

This paper aims to provide some highlights of how arbitration regime operated in Macao SAR evolved from the past to the present. The article will be separated into six parts. Part II will provide an overview as to how the Macao Arbitration Regime changed over time since its colonization and after its handover to Mainland China. Then, the paper will present a brief overview of the arbitral institutions now situated in Macao SAR by looking into their functions and operating frameworks in Part III. This article will proceed in Part IV by discussing some of the key features pertaining in the new Macao Arbitration Law 2019 with the illustration of some important provisions stipulated in the new legislation. The next section, Part V, will be dedicated to discussion of the practical challenges that might occur when the arbitration is held in Macao SAR. Last but not least, Part VI will address the conclusion and way forward of Macao Arbitration.

2 An Overview of Macao's Arbitration Regime

2.1 Historical Development of Macao's Arbitration Law

Macao Law has been deeply influenced by the Portuguese law when it was first colonized by Portuguese in the 16th century, whereby the tradition of continental law using codification remained the main source of law. The notion of 'arbitration' first appeared in Portugal as early as 15th century[2],

2 VICENTE, D. M. Applicable Law in Voluntary Arbitrations in Portugal. *The International and Comparative Law Quarterly*, 1995, Vol. 44, no. 1, p. 179.

but has never been explored until the early 20th century in Macao. Back then, no separate set of law was specifically enacted for resolving arbitration disputes in Portugal, and only a handful of legal provisions dealing with arbitration in commercial and civil matters were incorporated in the Portuguese Civil Procedure Code 1939.[3]

In 1986, the very first set of arbitration legislation, namely Voluntary Arbitration Law[4] came into existence in Portugal to handle voluntary arbitration, setting aside the matters such as recognition and enforcement of foreign arbitral awards.[5] Two years after the enactment of the Voluntary Arbitration Law in Portugal, a team of legal experts were engaged to draft the Macao version of arbitration law, with a draft proposal prepared in 1990.[6] Nevertheless, it took more than 6 years for the late Portuguese Government to actually promulgate the relevant rules in regulating the conditions for voluntary arbitral institutions in 1996.[7]

2.2 Some Highlights on the Old Arbitration Regime

Prior to the new Macao Arbitration Law 2019, dual arbitration regimes were in place, namely (1) the Voluntary Arbitration Regime and (2) the External Commercial Arbitration Regime. Two separate laws were introduced to regulate this dual arbitration regime – the Decree-Law No. 29/96/M was introduced to govern domestic arbitration, whereas the Decree-Law No. 55/98/M, which exemplified from the Model Law on International Commercial Arbitration of United Nations Commission on International Trade Law ("UNCITRAL Model Law"), dealt with the international arbitration disputes. For the purpose of discussion, this paper will only highlight some of the major provisions stated in Decree-Law No. 55/98/M.

Unlike the new Macao Arbitration Law 2019 where the arbitration is broadly availed to resolve foreign-related disputes upon the agreement

3 Ibid., p. 180.

4 Law No. 31/86, came into force 29 November 1986 after several revisions were made in the proposal.

5 Supra note 3.

6 LOK, V. C. Brief Discussion on the Development of Macao's Arbitral Regime (in Chinese). *Administration*, 2000, Vol. 48, no. 13(2), p. 454.

7 Decree-Law No. 40/96/M by Gazette published 22 July 1996 and came into effect 15 September 1996.

of the disputable parties, the repealed Decree-Law No. 55/98/M governing the foreign-related arbitration disputes deals explicitly with the scope of "commercial matters". In other words, foreign disputes involving matters such as trade transaction, sales agreement, commercial representative or agent, collection of accounts, financial lease, consulting, engineering, license contract, investment, financing, banking transaction, insurance, development agreement or franchise agreement for the supply or exchange of goods or services, joint ventures and other forms of industrial or commercial cooperation, air, sea, rail or road transportation of goods or passengers would be regarded as commercial matters pursuant to Art. 1 para. 2 of Decree-Law No. 55/98/M.[8] In addition, based on Art. 27 of Decree-Law No. 55/98/M, the old provision simply allows the parties to seek judicial assistance from the court without any details on the procedural requirements to be complied with.

Hence, the unification of the dual regimes has indeed streamlined the legislations into unilateral law, making it more user-friendly without differentiating between the domestic and international arbitration under the new Macao Arbitration Law 2019.

3 Presence of Arbitral Institutions in Macao SAR

To correctly understand how the arbitration regime works in Macao SAR, it may be important to appreciate the presence of the arbitral institutions in the jurisdiction. So far, there are only three official arbitral institutions that offer arbitration services in Macao SAR, namely the Macao Consumer Mediation and Arbitration Centre, the Voluntary Arbitration Centre of the Macao Lawyers Association[9], and the World Trade Center Macau Arbitration Center ("WTC Macau Arbitration Center").[10]

8 Art. 1 para 2. Decree-Law No. 55/98/M.

9 Officially known as *"Centro de Arbitragens Voluntárias da Associação dos Advogados de Macau"* in Portuguese.

10 The Centre for Arbitration of Conflicts in Insurance and Private Pension Funds (which was set up in 2001 and operated by the Monetary Authority of Macao), and the Building Administration Arbitration Centre (which was set up in 2011 and operated by the Housing Bureau) have been extinguished pursuant to the Dispatch of the Chief Executive No. 128/2020 (by Gazette dated 8 June 2020) and the Dispatch of the Chief Executive No. 112/2020 (by Gazette dated 24 April 2020) respectively.

