International Comparative Jurisprudence 2019 Volume 5 Issue 2
ISSN 2351-6674 (online) DOI: http://dx.doi.org/10.13165/j.icj.2019.12.005

MYKOLAS ROMERIS UNIVERSITY

International Comparative Jurisprudence

INTERNATIONAL COMMERCIAL ARBITRATION – ENFORCEMENT OF ARBITRAL AWARDS REVISITED

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Received 15 July 2019; accepted 21 November 2019
DOI: http://dx.doi.org/10.13165/j.icj.2019.12.005

Abstract. International commercial arbitration is becoming increasingly convoluted, and hence requires a certain degree of uniformity in order to achieve true international applicability. As a result of this complexity, after arbitration proceedings finish both the national courts of the seat of arbitration and the national courts of enforcing jurisdiction are caught in the dilemma of how to interact with each other, as well as with the arbitral awards produced by arbitral tribunals. This article assesses this phenomenon critically in order to weight current developments in arbitration against the normative structure of arbitration as they were originally intended.

Keywords: arbitration structure, enforcement and set aside courts relation, public policy.

Introduction

International commercial arbitration (ICA) has been a widely accepted alternative dispute resolution mechanism for a considerable amount of time, and now serves as one of the alternatives to litigation worldwide. Given the advancement of new technologies through time disputes have become more complex than ever, rendering ICA into a more and more fragmented process and thus raising the question: what is arbitration now? As arbitration is a prevalent dispute resolution method in international disputes, the national court's relation to ICA at two different stages of ICA proceedings (the setting aside and enforcement stages) after the arbitration proceedings are finished is becoming very important. Once the arbitral proceedings are finished, the national court versus arbitration relation is questionable. How should the courts at the seat of arbitration and the state of enforcement act in relation to each other and to arbitral awards rendered?

Much was already discussed regarding the structure of arbitration. Authors including Gaillard (2010), Reismann (2012), Paulsson (2010), Bachand (2012), and Khan (2013) have discussed the structure of arbitration and its co-existence with national courts, trying to draw appropriate lines between the two methods of dispute resolution. Amongst Lithuanian authors, the topic of court intervention was discussed by Audzevičius and Parchajev (2017), but mainly in terms of court control and support functions during arbitration proceedings.

The object of this research is the impact of court related procedures on ICA. The aim of this article is to assess a proper structure of co-existence between courts at the setting aside of jurisdiction, and courts at the enforcement of arbitral awards state in the context of ICA. This aim will be achieved by analysis of work conducted by other authors, and both international and Lithuanian legal acts and case law. Whilst performing the analysis, data was gathered by the document analysis method. The analysis was rendered on the basis of content, comparative, and systemic analysis. This article's originality stems from an overview of the structure of arbitration, achieved by taking a holistic approach and analyzing the implications of the current and potential normative structure of ICA.

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The article is divided into four parts. The first section of the article provides overviews of the different stances taken by various ICA scholars with respect to the co-existence between national courts and the ICA proceedings on the one hand, and the co-existence between courts at the seat of arbitration and the enforcement jurisdiction on the other hand, as well the problems that such co-existence between national courts can pose to ICA. The second section discusses the possible ways, in both common law and civil law countries, that courts in the enforcing jurisdiction can act with respect to a decision rendered by the national courts at the setting aside proceedings so as to deter parties from unduly abusing the process of ICA by initiating the same claims regarding arbitral award at both the setting aside and enforcement proceedings. The analysis (with emphasis on caselaw from different jurisdictions) also includes the situation whereby the enforcement court is caught in deciding the public policy matters, even though previously the public policy grounds were already considered by national courts during setting aside proceedings. The third section of the article considers whether the Preliminary Draft Convention on the International Enforcement of Arbitration Agreements and Awards – "the Miami Draft" (the Miami Draft) – provides, and whether it should provide for, remedies to problems discussed in this article. The fourth section of the article provides readers with possible remedies for problems identified in this article and recommendations on how and in what ways the national courts at different stages of arbitration shall co-exist in the context of ICA, and how much deference the enforcing court shall give to judgments rendered by the court at the seat of arbitration in setting aside proceedings.

1. Arbitral Autonomy versus Arbitral Dependence – what is right?

In order to ascertain what kind of international legal instrument ICA became and should be, it is necessary to explore the focal premises on the basis of which ICA and domestic courts co-exist around the globe. Appropriate understanding of arbitration proceedings may be explored, as with most phenomena in social sciences, only upon thorough understanding of the fundamental principles underlying the normative structure of the legal arrangement in question - in this case the structure of arbitration.

