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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.<sup>1</sup> *“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.”*<sup>2</sup>

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<sup>1</sup> 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>

<sup>2</sup> *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.<sup>3</sup> 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.”*<sup>4</sup>

The main characteristic feature of an arbitration agreement is that it constitutes an arrangement regarding the dispute resolution process.<sup>5</sup> An arbitration agreement represents a contract according to which parties submit their dispute to arbitration.<sup>6</sup>

<sup>3</sup> 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.

<sup>4</sup> Art. II para. 1 New York Convention.

<sup>5</sup> 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.

<sup>6</sup> 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.<sup>7</sup> 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.”<sup>8</sup> The term dispute is interpreted widely – it applies to both existing and future disputes.<sup>9</sup> “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.”<sup>10</sup> Moreover, the dispute must fall within the scope of an arbitration agreement.<sup>11</sup>

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”.<sup>12</sup> An arbitration agreement under New York Convention

<sup>7</sup> 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.

<sup>8</sup> Judgment of the PCA of 30 August 1924, Case *The Mavrommatis Palestine Concessions*.

<sup>9</sup> 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, P. *Dobovor 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](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.

<sup>10</sup> BORN, B. G. *International commercial arbitration*. Alphen aan den Rijn: Kluwer Law International, 2014, p. 251.

<sup>11</sup> 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>

<sup>12</sup> 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](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.<sup>13</sup> 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.<sup>14</sup>

New York Convention further requires an arbitration agreement to concern “a subject matter capable of settlement by arbitration”.<sup>15</sup> The subject matter is arbitrable when there is no mandatory jurisdiction of a national court.<sup>16</sup> 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.<sup>17</sup>

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- <sup>13</sup> 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, L. *Dohovor o uznání a výkoně 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.
- <sup>14</sup> 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.
- <sup>15</sup> 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.
- <sup>16</sup> 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.
- <sup>17</sup> BĚLOHLÁVEK, J. A. *Arbitration: Principles & particularities*. Chišínau: 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<sup>18</sup> and literature<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

### 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*”.<sup>22</sup> 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*

<sup>18</sup> 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. Privalor*; 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*.

<sup>19</sup> 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.

<sup>20</sup> FOUCHARD, P. et al. *Fouchard, Gaillard, Goldman on international commercial arbitration*. The Hague: Kluwer Law International, 1999, p. 196.

<sup>21</sup> 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.

<sup>22</sup> Art. II para. 1 New York Convention.

of letters or telegrams.”<sup>23</sup> 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.).<sup>24</sup>

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.<sup>25</sup> 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.<sup>26</sup>

As a result, courts refuse to enforce an arbitration agreement against a party that has not signed it.<sup>27</sup> United States (“U.S.”) Court of Appeals

<sup>23</sup> Art. II para. 2 New York Convention.

<sup>24</sup> 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.

<sup>25</sup> 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.

<sup>26</sup> 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.

<sup>27</sup> 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](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.<sup>28</sup>

It was, however, held by some courts that a tacit acceptance<sup>29</sup> of an arbitration agreement should be considered as sufficient for the purposes of Art. II para. 2 of New York Convention.<sup>30</sup> 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.<sup>31</sup>

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<sup>32</sup> is contained in an exchange of letters or telegrams.<sup>33</sup> It has been

<sup>28</sup> 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.*

<sup>29</sup> 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.

<sup>30</sup> 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. *Dobovor o uznaní a výkone cudzích rozhodcovských rozhodnutí: (New York, 1958): komentár*. Bratislava: Wolters Kluwer, 2016, p. 53.

<sup>31</sup> 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](https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf)

<sup>32</sup> Or an arbitration clause incorporated in a contract.

<sup>33</sup> Art. II para. 2 New York Convention.

generally held by the courts that letters or telegrams need not be manually signed.<sup>34</sup>

Art. II para. 2 of New York Convention covers the means of communication used in 1958.<sup>35</sup> 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.<sup>36</sup> *“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.”*<sup>37</sup>

Therefore, in 2006 UNCITRAL adopted a Recommendation regarding the interpretation of Art. II para. 2 and Art. VII para. 1 of New York Convention.<sup>38</sup> The recommendation advocates interpreting Art. II para. 2 of New York Convention in a way that the circumstances described therein are

<sup>34</sup> 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, E. *Dohovor o uznaní a vykonávaní 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.

<sup>35</sup> 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.

<sup>36</sup> 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.

<sup>37</sup> 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.

<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> Besides, national legislation should not be applied if its requirements are stricter than those of Art. II para. 2 of New York Convention.<sup>42</sup>

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,<sup>43</sup> the UNCITRAL Model Law on Electronic

<sup>39</sup> 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.

<sup>40</sup> 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>

<sup>41</sup> 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](https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf)

<sup>42</sup> 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, L. *Dohovor o uznání a výkone cudzích rozhodcovských rozhodnutí: (New York, 1958): komentár*. Bratislava: Wolters Kluwer, 2016, p. 57.