3.1 The Macao Consumer Mediation and Arbitration Centre

This institution was first established in 1988 in Macao under the name *"Macao Consumer Arbitration Centre"*[11], and was recently renamed as the *"Macao Consumer Mediation and Arbitration Centre"* on 14 December 2020 by Gazette pursuant to the Dispatch of the Chief Executive No. 228/2020. It was initially set up with the aim to resolve disputes by alternative means other than courts, specifically consumer disputes related to goods and services, i.e., contractual disputes involving consumers and businesses.[12] According to the online statistics provided by the Macao Consumer Mediation and Arbitration Centre, over 14% of the complaint cases in aggregate that have been dealt with are related to 'telecommunication and computer equipment' and 'laundry products' complaints between 1998 and 2019. Over the same period of time, out of 635 cases submitted to the institution, 411 cases have been sought for mediation and 209 cases for arbitration.[13]

Based on the Dispatch of the Chief Executive No. 228/2020, there is no maximum ceiling set in the disputable amount to be accepted by the institution. As a way of incentive encouraging the use of non-litigation means in resolving the dispute, parties will enjoy a free-of-charge mediation or arbitration services with the institution if the claimable amount does not exceed MOP 100,000 as prescribed by the Court of First Instance in Macao SAR. Provided that this is a voluntary process which is open to the general public, parties will have a choice to opt for mediation or arbitration, or even a combination of 'mediation and arbitration' ("med-arb")[14] to resolve the disputes in the Macao Consumer Mediation and Arbitration Centre.[15] Regardless which of the above-mentioned mode is selected to resolve a consumer dispute,

11 Regulations of Macao Consumer Mediation and Arbitration Centre No restriction on dispute amount, arbitration open to liberal professionals. *Government Information Bureau of the Macao SAR* [online]. 14. 12. 2020 [cit. 1. 6. 2021]. Available at: https://news.gov.mo/detail/en/N20LNxzIgy?2

12 Ibid.

13 5 cases have been withdrawn during the procedures (1 case in 2012 and 4 cases in 2013) – Statistics of arbitration cases in past years. *Macao SAR Government Consumer Council* [online]. [cit. 1. 6. 2021]. Available at: https://www.consumer.gov.mo/CAC/Statistics.aspx?lang=en

14 Parties are normally encouraged to first mediate then arbitrate if combined mode is adopted.

15 Supra note 11.

a written agreement to mediate or arbitrate or both has to be reached between parties in advance that they consent to submit the dispute to institution for mediation or arbitration or med-arb before the process officially kicks off.[16] In the amid of the COVID-19 as well as the cross-border transactions which become more frequent than ever, Art. 29 of Dispatch of the Chief Executive No. 228/2020 also permits parties to resolve the disputes by conducting the mediation or arbitration via video-conferencing if necessary.[17]

In case mediation or med-arb is adopted, the institution would normally select a mediator on the parties' behalf and try to facilitate the mediation process in the hope that the dispute could be quickly resolved.[18] On the other hand, if arbitration is opted, or when the mediation session fails in med-arb, then an arbitrator will be appointed to hear the submissions of both parties and their relevant evidence before he or she makes a final award.[19] Once parties have reached a settlement, in the case of mediation, a mediation agreement in writing has to be signed, whereas for arbitration, the arbitrator will come up with a final award which carries the same legal effect as the court order in Macao.[20]

3.2 The Voluntary Arbitration Center of the Macao Lawyers' Association

In March 1998, the Voluntary Arbitration Center of the Macao Lawyers' Association was set up pursuant to the Dispatch No. 26/GM/98 with the objective to resolve disputes arising between lawyers, lawyers and clients, or any conflicts that relate to civil, administrative or commercial matters.[21] So far, there are only 2 arbitration cases that have been dealt with by the Voluntary Arbitration Center.

16 Consumer Mediation and Arbitration Service. *Macao SAR Government Consumer Council* [online]. [cit. 1. 6. 2021]. Available at: https://www.consumer.gov.mo/AboutUs/Formalities.aspx?lang=en&id=CC-1414_e

17 Art. 29 Dispatch of the Chief Executive No. 228/2020.

18 Macao Consumer Council, Frequently Asked Questions. *Macao SAR Government Consumer Council* [online]. [cit. 1. 6. 2021]. Available at: https://www.consumer.gov.mo/CAC/faq.aspx?lang=en

19 Ibid.

20 Supra note 16.

21 Art. 3 letters a) to c) Dispatch No. 26/GM/98; Art. 3.1 para. 1–3 Articles of Association of the Voluntary Arbitration Centre of the Macao Lawyers' Association, Government Gazette No. 24 (Part 2), dated 10 June 2020.

At present, the Voluntary Arbitration Center has initiated two main rules that govern the procedure of arbitration: (1) "Rules on Arbitral Procedure" and (2) "Rules on Emergency Arbitral Procedure".[22] For the sake of clarity, this paper will highlight the relevant discussion on the former rules only. Based on the "Rules on Arbitral Procedure" issued by the Macao Lawyers' Association ("Macao Lawyers' Association Rules on Arbitral Procedure"), a sole arbitrator or arbitrators can be appointed by the Voluntary Arbitration Center if parties cannot reach unanimous consent in the appointment of arbitrator(s).[23]

In light of efficiency and effectiveness, two or more arbitration cases may be consolidated by the Chairman of the Voluntary Arbitration Centre upon hearing the views of the parties or in pursuit of a party's application.[24] In addition, the first meeting record has to be prepared by the arbitral tribunal with the involvement of the parties after receiving the submission for arbitration. Amongst all, the following matters need to be elaborate in the first meeting minutes in accordance with Art. 24, namely:

