



**PROCEDURAL PUBLIC POLICY IN REGARD TO THE
ENFORCEMENT AND RECOGNITION OF FOREIGN ARBITRAL
AWARDS**

by Andrey Ryabinin

LL.M. SHORT THESIS
COURSE: International Dispute Settlement
PROFESSOR: Tibor Varady
Central European University
1051 Budapest, Nador utca 9.
Hungary

Abstract

Present work analyzes the notion of procedural public policy as an independent ground for refusing the recognition and enforcement of foreign arbitral awards with particular emphasis on development of this concept in the Russian Federation. General examination of the public policy and its evolution in international practice and theory and in Russia precedes discussion of the main topic and shows separation of the procedural public policy within the general concept of the public policy. The procedural public policy is scrutinized through comparison with other procedural grounds established in the New York Convention and discussion of the major legal principles widely recognized as part of the procedural public policy. It is concluded that the procedural public policy has its own unique content and purpose that allow considering it as an independent ground for refusing the enforcement and recognition of foreign arbitral awards. At the same time the concept of procedural public policy in Russia is at the stage of its emergence and facing certain challenges due to a number of factors discussed in the paper. However there are positive signals in the development of Russian judicial practice and doctrine bringing to the conclusion that in the absence of new significant negative factors evolution of arbitration practice in Russia will soon reach the stage when the procedural public policy will be widely recognized by judicial community.

Table of Contents

Introduction	1
Chapter I. Overview of Public Policy Concept in regard to Enforcement of Foreign Arbitral Awards.....	4
1.1. Domestic, international and transnational public policy	4
1.2. Scope of Judicial Review.....	10
1.3. Public order in Russia.....	12
Chapter II. Procedural Public Policy – an Independent Ground for Refusal of Enforcement and Recognition of Foreign Arbitral Awards?	19
2.1. Procedural public policy in relation to other Article V procedural grounds for refusal of enforcement and recognition of foreign arbitral awards	19
2.2. Major principles of international procedural public policy	25
2.3. Russian Approach towards Procedural Public Policy	31
Conclusion	34
Bibliography	36

Introduction

The topic of procedural public policy has been controversial from the very beginning of its separation within the general theory of public policy in the international commercial arbitration. This controversy extended over both legal theory and judicial practice featuring disagreement of various scholars and courts in different jurisdictions in regard to accepting the notion of procedural public policy. Nevertheless, it is difficult to acknowledge existing international scholarship on this subject as sufficient especially in comparison with other aspects of public policy. It is even more sensitive given that procedural public policy represents core values vital for the arbitration procedure that shall be accorded special attention and significance.

Russian scholarship and Russian judicial practice concerning procedural public policy can be still regarded as being at the stage of emergence. It is however possible to analyze positions taken by Russian courts and legal scholars as well as current trends established at the present moment. Indeed, such an analysis is crucial in identifying existing drawbacks and possible ways of tackling them in view of increasing call for promotion and development of alternative dispute resolution mechanisms in Russia and all over the world. Russia is becoming more integrated into the world market economy which remarkably raised requirements for Russian legal system to meet especially in the field of international dispute resolution. Effective mechanism of enforcement of foreign arbitral awards protecting parties from infringement of their basic procedural rights is one of the features foreign investors will always be looking for when making investment choices and absence of such mechanism may become an obstacle for inflow of foreign investment and better bargaining conditions of domestic businessmen when doing business with foreign partners.

Previous two paragraphs describe a background for two main objectives present work is aimed to achieve. First, to answer main research question: whether notion of procedural

public policy exists in nowadays international commercial arbitration as an independent ground for refusal in the recognition and enforcement of foreign arbitral awards. Second, to analyze current attitude of Russian courts and scholars towards the issue of procedural public policy. Russian case study will enable us to see how conditions of development of particular country influence its arbitration culture in general and evolution of notion of procedural public policy in particular.

Achievement of goals set for the thesis will require coverage of following main issues.

Before moving to the main topic of the paper, the first chapter will start from general overview of the public policy concept through the prism of main treatises and court decisions dealing with the topic. Various aspects of the public policy will be discussed as defined by such distinguished scholars as Fouchard, Lalive, Bockstiegel, Van den Berg and others. Apart from scholarly writings and judicial practice, a harmonization work of international organizations will be examined with main emphasis on results of 70th Conference of the International Law Association (2002) where public policy issue was given special attention. Scope of judicial review in cases where the public policy defense is involved will be separately examined in the first chapter as having important practical implications.

