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Case Note

ANNULMENT OF AN INTERNATIONAL COMMERCIAL ARBITRATION AWARD: THE UKRAINIAN EXPERIENCE

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ABSTRACT

Background: *The development of foreign economic relations between business entities is the key to a stable economy of each country as a whole. During the implementation of these relations, the emergence of disputes and the procedure for their resolution is one of the main prerequisites for giving preference to alternative dispute resolution, namely international commercial arbitration. Despite the existence of unified rules and standards for the recognition and enforcement of international commercial arbitration awards, which are enshrined in the New York Convention of 1958, many issues arise in the doctrine of international civil procedure and law enforcement practice. These issues are the result of an inconsistent approach to arbitration in the national legislation of the member states of the New York Convention of 1958.*

Methods: *The article will consider the distinction in the definitive approach of 'challenging' and 'annulment' the decision of international commercial arbitration through the prism of comparative legal regulation and evaluation of the results of both the domestic doctrine of arbitration and foreign scientific schools. In addition, during the analysis of the numerical judicial practice of national courts, the problematic issues of the procedural procedure for annulment of decisions of international commercial arbitration and the grounds for their annulment are considered.*

Results and Conclusions: *Among the results, some gaps and contradictions were discovered, in particular, the ideas of 'challenging' and 'appealing' such awards. These procedures differ in that within the framework of the procedure for challenging the decision of international commercial arbitration, and the state court has no right to review such a decision on the merits.*

1 INTRODUCTION

For many years, international arbitration has been at the forefront of the list of the most popular and effective means of resolving disputes in various jurisdictions.[1] Such popularity is not accidental since such a means of dispute resolution is distinguished by a number of advantages: the ability of the parties to decide their own relationship 'neutral territory', transferring it for consideration to neutral persons who are not tied to the country in which one of the parties is registered or resides; the ability of the parties to independently determine the procedure for considering their dispute, adapting it in accordance with the specific circumstances of the case; confidentiality of the process, which, as a general rule, can only be violated by the mutual consent of both parties; international arbitration can be less expensive than traditional litigation; international arbitration can provide better justice since many domestic courts are overloaded, which does not always allow judges to devote enough time to adopting quality legal rules, etc.

Despite its numerous advantages, the resolution of disputes through international commercial arbitration has its drawbacks, one of which is the ambiguity of challenging arbitral awards.[2] Given this, the topic under study is especially relevant in the context of modern legal thought.[3]

1 Hong Kong International Arbitration Centre (HKIAC) (ed), *International Arbitration: Issues, Perspectives and Practice: Liber Amicorum Neil Kaplan* (Kluwer Law International 2019).

2 Christopher Koch, 'The Enforcement of Awards Annulled in their Place of Origin: The French and US Experience' (2009) 26 (2) Journal of International Arbitration 267.

3 Cristina M Mariottini and Burkhard Hess, 'The Notion of Arbitral Award' (*Max Planck Institute Luxembourg for Procedural Law*, 7 May 2020) 3 MPILux Research Paper Series, <https://www.mpi.lu/research/working-paper-series/2020/wp-2020-3> accessed 10 January 2023.

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2 THE CONCEPT OF CHALLENGING AND ANNULMENT OF THE DECISIONS OF INTERNATIONAL COMMERCIAL ARBITRATION

Protection of the rights and freedoms of citizens by unconstrained methods of protection is an integral element of the rule of law.[4] Among such methods of protection, the leading place is occupied by the judicial one, which is clearly provided for both in the Basic Law of Ukraine (Arts. 55, 129 of the Constitution of Ukraine)[5] and special national legislation (the Law of Ukraine 'On the Judiciary and the Status of Judges').[6]

Though the reform of the national civil proceedings in 2017 led to alternative schemes of dispute resolution, international commercial arbitration has become the most effective mechanism for protecting rights and freedoms in foreign economic relations. In addition, in accordance with the decision of the Constitutional Court of Ukraine, 'one of the ways to exercise the right of everyone by any means not prohibited by law to protect their rights and freedoms from violations and unlawful encroachments in the field of civil and commercial legal relations is to appeal to the arbitral tribunal'.[7]

In accordance with the current legislation, a dispute in the field of civil and commercial legal relations subordinate to the court of general jurisdiction may be referred by its parties to the arbitral tribunal, except in cases established by law. In order to ensure the implementation of these provisions of the Codes, guided by para. 3 of part 1 of Art. 85 of the Constitution of Ukraine, the Verkhovna Rada of Ukraine adopted the Law regulating the establishment and operation of arbitral tribunals in Ukraine. The functioning of arbitral tribunals in Ukraine is based not only on the principles of national but also international law.[8]

These issues are reflected in the literature of both Ukrainian and international scientists.[9] And it was thanks to the systematic analysis of various points of view regarding the legal nature of the 'judicial method of protection' and 'alternative' that it allowed us to draw certain conclusions and recommendations for improving the procedure for consideration of foreign economic disputes. Scientists draw particular importance to the issues of recognition and enforcement of an international commercial arbitration award and the grounds for its annulment.