1. The summary description of the dispute;
2. The place of arbitration;
3. The applicable law or, if the parties have so determined and are legally admissible, recourse to a decision in accordance with equity *(ex aequo et bono)* or balancing conflicting interests *(amiable compositeur)*;
4. The language of the arbitration;
5. The identification of the parties and their representatives or legal representatives and the respective contacts;
6. The procedural documents to be submitted by the Parties and the respective deadlines;
7. The value of the cause or its estimate that one considers appropriate.[25]

In terms of the decision made by the arbitral tribunal, the final award is generally not appealable unless parties agreed otherwise in the arbitration agreement or when it falls into an exception in law.[26] The Macao Lawyers'

22 Rules are available in Chinese and Portuguese only. – Centro de Arbitragem – Legislação. *Associação dos Advogados de Macau* [online]. [cit. 1. 6. 2021]. Available at: https://aam.org.mo/centro-de-arbitragem/

23 Art. 12 Macao Lawyers' Association Rules on Arbitral Procedure.

24 Art. 18 Macao Lawyers' Association Rules on Arbitral Procedure.

25 Art. 24 Macao Lawyers' Association Rules on Arbitral Procedure.

26 Art. 30 Macao Lawyers' Association Rules on Arbitral Procedure.

Association Rules on Arbitral Procedure do not state the relevant circumstances which fall into the exceptions but have provided parties with the channels to lodge an appeal with other competent arbitral tribunals if so proved.[27] Sole arbitrator or arbitrators sitting in the preceding arbitral tribunal would be excluded from taking part in the appeal as member(s) of the arbitral tribunal to maintain impartiality.[28] As for the appellant, a time limit of 30 days counting from the date since the award is handed down will be provided.[29] If the grounds for appeal are agreeable by arbitral tribunal, such decision will supersede the award made by the former arbitral tribunal, and *vice versa*.[30] Regardless whether the appellant succeeded in the claim or not, the arbitral tribunal for appeal will render the award[31] within 6 months since the date the Secretariat received the appeal application.[32]

In addition to the substantial rules on the arbitral procedure mentioned above, the "Code of Professional Ethics" laid down by the Macao Lawyers' Association ("Macao Lawyers' Association Code of Professional Ethics") has also been in place for arbitrator(s) to comply.[33] Under such Code, an arbitrator is under different obligations, e.g., confidentiality[34], disclosure duty[35], diligence duty[36], and suggesting conciliation to resolve the dispute without affecting parties' decisions[37] and so on.

3.3 The World Trade Center Macau Arbitration Centre

This institution, originally known as the *"World Trade Center Macau Voluntary Arbitration Center"*, was set up just before the handover to Mainland China

27 Art. 31 Macao Lawyers' Association Rules on Arbitral Procedure.
28 Art. 36 para. 3 Macao Lawyers' Association Rules on Arbitral Procedure.
29 Art. 33 Macao Lawyers' Association Rules on Arbitral Procedure.
30 Art. 38 Macao Lawyers' Association Rules on Arbitral Procedure.
31 The award rendered by the arbitral tribunal for appeal is one that is final and is not appealable according to Art. 40 of the Macao Lawyers' Association Rules on Arbitral Procedure.
32 Art. 37 Macao Lawyers' Association Rules on Arbitral Procedure.
33 Macao Lawyers' Association Code of Professional Ethics – Código Deontológico dos Árbitros Centro de Arbitragem da AAM. *Associação dos Advogados de Macau* [online]. [cit. 1. 6. 2021]. Available at: https://aam.org.mo/wp-content/uploads/2021/01/Codigo-Deontologico-do-Arbitro-site.pdf
34 Art. 10 Macao Lawyers' Association Code of Professional Ethics.
35 Art. 5 Macao Lawyers' Association Code of Professional Ethics.
36 Art. 7 Macao Lawyers' Association Code of Professional Ethics.
37 Art. 12 Macao Lawyers' Association Code of Professional Ethics.

in June 1998 pursuant to the Order 48/GM/98[38], to promote alternative resolution methods other than litigation means, such as arbitration and mediation.[39] As part of the World Trade Center Macau, the WTC Macau Arbitration Center is operated by a Directive Council which includes a President, a Vice-President, and five Members.[40] Based on the latest statistics, there are only 4 arbitration cases that have been handled by the institution.

The internal rules of the WTC Macau Arbitration Center ("WTC Internal Rules") have recently been amended by way of passing a resolution in the Directive Council on 27 April 2020. Rules related to arbitration and mediation are provided under the internal rules in Chapter 3 (for arbitration) and Chapter 4 (for mediation) respectively.[41] When an application for arbitration has been submitted to the WTC Macau Arbitration Centre, like many other international arbitral institutions, a party retains the flexibility in the arbitration process, e.g., the number of arbitrators in forming an arbitral tribunal[42], the language used in the arbitration[43], the place of arbitration[44], etc. Throughout the process of arbitration, arbitrators and relevant stakeholders will be bound by the duties such as disclosure[45], confidentiality[46], recusal[47], co-operation[48], etc. In order to facilitate the arbitration process, and to save costs and time, an arbitrator or arbitrators will have the discretion to consolidate the arbitration cases, subject to the agreement of the parties, when there are two or more arbitration cases with similar natures and with the same party involved.[49]

38 Published in the Macau Official Gazette no. 24 of 15 June 1998.

39 World Trade Center Macau – About us. *World Trade Center Macau Arbitration Center* [online]. [cit. 1. 6. 2021]. Available at: http://www.wtc-macau.com/arbitration/eng/index.htm