For this purpose it is important to note that over time, especially since the New York Convention (the NYC) was adopted in 1958, many legal practitioners, scholars, and government officials have embarked on the topic of ICA and its relation to state courts. To date this issue remains hotly debated, especially in the wake of international trade and new forms of doing business. For this reason, various scholars of ICA have engaged in a debate that attempts to identify the theory of co-existence between ICA and national legal systems (including national courts).

As ICA is a creature of a party contract, it is not debatable that party autonomy in arbitration is a core aspect. The question, however, revolves around how autonomous ICA is and should be, especially given the fact that without coercive state powers arbitral awards cannot be enforced. Naturally, the authors of ICA argued for two distinct theoretical approaches to ICA.

The first approach pertains to a nearly complete arbitral autonomy, whereby arbitration exists as a separate legal order. This theory is supported by Emmanuel Gaillard in his prominent work on the legal theory of international arbitration (Gaillard, 2010). In this book, as well as in his article (Gaillard, 2012), Gaillard argues about a transnational system of arbitration. The author goes on to say that arbitration is, and in principle shall be considered to constitute, a separate legal order – a so called *transnational system of justice*. Gaillard explains three different theories (2012, pp. 68-70) that can be applied in ICA. The first theory is called *monolocal* theory. The basic premise of this theory is that arbitral award becomes binding exclusively at the seat of the arbitration, i.e., if the award is set aside in the country of the seat of the arbitration, it can be no longer enforced in any other country (2012, p. 68). Generally, this theory goes hand in hand with Article V(1)(e) of the NYC, which stipulates that an arbitral award may be refused recognition at the enforcement jurisdiction, if it was set aside in the country of the seat of the arbitration[2]. The second theory analyzed by Gaillard is referred to as the *Westphalian* theory (2012, p.

[2] Please note that there are jurisdictions (i.e., France), whereby this principle is not followed.

68). According to this theory, state courts are free to enforce or not enforce the award that has been set aside in another country. Lastly, Gaillard discusses and advocates the third theory, the so-called *transnational justice* theory in arbitration (2012, p. 70). The essence of this theory is that most countries in the world abide by NYC, and thus accept the current structure of ICA. As a result domestic courts, in deliberating whether to enforce an award that has been set aside elsewhere, shall follow the principles of transnational justice, i.e., follow the most appropriate international practice on the basis of which the decision to enforce (or not enforce) an award shall be rendered. It seems that the theory of transnational justice is also compatible with the NYC, since an arbitral award that was set aside on clearly incorrect grounds could be enforced in another jurisdiction as a result of Article V(1)(e) of the NYC. The said article prescribes that the recognition and enforcement of an arbitral award may be refused if the arbitral award was set aside in another country by a competent authority. Therefore, it follows that if the arbitral award was set aside in a clearly flawed manner then it was not decided by a competent authority, as Article V(1)(e) of the NYC envisages. Also, as the wording of Article V(1)(e) suggests, nothing in the NYC obliges the country of enforcement to actually refuse recognition and enforcement of an annulled award, as the wording of the aforementioned Article stipulates that "recognition and enforcement of the award *may* be refused." Needless to say, the word "*may*" already spares the courts at the enforcement jurisdictions from the obligation not to enforce an award that was set aside at the seat of arbitration. Furthermore, the NYC also prescribes for the so-called more favorable enforcement rule, which is enshrined in Article VII (1), which states that "the provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

In essence, this provision means that if the national law envisages more favorable legal acts with respect to enforcement of international arbitral award, then those rules shall be applied irrespective of the grounds of refusal as set out in the NYC. Therefore, as illustrated in French cases (the *Norsolor*, *Hilmarton*, and *Chromalloy* cases) and in other civil law countries, the grounds for refusal of the recognition of arbitral award may be more favorable than those set out in the NYC. Having said that, artificially separating setting aside proceedings from the enforcement proceedings, as they would not co-exist together, would not only be against the spirit of arbitration, but may also defeat its original purpose entirely. So although it would be too extreme to limit the court of arbitral awards to primary jurisdiction (i.e., the seat of arbitration), since there may be arbitration unfriendly seats it seems that separating the ICA regime (arbitration proceedings) from national court co-existence would be one step too far. In other words, it is important that ICA interacts with setting aside and enforcement courts not as with separate entities, but rather like with one inextricably linked "*package*."