Art. 35 of the Law of Ukraine 'On International Commercial Arbitration' provides that arbitrage award, regardless of the country in which it was rendered, is recognised as mandatory and, when submitting a written petition to the competent court, is executed

4 Jeffery Commission and Rahim Moloo, *Procedural Issues in International Investment Arbitration* (Oxford International Arbitration Series, OUP 2018).

5 Constitution of Ukraine No 254 k/96-BP of 28 June 1996 <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 10 January 2023.

6 Law of Ukraine No 1402-VIII 'On the Judiciary and the Status of Judges' of 2 June 2016 <https://zakon.rada.gov.ua/laws/show/1402-19#Text> accessed 10 January 2023.

7 Decision No 1-рп/2008 in Case No 1-3/2008 'On constitutional submission 51 people's deputies of Ukraine on compliance with the Constitution of Ukraine (constitutionality) of the provisions of paragraphs seventh, eleventh of Article 2, Article 3, paragraph 9 of Article 4 and Section VIII 'Arbitration Self-Government' of the Law of Ukraine 'On Arbitration Courts' (case on the tasks of the arbitral tribunal)' (Constitutional Court of Ukraine, 10 January 2008) <https://zakon.rada.gov.ua/laws/show/v001p710-08#Text> accessed 10 January 2023.

8 Decision No 1-рп/2008 in Case No 1-3/2008 'On constitutional submission 51 people's deputies of Ukraine on compliance with the Constitution of Ukraine (constitutionality) of the provisions of paragraphs seventh, eleventh of Article 2, Article 3, paragraph 9 of Article 4 and Section VIII 'Arbitration Self-Government' of the Law of Ukraine 'On Arbitration Courts' (case on the tasks of the arbitral tribunal)' (Constitutional Court of Ukraine, 10 January 2008) <https://zakon.rada.gov.ua/laws/show/v001p710-08#Text> accessed 10 January 2023.

9 Sophie Goldman and Sigrid van Rompaey, *Annulment and Enforcement of Arbitral Awards from a Comparative Law Perspective: Contributions from CEPANI40 Colloquium Held on October 18, 2018* (Kluwer België 2018).

taking into account the provisions of this article.[10] From this, it follows that the decision issued by international commercial arbitration is final, that is, one that is not subject to review by the appellate and cassation instances. At the same time, the international and national jurisdiction in the field of regulation of international commercial arbitration recognises the possibility of challenging such a decision. In particular, Chapter VII of the Law of Ukraine 'On International Commercial Arbitration' is entitled 'contesting an arbitral award'.[11]

This difference was also emphasised by the Supreme Court within the framework of the procedure for challenging the decision of international commercial arbitration. In particular, the Court noted that 'the court of general jurisdiction has no legal basis for analysing the correctness of the application by the International Commercial Arbitration Court of the substantive law of Ukraine in resolving the dispute and to review the dispute on the merits'.[12]

This position is clearly seen in other decisions of the Civil Court of Cassation within the Supreme Court of Ukraine. For example, considering the appeal against the decision of the arbitral tribunal of 15 February 2018, by which BEGARAT Fertribs-und Service GmbH LLC was charged an amount of money for the supply of goods that, according to their technical characteristics, did not meet the technical specification that the parties agreed to enter into a contract, the appellate court, which considered the complaint as a court of first instance, concluded that 'the circumstances established by this decision do not apply to public, of the economic and social foundations of the state, the decision is not aimed at violating public order, and therefore is not a violation of public order'. In turn, the Supreme Court found that

> the appellate court came to a reasonable conclusion that the disputed decision of the arbitral tribunal does not go beyond the contract and does not contradict the public order of Ukraine, and the court of general jurisdiction has no legal basis to analyse the correctness of the application by the International Commercial Arbitration Court of the substantive law of Ukraine in resolving the dispute and to review the dispute on the merits.[13]

It is also worth mentioning another decision of the Court, which emphasised that

> any assessment by the trial court of the circumstances of the arbitration dispute, the completeness and propriety of the evidence submitted by the parties to the arbitration proceedings, etc., would mean unlawful judicial interference prohibited by Art. 5 of the Law of Ukraine "On International Commercial Arbitration" and violation of the principle of legal significance of the court decision.[14]

3 PROCEDURE FOR CHALLENGING INTERNATIONAL COMMERCIAL ARBITRATION AWARDS

The issue of challenging an arbitral award in Ukraine is governed by Chapter VIII of the Civil Procedure Code of Ukraine and Art. 34 of the Law of Ukraine 'On International

10 Law of Ukraine No 4002-XII 'On International Commercial Arbitration' of 24 February 1994 <https://zakon.rada.gov.ua/laws/show/4002-12#Text> accessed 10 January 2023.

