RESEARCH ARTICLE

AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Research Article

CHALLENGES OF LEGAL GUARANTEES FOR THE ENFORCEMENT OF ARBITRAL AWARDS IN INTERNATIONAL COMMERCIAL CASES

Oleksii Makarenkov* and Lurdes Varregoso Mesquita

ABSTRACT

Background: *The historical determinants of the appearance of international arbitration correspond to the general tendency of the complication of legal relations of highly developed civilisations, where business processes are its drivers. It is expected that a complex transnational business layered on different levels of civilisation is characterised by an increase in the probability of misunderstandings regarding the proper fulfilment of obligations, the resolution of which is referred to as international arbitration, which, by nature, is more effective than national courts. In this regard, within legal doctrine and among legal practitioners, there is an ongoing discourse on strategies to mitigate risks associated with the execution of international arbitration decisions and related issues.*

Methods: *The research employed a methodological toolkit encompassing formal and dialectical logic, a synergistic methodological approach. The primary method within this framework was the synergistic analysis of the transformation of formal-legal sources and the corresponding application practices. Additional methods included historical-legal, comparative-legal, formal-dogmatic methods and contextual analysis.*

Results and Conclusions: *Formal-legal guarantees for the execution of international arbitration decisions represent a system of requirements governing the procedural and actual actions of state-authorised persons (bodies) that ultimately lead to such execution. The basis of such guarantees is the adequacy of the subject to which the method is applied. Firstly, the arbitrators must make the decision. Secondly, this concerns a property (commercial) dispute. Thirdly and fourthly, enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought and arising out of differences between persons, whether physical or legal. These signs follow from the corresponding specific acts of private international law. The enforceability of an arbitral award depends on the timely and appropriate actions of the parties to the contract. Even during the negotiation of a foreign economic agreement, the result of an audit of the business partner's reliability in terms of its ability to fulfil its financial and/or other obligations properly should be obtained.*

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

1 INTRODUCTION

The quasi-judicial role of international commercial arbitration organically complements the proceedings of national and other courts in ensuring the successful course of transnational entrepreneurship. The historical determinants of the appearance of the arbitration method of resolving commercial disputes are not only preserved but also strengthened. This corresponds to the general tendency of the complication of legal relations of highly developed civilisations, where business processes are their drivers with complex compositions of practical implementation, in particular, due to the proper fulfilment of obligations within the framework of agreements with a number of partners, etc. It is expected that a complex transnational business layered on different levels of civilisation is characterised by an increase in the probability of misunderstandings regarding the proper fulfilment of obligations, the resolution of which is referred to as international arbitration, which is inherently more effective than national courts. In this regard, in legal doctrine and among legal practitioners, the issue of risk neutralisation for the execution of international arbitration decisions and related issues is being updated.

In recent decades, there has been a clear tendency to towards increasing the role of international commercial arbitration as a mechanism for resolving disputes in complex commercial legal relations involving a foreign element. Business circles prefer the application of transnational informal norms to the traditional dogmatic approach, primarily for pragmatic reasons since, in this case, this method of resolving international commercial disputes meets their expectations to a greater extent.

For example, under Article 35 'Applicable law, amiable compositeur', the arbitral tribunal is mandated to apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law that it deems appropriate. The arbitral tribunal may resort to deciding as amiable compositeur or ex aequo et bono only if the parties have expressly authorised the arbitral tribunal to do so. Regardless, in all cases, the arbitral tribunal shall decide by the terms of the contract, if any, and take into account any usage of trade applicable to the transaction.[1]

In some societies, 'tribunals' exist apart from the formal court system. In many societies, too, arbitration serves as a prevalent alternative to 'regular' judicial progress. The key distinction between arbitration and litigation chiefly lies in that the arbitrator is only a temporary judge, usually selected by the parties rather than a state official.[2] The term 'arbiter' comes from the Latin – arbiter, mediator. In Roman civil proceedings, an arbiter (arbitri) functioned as a type of judge distinct from ordinary judges (judices). In the realm of international commercial arbitration, an arbitrator is a disinterested mediator called upon to resolve a dispute between two parties and find a compromise solution. Using the term 'court' in the title of international commercial arbitration is considered scientifically

1 UNCITRAL, *UNCITRAL Arbitration Rules (with art 1, para 4, as adopted in 2013 and art 1, para 5, as adopted in 2021); UNCITRAL Expedited Arbitration Rules; UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (UN 2021).

2 Lawrence M Friedman, 'Litigation and Society' (1989) 15 Annual Review of Sociology 21.

incorrect. The use of both terms is traditionally the prerogative of the state to nominate its judicial authorities, which is carried out on behalf of the entire state.

Nevertheless, some arbitrations incorporate such terms in their titles, such as the International Chamber of Commerce International Court of Arbitration, London Court of International Arbitration and Permanent Court of Arbitration. This usage can be explained by the development of such arbitrations as historically the first and most significant, as well as by several other historical-legal and foreign policy reasons. According to clause 1 of Part 1 of Article 17 of the Swedish code of judicial procedure, a court is not competent to entertain disputes specified in this chapter that fall within the purview of authorities other than a court, a special court, or required by an act or regulation to be determined directly by arbitrators.[3]

2 JURISDICTIONAL INNOVATIONS IN THE FIELD OF GUARANTEED INTERNATIONAL ARBITRATION AWARDS ENFORCEMENT

When determining the terms of international commercial arbitration, lawyers primarily focus on the ratification of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, dated 10 June 1958 (hereafter: EFAA Convention 1958).[4] On the territory of the EU, the legal institution of enforcement of court decisions in civil or commercial cases, which are not decisions of international arbitration courts, was strengthened by the Convention on Choice of Court Agreements of 30 June 2005[5] and Convention on the recognition and enforcement of foreign judgments in civil or commercial matters (hereafter: 'Hague Convention 2019').[6] The latter was adopted on 2 July 2019 by the Member States of the Hague Conference on Private International Law during its Twenty-Second Session.