40 Ibid.

41 The Internal Rules are only available in Chinese. – Internal Rules of the WTC Macau Arbitration Center. *World Trade Center Macau Arbitration Center* [online]. [cit. 1. 6. 2021]. Available at: http://www.wtc-macau.com/arbitration/cht/statute/arbitration_chinese_rules.pdf

42 Art. 45 WTC Internal Rules – *"If the party is silent on the number of arbitrators, three arbitrators will be appointed to constitute the arbitral tribunal."*

43 Art. 70 WTC Internal Rules.

44 Art. 69 WTC Internal Rules.

45 Art. 53 WTC Internal Rules.

46 Art. 90 WTC Internal Rules.

47 Art. 52 WTC Internal Rules.

48 Art. 84 WTC Internal Rules.

49 Art. 92 WTC Internal Rules.

4 Features of the New Macao Arbitration Law

4.1 Party Autonomy and Powers of Arbitral Tribunal

The notion of party autonomy is well-recognized in the new Macao Arbitration Law 2019. In particular, the "autonomy principle" has been laid down under Art. 5 para. 1 allowing parties to freely *"choose to resolve disputes by arbitration and determine their mode of operation, especially regarding the composition of the arbitral tribunal and relevant procedural rules"*.[50] In short, this new Macao Arbitration Law 2019 provides parties with wide discretion in a number of critical aspects in arbitral proceeding, for example, the preferred language, the place of arbitration, the procedure in the appointment of arbitrators, the number of arbitrators sitting in the arbitral tribunal, etc.

In terms of language, parties will have the autonomy to agree on one or more languages being used in the arbitral proceeding pursuant to Art. 50 para. 1 of the Macao Arbitration Law 2019.[51] If no consensus is achieved between parties, then the arbitral tribunal will determine the proper language or languages depending on the circumstances of the case, the convenience of the parties and the efficiency of communication.[52] Similarly, parties are free to choose the place of arbitration according to Art. 49 para. 1 of the Macao Arbitration Law 2019.[53] Ultimately, if parties cannot reach an agreement on that issue, the arbitral tribunal will have the right to select the place of arbitration based on various factors, e.g., the convenience of the parties[54] and may also hold meetings at any place that the arbitral tribunal considered appropriate for consultations among members of the arbitral tribunal, to hear the opinions of witnesses, experts, or parties, to inspect property or documents, or take other measures deemed necessary[55].

Likewise, as stated in Art. 54 of Macao Arbitration Law 2019, the parties will have the freedom to choose the agreed rules of procedure for arbitral

50 Art. 5 para. 1 Macao Arbitration Law 2019.
51 Art. 50 para. 1 Macao Arbitration Law 2019.
52 Art. 50 para. 2 Macao Arbitration Law 2019.
53 Art. 49 para. 1 Macao Arbitration Law 2019.
54 Art. 49 para. 2 Macao Arbitration Law 2019.
55 Art. 49 para. 3 Macao Arbitration Law 2019.

proceeding which the arbitral tribunal must abide by.[56] Obviously, when parties cannot agree on the specific rules of procedure, the arbitral tribunal will decide the best way to conduct such arbitral proceeding subject to the regulations[57] and is also granted the powers to determine the admissibility, the relevance and value of any evidence presented.[58] Aside from the rules, parties are also open to choose the number of arbitrators in constituting the arbitral tribunal based on Art. 21 para. 1.[59] Yet, Art. 21 para. 2 of the new Macao Arbitration Law 2019, which is more or less an equivalent provision of Art. 10 para. 2 of the UNCITRAL Model Law, provides that *"unless the parties have agreed otherwise, the arbitral tribunal shall consist of three arbitrators"*.[60] Based on the reading of the legislation wordings, despite the default number of the arbitrators in both the UNCITRAL Model Law and the new Macao Arbitration Law 2019 is set at three, the context is slightly diverged. In the case of new Macao Arbitration Law 2019, the pretext is that, if parties have come to a consensus, the parties' determination prevails, whereas for UNCITRAL Model Law, the number of arbitrators is set at three if the parties' determination cannot be reached. Unlike the new Macao Arbitration Law 2019, the UNCITRAL Model Law does not spell out the circumstance expressly when parties agree on the number of arbitrators.

4.2 Court's Involvement in Arbitral Proceeding

The principle of "minimum court's interference" has been expressly mentioned in Art. 5 para. 8 of the new Macao Arbitration Law 2019.[61] In other words, the interference of the court shall be kept at the very minimum and the court may intervene in all matters under the circumstances provided in this new Macao Arbitration Law 2019.[62] A good example of this is shown in Art. 61 of the new Macao Arbitration Law 2019, whereby the arbitral tribunal or party (subject to the consent of the arbitral tribunal) requests

56 Art. 54 para. 1 Macao Arbitration Law 2019.
57 Art. 54 para. 2 Macao Arbitration Law 2019.
58 Art. 54 para. 3 Macao Arbitration Law 2019.
59 Art. 21 para. 1 Macao Arbitration Law 2019.
60 Art. 21 para. 2 Macao Arbitration Law 2019.
61 Art. 5 para. 8 Macao Arbitration Law 2019.
62 Art. 5 para. 8 Macao Arbitration Law 2019.

the court to assist in obtaining evidence, especially if the investigation of the evidence depends on the wishes of one of the parties or a third party and refuses to cooperate[63], the court can notify the parties in the arbitration or third party to submit the necessary evidence[64]. It is important to take note that the process of obtaining evidence must be one that is of an urgent nature, and such act will typically take priority over any non-emergency judicial work.[65] One interesting point to note is that, the new Macao Arbitration Law 2019 provides a more detailed elaboration on the relevant rules of "Court Assistance in Taking Evidence" as well as its procedure under Art. 61 para. 1–6, whereby Art. 27 of the UNCITRAL Model Law only furnishes a simple version of the equivalent provision without specific details.