11 Ibid.

12 Case No 824/85/19 (Civil Cassation Court of the Supreme Court of Ukraine, 31 October 2019) <https://reyestr.court.gov.ua/Review/85390247> accessed 10 January 2023.

13 Case No 796/124/2018 (Civil Cassation Court of the Supreme Court of Ukraine, 11 October 2018) <https://reyestr.court.gov.ua/Review/77089264> accessed 10 January 2023.

14 Case No 761/10859/17 (Civil Cassation Court of the Supreme Court of Ukraine, 17 October 2018) <https://reyestr.court.gov.ua/Review/77312943> accessed 10 January 2023.

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Commercial Arbitration'.[15] When investigating the issue of challenging an arbitral award, it is worth paying attention primarily to the fact that state courts of Ukraine may accept an application for annulment of an arbitral award only if the place of arbitration is located in Ukraine (Part 2 of Art. 454 of the Civil Procedure Code of Ukraine). At the moment, there is only one permanent International Commercial Arbitration Court operating in Ukraine at the Ukrainian Chamber of Commerce and Industry in Kyiv, and based on the provisions of Part 4 of Art. 454 of the Civil Procedure Code of Ukraine, 'An application for annulment of an international commercial arbitration decision shall be submitted to the General Court of Appeal at the location of the arbitration', i.e., to the Kyiv Court of Appeal.

The application for annulment of the arbitral award shall be submitted in writing or by electronic means of communication by the party to the arbitration proceedings, with its obligatory signature but not later than three months from the date of the decision of the international commercial arbitration. The term for consideration of an application for annulment of an arbitral award is 30 days from the date of receipt of such an application to the court and is considered by the judge alone.

Despite the clear legal regulation of the procedure for challenging the decision of international commercial arbitration, there is a certain inconsistency between the provisions of the Civil Procedure Code of Ukraine and the Law of Ukraine 'On International Commercial Arbitration'. Thus, in accordance with Art. 455 of the Civil Procedure Code of Ukraine, annulment of the award of international commercial arbitration must be submitted by the application itself in writing and signed by the person submitting it.

The Law of Ukraine 'On International Commercial Arbitration' Art. 34 states that the appeal in court of an arbitral award can only be carried out by filing a petition. Thus, it is possible to notice a certain inconsistency between the provisions of these regulations regarding which procedural document should be submitted to the court in order to challenge arbitral awards.

According to the Law of Ukraine 'On Citizens' Appeals', a petition is a written request for recognition of a person's status, rights or freedoms, etc.[16] A statement is an appeal of citizens with a request to promote the implementation of their rights and interests enshrined in the Constitution and current legislation or to report on violations of current legislation or shortcomings in the activities of enterprises, institutions, organisations (regardless of ownership), people's deputies of Ukraine, deputies of local councils, or officials, as well as expressing opinions on improving their activities.

After analysing the meaning of these two terms, it can be concluded that with regard to the issue of challenging the decision of international commercial arbitration, the proper procedural basis (document) to be submitted in such a case to the court is the application. The statement itself, based on the content of the interpretation of this term, is the document in which questions regarding the shortcomings of the activities of the relevant authorities may be raised, while the petition is filed only on issues of recognition of status, rights, and freedoms.

Additional confirmation of the expressed position is the fact that, based on the provisions of Art. 184 of the Code of Civil Procedure, it is the statement of claim that is the document on the basis of which the court opens the claim proceedings. With regard to separate and orderly proceedings in civil proceedings, it is also worth noting that the court opens such proceedings only in the presence of relevant applications.

15 Code of Ukraine No 1618-IV 'Civil Procedure Code of Ukraine' of 18 March 2004 <https://zakon.rada.gov.ua/laws/show/1618-15#Text> accessed 10 January 2023; Law of Ukraine No 4002-XII (n 14).

16 Law of Ukraine No 393/96-BP 'On Citizens' Appeals' of 2 October 1996 <https://zakon.rada.gov.ua/laws/show/393/96-%D0%B2%D1%80#Text> accessed 10 January 2023.