On 1 September 2023, the Hague Convention 2019 entered into force following the ratification by at least two states and their associations (Article 28). The Convention is effective between the European Union (EU), including its member states (except Denmark), and Ukraine. Uruguay deposited its instrument of ratification of the Hague Convention 2019, becoming a new Contracting Party to the Convention, with its entry into force on 1 October 2024.[7] While six additional states have signed the Convention, they have not yet ratified it.

3 The Swedish Code of Judicial Procedure (1942:740) <https://www.government.se/government-policy/judicial-system/the-swedish-code-of-judicial-procedure> accessed 25 September 2023.

4 UN Commission on International Trade Law, *Convention on the Recognition and Enforcement of Foreign Arbitral Award (New York, 1958)* (UN 2008).

5 Convention on Choice of Court Agreements (Hague, 30 June 2005) <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> accessed 25 September 2023.

6 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=legissum:4610899> accessed 25 September 2023.

7 'Judgments Convention: Entry into force and ratification by Uruguay' (*Hague Conference on Private International Law (HCCH)*, 1 September 2023) <https://www.hcch.net/en/news-archive/details/?varevent=936> accessed 25 September 2023.

Didier Reynders, EU Commissioner for Justice, remarked, 'The time is right for greater international unity and cooperation in civil and commercial law. I hope that the entry of the Hague Judgments Convention into force and its application in the EU and Ukraine will motivate other countries to sign up. In an increasingly globalised world, implementing the law cannot be restricted by borders – the more countries join the Convention, the more effective our judgements will become. Citizens and companies will benefit from the treaty, and it will further facilitate trade and investment between the EU and Ukraine.'[8]

2.1. Formal-Legal Guarantees of Jurisdictional Decisions in Commercial Cases Execution: Comparative-Legal Analysis

The Judgments Convention establishes a common framework for the global circulation of judgments in civil or commercial matters, overcoming the complexities arising from differences in legal systems. By providing a minimum standard for circulating foreign judgments among Contracting Parties, the Convention promotes access to justice for all and facilitates international trade, investment, and mobility by reducing the risks and costs of cross-border litigation.

***Table* 1. Comparison of legal guarantees of foreign arbitral awards and foreign judgments enforcement**

No	Comparison	
	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)	Convention on the recognition and enforcement of foreign judgments in civil or commercial matters was adopted on 2 July 2019 by the Hague Conference on Private International Law
1	Article 3 Each Contracting State recognizes arbitral awards as binding and enforces them.	This Convention does not apply to arbitrations and related proceedings (Part 3, Article 2). This Convention applies to the recognition and enforcement of judgments in civil or commercial matters. Concomitantly, it does not apply to tax, customs or administrative matters (Part 1, Article 1).
2	Article 5 defines the grounds for refusal to execute the decision, namely: incapacity of the party, invalidity of the agreement; non-notification of the appointment of an	Article 5 defines in detail the grounds for executing a court decision; in Article 6 – a court decision issued regarding real property rights to immovable property is recognized and enforced if and only if the property is located in the State where the decision was made; in Article 7 – grounds

8 Directorate-General for Neighbourhood and Enlargement Negotiations, 'Ukraine: mutual recognition of judgments between EU and Ukraine starts today under Hague Convention' (*European Commission*, 1 September 2023) <https://neighbourhood-enlargement.ec.europa.eu/news/ukraine-mutual-recognition-judgments-between-eu-and-ukraine-starts-today-under-hague-convention-2023-09-01_en> accessed 25 September 2023.

2	arbitrator or of arbitration proceedings; violation of the right to provide explanations; the dispute is not covered by the terms of the arbitration agreement or the arbitration clause in the contract; the composition of the arbitration body or the arbitration process did not comply with the agreement of the parties or the law of the country where the arbitration took place; the object of the dispute cannot be the subject of arbitration.	for refusal to execute a court decision. It is also detailed that court decisions are not enforced due to the following general procedural grounds: if proceedings between the same parties and on the same subject are ongoing in the court of the requested State (Part 2 Article 7); if the decision is made on an issue to which this Convention does not apply (clause 1 of Article 8); to the extent that the court decision provides for the recovery of compensation, including punitive fines, which do not compensate the party for actual losses or damage caused (clause 1 of Article 10); if the State has a significant interest in not applying this Convention to a separate issue and declares that it will not apply the Convention to such an issue (clause 1 of Article 18); if the court decision was adopted as a result of proceedings in which the State, a state body or a natural person acting on behalf of the State or such a state body is a party (clause 1 of Article 19).
3	The decision is not executed when the period for appealing such a decision is still running or it is appealed	
4	subparagraph e) clause 1 of Article 5; Article 6	clause 4 of Article 4
5	The decision is not executed if its execution would be obviously incompatible with the public order of the state	
6	subparagraph b) clause 2 of Article 5 (only public order is mentioned)	subparagraph c) clause 1 of Article 7 (the rule is more detailed, namely: the court decision is not enforced even when it is inconsistent with the fundamental principles of procedural justice; related to a violation of the security or sovereignty of the state)
7	The institution of ensuring the execution of the court decision is provided for by the requirements of the procedural law of the state, which is applied during the resolution of the dispute	
8	Mentioned in Article 6	Not mentioned

Thus, the emergence of new international agreements in the field of national court decision enforcement organically complements the system of foreign arbitral awards enforcement, in particular under the rules of the EFAA Convention 1958. This parallel can be likened to the democracy of our legal system – acknowledging major flaws but recognising these are the best we have. This trend reveals the relationship between the state and the private sector in the field of justice.