Second chapter of the work dealing with the procedural public policy after having analyzed main points of view on the subject, will move to identify procedural public policy in the light of its correlation with other procedural grounds for refusing enforcement of foreign arbitral awards stated in the New York Convention. In the second section of the second chapter the international perspective of procedural public policy will be presented to demonstrate procedural principles universally recognized as fundamental to arbitral procedure and thus constituting part of procedural public policy.

Courts in different jurisdiction has been dealing with the procedural public policy, but most significant contribution in this area was made by Swiss courts decisions of which will

be often referred to in the present work. Other leading jurisdictions such as France and United States will be also dealt with. Separate judgments from Germany, New Zealand and other jurisdictions are also of an interest in view of better coverage of the international scope.

“Russian line” of the present paper will be pursued in parallel with developing main ideas of the paper through analysis of practice of Russian courts in enforcing foreign arbitral awards and overview of respective Russian scholarship (Karabelnikov, Krokhaev, Komarov).

Chapter I. Overview of Public Policy Concept in regard to Enforcement of Foreign Arbitral Awards

1.1. Domestic, international and transnational public policy

Theory of public policy has been developing over long period of time taking different shapes and meeting different attitudes of scholars and practitioners. Time and contribution of local legal community are the two main features inherent to public policy concept united under one umbrella feature of relativity.¹ Relativity causes constant development of public policy over time in different legal communities and on international arena. It also became the basis of division of public policy into domestic, international and transnational (truly international). Initially appeared as of exclusively domestic nature public policy has followed trends of globalization and unification of certain legal values which gave birth to international, and later, as countries made another significant step towards interosculation of legal doctrines, to transnational public policy shared by more and more countries in the world. Let us now turn to brief description of these three areas of public policy.

Domestic public policy was prevailing concept of public policy when challenging arbitral awards in the national courts starting until adoption of New York Convention of 1958 that became a milestone in development of international commercial arbitration. Although article V2(b) does not explicitly specify any specific type of public policy referring only to public policy of the country where recognition and enforcement of an arbitral award is sought, it was widely recognized that the intent of creators of New York Convention is directed at challenging foreign arbitral awards only on international public policy grounds. It is common view nowadays that domestic public policy applies to domestic awards only. Exclusive application of international public policy to foreign arbitral awards was supported in all major jurisdictions and on international level (including ILA Final Report).

¹ See more on relativity in: K-H. Bockstiegel, Public Policy and Arbitrability, in ICCA Congress series no. 3 (New York/1986), pp. 179 - 180

Less obvious is the borderline between domestic and international public policy. It has been stated that there are two major ways of viewing international public policy in relation to domestic one: first as the application of essentially domestic public policy, narrowed somewhat; and second as the application of particular rules especially designed to be used in cases involving international commerce.² For example, United States courts have essentially taken the second, more liberal approach, measuring public policy in the area of international arbitration by the needs of international commerce having established standard of “most basic notions of morality and justice”³ in regard to international public policy.

Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards by International Law Association presented in 2002⁴ (hereinafter referred to as ILA Final Report) also provides its own explanation of international public policy which is broad enough:

[...] body of principles and rules recognised by a State, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of said award would entail their violation on account either of the procedure pursuant to which it was rendered or of its contents.⁵

But further description through breaking down to following three elements makes it more certain:

(i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as “lois de police” or “public policy rules”; and (iii) the duty of the State to respect its obligations towards other States or international organizations.⁶

Swiss Federal Supreme Court has recently issued a judgment where provided an interesting and detailed analysis in attempt to summarize efforts of Swiss courts to define

² See P. Lalive, *Transnational (or Truly International) Public Policy and International Arbitration in ICCA Congress series no. 3 (New York/1986)*, p. 275.