4.3 Recognition and Enforcement of Arbitral Awards

Similar to Art. 35 of the UNCITRAL Model Law, where competent courts are allowed to recognize and/or enforce the arbitral award, the new Macao Arbitration Law 2019 specifies that competent courts in Macao SAR, such as the Court of First Instance[66] and the Intermediate Court[67] will have the jurisdiction to exercise the discretionary power in certain circumstances for the purpose of recognition and/or enforcement of foreign arbitral awards pursuant to Art. 74 of the new Macao Arbitration Law 2019.[68] Despite the court's intervention is to be kept in the minimal at all times, the "recognition and enforcement" of foreign arbitral awards is particularly important as the terms carry special meanings in the international arbitration framework. The rationale behind is that, when parties seek arbitration as a means to settle dispute, they will concern about the necessary tool for the recognition and enforcement of foreign arbitral awards and will make sure whether such foreign arbitral award can be enforced or not.[69]

63 Art. 61 para. 1 Macao Arbitration Law 2019.
64 Art. 61 para. 3 Macao Arbitration Law 2019.
65 Art. 61 para. 6 Macao Arbitration Law 2019.
66 Art. 74 para. 1 Macao Arbitration Law 2019.
67 Art. 74 para. 2 Macao Arbitration Law 2019.
68 Art. 74 Macao Arbitration Law 2019.
69 DIAS SIMÕES, F. Recognition and Enforcement of Foreign Arbitral Awards in Macau. *Hong Kong Law Journal*, 2014, Vol. 44, no. 2, p. 567.

In line with the new Macao Arbitration Law 2019, there is a separation of works allocated to the courts (i.e., between the Court of First Instance[70] and the Intermediate Court[71]) in Macao when it comes to recognition and enforcement of foreign arbitral awards. According to Art. 70, a foreign arbitral award shall have effect in Macao only after they have been recognized by the Intermediate Court of Macao taking into account the international conventions, mutual legal assistance agreements, or special laws applicable to the jurisdiction.[72] Whereas for the enforcement of the foreign arbitral awards, it would be dealt with by the Court of First Instance after the foreign arbitral award has been recognized by the Intermediate Court.[73]

4.4 Arbitrability of Administrative Dispute

In respect of the nature of the dispute, Chapter 10 of the new Macao Arbitration Law 2019 has designated a particular section in handling administrative disputes by means of arbitration, which is a unique feature not included in the UNCITRAL Model Law. For instance, Art. 77 provides that an administrative dispute is arbitrable if there is an administrative contract, the liability has to do with administrative authority, civil servant or service personnel that losses have been caused by its public management activities.[74] To put it in another way, so long a party concerned in the dispute involves a civil servant or administrative authority, such signatory party in the arbitration agreement will be entered under the name of the Macao Special Administrative Region.[75] In an administrative dispute, the Chief Executive is vested with the power to appoint arbitrators designated by the Macao Special Administrative Region.[76] Bearing in mind this special

70 Supra note 67; According to Art. 74 para. 1 of the Macao Arbitration Law 2019, the Court of First Instance is the court with the jurisdiction to exercise the discretionary power provided in Art. 15, Art. 23 para. 2 point iii), para. 3–4, Art. 24 para. 2–4, Art. 29 para. 4, Art. 30 para. 2, Art. 44, Art. 45, Art. 46 para. 9, Art. 51 para. 4, Art. 61, Art. 69 and Art. 73.

71 Ibid.; According to Art. 74 para. 2 of the Macao Arbitration Law 2019, the Intermediate Courts are courts with the jurisdiction to exercise the discretionary power provided in Art. 70–72.

72 Art. 70 Macao Arbitration Law 2019.

73 Art. 73 Macao Arbitration Law 2019.

74 Art. 77 para. 1–3 Macao Arbitration Law 2019.

75 Art. 78 para. 1 Macao Arbitration Law 2019.

76 Art. 78 para. 1 Macao Arbitration Law 2019.

nature of the dispute, there is a prerequisite set for (1) the applicable law, whereby the arbitral tribunal shall only rule with the substantive law of Macao Special Administrative Region on the administrative disputes pursuant to Art. 79[77] and (2) the arbitral awards concerning the administrative disputes shall be announced by publication[78].

4.5 Emergency Arbitration

The concept of emergency arbitration has been introduced in the new Macao Arbitration Law 2019 in Chapter 3 of the legislation. Under the new law, in order to nominate an emergency arbitrator, it is very crucial to specify the relevant rules for such nomination in the arbitration agreement by the parties, otherwise it would be deemed as invalid.[79] The term "emergency arbitrator" is well-defined in Art. 2 para. 6 as *"an arbitrator appointed to order the adoption of emergency interim measures before an arbitral tribunal is constituted"*.[80] Therefore, an emergency arbitrator will be granted power to only deal with emergency interim matters, e.g., ordering the emergency interim measures at the request of either party[81] or reserving the right to make decision on the request for an emergency interim measure[82]. Upon the request of any party, emergency arbitrator is empowered with the rights to modify, suspend or terminate the emergency interim measures that have been ordered.[83] It is also noteworthy that a time limit is set to a requesting party when an emergency interim measure has been ordered before the arbitration procedure begins.[84] That is, the requesting party has to take necessary measure to carry out the arbitration procedure within 30 days from the day the notice of order is received, otherwise such emergency interim measure will be declared as invalid pursuant to Art. 19 of the new Macao Arbitration Law 2019.[85]

77 Art. 79 Macao Arbitration Law 2019.
78 Art. 80 Macao Arbitration Law 2019.
79 Art. 16 Macao Arbitration Law 2019.
80 Art. 2 para. 6 Macao Arbitration Law 2019.
81 Art. 17 para. 1 Macao Arbitration Law 2019.
82 Art. 17 para. 2 Macao Arbitration Law 2019.
83 Art. 18 Macao Arbitration Law 2019.
84 Art. 19 Macao Arbitration Law 2019.
85 Art. 19 Macao Arbitration Law 2019.