Gaillard's *transnational justice* theory, as explained above, is criticized by at least two distinguished commentators of ICA. First, in a hallmarked work, Reismann (2012) criticizes Gaillard's theory pertaining to *Westphalianism* and *transnational justice* by pinpointing that the ICA has its own architecture (a definition coined by Reismann), whilst presenting their view on arbitral legal order. The current ICA structure, according to Reismann, is based on the premise that in principle two jurisdictions form the pillars of the ICA: primary jurisdiction (the seat of arbitration) and secondary jurisdictions (all jurisdictions where the enforcement of arbitral award is being sought). According to Reismann, the NYC is constructed in such a way that arbitral award cannot be enforced if it is set aside in the primary jurisdiction. Reismann argues that if that was not the case, then parties could try and enforce an arbitral award in numerous jurisdictions even though it was set aside in the primary jurisdiction (p. 31). Obviously this can happen, in which case nothing can prevent parties from doing so. However, the courts, when caught at the enforcement stage, shall give due consideration to setting aside proceedings in order to create as much uniformity of arbitral proceedings as possible, as well as more efficiency. This kind of architecture is a cornerstone of ICA, which is constructed in order to avoid situations when the losing party in arbitration is seeking the annulment or enforcement of an award in numerous jurisdictions and, as a result, thwarts the effectiveness of arbitration (p. 17). Therefore, in principle, Reismann rejects the idea of arbitral autonomy as it is understood by Gaillard. In response, Gaillard (2012) disagrees with Reismann's *Architecture of Arbitration* by rejecting the idea of primary and secondary jurisdiction in ICA. Gaillard argues that, according to Article V of the NYC, nothing

prevent states from adopting a more liberal approach for the enforcement of arbitral awards than that adopted by the NYC (p. 71), i.e., states can enforce the award even if it was set aside at the seat of arbitration. Furthermore, as illustrated in numerous French cases (*Norsolor*, *Hilmarton* and *Chromalloy* cases), the French approach allows for an arbitral award to be recognized and enforced even though it was set aside. This is because French courts, when deliberating whether to enforce an arbitral award or not, generally do not take into account considerations of the court where the award was set aside: the laws of arbitration of other countries do not form part of the French legal system, so the argument goes (Gaillard, 1999, p. 25).

However, the stance taken by Gaillard is dubious. Firstly, one of the cornerstone features of arbitration is its finality. This feature of ICA is one of its most attractive. Having multiple proceedings, or in other words treating setting aside and enforcement proceedings as barely related, can have adverse consequences on the efficiency of arbitration, since the parties to arbitration may go through setting aside proceedings that are rendered useless if ignored by the courts in the enforcement jurisdictions. As Albert Van der Berg (2014) put it, "The place of arbitration is a direct or indirect choice of the parties. If parties have chosen a country that is not arbitration friendly, enforcement courts are not there to rescue such a choice." (p. 263).

Given the principle of party autonomy, the aforementioned statement seems to be more than accurate, even though Gaillard (1999) advocates that the seat of arbitration is often chosen for reasons other than those related to the outcome of potential setting aside proceedings (p. 43). However, treating setting aside proceedings merely as one of the stages in arbitration (in addition to those of enforcement) would lead to a lack of uniformity and abuse of the process. It is for good reason that the NYC has setting aside as one of the grounds for refusing recognition and enforcement of arbitral awards. Real uniformity and balance between arbitration and national courts at setting aside and enforcement stages can only be achieved if the courts of the signatories to the NYC trust the judgments of the courts of other jurisdictions.

Gaillard's *transnational justice* theory is also criticized by Jan Paulsson (2010), who observes that, in practice, *transnational justice* theory is no more than the theory of *Westphalianism*. He notes that even now courts, when caught at the enforcement stage, are often already considering internationally accepted ICA principles (p. 17). In addition, Paulsson argues that ICA cannot be independent from the state courts in the manner stipulated by Gaillard (p. 17), since domestic courts derive their authority and loyalty from the state, and not transnational legal norms. As such, it is at the exclusive discretion of domestic courts to either accept these norms within the realm of domestic policies or reject them. On top of that, authors like Jonathan Mance (2016) equally reject the idea of autonomous arbitration, by arguing that parties select specific countries as the seat of arbitration for a reason, i.e., because of their laws regulating arbitration (p. 241). The same line of reasoning can be found in Albert Jan van den Berg's (2014) article, where the author suggests that court intervention could potentially be reduced by completely abolishing the setting aside procedure, as in many countries most of the grounds for non-enforcement of arbitral awards and grounds for setting aside arbitral awards are almost the same. Whilst this might prevent double control of arbitral awards, van den Berg notes that the abolishing of setting aside would have adverse consequences (p. 285). This is because the ICA would be hindered by the enforcing court ignoring the decision of the court of the seat of arbitration, even though usually the latter can properly assess whether there are grounds for setting aside or not (p. 285). It makes sense, in essence, to reject Gaillard's idea of completely autonomous arbitration, i.e., arbitration which is based on transnational legal practices and custom, when deliberating whether to enforce an arbitral award or not. This is because even though transnational ICA doctrine exists on the level of scholarship and court practice (including Lithuanian caselaw [Lithuanian Supreme Court judgment of 27 June 2014]), it is nevertheless not transposed to any statutory instrument, and hence countries may decide whether to enforce arbitral awards or not based on their national practices rather than on international ones.

