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***Grounds for refusing enforcement of arbitral awards and settlements –
a comparative study in law.***

*(Przesłanki odmowy wykonania wyroków i ugód arbitrażowych
w ujęciu prawnoporównawczym)*

Summary

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It has been 62 years since the enactment of the New York convention on recognition and enforcement of the foreign arbitral awards dated 10th of June 1958. In 2008, during a conference organised by International Council of Commercial Arbitration (ICCA), on occasion of the 50th anniversary of the New York convention, prof. Jan van den Berg presented a new draft of the convention on the international enforcement of the arbitration agreements and awards (Miami Draft). The draft has been subject to academic debate in the arbitral community ever since. The opinions presented vary, but even the most avid adversaries of the draft recognise its positive elements. The fundamental issue of further enhancement of the international system of enforcement of the arbitral awards and decisions seems to be close to many scholars' hearts. While building such a system, which is a work in progress, the different traditions of law and socio-economic conditions in many countries laid ground for different solutions. However, the basic principles of parties' autonomy, speed and confidentiality of the arbitral proceedings, constitute universal light posts, while looking for the most favourable, legal solutions.

In a broader international perspective, this dissertation is aimed at identifying the 'best in its class' legal constructs regarding the grounds for refusal to enforce the arbitral awards and settlements, awards rendered in any sort of expedited proceedings as well as emergency arbitration awards such as interim and conservatory measures.

The multi-layer comparison of legal provisions in many different jurisdictions was used as the primary methodology of this dissertation.

One of the aspects of the comparison was to analyse the two, parallel systems of enforcements of judicial and arbitral awards through the lenses of arbitration axiology. This comparison is also aimed at evaluating the degree of dominance of *ius cogens* over *ius dispositivum* in both systems, i.e. to establish the existence of the legal dispositive framework of the parties' freedom to choose the way of settling their disputes.

Within its scope, this dissertation discusses the systems of the majority of the European countries, including France, United Kingdom, Germany, Italy, Holland, Switzerland, Russia and Belgium as well as United States and some Asian and African countries. The selection of the chosen systems was

driven by statistics which show countries apparently in the avant-garde amongst arbitration friendly venues. Most of the selected systems were subject to recent reform reflecting the most up to date postulates among the arbitration community.

The issue of the enforcement of arbitral awards and settlements is intrinsically connected with the globalisation of arbitration. One of the key elements of this broader concept is ability of the parties to freely choose the seat of the arbitration, which in real terms constitutes the ability to choose the law pertinent to the given territory under which the arbitration occurs. This has clear implications when it comes to the enforcement of arbitral awards and decisions. Against the postulate of delocalisation, the above mentioned *ius cogens* on the enforcement, prevails over other provisions chosen by the parties to arbitration, including arbitration rules incorporated into the arbitration agreement.

This dissertation is composed of five chapters. Chapter No I systemises the sources of law in the context of international enforcement proceedings and in historical terms. The hierarchy of sources of the law and the issue of choosing the law applicable to arbitration proceedings are fundamental to achieving the afore-mentioned, main goal of arbitration, which is effective, i.e. quick and professional settlement of the disputes. This chapter attempts to answer the question: which of the analysed systems is most favourable for participants in arbitration and in what way are the sources of the law intertwined?

The realm of the New York Convention and UNCITRAL Model Law outlined in chapter No I were subjected to detailed analysis in the next two chapters. Chapter No II compares the grounds for refusal of a declaration of enforceability contained in the New York Convention and the Miami Draft against the background of the case law of different countries. The analysis of case-law seems to be the only reliable platform for considering amendments to relevant provisions in an international context.

The subject of consideration in chapter No III is the amendment of the UNCITRAL Model Law to such an extent, which has a direct impact on the enforcement of arbitration decisions and settlements. Suggesting further reform is not possible without a thorough understanding of the universal

axiology of the Model Law. UNCITRAL's work is an ongoing process and brings together all the postulates arising from various legal systems.

Chapter No IV reviews the changes introduced to the arbitration rules of the leading international arbitration institutions, against the background of solutions contained in the rules of the main Polish, arbitration courts. The comparison of relevant standards was made in the context of the validity of contractual provisions in which the parties waive the right to challenge the arbitration award, as well as in the context of the implied waiver of such right.

Chapter No V was devoted to the analysis of Polish provisions regulating the grounds for refusal of enforcement of arbitral decisions and settlements in the context of the conclusions made in chapters I, II, III and IV.

Based on the comparisons made, an assessment of the functioning of existing solutions was formulated, with particular emphasis put on the 2005 and 2015 Amendments to Part V of the Polish Code of Civil Procedure.

A review of the case-study, as well as the provisions of selected legal systems, steers towards the conclusion that arbitration law in the scope of enforcement of arbitral decisions and settlements does not evolve at the same pace in all parts of the world. Some systems have achieved more favourable standards, than the others. Conventions do not always constitute the ultimate model in this regard. The development of new technologies, which has not been observed so far in history, and thus new forms of business activity, also require that the Polish legislator takes action to amend Polish regulations. In particular the following areas of enforcement were distinguished as requiring amendment:

- 1) The first of these areas is the scope and construction of the grounds for refusal to enforce arbitration awards and settlements. The reformulation of these grounds should aim at eliminating differences in interpretation thereof.
- 2) The second area is the determination of the binding force of a contractual and implied waiver of the right to challenge the arbitral awards over the course of the enforcement proceedings, both direct and implied. Although it is commonly accepted that the parties may waive their right to set aside an arbitral award, none of the

jurisdictions introduced the same waiver for the challenge in the enforcement proceedings.