Investigating the issue of the grounds on which decisions of international commercial arbitration can be challenged, it is worth noting that they are the same in the Civil Procedure Code of Ukraine and in the Law of Ukraine 'On International Commercial Arbitration'. So, in accordance with Art. 459 of the Civil Procedure Code of Ukraine, the list of grounds for annulment of an arbitral award can be divided into 2 groups: 1) those that are subject to verification by the court at the request of the party on which the burden of proving the relevant circumstances lies; 2) those that are subject to verification by the court ex officio, even if neither party refers to them.

With regard to the first group of grounds, in accordance with clause 1 of part 2 of Art. 459, the following grounds are: a) one of the parties to the arbitration agreement was incapacitated; or this agreement is invalid under the law to which the parties subordinated this agreement, and in the absence of such an indication, according to the law of Ukraine; or (b) s/he was not properly notified of the appointment of an arbitrator or of the arbitration proceedings or for other valid reasons she was unable to submit his/her explanations; or c) the award is rendered in respect of a dispute not provided for in the arbitration agreement or that does not fall within its terms or contains rulings on matters beyond the scope of the arbitration agreement, but if the rulings on matters covered by the arbitration agreement may be separated from those not covered by such agreement, then only that part of the arbitral award may be set aside, which contains rulings on matters not covered by the arbitration agreement; or d) the composition of the international commercial arbitration or the arbitration procedure did not comply with the agreement of the parties, unless such agreement is contrary to the law from which the parties cannot deviate, or, in the absence of such agreement, did not comply with the law.

To the second group of grounds, clause 2 of part 2 of Art. 459 adds the following: a) under law, the dispute, in view of its subject matter, cannot be referred to the resolution of international commercial arbitration; or b) the arbitral award is contrary to the public order of Ukraine.

With regard to disputes that cannot be referred to international commercial arbitration, this issue is governed by Part 1 of Art. 22 of the Commercial Procedural Code of Ukraine, according to which a dispute relating to the jurisdiction of a commercial court may be referred by the parties to an arbitral tribunal or international commercial arbitration, except for listed grounds.[17]

Thus, the current legislation of Ukraine quite clearly regulates relations regarding the appeal of decisions of international commercial arbitration, giving an exhaustive list of grounds for initiating such proceedings. But the desire of the legislator to reform arbitration legislation also gives rise to various points of view on this issue in the scientific community.[18]

4 GROUNDS FOR ANNULMENT OF AN ARBITRAL AWARD AT THE REQUEST OF ONE OF THE PARTIES

In order to study the problems of the annulment of an arbitral award[19] and find ways to resolve them, it is necessary to analyse each of the grounds for the annulment of the arbitral award in accordance with the legislation of Ukraine.

17 Code of Ukraine No 1798-XII 'Commercial and Procedure Code of Ukraine' of 6 November 1991 <https://zakon.rada.gov.ua/laws/show/1798-12#Text> accessed 10 January 2023.

18 Yuriy Prytyka, Vyacheslav Komarov and Serhii Kravtsov, 'Reforming the Legislation on the International Commercial Arbitration of Ukraine: Realities or Myths' (2021) 3 (11) Access to Justice in Eastern Europe 117, doi: 10.33327/AJEE-18-4.3-n000074.

19 Toms Krūmiņš, *Arbitration and Human Rights: Approaches to Excluding the Annulment of Arbitral Awards and Their Compatibility with the ECHR* (Springer 2020).

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According to subpara. 1 of para. 1 of part 2 of Art. 34 of the Law of Ukraine 'On International Commercial Arbitration' and para. 1 of part 2 of Art. 459 of the Civil Procedure Code of Ukraine, [20] a decision of international commercial arbitration may be annulled if the party filing the application for annulment provides evidence that one of the parties to the arbitration agreement was incapacitated; or this agreement is invalid under the law to which the parties subordinated this agreement and, in the absence of such an indication, under the law of Ukraine. After analysing this provision, we can conclude that this basis contains two elements – the incapacity of the parties to the arbitration agreement and the invalidity of the arbitration agreement. At the expense of the first element, it can be noted that it is associated with the lack of appropriate competence among the parties to the arbitration agreement. In addition,[21] we can conclude that the parties to the arbitration agreement have incapacity, as noted in the manual of the International Council for Commercial Arbitration (ICCA) on the interpretation of the New York Convention, the most frequently mentioned basis, proving, for example, 'mental insanity, physical incapacity, lack of authority to act on behalf of a legal entity', etc. For example, in case No. 761/28906/17, a petition was considered to annul the arbitral award due to the fact that the contract containing the arbitration clause was signed by the director of the company in excess of the powers specified in the statute.[22] Thus, it can be traced that the incapacity of the parties to the arbitration agreement is used as a basis for the annulment of the arbitral award.