On the other hand, it seems that not all commentators are in disagreement with Gaillard's vision of ICA. Bachand (2012) argues that currently courts apply international standards when deciding matters related to ICA. However, Bachand takes an approach that rests somewhere between that of Reismann and that of Gaillard, emphasizing that international standards shall be applied by domestic courts in the deliberation of ICA related issues only when the

national norms are silent on the specific ICA related matter at hand (p. 84). Moreover, there are advocates of arbitration that, as with Gaillard, support arbitration that is as autonomous from the intervention of state courts. One such proponent of autonomous arbitration is Julian D. M. Lew (2006), who argues that ICA is a creature of contract, and more often than not is self-regulatory (through arbitral rules, party stipulations, and legal instruments such as the NYC and Model Law on International Commercial Arbitration) (pp. 202-203). Support of Gaillard's *transnational justice* theory can be found in the work of Ali Khan (2013), who supports the idea that overall arbitration should be an almost completely autonomous procedure without any court intervention (p. 3). Khan gives suggestions on how to achieve, such as containing as many proceedings as possible within the realm of ICA (e.g., granting interim measures by arbitral tribunal as opposed to a court, contracting for an appeal mechanism in arbitral institutions etc.) (pp. 37-45). However, moving towards such autonomous arbitration could potentially cause issues when parties to arbitration are left without any recourse, as there would be no institution other than arbitration tribunal that could check on the arbitral award.

All in all, despite various views on the co-existence between ICA proceedings, courts at the seat of arbitration, and those of enforcement jurisdiction, it seems that a proper balance shall be achieved in order to capitalize on the NYC structure as fully as possible. Below the possible remedies and ways of co-existence between the national courts at the setting aside and enforcement proceedings stage will be presented on the basis of work by several authors and case law from different jurisdictions, and will be followed by critique and further suggestions by the author of this article.

2. What is the right thing to do?

In this section of the article, a short overview of how courts at the enforcement jurisdiction could approach the decision rendered during setting aside proceedings at the seat of arbitration will be presented, together with case law analysis.

2.1. Potential remedies with respect to co-existence between the courts at the seat of arbitration and the courts at the enforcement stage

Having discussed different structures of national court co-existence at the setting aside and enforcement jurisdictions, it is also important to provide an overview of the ways in which the courts at the enforcement and recognition stages may treat the setting aside proceedings at the seat of arbitration. The problem in the interaction between the courts at the seat of arbitration and the courts at the enforcement stage is that very often the losing party in the ICA proceedings raise the same issue at the setting aside proceedings as they do later at the enforcement stages, essentially rendering the process of setting aside proceedings almost useless (Nazzini, 2018). The following example can illustrate this process: Party A loses in the ICA proceedings against Party B. Consequently, Party A initiates the setting aside proceedings at the seat of arbitration on the grounds that it was not given a proper opportunity to present its case (the same grounds exist at the enforcement of arbitral awards stage, as prescribed in Article V(1)(b) of the NYC). The stated claim is then dismissed by the court during setting aside proceedings. Party B then goes on to enforce the arbitral award at the enforcement jurisdiction. Nevertheless, despite the fact that the claim was already dismissed at the seat of arbitration, Party A once again invokes the same claim, stating that it was not able to properly present its case on the grounds of Article V(1)(b) of the NYC during the enforcement proceedings. As a result, the arbitral award is checked at both the setting aside and the enforcement proceedings, on the same grounds twice. Such a double control of arbitral award is troublesome, as one of the fundamental principles of the ICA – the finality of arbitration proceedings – is undermined. Therefore, such a situation is hardly satisfactory since parties to arbitration are stuck in litigation – precisely the form of proceedings that they wanted to avoid when they initially agreed to solve their disputes via arbitration. The question then becomes: what can be done by the national courts to avoid such situations and actually respect the fundamental principle of arbitration, namely the principle of finality?

One solution proposed by Nazzini (2018) would be to treat the proceedings at the seat of arbitration as *res judicata* (so called cause of action estoppel). However, this approach is hardly applicable as in essence setting aside proceedings concern the nullification of arbitral awards, whereas at the enforcement jurisdiction proceedings predominantly concern the enforcing of an arbitral award (pp. 614-615).