4.6 Eligibility of Foreign Arbitrators and Regulations on Arbitrators' Fees

Due to the restrained number of experienced arbitrators in Macao, the new Macao Arbitration Law 2019 has introduced the "opening-up" policy for overseas arbitrators to act as arbitrator(s) of the arbitral tribunal in case an arbitration proceeding is held in Macao.[86] So far, the Macao resident status is not a must for an arbitrator to sit in an arbitration in Macao[87] nor an administrative license is requested to perform the duty[88]. So long the appointed foreign arbitrator can produce certification documents concerning the information of the arbitration, such as the date and place of performance of the duties as arbitrator, the foreign arbitrator will be exempted from undergoing any application[89] and can stay in the jurisdiction within the timeframe of the arbitration proceedings[90]. In connection with the arbitrator's and the arbitral tribunal's fees, this is governed by Art. 34 of the new Macao Arbitration Law 2019.[91] Without the agreement of the parties, fees of the arbitrators and the arbitral tribunal as well as the relevant fees incurred in arbitration proceeding shall be calculated based on the provisions stipulated in the respective arbitral institutions' rules.[92]

5 Practical Challenges in Macao's Arbitration

5.1 Language Barriers

Chinese and Portuguese remain the official languages in Macao after the handover, despite English is commonly used in trades and business nowadays. Conventionally, Portuguese is the official language and all laws were written in Portuguese back in centuries ago and still continue to carry its importance nowadays in practice. On the other hand, with the introduction

86 Art. 81 Macao Arbitration Law 2019.
87 Art. 81 para. 2 Macao Arbitration Law 2019.
88 Art. 81 para. 1 Macao Arbitration Law 2019.
89 Supra note 87.
90 Supra note 88.
91 Art. 34 Macao Arbitration Law 2019.
92 Art. 34 para. 2 Macao Arbitration Law 2019.

of Basic Law of Macao SAR[93], Chinese has become a preferred language used in different sectors after Macao's handover to China.

The applicability of these dual languages may in fact create difficulty for legal practitioners when it comes to the interpretation of law with two different sets of languages. Thus, there comes an issue of priority in terms of languages. Undoubtedly, the long-tradition of using Portuguese as the official language in the legal system in Macao has brought an extensive impact to the Macao's legal system and society as a whole, yet the Chinese language will always prevail[94] when a conflicting understanding arises between the Portuguese and Chinese translations in interpreting a law after the handover.[95]

As Macao's laws were drafted and enacted primarily in Portuguese in the past, and now they are more commonly bilingual – Chinese and Portuguese, there is little room for non-Chinese and non-Portuguese speaking legal practitioners to understand fully what the laws actually meant without first attaining the language or languages in a proficient level. Given that arbitration disputes, in particular international commercial arbitrations, involve parties coming from around the world, the language barriers may create extra hurdles to arbitrators when Macao law is referred or adopted as substantive law in an arbitration dispute, and so much so it would be very challenging for a non-Chinese or non-Portuguese speaking arbitrator to render an award in an arbitration which shall be unbiased and just. In the realm of international commercial arbitration, most of the arbitrators of course will be fluent in English, but very limited practitioners will be able to master English-Portuguese effectively and simultaneously, and even less when looking for multilingual arbitrators who speak the languages in a native manner.

Despite the fact that more professional interpreters have been cultivated in the past decades locally and overseas to meet the large demand of Portuguese-Chinese linguists in interpretation and translation works, especially in the government and business sectors, sometimes they have been blamed for not providing a sound or accurate interpretation or translation

93 Art. 9 Basic Law of Macao.

94 Standing Committee of the National People's Congress issued an official interpretation on 2 July 1999.

95 TONG, I. C. Linguistic Pluralism and the Legal System of Macau. *Journal of International and Comparative Law*, 2020, Vol. 7, no. 1, p. 188.

job, e.g., the interpreter fails to grasp the true meaning of the law which was originally written in Portuguese when conducting the legal interpretation or translation, or simply because they lack the required proficiency in Portuguese language.[96]

Language itself plays a significant role in international commercial arbitration, especially that administered by an arbitral institution. Until today, English seems to remain the most chosen and preferred language among the arbitral institutions based on the latest statistics.[97] Arbitrators are normally expected to be fluent in the language selected by the parties to understand the case well without the presence of the interpreters when conducting the arbitration proceeding. There are lots of challenges involved when employing interpreters or translators, on top of the high costs incurred in engaging a team of interpreters, at the same time, a high quality of interpretation or translation is also demanded from these professionals in the course of an arbitration. This would be even more real if all parties in the arbitration come from different jurisdictions and are capable of communicating in the mother tongue only, which will definitely create an issue in the communication as well as ensuring the overall quality of the arbitration process.[98] In addition, there is always a consideration related to impartiality and confidentiality to be taken into account when a third party like an interpreter or translator is involved in the arbitration process.[99] Hence, proper training and professional experience of the interpreters or translators are highly important to ascertain the quality of the interpretation or translation works throughout a non-litigation process.[100] Thus, the language barriers remain a challenge not only for Macao's legal community, but the arbitration worldwide.