On the one hand, justice remains the exclusive prerogative of the state, a sign of its sovereignty and its desire to strengthen its influence in the areas of both determining the obligations of the parties to commercial relations and resolving disputes regarding the content of such obligations, enforcing decisions following the consequences of resolving such disputes. On the other hand, the sphere of private legal relations demonstrates its autonomy from the state in resolving commercial and civil disputes arising from misunderstandings during the communication of entities registered in at least two different states.

2.2. Dual System of Commercial Interest's Jurisdictional Protection

In commercial (civil) disputes, the party in violation of contractual obligations often simplifies, ignores, and/or otherwise distorts the meaning of the contract terms. Accordingly, the functional essence of court and arbitration is exhausted to the same extent by mediation in the search, discovery and fixation of the only correct knowledge about legal relations between the parties to the dispute, the rules suitable for them, etc. Arbitration in commercial disputes competes with commercial courts of the state. This phenomenon actually represents entrepreneurship in the field of justice. Notably, differences between these two institutes highlight a discernible shift in the criterion of preferences towards arbitration.

Investors should, therefore, develop effective enforcement strategies from the outset of an investment dispute and identify extra-EU jurisdictions where respondent States hold sufficient enforceable assets. Australia, the UK and the US appear to be the preferred options for extra-EU enforcement. The effective enforcement mechanism of arbitration awards and the potential reputational damage of adverse awards (e.g. when issuing government bonds) make settlement negotiations still attractive for respondent States.

Recently, Germany agreed to pay €1.4bn to Swedish Vattenfall to settle its nuclear energy dispute brought under the ECT. It has also been reported that the Republic of Croatia settled its disputes with four European banks over the forced into euro of Swiss franc-indexed loans into euros.

***Table* 2. Advantages and disadvantages of resolving commercial disputes by international arbitration and national court**

Characteristics type	International Arbitration	National Court
Advantages	1) Use of English or another language, as agreed by the parties; 2) The possibility to approve and/or select arbitrator candidates; 3) Eliminated from the system of state corruption; 4) The arbitrator takes great care of his competence and other components of authority; 5) The parties have the opportunity to determine the rules of arbitration proceedings.	1) Covering the costs of court functioning, except for the court fee, is carried out at the expense of public funds; 2) Economic expediency for the parties to resolve disputes with a small, compared to cases in international arbitration, cost of the claim, for example, 250 US dollars, etc.

Disadvantages	High costs for the dispute resolution process are covered exclusively by the parties. In this regard, claims with relatively large amounts of claims are submitted to international arbitration. For instance, this encompasses the cost of remuneration for arbitrators and lawyers, which can be relatively high. Considering the base salaries that were being offered, there was a flood of young people wanting to be lawyers.[9] It should be noted that introducing arbitration as a binding mechanism for the solution of small claims may be complex since it could lead to a situation of mandatory institutional arbitration.[10]	1. Using exclusively the language of the national judiciary; 2. The possibility to challenge a judge and to satisfy such a statement based on the results of its consideration by another judge who, as a rule, are on friendly terms with each other, is limited by the procedural law; 3. The court is in the system of political pressure and other manifestations of corrupt influence; 4. Motives to ensure the competence and other components of the authority of individual judges and/or are sometimes weakened by the overload of the volume of cases that must be considered within the deadline; a system of neutralization of professional mistakes through mutual condescension to each other; lack of direct dependence on the opinion of the parties in the case about the professionalism of the judge, etc.; 5. The parties are deprived of the opportunity to determine the rules according to which the court will consider the case.
Variable	Depending on the features of the specific national legal system, the circumstances of the case, the nature of the parties and arbitrators/judges, the following indicators do not clearly reveal permanent qualities or shortcomings, namely: 1) the speed of decision-making arbitration/court; 2) fact and speed of implementation of arbitration/court decisions; 3) formalisation of procedures for proving the circumstances of the case;	

9 Eliyahu M Goldratt, *Critical Chain* (North River Press 1997) 14.

10 Lurdes Varregoso Mesquita and Catia Marques Cebola, 'European Small Claims Procedure: An Effective Process? A Proposal for an Online Platform' (2022) 5(2) Access to Justice in Eastern Europe 19.

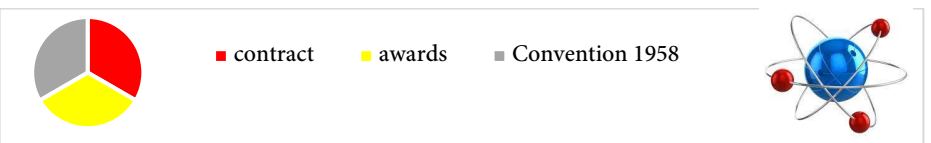
Variable	4) formalisation of fidelity verification procedures and balancedness of the decision made in the case; 5) use of procedures for appealing the decision. For instance, these changing factors become unequivocal advantages of arbitration in cases where the breaching contract is registered in a country with a high corruption index and a low rule of law index, such as the Republic of Azerbaijan, the United States of Mexico, Ukraine, based on Corruption PI estimates for 1991-2023. On the contrary, these factors are equally the advantages of justice carried out by national courts, e.g. the United Kingdom of Great Britain and Northern Ireland, the Republic of Singapore, the State of Japan. The factor of compliance with the principles of procedural competitiveness and dispositiveness of the parties to the dispute is also important. 'Expedited rules need to be handled with care, especially when they contain a time limit for the arbitral tribunal to render the award. There are issues for the respondent in presenting their case in a very short time frame, and there is a latent risk that exceeding the time limit may be considered a relevant procedural error in a jurisdiction of enforcement.'[11]

3 IDENTIFICATION OF OBSTACLES TO THE INTERNATIONAL ARBITRATION AWARDS ENFORCEMENT

Execution of international arbitration decisions can be imagined as an atomic quantity. Sufficient conditions for such performance are the terms of the contract between the parties to the dispute, the successful completion of the consideration of this dispute by international arbitration and the fact that the EFAA Convention 1958 is in force in the states, the jurisdictions of which the parties to the contract belong. Schematically, this can be represented as three parts of one whole in the diagram on the left of the table, collectively representing the enforcement of an international arbitration award.