However, as suggested by Nazzini (2018), other types of estoppel could be used in order to deter or prevent parties from raising the same issues (or raising them later than they could be) after the setting aside proceedings happen. This is, namely, the cause of issue estoppel (p. 615). In essence, this estoppel prevents parties from bringing the same claims in different kind of proceedings, as they were already decided by other competent courts (p. 616). The cause of issue estoppel is used in common law countries and is largely unknown in civil law countries. Nevertheless, it is a useful tool used in common law countries that can prevent parties from raising the same grounds in, for instance, arbitration proceedings. As mentioned above, if the party claimed one of the grounds enshrined in Article V of the NYC at the setting aside proceedings, and the issue therefore was decided at the seat of arbitration, then issue estoppel would prevent a party from raising the same issue at the enforcement proceedings (p. 616). Since one of the most fundamental principles in arbitration is finality, such an approach is compatible with the spirit of arbitration and shall be adopted by the courts, save for in exceptional circumstances where it is clearly visible for the enforcing court that the court at the seat of arbitration has made an erroneous mistake. The national courts at civil law jurisdictions, even though they have not adopted the cause of issue estoppel, shall adopt general principles of justice at the enforcement jurisdictions, and take into account the fundamental notions of arbitration when dealing with arbitral awards that have undergone setting aside proceedings. It is thus important to teach judges in national courts, as far as possible, to take a holistic view when dealing with ICA cases so as to buttress the principle of finality in arbitration.

Another principle which can be used against parties that abuse setting aside and enforcement proceedings is abuse of process. As established in English caselaw (*Henderson v. Henderson*, 1843), if a party could have brought a claim in earlier proceedings but did not, it should be prevented from bringing such a claim in later proceedings. In most civil law countries, this rule is somewhat different. For example, according to Article 95 of the Lithuanian Civil Code of Procedure (Lithuanian Civil Code of Procedure, 2002), parties to a dispute cannot abuse their procedural rights. In essence this means, according to Lithuanian caselaw and doctrine, that parties shall not on purpose submit claims which are unsubstantiated, or try and prolong the process of litigation. Despite such a norm, it is questionable whether Lithuanian courts would apply such a principle if the party submits a claim which could have been submitted earlier but was not, especially when taking into account the normative structure of ICA. In other words, in civil law jurisdictions there is nothing, in principle, that would prevent a party from bringing a claim during the enforcement stage that could actually have already been submitted during setting aside proceedings.

As a result, abuse of process rule as enshrined in common law doctrine can serve as a useful tool to deter parties from forum-shopping when enforcing their arbitral awards after the arbitration has been through setting aside proceedings. It must be noted that courts in civil law jurisdictions, although without such tools as cause of issue estoppel and abuse of process as established in *Henderson v. Henderson*, can still apply general principles of justice in order to deter parties from abusing the process, in this way creating more efficiency and uniformity within the ICA proceedings. However, to do so the national courts need to take into account the spirit of arbitration and look at the norms (established in the NYC) by taking a holistic approach. All in all, as discussed by Nazzini (2018), both the cause of issue estopell and the abuse of process institutions could enforce the fundamental principle of finality in arbitration by preventing parties from raising the same claims (or raising them later) at the enforcement jurisdiction when the arbitral award was already questioned at the court of the seat of arbitration. It must be noted, however, that the above rules, as prescribed in the common law doctrine, are useful with respect to grounds that can be invoked by the parties regarding improper constitution of an arbitral tribunal and other procedural grounds, but their applicability is hardly possible in civil law jurisdictions. Therefore, the judges in civil law countries must take into account the general principles of justice to preclude unfair parties from initiation claims on the same grounds twice, i.e., at the seat of arbitration and later during the enforcement stage.

It must be stressed that the institutions of the cause of action estoppel and the abuse of process are somewhat unclear with respect to the possibility to refuse enforcement and recognition of an arbitral award on public policy grounds, as prescribed in Article V(2) of the NYC. This is because each country has sovereignty over what is in breach of its public policy grounds (Nazzini, 2018, pp. 636-638). Nevertheless, the case law analysis presented below will illustrate conflicting stances taken by courts in different countries, and will be followed by analysis of these decisions by the author of this article.

2.2. Shall the country of enforcement defer to the decision rendered, rengarding public policy, at the seat of arbitration?

The public policy ground prescribed in Article V(2) of the NYC has always been a controversial one (Nazzini, 2018, pp. 611-612). As a general rule, the doctrine of the ICA developed in such a way that when it comes to the enforcement of an arbitral award, the grounds of public policy as a refusal for recognition shall be treated narrowly, i.e., as international public policy. Otherwise, the enforcement of arbitral award would become rather difficult as the public policy ground could be used as a shield in numerous jurisdictions by the party that lost the ICA proceedings.

It is also important to mention that ultimately each country has a final say as to what constitutes its public policy, or even international public policy. However if, in line with the NYC and principle of finality in ICA, public policy ground shall not be abused by the parties and courts, then *vice versa* courts, as discussed above, cannot save parties from the poor choices of the seat of arbitration (Albert Jan van der Berg, 2014, p. 263). To illustrate what approach can be taken when parties invoke public policy ground against arbitral award, two recent court decisions in different jurisdictions will briefly be discussed.