96 TONG, I. C. Linguistic Pluralism and the Legal System of Macau. *Journal of International and Comparative Law*, 2020, Vol. 7, no. 1, p. 190.

97 80.3% of arbitration administered by Hong Kong International Arbitration Centre ("HKIAC") were in English in 2019. – 2020 Statistics. *HKIAC* [online]. [cit. 1. 6. 2021]. Available at: https://www.hkiac.org/about-us/statistics; 79% of arbitral awards administered by ICC were in English in 2019. – ICC Dispute Resolution 2019 Statistics. *Global Arbitration News* [online]. [cit. 1. 6. 2021]. Available at: https://globalarbitrationnews.com/wp-content/uploads/2020/07/ICC-DR-2019-statistics.pdf

98 CARTER, A. and S. WATTS. The Role of Language Interpretation in Providing a Quality Mediation Process. *Contemporary Asia Arbitration Journal*, 2016, Vol. 9, no. 2, p. 304.

99 Ibid.

100 Ibid.

5.2 Lack of Precedents

Until today, there were only a few arbitration cases being heard and decided in Macao SAR leading very little opportunities for legal practitioners to explore and get hands-on experience in Macao's arbitration arena. With the nature of arbitration being one that is impartial and confidential, the publication of the arbitral awards is not that common among arbitration community. As a result, arbitrators and relevant parties may not have any idea as to how former disputes were settled and decided without the presence of the awards as precedents, or to predict the outcome of an arbitration.[101] The beauty of having the published award shall not be ignored especially when it comes to the point of certainty. With reference to the preceding awards, arbitrator(s) and parties will be able to estimate the likelihood of success in the arbitration, the approaches that a particular arbitrator handled the cases and so on, so as to assist the parties and their legal representatives to better prepare for the arbitration case and without wasting unnecessary time and costs, should the claim be one that is seen as frivolous.[102]

Some studies also showed that even if an award is redacted, the provision of such published award may be valuable to the parties to understand the arbitrator's insights.[103] Despite 'arbitration' is not new to many professions in Macao SAR, so far not much has been explored on the practical side. Hence, if the award can be made available by way of publication, this would not only help arbitrators (including those newly joined professionals to better learn how experienced arbitrators decide in an arbitration) but it also allows parties to consider who can be a suitable candidate to act as arbitrator when they come across an arbitration.[104] In the interest of the inexperienced arbitrators, an award may indeed serve as a privileged

101 ZLATANSKA, E. To Publish, or Not to Publish Arbitral Awards: That is the Question… *International Journal of Arbitration, Mediation and Dispute Management*, 2015, Vol. 81, no. 1, p. 28.

102 Ibid.

103 2018 International Arbitration Survey: The Evolution of International Arbitration. *Queen Mary University of London* [online]. [cit. 1. 6. 2021]. Available at: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey--The-Evolution-of-International-Arbitration-(2).PDF

104 Ibid., p. 29.

material for the purpose of intellectual understanding, e.g., how to approach an arbitration with similar facts when one is appointed as an arbitrator in the near future.[105]

Unlike the doctrine of precedents that many common law jurisdictions would welcome, publishing awards has not yet been accepted as a norm in many international commercial arbitrations. Since arbitration itself is a party-autonomy dispute resolution mechanism, parties are open to opt-in or opt-out, including the selection of arbitrator. Hence, with the publication of the awards available in the public domain, this would enable parties to know the names of the arbitrators, the arbitration cases that the arbitrator(s) have been involved in, the specific nature of the disputes in the past, how the arbitrator(s) ruled the case, etc.[106] From the arbitrator's perspective, this would, in turn, provide a good track record to build-up his or her reputation in the field of arbitration[107] which will be very encouraging for arbitrators who newly join the profession.

5.3 Protectionism in Local Legal Profession

At present, the development of legal education in Macao SAR is still underdiscussed in many foreign legal scholarships, and little details are known to the international legal community. In the current Macao's legal system, no distinction is drawn between solicitor and barrister. Thus, these lawyers are normally permitted to accept contentious and non-contentious work, e.g., providing legal advice and appearing in court as counsel, etc.[108] Historically, Macao's legislations are written in Portuguese and Chinese only. Thus, the majority of law students in Macao are bilingual in Chinese and Portuguese at a level whereby they can understand the legislation. Unlike many jurisdictions where registration to practice law is allowed upon fulfillment of certain statutory requirements, such as registering as 'foreign lawyer' in Hong Kong or Singapore, Macao SAR has its set of unique rules laying down the specific conditions for legal qualification and practice. Ultimately,

105 Ibid.
106 Ibid, p. 31.
107 Ibid.
108 OLIVEIRA, J. C. et al. An Outline of the Macau Legal System. *Hong Kong Law Journal*, 1993, Vol. 23, p. 383.

the requirements in both language and legal education may impose hurdles to potential candidates who hold foreign legal qualification, especially those from common law jurisdiction, to practice law or to represent clients in Macao SAR.