An alternative scheme of the atom (on the right side of the table) illustrates the image of the three formal-legal factors as particles revolving around the nucleus, thus forming the atom. At the core of this atom is the enforcement of international arbitration awards, as illustrated in chart 3.

Chart 3. Enforcement of international arbitration awards as an atomic magnitude



11 Freshfields Bruckhaus Deringer, *International Arbitration in 2022: Top Trends* (Freshfields Bruckhaus Deringer LLP 2022) 17.

3.1. Formalisation of Legal Risk Calculations of International Arbitration Awards Non-Enforcement

Legal, political, economic, spiritual, cultural, and other social contexts of execution of international arbitration decisions expand the factors that must be considered. This is not to mention possible 'follow-up' legal battles on the enforcement front. After all, the disputes end when the arbitral awards are settled, not just issued.[12] This is required by a conclusion about the expediency of consideration of a commercial dispute by international arbitration and the real possibility of ultimately fulfilling the decision of this arbitration. Integrals in these relationships become the principle of the rule of law and the corruption perception index. Legal guarantees for the enforcement of arbitral awards in international commercial cases can be determined by the formula of the product of the functions of both parameters, namely: ∫eaa = ∫rl (l + p + e + s + o) + ∫cpi.

The value of ∫eaa is an integral calculation of the possibility of executing an international arbitration decision in legal reality. It is the product of two other elementary functions, namely ∫rl (rule of law) and ∫cpi (freedom from corruption). In essence, these two factors reflect different aspects of law as a phenomenon of objective reality, a system of objectively expressed and accessible for human perception universally binding, anthropomorphic requirements. The value product ∫rl consists of the following contextual components, namely: l – legal context, p – political context, e – economic context, s – spiritual context, o – other social contexts). F. i., What strikes the eye in the case of Canada – in comparison to the other countries – is the high percentage of cases involving the judicial review of various measures of government institutions/bodies/agencies.[13]

The index of the rule of law in international arbitration plays the function of evaluating the level of civilisation of the country's legal system where the arbitral decision is to be implemented. Legally, this index is divided into components of the creation and application of law, which, in turn, are economically, politically, and spiritually determined. For instance, the Eiser award was annulled on 11.06.2020 due to a violation of the procedural principles of law (impartiality of the arbitrator, his integrity and other deviations from the requirements of the rule of law during the consideration of the case). However, the annulment was not based on the legal reasoning of the award but on a lack of disclosure of a relationship between one of the arbitrators (claimants' nominee) and the claimants' damages experts. This led the annulment committee to decide that the arbitral tribunal was improperly constituted. The case was resubmitted to a new tribunal, and the new arbitration remains pending.[14]

12 Filip Balcerzak, *Renewable Energy Arbitration – Quo Vadis? Implications of the Spanish Saga for International Investment Law* (Nijhoff International Investment Law Series 23, Brill Nijhoff 2023) 59.

13 Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP 2022) 192.

14 *Eiser v Spain* ARB/13/36 (ICSID, 11 June 2020) <https://jusmundi.com/en/document/decision/en-eiser-infrastructure-limited-and-energia-solar-luxembourg-s-a-r-l-v-kingdom-of-spain-decision-on-the-kingdom-of-spains-application-for-annulment-thursday-11th-june-2020> accessed 25 September 2023.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Simultaneously, we consider the influence of other social factors, i.e., religion, relations with other nations, etc. The factor of corruption perception within the specified formula of magnitude integration that affects the reality of the international arbitration awards enforcement shows the degree of distortion of legal standards in the psyche of people. As was noted by the former United Nations Secretary-General Mr. Kofi Annan, corruption 'undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish.'[15] Law in the objective sense is sociogenic and anthropomorphic. Accordingly, the implementation of the law requirements or the distortion of the law are objectified in human actions. Such variants of attitude to law correlate with degrees of human virtues and manifestations of vices. Subjective perception and reproduction of objectively expressed law are observed in the content of legal relations. In our case, legal relations in international arbitration awards enforcement represent the essence of the relationship between human nature and law dynamics. This can be an evasion of the international arbitration awards enforcement, opposition to such execution and/or its impossibility both in advance and at the stage of the direct course of enforcement proceedings.

3.2. Characteristics of Implicit Features in the Risks of International Arbitration Awards Non-Enforcement

The legal analysis of the mentioned social contexts of arbitral awards enforcement becomes increasingingly imperative as the indicators of the rule of law and freedom from corruption diminish in a given country. The most successful moment of such an analysis coincides with the beginning of the parties' work under the contract, aiming to meticulously identify all significant potential risks that may impede the enforcement of arbitral awards.

Critical elements of this analysis pertain to the legal characteristics of the hypothetical defendant's tangible assets, which may become the subject of potential claims. Disturbing signs of such assets include its inflated price, its being pledged, its insufficiency to meet the demands of all existing and/or future creditors (i.e., lack of correlation with payables), belonging to family members of public authorities' representatives (potential oligarchy), and others.