On 13 June 2019, the Lithuanian Supreme Court decision (Lithuanian Supreme Court judgment of 13 June 2019) refused the enforcement of an arbitral award on the grounds of public policy. The reason for doing so was that the arbitral award upheld the punitive damages in favor of the the winning party in the ICA proceedings, even though the winning party was fully compensated for its losses. It is important to note that the Court of Appeal of Lithuania had a different reasoning, stating that the courts at the seat of arbitration did not set aside the award on the grounds of public policy, and hence the decision of the national court at the seat of arbitration is *res judicata*.

It is a generally accepted principle worldwide that in civil proceedings punitive damages shall be used as compensation for losses, but cannot be used to punish parties for the breach of contract (Petsche, 2013, p. 104). Even though this rule is, in principle, correct, it provides some uncertainty when applied in the ICA. It is important to mention that in the case at stake the losing party applied to courts at the seat of arbitration (Serbian courts) in order for the award to be set aside as the arbitral tribunal upheld the punitive damages. Nevertheless, the Serbian courts upheld such punitive damages and did not find that they would be in breach of public policy. The question then becomes: when public policy ground is invoked by a party at the seat of arbitration, and dismissed accordingly by the national court in setting aside proceedings, how much deference should the court at the enforcement jurisdiction give to such a decision? To answer the question, as discussed above, it is important to take into account the fact that the Court of Appeal of Lithuania arguably took the correct approach: since the Serbian court did not set aside the award on public policy grounds, such a decision was respected by the Court of Appeal in Lithuania. However, it was then reversed by the Lithuanian Supreme Court. Equally, it is important to briefly overview the recent decision of the Greek court (Piraeus First Instance Court ruling no. 722 of 2019), where the punitive damages established by virtue of the arbitral award were actually upheld by the court.

The rationale of the Greek court was predominantly based on the fact that punitive damages must not be too excessive. Hence the mere fact that, generally, punitive damages are against the public policy of a country, in the context of the ICA, cannot be conclusive. In this case, the court compared the actual losses incurred by the party with the amount of punitive damages. Since the court ruled that the punitive damages were not in excess of the

actual loss by too large of a margin, the award was ruled to be enforceable. In this way, the court took a pro-enforcement stance as prescribed in the NYC.

This Greek court decision can be contrasted with the Lithuanian Supreme Court decision as described above where the court, in essence, refused arbitral award upholding the punitive damages almost *per se*. However, in the opinion of the author of this article, the reasoning of the Lithuanian Supreme Court is not correct as it does not respect the structure of arbitration as it was originally intended. First of all, even though it is true that each country has its own public policy, in the context of the ICA public policy should be interpreted narrowly, and regarded as international public policy. Hence, although it is generally accepted that punitive damages are against the public policy of various countries, one must take into account the structure of arbitration and the principle of finality when it comes to arbitration. Since parties agreed to have their dispute arbitrated in a particular seat of arbitration they have also, at the least indirectly, submitted themselves to setting aside proceedings in the national courts of their choice. Hence, it follows that the decision of the national court of the seat of arbitration – regarding the setting aside of arbitral award on the grounds of arbitral tribunal upholding punitive damages as being against public policy – shall be equally treated as evidence of each respective parties' exercise of their autonomy within the arbitration proceedings. Otherwise, the parties could have selected a more favorable seat of arbitration with respect to a given transaction. Therefore, parties' own choice of the seat of arbitration, i.e., the exercise of the principle of the party's autonomy in arbitration, shall in no way go against the other principle of arbitration: finality of the ICA proceedings. Secondly, if the enforcing court is not giving due consideration to the decision rendered at the court of the seat of arbitration, the ICA proceedings become prolonged and start to resemble litigation, which is not what the parties opted for. There is a clear distinction between arbitration (as it was originally intended) and litigation and thus, unless in exceptional circumstances, such distinction shall be respected by the national courts. The question of what constitutes exceptional circumstances, of course, is rather tricky, but as illustrated by the Greek court decision pro-enforcement of an arbitral awards stance can be taken by evaluation of harm (and other circumstances) to be done if the punitive damages were to be enforced. It is thus important for national courts to take into account not only their own public policy considerations but also wider implications (negation of pro-enforcement principles as prescribed in the NYC may have negative consequences on the efficient functioning of the ICA) related to the intent of parties selecting to solve their disputes via arbitration, applying their choice of the seat and their choice of the law, as well as considering a party's expectation that the decision of the arbitral tribunal should be final. If this is not done by the courts on an international level, then arbitration will be changed to a hybrid solution that contains elements of arbitration and litigation, therefore defeating the intent of the original parties when resorting to arbitration.