Likewise, given that Macao lawyers are primarily educated and trained either locally or in Portugal, not a lot of legal professionals in Macao SAR would have the same opportunity to receive additional legal education or legal training, for example, in common law. Thus far, there is only a handful of legal professionals who attained the legal knowledge jointly in civil law and common law. Looking from the viewpoint of arbitration, arbitrators are normally specialists with particular set of expertise or even cross-disciplines, who would often have tremendous experience dealing with a vast majority of the arbitral cases involving complicated facts and issues in cross-border and international disputes. Eventually, in light of the highly technical area of expertise and knowledge that are required in an area like arbitration, these cases are usually referred to the same group of arbitrators who have the international experience and arbitration exposures, leaving very few opportunities for new arbitrators to join the arbitration market due to factors such as *"high barriers to entry and information asymmetries"* [109], let alone Macao's professionals who are eager to start their careers as arbitrators.

5.4 Competitions Among International Arbitral Institutions

On top of the above challenges, not only the rapid growth in the arbitration cases has triggered higher rivalry in the market among the arbitrators worldwide, the international arbitral institutions are also facing fierce competition in the increasing number of arbitration cases. According to the Queen Mary University of London's statistics (2018), conventional locations for arbitration such as London, Paris, Singapore, Hong Kong, and Geneva were the five preferred seats of arbitration selected[110], whereas ICC,

109 ROGERS, C. A. The Market for Arbitrators and the Market for Lemons. *Kluwer Arbitration Blog* [online]. 10. 6. 2020 [cit. 1. 6. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2020/06/10/the-market-for-arbitrators-and-the-market-for-lemons/

110 2018 International Arbitration Survey: The Evolution of International Arbitration. *Queen Mary University of London* [online]. P. 9 [cit. 1. 6. 2021]. Available at: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey--The-Evolution-of-International-Arbitration-(2).PDF

LCIA, SIAC, HKIAC, and SCC were the preferred arbitral institutions[111]. When determining which institution is to be chosen for an arbitration, factors such as 'general reputation and recognition of the institution', 'high level of administration (including efficiency, pro-activeness, facilities, quality of staff)', 'access to wide pool of high-quality arbitrators', 'previous experience of the institution' were considered crucial when an arbitration is opted for.[112]

Yet, based on the above survey, it was found that *"global presence/ability to administer arbitrations worldwide"* has become an important driver for parties, especially with the large volume of cross-border transaction disputes happening globally, and given that many arbitral institutions handling cases in *"a multitude of locations around the world"* nowadays.[113] A good example is the pilot programme proactively launched by the Supreme People's Court ("SPC") by allowing foreign arbitral institutions to set their representative offices in Shanghai[114] and Beijing[115] in the Free Trade Zone.[116] This example demonstrates a significant step moving the Chinese arbitration system towards an arbitration-friendly jurisdiction.

6 Conclusions and the Way Forward

The introduction of the new Macao Arbitration Law 2019 has indeed been a great leap forward in many ways through the reform in its arbitration

111 Ibid., p. 13.

112 Ibid., p. 14.

113 The State Council's Circular on Issuing the Plan for Further Promoting the Reform and Opening-up the China Shanghai Pilot Free Trade Zone (promulgated on 8 April 2015).

114 2018 International Arbitration Survey: The Evolution of International Arbitration. *Queen Mary University of London* [online]. P. 15 [cit. 1. 6. 2021]. Available at: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF

115 Administrative Measures for Registration of Business Offices Established by Overseas Arbitration Institutions in China (Beijing) Pilot Free Trade Zone (the "Administrative Measures") take effect since 1 January 2021. English version of the Administrative Measures is available online. – Administrative Measures for Registration of Business Offices Established by Overseas Arbitration Institutions in China (Beijing) Pilot Free Trade Zone. *Beijing Arbitration Commission. Beijing International Arbitration Center* [online]. 31. 12. 2020 [cit. 1. 6. 2021]. Available at: https://www.bjac.org.cn/news/view?id=3878

116 PRUSINOWSKA, M. China as a Global Arbitration Player? Recent Developments of Chinese Arbitration System and Directions for Further Changes. *Tsinghua China Law Review*, 2017, Vol. 10, no. 1, p. 39.

system, which definitely brings a new chapter in the Macao SAR's arbitration history, and hopefully with a more arbitration-friendly mechanism. Yet, the new legislation is not perfect, and there still exist some uncertainties as to how the new arbitration law will bring benefits to the arbitration audience in terms of its effectiveness and efficiency. On the one hand, despite the Chinese-Portuguese language continues to play a significant role in the local legal system, as well as legal education in Macao SAR, which shapes its uniqueness, not only within Mainland China, but in the world, the protectionism of the legal profession may impede obstacles in light of the stringent prerequisites for legal qualification.

Languages may continuously impose difficulties for arbitrators to understand the case, especially when the Macao law is used as the substantive law in an arbitration. Despite some laws and regulations were gradually and unofficially translated into English, some of which are accessible in public domain, Chinese and Portuguese remain predominantly the two official languages that are currently in use. Thus, having a competitive edge in mastering the language and knowing the law in the native language would surely be a plus to arbitrators when they are appointed to act in Macao SAR. On the other hand, for an arbitral institution to become "internationalized", the implication of the new Macao Arbitration Law 2019 is just one of the many successful factors. Excellent one-stop service shall be in place with well-trained administrative and support staff in the secretariats would help a great deal to expedite the arbitration process.[117] Competition does not stay alone locally. Keeping abreast of the latest global development in international arbitration and setting new strategies to outstand its competitors is extremely crucial for local arbitral institutions to act. Ultimately, promoting Macao SAR as a suitable place for future arbitration and bringing more attractiveness to the international arbitration community to come to Macao SAR for arbitration are the goals that one should aim at.

117 SLATE, W. K. International Arbitration: Do Institutions Make a Difference. *Wake Forest Law Review*, 1996, Vol. 31, no. 1, p. 47.

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