The second element of the above ground is the invalidity of the arbitration agreement. The requirements to be met by the arbitration agreement under Ukrainian law are provided for in Part 2 of Art. 7 of the Law of Ukraine 'On International Commercial Arbitration'. The said provision states that the arbitration agreement is concluded in writing, namely: the agreement is considered concluded in writing, (1) if it is contained in a document signed by the parties, or (2) concluded by exchanging letters, electronic messages, if the information contained therein is available for further use, (3) messages by teletype, telegraph or other means of telecommunications, ensuring the fixation of such an agreement, or (4) by exchanging a statement of claim and a response to a claim in which one of the parties asserts the existence of an agreement and the other does not object to it.

The aforementioned provision of the Law gives the parties some freedom to choose which way to enter into an arbitration agreement, but, at the same time, such freedom is limited to the requirement for a written form.[23] In this regard, the arbitration agreement concluded by the parties through conclusive actions or by giving oral consent is invalid.

The following grounds for annulment of an arbitral award at the request of one of the parties relate specifically to procedural defects.[24] Thus, in accordance with para. 2 of para. 1 of part 2 of Art. 34 of the Law of Ukraine 'On International Commercial Arbitration', an arbitral award may be annulled by a court if the party filing the petition for annulment submits evidence that it was not properly notified of the appointment of an arbitrator or of the arbitration proceedings or for other valid reasons it could not submit its explanations.

In addition, in accordance with para. 4 of para. 1 of part 2 of Art. 34 of the Law of Ukraine 'On International Commercial Arbitration', the basis for annulment of the award is the inconsistency of the composition of the arbitral tribunal or the arbitration procedure with

20 Law of Ukraine No 4002-XII (n 14); Code of Ukraine No 1618-IV (n 19).

21 VS Deshpande, 'International Commercial Arbitration: Uniformity of Jurisdiction' (1988) 5 (2) Journal of International Arbitration 115, doi: 10.54648/joia1988017.

22 Case No 761/28906/17-ц (Kyiv Court of Appeal, 24 October 2018) <https://reyestr.court.gov.ua/Review/77413779> accessed 10 January 2023.

23 Ilias Bantekas, 'Transnational arbitration agreements as contracts: in search of the parties' (2022) 38 (3) Arbitration International 169, doi: 10.1093/arbint/aiac007.

24 Gary B Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021).

the agreement of the parties unless such an agreement contradicts any provision of this Law, from which the parties cannot deviate, or, in the absence of such an agreement, inconsistency with the Law of Ukraine 'On International Commercial Arbitration'.

These grounds are primarily aimed at protecting the fundamental rights of the parties to the arbitration process, including the right to due process, the right to autonomy to determine its own dispute resolution procedure, the right to fair and impartial consideration by an independent arbitral tribunal, etc.

So, in accordance with Art. 18 of the said Law, the parties shall be treated equally, and each party shall be given every opportunity to state its position. Art. 19 of the Law of Ukraine 'On International Commercial Arbitration', in turn, stipulates that subject to compliance with the provisions of this Law, the parties may, at their discretion, agree on the procedure for consideration of the case by the arbitral tribunal. Art. 12 of the Law of Ukraine 'On International Commercial Arbitration' imposes on arbitrators the obligation to notify circumstances that may raise reasonable doubts about their impartiality or independence, thereby providing the parties to the arbitration process with the right to an impartial arbitral tribunal. Similarly, in Arts. 10 and 11 of the Law 'On International Commercial Arbitration', details the procedure for appointing arbitrators in the absence of an agreement between the parties regarding such a procedure. Violation of the above-mentioned rules leads to an encroachment on the fundamental rights and guarantees of the parties to the arbitration process and therefore may become the basis for annulment of the arbitral award.

The reason for setting aside an arbitral award is the incorrect determination of the jurisdiction of the arbitral tribunal. Thus, the Law of Ukraine 'On International Commercial Arbitration' in subpara. 3 of para. 1 of part 2 of Art. 34 and the Civil Procedure Code of Ukraine in para. 1 of part 2 of Art. Art. 459 determines that an award of an international commercial arbitration may be set aside if the party filing the annulment application provides evidence that the award has been rendered in respect of a dispute not provided for in the arbitration agreement or that does not fall within its terms or contains rulings on matters beyond the scope of the arbitration agreement. However, if the rulings on matters covered by the arbitration agreement may be separated from those not covered by such agreement, then only that part of the arbitral award that contains rulings on matters not covered by the arbitration agreement may be annulled. Scientists note that this is 'based on the principle that the arbitral tribunal receives its powers by agreement of the parties and therefore has the right to exercise no more powers than such an agreement of the parties allows'. At the same time, the said grounds for annulment of the arbitral award shall be applied in connection with Art. 16 of the Law of Ukraine 'On International Commercial Arbitration', according to which the arbitral tribunal may itself adopt a decision on its competence, including any objections to the existence or validity of the arbitration agreement.