The question is thus one of a standard of review and evaluation, by national courts, of the public policy grounds. It is the opinion of this author that even when evaluating public policy grounds, the courts at the enforcement jurisdiction ought still to consider the decision regarding public policy argument rendered by the courts of the seat of arbitration and, in doing so, should apply the approach as illustrated by the mentioned Greek case, so as to take the pro-enforcement of arbitral awards stance as embodied in the ICA principles.

3. The Miami Draft – an answer to pitfalls when enforcing arbitral awards?

The legal instrument which shall be addressed in the context of the ICA problems discussed in this article is the so-called Miami Draft. This was prepared by Albert Jan van den Berg in order to supplement the NYC by allowing interested parties to use it as a set of guidelines to achieve more uniformity with respect to the enforcement of arbitral awards rendered in the ICA. The question, however, is whether the Miami Draft is sufficiently effective in doing so.

Firstly, The Miami Draft, contrary to Article V of the NYC, states that the arbitral award *shall* be refused (instead of *may* be refused) recognition if it was set aside in the primary jurisdiction. Even though such stipulation in the Miami Draft is commendable, it seems to be too strict. There may be situations when the award is set aside on the basis of manifestly flawed considerations. Hence, the word *shall*, if blindly applied, would prevent courts at the

enforcing jurisdiction from saving parties from manifest injustice. Therefore, the word *may*, as prescribed in Article V of the NYC, shall remain but should not be abused by courts at the enforcement jurisdictions. As a result, the Miami Draft does not really take the principle of finality in the ICA any further, i.e., respecting the principle of finality cannot thwart fundamental notions of justice.

Secondly, rules having equal effect to the cause of issue estoppel and the abuse of process (*Henderson v. Henderson* case) in the ICA, are not addressed in the Miami Draft. Hence, despite efforts that need to be applauded in creating this legal instrument, it has manifest shortcomings in this regard since rules of equivalent effect could indeed be included in the Miami Draft in order to prevent delays in the ICA. At the moment, there is nothing in the Miami Draft that could prevent a party raising the same issue during setting aside and enforcement proceedings.

As for the public policy as grounds for the refusal of recognition of an arbitral award, the Miami Draft allows refusal of enforcement of an arbitral award if it would be against *the international public policy as prevailing in the country of enforcement*. In contrast to the NYC, according to which arbitral award can be refused if it is against the country's *public policy* (not *international public policy*), the Miami Draft narrows down public policy to international public policy, and therefore enhances the principle of finality in the ICA. Nevertheless, the Miami Draft is silent on how much deference the enforcing court shall give to public policy considerations decided upon during setting aside proceedings. However, since there may be various public policy considerations that cannot be predicted, trying to prescribe the level of deference to be applied in each case by the enforcing court would hardly be possible. Hence, the Miami Draft improves the NYC with respect to grounds for refusing an arbitral award on the grounds of public policy.

Finally, the Miami Draft also fails to address situations where a debtor party in the ICA moves for the setting aside of an arbitral award at the seat of arbitration and, if unsuccessful, later tries to invoke the same or different grounds at the enforcement jurisdiction. In following the principle of finality in arbitration, due deference to a decision rendered at the seat of arbitration shall be given. For example, if a party moves for an arbitral award to be set aside, but the motion to set aside is dismissed by the court at the seat of arbitration, then the enforcing court shall enforce the award almost by default, save for exceptional circumstances when a decision is clearly flawed. However, although the Miami Draft does not address such questions it is the opinion of this author that, in order to achieve its aims more effectively, it should.

Ultimately, although the Miami Draft promotes finality in the ICA and further enforces the structure of arbitration as it was envisaged in the NYC, it fails to address critical questions which it seems have to be addressed by the courts themselves in understanding the fundamentals of the ICA.

4. Suggestions on the scope of co-existence between the court of the seat of arbitration and the court of the enforcement jurisdiction in the context of the ICA

Having discussed different stances taken with respect to ICA and its structure, i.e., national court involvement in setting aside and enforcement proceedings, it should be noted that although various authors advocate autonomous arbitration, and even support the enforcement of arbitral award despite the fact that it was set aside in another jurisdiction, such suggestions are not viable.

Firstly, it is against (save for exceptional circumstances) Article V of the NYC and thus is, in principle, against the spirit of arbitration. Secondly, parties are free to select the seat of arbitration as they see fit in order to avoid malicious (flawed, corrupt, and similar) setting aside of arbitral award. Hence, if the arbitral award is set aside (even wrongly so) at the country of the seat of arbitration, and later is refused enforcement in another country as a result, the losing party in ICA should not have the right to override the structure of ICA as designed in the NYC. In other words, one of the focal premises of ICA is party autonomy in selecting the procedure and place of arbitration. With freedom of choice also comes risks. But undoubtedly party autonomy is one of the features that renders ICA so attractive. Thus, it would be counter-productive for countries to risk undermining the structure of

ICA as it is (if the award is set aside, it cannot be enforced in another country) in order to save parties to ICA that were not careful in selecting the right forum for their dispute. Furthermore, the principle of comity (Schultz & Ridi, 2017, p. 582) in international law also demands the respect of another country's decision in court.