Combating corruption has become an en-vogue topic in many areas of law, such as tax law and employment law, as well as in optimising public procurement rules, corporate governance and arbitration. It goes without saying that the bribe-giver cannot openly approach his business partner's agent and offer him a bribe. Rather, the illegality of these activities requires that the bribe results from a careful and subtle approach. Accordingly, negotiations concerning bribery often feature intermediaries to ease the transaction. Such middlemen often appear as 'consultants' or brokers to their employers. Consulting services are common in international trade and can be a sensible approach, for instance, concerning the political or economic situation in the target country or with respect to regional customs and practices. However, amongst the herd of consultants are black sheep whose main or sole

15 Adilbek Tussupov, *Corruption and Fraud in Investment Arbitration: Procedural and Substantive Challenges* (European Yearbook of International Economic Law 22, Springer Cham 2022) 4.

activity consists of funnelling bribes to influential people. These people have at their disposal both the political contacts as well as the know-how for such covert transactions.[16] All these signs testify to the danger of lack and/or unavailability of property when the need to enforce arbitral awards arises.

Oligarchic or other corrupt influence involves improper and/or unofficial influence on judges to make decisions in favour of specific individuals. These are markers of the crisis of the rule of law in the country, posing critical risks to the enforcement of arbitration decisions.

The Rule of Law is a signal virtue of civilised societies. Where the Rule of Law is obtained, the government of a state is carried on within a framework laid down by law. This provides significant security for the independence and dignity of each citizen. In societies where the Rule of Law prevails, individuals have a clear understanding of their rights and actions, minimising the likelihood of getting themselves embroiled in civil litigation or in the criminal justice system. Authority, in such contexts, has to be grounded in adherence to norms posed or evolved in a certain way or on the values (peace and good order) secured by such recognition. The justification of norms posed by authorities must presumably be in terms of their rightness (justice) or the good they bring about. Even in cases where authority is considered self-sufficient, without further appeal to substantive reasons, it underscores the ultimate dependency of reasons of authority on substantive reasons and the necessity for institutional argumentation to be anchored in pure practical argumentation.

For instance, following the consistent line of past cases ensures legal certainty, generally a universally recognised value in law.[17] Concomitantly, when various types of public power abuse prevail, the guarantee of legal requirements disappears. In particular, within the framework of the issues raised in this work, such abuses occur through the mechanisms of bureaucratic (political, organisational) decisions regarding the formal-legal distortion of the defendant enterprises' legal status. The unethical motive, in this case, would be to obstruct the collection of funds under potential or already existing arbitration awards for an improper benefit.

Consider a scenario where a bank's activity is obstructed by labelling it as problematic. Concomitantly, such a bank is not recognised as insolvent, and the public authority is not obligated to pay the deposits it guarantees. During this time, legal entities cannot decide on the collection of funds from the bank, as its new legal status imposes a moratorium on such collection. Meanwhile, the public authorities await the predicted collapse of the national currency. After that, the funds are paid to depositors in the equivalent of world currencies (US dollars, euros), which is several times lower than the exchange rate that was on the day the bank was blocked by the state regulator, limiting client access to their accounts.

Another example involves the formal preservation of the solvency status of an insurance company with multimillion-dollar debts due to enforcement proceedings by hundreds of

16 Michael Joachim Bonell and Olaf Meyer (eds), *The Impact of Corruption on International Commercial Contracts* (Ius Comparatum – Global Studies in Comparative Law 11, Springer Cham 2015) 3, 7.

17 Charalampos Giannakopoulos, *Manifestations of Coherence and Investor-State Arbitration* (CUP 2023) 27, 42, 77.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

debt collectors. This status allows the state to refrain from using legal mechanisms to satisfy creditors' demands at the expense of motor transport bureaus, reinsurers and other funds.

The above-described model of legal reality oligarchic distortion, which allows non-execution of international arbitration awards, court decisions, and other executive documents, may be accompanied by the risk of unavailability to recover the pledged property. In the case of pledged property, the pledgee has a priority right over all other debt collectors to satisfy their claims at the expense of such property. If such property was also artificially overvalued, this fact should be discovered beforehand. It is expedient to do this so that the ratio of collateral obligations to collateral property declared in the documents does not give the impression, essentially false, that if necessary, satisfaction of the other creditors' demands is also possible at the expense of such property. It is also worth taking into account the fact of the long-term, friendly nature of business relations between the mortgagor and the mortgagee. In this case, they can jointly lay in commercial legal documents distortions of the content of the legal relations to their mutual benefit, particularly through artificial but formal legal grounds for the bankruptcy procedures of enterprises.

Insolvency affects every phase of arbitration, from a party's ability to participate in arbitration proceedings to the pursuit of arbitral proceedings and, ultimately, enforcement. The high levels of debt across Africa and Asia are particularly noteworthy due in part to the slowing of the Chinese economy and the resulting reduction in Chinese foreign direct investment abroad.[18] In countries characterised by a low rule of law index, high corruption and/or low business culture, the insolvency of the enterprise and its subsequent bankruptcy do not guarantee the enforcement of international arbitration awards or implementation of other executive documents.

Variations in bankruptcy procedures aimed at avoiding the payment of large sums of debt are proportional to the possibilities of procedural jurisdictional, managerial, financial and/or commercial distortions and their combinations. For instance, assets like vehicles, technical documentation, equipment, land, premises or their part are leased by the enterprise and not owned by it. Part of fixed assets may be in pledges, making it challenging to collect funds from such an enterprise involved in international commercial arbitration, forcing it to fulfil contractual terms or otherwise satisfy claims. Such enterprises may undergo bankruptcy proceedings, and concomitantly, their leased assets may already be leased by another enterprise engaged in the same type of business activity as the debtor enterprise. Even the workforce of this new enterprise may be absolutely identical to the composition of employees who previously worked at the debtor enterprise, whether in bankruptcy proceedings or likely to enter into such proceedings without incurring any financial loss.