The Supreme Court, when analysing the above provision in the case on the claim of Jodovit S.R.L. (Italy) against Public Joint Stock Company Energomashspetsstal, noted that it constitutes the generally accepted principle of 'competence-competence', which in practice 'is implemented in such a way that the Arbitral Tribunal itself must interpret the content of the arbitration agreement in order to determine whether or not it (the court) has the competence to consider a particular case'.[25] However, given that the State Court under national arbitration law has the power to review the award of international commercial arbitration in terms of possible defects in the jurisdiction of the arbitral tribunal, the principle of 'competence-competence', scientists note that it is not absolute.

25 Case No 824/166/19 (Civil Cassation Court of the Supreme Court of Ukraine, 13 February 2020) <https://reyestr.court.gov.ua/Review/87793666> accessed 10 January 2023.

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Consequently, there are two types of annulment of an arbitral award at the request of one of the parties: defects in the arbitration agreement concluded between the parties to the dispute and defects in the procedure for conducting the arbitration process. Both some and other grounds are applied differently by national courts, so it is necessary to form a unified judicial practice in this regard.

5 GROUNDS FOR ANNULMENT OF AN ARBITRAL AWARD AT THE INITIATIVE OF THE COURT

Unlike the previous ones, the grounds to be considered in this section shall be applied by the court on its own initiative without the need for any initiative on the part of the applicant.[26]

In accordance with para. 2 of part 2 of Art. 34 of the Law of Ukraine 'On International Commercial Arbitration' and para. 2 of part 2 of Art. 459 of the Civil Procedure Code of Ukraine,[27] an arbitral award may be annulled by a court only if the court determines that

1) the object of the dispute cannot be the subject of arbitration proceedings under the legislation of Ukraine;

2) the arbitral award is contrary to the public order of Ukraine.

At the same time, as noted by the Supreme Court in the case on the petition of Ostchem Holding Limited for the recognition and granting of permission to enforce a foreign arbitral award on the territory of Ukraine,

> the court ... shall ex officio, in accordance with the nature of its own powers and its legal status in the State, check, on its own initiative and without fail, the observance of public order in each case, regardless of whether the party objecting to the recognition and enforcement of the award of international commercial arbitration refers to the existence of these obstacles to such appeal and its satisfaction by the court. ...An obligatory element simultaneously with the clarification of compliance with public order is to provide an assessment of the arbitrability of the dispute resolved by international arbitration.[28]

Therefore, the Supreme Court stressed that whenever courts decide whether to annul, recognise, or enforce an arbitral award, they have an obligation to analyse the said grounds, regardless of whether the party objecting to the recognition and enforcement of an international commercial arbitration award refers to the existence of these obstacles to such appeal and its satisfaction by the court. To demonstrate how to solve this problem, legal scholars give examples of legislation in other countries in which this issue is regulated in more detail.[29]

The main issue is the arbitrability of economic disputes related to bankruptcy. Art. 22 of the Commercial and Procedural Code of Ukraine expressly provides for bankruptcy cases and cases in disputes with property claims against the debtor against whom bankruptcy proceedings have been opened, including cases in disputes on invalidation of any transactions

26 Silja Schaffstein, *The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals* (Oxford International Arbitration Series, OUP 2014).

27 Law of Ukraine No 4002-XII (n 14); Code of Ukraine No 1618-IV (n 19).

28 Case No 519/15/17 (Civil Cassation Court of the Supreme Court of Ukraine, 27 June 2018) <https://reyestr.court.gov.ua/Review/75717009> accessed 10 January 2023.

29 Joseph Lee, 'Intra-Corporate Dispute Arbitration and Minority Shareholder Protection: A Corporate Governance Perspective' (2017) 83 (1) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 85.

(agreements) concluded by the debtor, are inexplicable, involve the collection of wages, etc.[30] At the same time, the current legislation does not contain an answer to what should happen to the arbitration process in the event that after its commencement, a bankruptcy case was initiated against one of the parties. In order to avoid controversial judicial practice, this issue should be regulated at the legislative level.