As a result, one may argue that the boundaries of court involvement in the current and intended structure of arbitration are two-fold: 1) the court shall have the competence to assess the legality of arbitral award at the seat of arbitration in order to prevent forum-shopping by the losing party in the ICA by trying to enforce the award in different jurisdictions; 2) enforcing courts shall not enforce the award which was set aside in another jurisdiction (save for clearly erroneous decisions). Equally, the enforcing court shall adopt a more liberal approach when enforcing arbitral awards if the setting aside proceedings were undertaken at the seat of arbitration but unsuccessfully (i.e., the motion to set aside was dismissed). This is the case in order to avoid the double control of arbitral awards – if the courts in the seat of arbitration declared an arbitral award to be valid, the enforcing court shall take this into account and adopt less stringent approach in reviewing the award on the grounds of Article V of the NYC than it would normally do. Hence, the court involvement in the context of the structure of ICA should be designed as pictured in the table below:

Table 1. Relation between courts of setting aside jurisdiction and courts at the enforcement jurisdiction

Action taken by the court of the seat of arbitration in relation to arbitral award	**Arbitral award review standard for enforcement on grounds of Article V of the NYC at the country of enforcement**
Reviewed and set aside	No enforcement almost[3] by default
Reviewed but motion to set aside dismissed	Enforcement almost by default
Not reviewed	Enforcement or non-enforcement by applying grounds of Article V of the NYC in ordinarily manner

To conclude, in order for the ICA to structure efficiently it is important that courts caught at the enforcement stage of an arbitral award give due consideration to previous setting aside proceedings, if any.

Conclusions

Having discussed the interaction between national courts at the seat of arbitration and at the enforcing jurisdiction, as well as their interaction with arbitral awards (i.e., court related procedures after the arbitral awards are rendered), it is possible to draw the following conclusions:

1. The national courts at the seat of arbitration and the enforcement jurisdictions shall co-exist in such a way that the enforcing court shall give due consideration to the court decision with respect to setting aside proceedings at the seat of arbitration. This is in order to enforce the structure of the arbitration as it was originally intended. At the moment different national courts at the enforcement take different approaches as to how much deference to give to the decision of the national court at the seat of arbitration. Such a lack of uniformity acts as a deterrent for the parties to choose the ICA, and hence shall be avoided.

2. The courts of the enforcement jurisdiction after the setting aside proceedings in the ICA were undergone shall, if in common law countries, either apply the cause of issue estoppel or the abuse of process principle in order to deter parties from raising the same claims (or raising them later) at different stages of the ICA proceedings. Alternatively, the enforcing courts at the civil law countries may use general principles of justice in order to reach the same result.

[3] "Almost", in this context, means those rare occasions were the enforcement or non-enforcement of arbitral award would be so flagrant that would breach international public policy.

3. When it comes to refusal of recognition and enforcement of an arbitral award on the grounds of public policy, the courts at the enforcing jurisdiction shall also take into account the decision regarding public policy matter rendered at the seat of arbitration. This is done by taking the pro-enforcement attitude of arbitral awards to create further uniformity within the ICA structure, as well as to enhance the efficiency of the ICA proceedings. The pro-enforcement attitude, in this case, could be the weighting of the actual damage or disproportionality as compared to the country's public policy existing standards.

4. The Miami Draft, although it further strengthens the principle of finality in the ICA, fails to address the issue of enforcement of arbitral award standard once the setting aside proceedings are undergone, and thus is only partially effective.

5. The principles of party autonomy and finality in the ICA shall not negate one another but rather complement each other, i.e., when parties exercise their autonomy they choose a specific seat of arbitration and the national courts at the enforcement jurisdiction shall not, save for in exceptional circumstances, permit parties from escaping the decision rendered by the national court at the seat of arbitration. Such an attitude goes hand in hand with another principle of arbitration, i.e., the aim of finality in the ICA proceedings to avoid double control of arbitral awards as much as possible.

6. The national courts at the enforcing jurisdiction shall take into account the goal of the ICA proceedings and the NYC in a holistic way in order to achieve the ICA goals, which aim for speedy and non-appealable dispute resolution. To this end the education of judges in national courts is necessary, as the examples from the caselaw show that there is no uniform standard with respect to how much deference the arbitral award enforcing court shall give to a decision rendered by the court in the setting aside proceedings at the seat of arbitration.

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