Avoidance of the above-mentioned and other risks of international arbitration awards enforcement risks in practice is facilitated by the institutions of assignment by creditors of their debts, sale of debts, and the like. One key tool for liquidity management is the capital allocation strategy, and third-party funding of legal claims appears complementary to this strategy. Users cite the freeing up of working capital, taking cost liability off the balance sheet, and risk management as the top three key benefits of

18 Freshfields Bruckhaus Deringer (n 11) 7.

litigation funding. There is now even a growing market for the sale and purchase of arbitration awards, through which claimants can monetise awards in their favour without incurring the risk and cost of enforcement.[19]

3.3. Procedural and Other Factors Affecting the Enforceability of Arbitration Awards

A purely procedural guarantee of the proper execution of an arbitration award is the legal institution of securing a claim. Measures to secure a claim can be implemented at different stages of resolving an international commercial dispute, either by a national commercial court, a foreign court handling commercial disputes and whose decisions are enforceable in the defendant's country, or through international arbitration.

According to clause 4, Article 6 of the European Convention on International Commercial Arbitration 1961, a request for interim measures or measures of conservation addressed to a judicial authority does not conflict with the arbitration agreement or regarded as a submission of the substance of the case to the court.[20] Strengthening the requirements of this comprehensive regulatory legal act, delineating the limits of state court intervention in arbitration proceedings when exercising judicial control and addressing other aspects of their interaction can be traced at the level of national laws. For instance, according to clauses 4 and 5 of Part 1 of Article 175 of the Economic Procedural Code of Ukraine, a judge refuses to open proceedings in a case if there is a decision of an arbitration court, international commercial arbitration, made within its jurisdiction in Ukraine regarding a dispute between the same parties, on the same subject and the same grounds, except for cases when the court refused to issue an executive document for the enforcement of such a decision. This includes decisions of a foreign court or international commercial arbitration recognised in Ukraine involving the same parties on the same subject and grounds.[21]

Section 139 of the Civil Procedure Law 1999 of the Republic of Latvia stipulates that 'an application for securing a claim before an action is brought shall be submitted to the court in which the action regarding the claim sought to be secured is to be brought'; 'upon satisfying an application for securing a claim before an action is brought, a judge shall determine a time period for the plaintiff within which he or she must submit a statement of claim to the court or permanent arbitration'.[22] Thus, the civil procedural regulations of Latvia do not provide for the possibility of asking the court to secure the claim if it is essentially planned to be filed with the court of another state.

19 ibid 10.

20 European Convention on International Commercial Arbitration (Geneva, 21 April 1961) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en> accessed 25 September 2023.

21 Economic Procedural Code of Ukraine no 1798-XII of 6 November 1991 <https://zakon.rada.gov.ua/laws/show/1798-12#Text> accessed 25 September 2023.

22 Andrejs Gvozdevičs, 'The Securing a Claim in the Context of Sustainable Development: An Evaluation of the Latvian Experience' (2021) 10(4) European Journal of Sustainable Development 285.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Concomitantly, according to Article 17 of the UNCITRAL Model Law on International Commercial Arbitration 1985, unless otherwise agreed by the parties, the arbitral tribunal may grant interim measures at the request of a party. An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to (a) Maintain or restore the status quo pending determination of the dispute; (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) Preserve evidence that may be relevant and material to the resolution of the dispute.[23]

If a state does not or cannot provide effective legal protection against corruption, an argument that it does not respect the full protection and security standard under the relevant investment treaty may be expected. The stability of the business environment and legal security are more characteristic of the standard of fair and equitable treatment, while the full protection and security standard primarily seeks to protect investments from physical harm.[24]

The intensification of global problems, international competition, which is often far from fair, and the economic failure of a number of nations only confirm the weakness of public authority. Consequently, there is a growing trend to actualise alternative methods of communication with the state to ensure as much as progress as possible in finance, digital technologies and other spheres of commerce, spiritual culture, etc. International commercial arbitration is not exempt from this trend. For instance, since 2013, claims concerning international investment law in the renewable energy sector have outnumbered any other claims based on the Energy Charter Treaty. This tendency has remained valid.[25]

Tech companies, typically innovators and disruptors, have traditionally favoured litigation and been underrepresented in alternative dispute resolution methods like arbitration. However, that is changing as tech companies are becoming more aware of investment treaty protection and increasingly turn to arbitration for disputes involving cryptocurrency, blockchain and artificial intelligence (AI).[26] Concomitantly, the leaders of the G20, in their declaration following the joint meeting, instructed their Financial Stability Board to promote the effective and timely implementation of the recommendations for the regulation, supervision and oversight of crypto-assets activities and markets and of global stablecoin arrangements consistently globally to avoid regulatory arbitrage.[27]

Considering the problems of the effectiveness of states in the modern world, the legal institution of international commercial arbitration is not only a good alternative for resolving

23 UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006* (UN 2008).

24 Tussupov (n 15) 132.

25 Balcerzak (n 12) 59.

26 Freshfields Bruckhaus Deringer (n 11) 19.

27 G20 New Delhi Leaders' Declaration (New Delhi, India, 9 September 2023) <https://www.g20.org/en/media-resources/documents/doc-outcomes/> accessed 25 September 2023.

disputes between economic entities, but also demonstrates a constructive synergy. This synergy is evident in the derivation of mediators and arbitrators for reconciling parties involved in international investment disputes. For instance, in the Sanum Investments v. Lao People's Democratic Republic case, the arbitral tribunal did emphasise that severe financial misconduct by the Claimants, incompatible with their good faith obligations as investors in the host country (such as criminality in defrauding the host Government in respect of investment) has Treaty consequences. These consequences extend to their reliance on the guarantee of fair and equitable treatment, as well as their entitlement to relief of any kind from an international tribunal.[28]

Arbitration jurisdiction is understood to be the competence to decide a case. In the realm of commercial or investment arbitration, the jurisdiction of tribunals is always based on the parties' consent to a particular dispute. In treaty-based arbitrations, states consent to arbitrate in their capacity as contracting parties to a particular investment treaty. It is commonly described as an 'offer' to arbitrate any future disputes. This offer, contained in a jurisdictional clause of a treaty, is directed to investors with the nationality of another contracting state to that treaty and covers the defined class of investments set out in the treaty. This means that an entity or individual must meet certain requirements in the applicable treaty to be 'eligible' to effectively accept the offer to arbitrate made by the states.[29]