As noted above, as a general rule, by virtue of the provisions of part 1 of Art. 22 of the Commercial and Procedural Code of Ukraine, the parties may not submit to international arbitration disputes relating to the privatisation of property and disputes arising from relations related to the protection of economic competition. At the same time, part 2 of Art. 22 of the Code of Civil Procedure of Ukraine contains an exception, providing that the parties may submit to the resolution of international arbitration the civil law aspects of these categories of disputes. Today, domestic courts ignore the latter rule, completely refusing to consider this category of disputes.

The last reason for the annulment of the award of international arbitration that will be considered is a violation of the public order of Ukraine. For the first time, the definition of the term 'public order' was provided by the Plenum of the Supreme Court of Ukraine on 24 December 1999. Public order should be understood as 'the law and order of the state, the determining principles and principles that form the basis of the existing system in it (concerning its independence, integrity, independence and inviolability, basic constitutional rights, freedoms, guarantees, etc.)'.[31]

Thus, already in 2018, the Supreme Court, when defining the concept of public order in the petition of CJSC Peter-Service for permission to enforce an arbitral award and issue a writ of execution, pointed out that the legal concept of public order exists in order to protect the state from foreign arbitral awards that violate the fundamental principles of justice and justice in force in the state.[32] These provisions are called upon to establish a legal barrier to decisions made contrary to the cardinal procedural and substantive principles on which public and state order rests. They are also intended to prevent the possibility of recognition and granting permission to enforce decisions related to corruption or inadmissible ignorance of arbitrators. Within the framework of this case, the debtor referred to the violation of public order as a basis for denying the petition for recognition and enforcement of an international arbitration award made in favour of a Russian company. The debtor believed that the fact that the company in favour of which the arbitral award was made is located in the territory of the aggressor country is sufficient to apply the policy of public order. However, the Supreme Court drew attention to the risk of unreasonable refusal to enforce the award of international commercial arbitration when applying the concept of public order, noting that this 'is a kind of blocking of the award and will be in the nature of an artificial regulatory a barrier that, from the point of view of international law, is completely unacceptable'.[33] In view of this, the Supreme Court rejected the debtor's argument, concluding that references to public order can take place only in cases where the enforcement of a foreign arbitral award is incompatible with the fundamentals of the state's law and order and the events that occurred in Ukraine since February-March 2014 and the recognition of the Russian Federation as an aggressor country in relation to Ukraine did not affect private law relations between CJSC

30 Code of Ukraine No 1798-XII (n 21).

31 Resolution of the Plenum of the Supreme Court of Ukraine No 12 'On the practice of court consideration of petitions for the recognition and enforcement of decisions of foreign courts and arbitrations and for the annulment of decisions rendered in the order of international commercial arbitration on the territory of Ukraine' of 24 December 1999 <https://zakon.rada.gov.ua/laws/show/v0012700-99#Text> accessed 10 January 2023.

32 Case No 755/6749/15-c (Civil Cassation Court of the Supreme Court of Ukraine, 26 September 2018) <https://reyestr.court.gov.ua/Review/76885631> accessed 10 January 2023.

33 Ibid.

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'Peter-Service' and PJSC 'Telesystems of Ukraine' or their obligations arising on the basis of this agreement.[34]

Thus, the court distinguished between the private law consequences of the execution of the decision on the territory of Ukraine (which cannot entail a violation of public order but are only negative consequences for the private side of the contractual relationship) and those consequences that have a public interest and may violate the fundamental legal principles enshrined in Ukraine.

In turn, the use by Ukrainian courts of a broad understanding of the term 'public order' may lead to the unreasonable annulment of the arbitral award or refusal to recognise such a decision. For example, we can cite the decision of the Supreme Court on the application of JV Poltava Petroleum Company to the State of Ukraine on granting permission for the enforcement of an arbitration award. According to the circumstances of the case, the applicant initiated arbitration proceedings against Ukraine in accordance with the Energy Charter Treaty (ECT) and bilateral investment agreements concluded by Ukraine with WelIkobria and the Netherlands. Within the framework of the initiated arbitration proceedings, the parties appointed an emergency arbitrator, who established a violation by Ukraine of its obligations to the applicant and an order of Ukraine 'to refrain from imposing a rent for the use of subsoil for the extraction of natural gas by JV Poltava Petroleum Company at a rate higher than 28%'. In turn, Ukraine asked the court to refuse to implement this decision on the basis of violation of public order since 'giving the courts the competence to change the amount of taxes / mandatory payments contrary to the norms of the Tax Code of Ukraine would be a violation of the fundamental principles established in the state'.[35] First, the Kyiv Court of Appeal, in its ruling of 21 December 2016, and then the Supreme Court, in its decision of 19 September 2018, applied a broad approach to the definition of the term 'public order' and rejected the applicant's application for execution of the said decision. Thus, the courts interpret the term 'public order' differently, which does not always have positive consequences.[36]

6 CONCLUDING REMARKS

The procedure for challenging arbitral awards is ambiguous, imperfect, and notwithstanding seemingly detailed legislative regulation, has some gaps and contradictions.