<sup>43</sup> 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](https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf)

Commerce,<sup>44</sup> the UNCITRAL Model Law on Electronic Signatures, and the United Nations Convention on the Use of Electronic Communications in International Contracts.<sup>45</sup>

Thus, the requirement of an arbitration agreement contained “*in the exchange of letters or telegrams*” is interpreted widely as including modern means of communication.<sup>46</sup> Moreover, less stringent national legislation or international treaties should be applied to assess the formal validity of arbitration agreements.<sup>47</sup>

## 4 Substantive Validity of Arbitration Agreements Under New York Convention

An arbitration agreement must be materially valid to have legal effects.<sup>48</sup> Art. II para. 3 of New York Convention thus provides that: “*The court*

<sup>44</sup> 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](https://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf)

<sup>45</sup> 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>

<sup>46</sup> 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](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.

<sup>47</sup> 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](https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf)

<sup>48</sup> 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.”<sup>49</sup>*

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.<sup>50</sup> 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”.<sup>51</sup>

“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.<sup>52</sup> Supreme Court in Melbourne in its decision

<sup>49</sup> 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](https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf)

<sup>50</sup> 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](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.

<sup>51</sup> 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*.

<sup>52</sup> BELOHLÁVEK, 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. 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.<sup>53</sup>

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.<sup>54</sup> 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.<sup>55</sup> The expression “*incapable of being performed*” further covers cases of pathological arbitration agreements.<sup>56</sup>

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.<sup>57</sup> The language of Art. II para. 3 of New York Convention establishes the presumptive validity of international

<sup>53</sup> Judgment of the Supreme Court in Melbourne of 31 August 2005, *La Donna Pty Ltd vs. Wolford AG*.

<sup>54</sup> 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](https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf)

<sup>55</sup> Judgment of the High Court in Madras of 29 October 2008, *Ramasamy Athapan and Nandakumar Athappan vs. Secretariat of Court, International Chamber of Commerce*.

<sup>56</sup> 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.

<sup>57</sup> 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.<sup>58</sup> New York Convention, however, does not specify which law governs the substantive validity of an arbitration agreement.<sup>59</sup> 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<sup>60</sup> and case-law<sup>61</sup> 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.<sup>62</sup>

<sup>58</sup> 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.

<sup>59</sup> 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.

<sup>60</sup> In literature see BÉLOHLÁVEK, 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.

<sup>61</sup> 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 - Bemanningsbedrijf BV vs. Fallimento Cap. Giovanni Coppola srl, in liquidation*.

<sup>62</sup> 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.”*<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup>

*“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.”*<sup>67</sup> 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.”*<sup>68</sup>

<sup>63</sup> Art. 117 para. 1 Czech PILA.

<sup>64</sup> BŘÍZA, P. et al. *Zákon o mezinárodním právu soukromém*. Praha: C. H. Beck, 2014, pp. 683–690.

<sup>65</sup> BELLONŮVÁ, P. et al. *Zákon o mezinárodním právu soukromém: Komentář* [online]. *ASPI. Wolters Kluwer* [cit. 25. 6. 2021]. Available at: <http://www.aspi.cz>

<sup>66</sup> *Ibid.*

<sup>67</sup> BŘÍZA, P. et al. *Zákon o mezinárodním právu soukromém*. Praha: C. H. Beck, 2014, pp. 683–690.

<sup>68</sup> 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.<sup>69</sup> Admissible arbitration contracts are those that are arbitrable – arbitrability<sup>70</sup> means the possibility to establish the jurisdiction of the arbitrators by entering into an arbitration agreement.<sup>71</sup> 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.<sup>72</sup> *“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.”*<sup>73</sup>

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.”*<sup>74</sup>

According to this provision the arbitrability requires the simultaneous fulfilment of the following conditions: (i) existence of a property<sup>75</sup> dispute,

<sup>69</sup> Art. 117 para. 1 Czech PILA.

<sup>70</sup> An exhaustive definition of the term “arbitrability” exceeds the scope of this article.

<sup>71</sup> BĚLOHLÁVEK, J. A. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Juris, 2013, p. 64; see also BRÍZA, 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.

<sup>72</sup> BĚLOHLÁVEK, J. A. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Juris, 2013, p. 1734.

<sup>73</sup> Ibid.

<sup>74</sup> Art. 2 para. 1 and 2 Act No. 216/1994 Coll., on Arbitration and Enforcement of Arbitral Awards.

<sup>75</sup> 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,<sup>76</sup> (iv) the dispute does not arise in connection with enforcement proceedings, incidental disputes, and consumer disputes.<sup>77</sup>

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),<sup>78</sup> labour law disputes having property nature,<sup>79</sup> disputes concerning bill of exchange/promissory notes,<sup>80</sup> non-contractual disputes having property nature (arising out of breach of intellectual property rights, breach of competition rules, transport accidents, etc.),<sup>81</sup> 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).<sup>82</sup>

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.<sup>83</sup>

<sup>76</sup> This condition refers to the jurisdiction of civil courts excluding criminal and administrative matters.

<sup>77</sup> BĚLOHLÁVEK, J. A. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Juris, 2013, pp. 137, 138.

<sup>78</sup> *Ibid.*, p. 151; see also ROZEHNALOVÁ, N. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. Praha: Wolters Kluwer Česká republika, 2013, p. 149.

<sup>79</sup> 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.

<sup>80</sup> BĚLOHLÁVEK, J. A. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Juris, 2013, p. 172.

<sup>81</sup> 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.

<sup>82</sup> BĚLOHLÁVEK, J. A. *Arbitration Law of Czech Republic: Practice and Procedure*. Huntington: Juris, 2013, p. 155.

<sup>83</sup> 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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