Persisting corruption offences, illegal violence and other consequences of condescension to human vices weaken judges and other representatives of public authority. Under such conditions, public policy in the sphere of investments and other areas of economic activity is ineffective, as it determines the distortion of the legal reality of business. Accordingly, these shortcomings of the public authorities are compensated by the activity of arbitrators, which equally favourably affects the course of commercial relations and their investment component. For instance, the Karkey tribunal found that the sum of USD 100,000 was not a significant amount considering the value of the whole investment project and the Minister's high-ranking position within the government. In other words, the tribunal assumed that this amount would have likely been insufficient to bribe a high-ranking governmental official, although it refrained from making definitive statements about the level of corruption. It appears that the Karkey tribunal did not attempt to assess the facts in light of the circumstances that were typical for the socio-economic environment of the relevant region.[30]

Compared to participants in private legal relations, these defects of public authority make it slow, incompetent, clumsy and/or amorphous. Court decisions and their implementation through the resources of this kind of public power are counterproductive. The commercial dimension of private legal relations is exclusively focused on the goal and the proper solution

28 *Sanum Investments Limited v Lao People's Democratic Republic* no 2013-13 (PCA, 13 December 2013) <https://www.italaw.com/cases/2050> accessed 25 September 2023; Tussupov (n 15) 91.

29 Balcerzak (n 12) 79.

30 *Karkey Karadeniz Elektrik Uretim AS v Islamic Republic of Pakistan* ARB/13/1 (ICSID, 22 August 2017) para 551 <https://jusmundi.com/en/document/decision/en-karkey-karadeniz-elektrik-uretim-a-s-v-islamic-republic-of-pakistan-award-tuesday-22nd-august-2017> accessed 25 September 2023; Tussupov (n 15) 126.

of the assigned tasks; that is, every day, it acts as best as possible and as quickly as possible. Simultaneously, the public authorities of any country are significantly inferior in this respect to representatives of businesses operating in conditions of fair economic competition. As we can see, the emergence and development of international commercial arbitration can be traced back to the historical and legal logic of building relationships between people in the public and private spheres, understanding the objective correlations between them, and recognising the relationships inherent in each of them separately.

4 CONCLUSIONS

Thus, arbitration as a method of settling disputes arising in international commercial relations requires legal guarantees of its acceptability and ultimate effectiveness. Arbitration proceedings to resolve an international commercial dispute are very interesting for lawyers. It is profitable for them. Simultaneously, the plaintiff in this dispute is only interested in the final result, representing the execution of the arbitral awards. In this regard, it is important to correctly assess the balance of risks that exclude the execution of a decision and legal guarantees that make such a decision inevitable.

Formal-legal guarantees of execution of international arbitration decisions are requirements for procedural and actual actions of persons (bodies) authorised by the state, which ultimately lead to such execution. The basis of such guarantees is the adequacy of the subject to which the method is applied. Firstly, the decisions must be made by the arbitrators, whether international or national. Secondly, it concerns commercial disputes. Thirdly, the enforcement of arbitral decisions pertains to those carried out in a state different from the one where recognition and enforcement of such decisions are sought. Fourthly, the enforcement of an arbitration award arises as a result of the unwillingness of the defendant (individual and/or legal entity) to comply with this award voluntarily. Fifth, these awards are final. These criteria emanate from the corresponding specific acts of private international law. It is noteworthy that the titles of existing conventions on international arbitration may explicitly use the term 'execution' since, according to the logic of the term and the content of these legal acts, execution is inherently impossible without recognition, provision of the text of the decision and all other relevant logical operations.

The enforceability of an arbitral award depends on the timely and appropriate actions of the parties to the contract. Even when concluding a foreign economic agreement, the result of an audit of the business partner's reliability in terms of its ability to fulfil its financial and/or other obligations properly should be obtained. Penalties for contract violations represent a guarantee to prevent such breaches. The stage of the grounds for filing a claim in international arbitration emerges to protect one's right violated by the other party (parties) to the contract, signalling the need to use the institution of securing a claim. Seizure of the defendant's property in the amount of the claims and similar measures guarantee the reality of an international arbitration award enforcement. Institutions of liability insurance of the other party under the contract and the possibility of sale and assignment of the debt also become effective means of guaranteeing the fulfilment of the obligations specified in the arbitration decision.

The circumstances of the specific case and the legal reality of each jurisdiction where the decision on this case is planned to be made require an assessment of the absence of distortions of the enforcement proceedings subject. If the degree of such distortions precludes the execution of an international arbitration decision on the territory of a specific state, this method is counterproductive. Legal reality distortions are defined according to the parameters of indices of freedom from corruption, rule of law, freedom of doing business, anthropocentric and/or legally impartial results of judicial practice, etc. Accordingly, it is necessary to find a legal instrument for its neutralisation for each challenge for the actual international arbitration awards enforcement. In a specific region of the state or the state itself, its regional associations (e.g., the EU), quality legislation, and practices of its application serve as such tools. However, at the global level associations of states do not show reliability in the matter of the inevitable execution of arbitral awards. The assessment of the risks of non-implementation of these decisions requires that lawyers take into account the natural asynchrony of the legislative framework formation of each state and the disproportionality of saturation with the content of effective connections between various branches of law (civil and economic, criminal procedural and administrative, etc.), the degree of unification of practices for the implementation of legislative requirements, as well as the level of responsibility for one's actions and other features of the participants in legal relations culture, attitudes towards citizens of other countries, and the like. Relying only on the fact that a state has ratified international arbitration conventions is clearly not sufficient to guarantee the enforcement of such an arbitration award.