Thus, the idea of 'challenging' an international commercial arbitration award is used in arbitration law and is opposed to the procedure for 'appealing' such a decision. These procedures differ in that within the framework of the procedure for challenging the decision of international commercial arbitration, and the state court has no right to review such a decision on the merits.

Ukrainian arbitration law contains several main categories of grounds for the annulment of arbitral awards. One of these categories is a defect in the arbitration agreement. In particular, the existing wording does not allow the arbitration agreement, which was concluded by conclusive actions or orally, to be considered valid even if there is written confirmation of the content of such an agreement. In addition, national law also contains two separate grounds for annulment of arbitral awards that relate to violations of the arbitration procedure, including failure to notify a party of the arbitration proceedings, violation of the principle of due process, violation of the procedure for selecting arbitrators, etc.

34 Ibid.

35 Case No 757/5777/15-c (Civil Cassation Court of the Supreme Court of Ukraine, 19 September 2018) <https://reyestr.court.gov.ua/Review/76596637> accessed 10 January 2023.

36 Niek Peters, *The Fundamentals of International Commercial Arbitration* (2nd edn, Maklu 2020).

Modern Ukrainian legislation in the field of arbitration does not clearly regulate the issue of the possibility of annulment of an arbitral award due to the non-arbitrable nature of the dispute in a case during which one of the parties was declared bankrupt. Thus, it is proposed to supplement the Code of Ukraine on Bankruptcy Procedures with relevant provisions for clearer regulation of this issue.

Under Ukrainian law, the civil law aspects of some public disputes may be referred to international arbitration, but the courts ignore this possibility, so there is a need to detail such civil law aspects at the legislative level. In modern judicial practice, a very broad concept of public order is used, which can lead to the unreasonable annulment of arbitral awards on this basis. Therefore it is necessary to consolidate a narrower definition of such a term.

REFERENCES

1. Bantekas I, 'Transnational arbitration agreements as contracts: in search of the parties' (2022) 38 (3) Arbitration International 169, doi: 10.1093/arbint/aiac007.
2. Born GB, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021).
3. Commission J and Moloo R, *Procedural Issues in International Investment Arbitration* (Oxford International Arbitration Series, OUP 2018).
4. Deshpande VS, 'International Commercial Arbitration: Uniformity of Jurisdiction' (1988) 5 (2) Journal of International Arbitration 115, doi: 10.54648/joia1988017.
5. Goldman S and van Rompaey S, *Annulment and Enforcement of Arbitral Awards from a Comparative Law Perspective: Contributions from CEPANI40 Colloquium Held on October 18, 2018* (Kluwer België 2018).
6. Hong Kong International Arbitration Centre (HKIAC) (ed), *International Arbitration: Issues, Perspectives and Practice: Liber Amicorum Neil Kaplan* (Kluwer Law International 2019).
7. Koch C, 'The Enforcement of Awards Annulled in their Place of Origin: The French and US Experience' (2009) 26 (2) Journal of International Arbitration 267.
8. Krūmiņš T, *Arbitration and Human Rights: Approaches to Excluding the Annulment of Arbitral Awards and Their Compatibility with the ECHR* (Springer 2020).
9. Lee J, 'Intra-Corporate Dispute Arbitration and Minority Shareholder Protection: A Corporate Governance Perspective' (2017) 83 (1) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 85.
10. Mariottini CM and Hess B, 'The Notion of Arbitral Award' (*Max Planck Institute Luxembourg for Procedural Law*, 7 May 2020) 3 MPILux Research Paper Series, <https://www.mpi.lu/research/working-paper-series/2020/wp-2020-3> accessed 10 January 2023.
11. Peters N, *The Fundamentals of International Commercial Arbitration* (2nd edn, Maklu 2020).
12. Prytyka Yu, Komarov V and Kravtsov S, 'Reforming the Legislation on the International Commercial Arbitration of Ukraine: Realities or Myths' (2021) 3 (11) Access to Justice in Eastern Europe 117, doi: 10.33327/AJEE-18-4.3-n000074.
13. Schaffstein S, *The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals* (Oxford International Arbitration Series, OUP 2014).

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