- 3) The third area is the issue of preclusion of the right to raise procedural objections in any of the post-arbitral proceedings.
- 4) The fourth area is the regulation of the enforceability of the emergency awards, as well as the interim and conservatory decisions.

Conclusions.

Ad 1. It has been concluded that amongst the grounds for refusal to enforce arbitration awards and settlements the lack of parties' capacity, as a separate ground, should be abandoned altogether. It seems that the requirement of the validity of the arbitration agreement already necessitates examining the issue of capacity and there is no need to create a separate ground in this respect. Also under the current provisions of the New York convention, the validity of the arbitration agreement is reviewed by the enforcement court twice; *ex officio* pursuant to Art. II (3), but also at the request of a party, which invoked Art. V(1) (a).

The other provision, which requires amendment, sets out the right of a party to present its case. It is suggested that Art. 1215 § 2 item 2 of the Polish Code of Civil Procedure should include a qualification of such a right to make it a "reasonable" right.

Also, the provision of art. V(1)(c) of the New York Convention and Art. 1215 § 2 item 3 of the Code of Civil Procedure regarding awards *extra* or *ultra petitia*, should refer to the relief sought included in the statement of claim rather than to the terms of submission as included in the arbitration agreement. Analysing the wording of the current grounds, in the context of extensive case-law, it becomes apparent that the scope set out in the norms mentioned is simply too wide. The Art. 1215 § 2 item 3 of the Code of Civil Procedure should apply only to arbitral settlements which have been transformed into an award, i.e. consent awards. The *in extenso*, implementation of the grounds specified in Art. V(1)(c) the New York Convention and Art. 36 (1) (a) (iii) of the UNCITRAL Model Law into the Polish system is misleading and may cause interpretational issues.

As it became obvious in the case-study included in this dissertation, one of the most important issues to deal with, while amending grounds for refusal to enforce arbitral awards, is the issue of the awards set-aside as not being subject to enforcement. Under the current Polish legal system this issue is dealt with in an ambiguous way. The European convention and the New York convention, both of which Poland is a signatory of, regulate the enforcement of set-aside awards in a different way. This calls for a legislative intervention. The key is to correlate the proceedings of the set aside and enforcement of the arbitral awards in order to avoid their double-control and a, so called, Russian doll effect i.e. multiplication of the post-arbitration proceedings. *De lege ferenda*, it would be appropriate to introduce a provision by force of which a party should not have the right to invoke grounds for refusal to enforce, if earlier that party had not filed for the setting aside of a given award. Consideration should also be given to abandon the ground of suspension of the enforceability of arbitral awards, which usually occurs in connection with lodging of a motion to set aside the award.

Last but not least, it is concluded that the ground of public policy protection should be modified in Art. V(2)(b) the New York Convention and in the Article 1215 § 2 in connection with Art. 1214 § 3 item 2 of the Code of Civil Procedure. This modification should introduce a norm that a refusal to enforce arbitral award or settlement may only occur if the enforcement would violate the principles of the international legal order.

Ad 2. A comparative study of different systems justifies the conclusion that it is necessary to introduce into the Polish set of appropriate provisions the option of contractual waiver of the right to challenge the award in the proceedings to enforce the arbitral awards in respect of the grounds specified in Art. 1215 § 2 item 2-5 of the Polish Code of Civil Procedure.

The issue of agreements limiting the judicial review of the arbitral awards is debated in the general context of the validity of any contractual provisions of the parties, which go beyond the mandatory norms. It is the main assumption of this dissertation that the reform of the arbitration law should aim at creating a legal environment which is independent from the *ius cogens* as much as possible. In the author's view the parties' waiver to challenge the award in any kind of the judicial proceedings does not differ in

axiology from the parties' right of choosing to resolve their dispute in one instance proceedings or, for that matter, through any kind of expedited proceedings.

Ad 3. The implied waiver (preclusion) to challenge the arbitral award is another issue requiring amendment. Art. 1193 of the Polish Code of Civil Procedure, should reflect in full the principle outlined in Art. 4 of the UNICTRAL Model Law, i.e. it should extend the party's implied waiver of the right to challenge the arbitral awards also to enforcement proceedings. This should only apply if the party was aware of the existence of the particular grounds during the proceedings and its failure to invoke these grounds earlier was not aiming only at delaying the rendering of the award. (dilatory tactics).

Ad 4. *De lege ferenda*, the Polish provisions should be re-formulated in a way that raises no doubts as to the assumptions of declaring enforceability of the interim and conservatory measures. The UNICTRAL Model Law contains the provisions of art. 17 (1) and (2) and 17 B (1), which may *in extenso* serve as a model of regulation. These provisions introduce a breakdown of interim, preliminary and conservatory measures. As it is the case in many other legal systems, also under the Polish law in force, it is not clear whether the decisions rendered by the emergency arbitrators are subject to the operation of the New York convention. This situation should be rectified by introducing into the law an explicit provision, which would leave no further room for doubt in this regard.

This dissertation not only provides particular legal solutions regarding the legal situations of the parties' attempting to enforce their claims included in the arbitral awards and settlements but also discusses some detailed institutional issues, including the option of creating an international court, which would be dealing with the enforcement of the international arbitral awards. Such a court could emulate some of the legal constructs used in the OHADA system presented in chapter No I.

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