The subject of this work is conceptualised as a molecular and, accordingly, an indivisible quantity. The functionality of this magnitude is determined by the necessary number of impulses of its atoms, namely legal (formal and factual), economic, political, spiritual-cultural and other social contexts, as well as the virtues of legal subjects. Their sufficient quantity translates into the desired quality of the ratios of these atoms. The molarity of the studied concept obtained in this way means its viability in each specific case when the party to the dispute seeks to fulfil the international arbitration decision. The lack of components in the concept and/or improper proportions of the ratio of their quantitative and, accordingly, qualitative features exclude the very fact of the existence of the concept – 'international arbitration awards enforcement', denying its nature. The assessment by the parties of an international commercial dispute of only certain aspects, parts, and features of the legal institution and not of its entire system is counterproductive. In this regard, although the phenomenon of atomicity formally-legally assumes the feasibility and necessity of completing the transaction, it ignores the objectively existing external socio-legal connections and influences.

International arbitration is a quasi-judicial body that performs almost the function of justice, and a national court is the only body that can be designated by the term 'court', and its primary function is justice. International commercial arbitration complements the function of justice of national courts in essence but does not acquire such functionality formally. The binding nature of arbitration decisions for implementation within the national

legal space gives them legal significance. Simultaneously, failure to comply with these decisions and/or other violations during enforcement proceedings are decided exclusively by national courts, in particular on the territory of the state where such a tort occurs. In fact, arbitration at the stage of execution of its decisions is fully subject to the influence of the public power, both its bodies that enforce arbitration decisions and the courts that administer justice in the field of challenging the illegality of these bodies' actions.

If the level of importance of the social purpose and functionality of arbitration and courts is the same, then ceteris paribus, arbitration shows more advantages than a court. The advantages of national courts increase in those states that are free from corruption and ensure the dominance of the rule of law principle in society. Dynamic and/or large businesses are more interested in arbitration procedures, which, firstly, have the necessary financial and organisational resources for full participation and, secondly, do not have the opportunity to delay the resolution of the dispute, seek to save time to increase profits, rather than wasting it on the laziness of national courts.

The challenges of common law content for international commercial arbitration outlined above determine the prospects of our next scientific searches, namely: 1) resolution of disputes regarding the use of domains, digital technologies and the Internet; circulation of digital currencies; 2) unification of law enforcement practice; 3) fulfilment of environmental requirements of commercial agreements; 4) fulfilment of the requirements of economic contracts regarding energy efficiency.

REFERENCES

1. Balcerzak F, *Renewable Energy Arbitration – Quo Vadis? Implications of the Spanish Saga for International Investment Law* (Nijhoff International Investment Law Series 23, Brill Nijhoff 2023).
2. Behn D, Fauchald OK and Langford M (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP 2022).
3. Bonell MJ and Meyer O (eds), *The Impact of Corruption on International Commercial Contracts* (Ius Comparatum – Global Studies in Comparative Law 11, Springer Cham 2015) doi:10.1007/978-3-319-19054-9.
4. Friedman LM, 'Litigation and Society' (1989) 15 Annual Review of Sociology 17, doi:10.1146/annurev.so.15.080189.000313.
5. Giannakopoulos C, *Manifestations of Coherence and Investor-State Arbitration* (CUP 2023) doi:10.1017/9781009153874.
6. Goldratt EM, *Critical Chain* (North River Press 1997).
7. Gvozdevičs A, 'The Securing a Claim in the Context of Sustainable Development: An Evaluation of the Latvian Experience' (2021) 10(4) European Journal of Sustainable Development 281, doi:10.14207/ejsd.2021.v10n4p281.

8. Mesquita LV and Cebola CM, 'European Small Claims Procedure: An Effective Process? A Proposal for an Online Platform' (2022) 5(2) Access to Justice in Eastern Europe 7, doi:10.33327/AJEE-18-5.2-a000206.

9. Tussupov A, *Corruption and Fraud in Investment Arbitration: Procedural and Substantive Challenges* (European Yearbook of International Economic Law 22, Springer Cham 2022) doi:10.1007/978-3-030-90606-1.

AUTHORS INFORMATION

Oleksii Makarenkov*
Dr. Sc. (Law), Professor, Researcher of Portucalense Legal Institute of Infante D. Henrique Portucalense University, Porto, Portuguese Republic
oleksii@upt.pt
https://orcid.org/0000-0003-0042-165X
Corresponding author, solely responsible for the manuscript preparing.

Lurdes Varregoso Mesquita
Responsible on IJP – Instituto Jurídico Portucalense, Oporto, Portugal
lvm@upt.pt
mlcm@estg.ipp.pt
https://orcid.org/0000-0003-3491-1921
Co-author, responsible for writing and research.

Competing interests: No competing interests were disclosed.
Disclaimer: The authors declare that their opinions and views expressed in this manuscript are free of any impact of any organizations.

ADDITIONAL INFORMATION

This work was supported by the UIDB/04112/2020 Program Contract, funded by national funds through the FCT I.P.

ABOUT THIS ARTICLE

Cite this article
Makarenkov O and Mesquita LV, 'Challenges of Legal Guarantees for the Enforcement of Arbitral Awards in International Commercial Cases' 2024) 7(1) Access to Justice in Eastern Europe 107-26 <https://doi.org/10.33327/AJEE-18-7.1-a000133>

Submitted on 23 Oct 2023 / Revised 21 Nov 2023 / Approved 26 Nov 2023
Published ONLINE: 20 Dec 2023 / Last Published: 1 Feb 2023
DOI https://doi.org/10.33327/AJEE-18-7.1-a000133

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Keywords: *commercial disputes, contract, corruption, enforcement, international arbitration, rule of law.*

RIGHTS AND PERMISSIONS