³ See, for example, *Parsons and Whittemore Overseas Co., Inc. v. Société générale de l'industrie du papier (RAKTA)*. 508 F. 2d 969 (2d Cir. 1974)

⁴ Full text of Report may be found on the web-site of International Law Association in a section on International Commercial Arbitration: <http://www.ila-hq.org/en/committees/index.cfm/cid/19> (last visited on March 25th of 2009)

⁵ Ibid

⁶ Ibid

international public policy.⁷ The Court underlined ambivalent nature of public policy, where, on one hand, “it is a safety valve helping to preserve the fundamental rules of which, ideally, every state should ensure that they are respected”⁸ which is *a-national function* of the public policy reservation, but on the other hand,

Swiss judge, who does not live in a no man's land but in a country attached to a given civilization where certain values are privileged as opposed to others, is led to identify these principles with his own sensitivity and on the basis of the essential values shared by this civilization; this is the *Swiss component* of the public policy reservation.⁹

It was also emphasized that Swiss case law:

[...] strove to free the public policy from any national connection, whether the *lex fori*, the *lex causae* or the law of a third country [...] because [it] does not aim at protecting the Swiss legal order and neither does it purport to sanction the failure to apply – or the improper application of – the foreign law governing the merits of the dispute, even if it were binding and nor does it sanction the failure to consider an immediately applicable mandatory provision of a third state.¹⁰

Such approach of one of the leading arbitration jurisdictions can be only welcomed.

Finally as a result of this analysis the Court came up with definition of public policy and held that “an award is inconsistent with public policy if it disregards those essential and widely recognised values which, according to the prevailing values in Switzerland, should be the founding stones of any legal order”¹¹. Here court clearly identified that nature of public policy is very subjective meaning dependence on legal values existing in a certain country which is difficult to argue with.

Third and obviously most debatable type of public policy is transnational (truly international) public policy. Most significant contribution into development of this theory was made by P. Lalive in his report to ICCA Congress in 1986. Since that time debate over transnational public policy has been intensified, although the very concept has not received any universal acceptance by scholars or practicing arbitrators and judges.

⁷ X (S.p.A.) v. Y (S.r.l.) case. Published in ASA Bulletin, Vol. 24 No. 3 (2006), pp. 550 - 560

⁸ Ibid,554.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid, 555.

In general, transnational public policy is not the public policy of any state (be it domestic or international) but rather public policy considerations that transcend state boundaries by including mostly norms absorbed from public international law (jus cogens, international custom) or, in a less amount, universally recognized rules of private international law.

Without going in details of the very concept, I will present some of the main criticisms of the theory.

One of the main problems with transnational public policy is its practical importance. Many authors disagree that it serves main purposes of arbitration. I agree with the statement that in cases when issue of bribery, corruption or even slavery arises the applicable law will generally provide the appropriate result with exception of few, if any, legal systems that would provide for the enforcement of such contracts today. Thus there will be no practical need to resort to a doctrine of transnational public policy in clear and obvious situations alike.¹² Application of transnational public policy by arbitrators may be only relevant using reasoning that not all courts in all jurisdictions have strong policies protecting certain social values usually referred as being a part of transnational public policy. This and other reasons (lack of judicial qualification, inefficient adjudication) favors position that arbitrators usually having strong qualification and impartiality shall test contractual relations of the parties against transnational public policy. But stated reasons are of exceptional nature. It is also worth mentioning that arbitrators are also very often in a position to resort to other applicable rules (be it national system, or international law rules) in order to justify their decision against internationally recognized misbehavior of the parties. Such a legal basis will also likely to be more understandable and more welcomed by the courts in enforcement proceedings.

¹² M. Pryles, Reflections on Transnational Public Policy, 24 (1), Journal of International Arbitration, 1, 6 (2007)

An interesting question arises as to the source of an arbitrator's power to have regard to transnational public policy. In cases where the arbitrator is empowered to decide as *amiable compositeur* or *ex aequo et bono*, it might be argued, that transnational public policy could be relevant. Further, in cases where the parties have not designated the governing law, and where the arbitrator is authorized to select the relevant "rules of law" as distinct from "law," it might be contended that this authority extends to selection of transnational public policies. But in cases where the parties have expressly selected the applicable law in their contract, the source of the arbitrator's authority to depart from that law and to apply transnational public policies is far from clear. Absent a provision of the *lex arbitri* authorizing the tribunal to depart from the law chosen by the parties, there would be a strong inference that the arbitrator is not authorized to do so. Respect for choice of law by the parties is one of the main benefits and achievement of international arbitration. M. Pryles believes that "to compromise this principle by permitting the arbitrators to have regard to transnational principles of public policy introduces an element of discretion which could do much to undermine the certainty which is so essential to international commerce."¹³ He also contends that recognition of the existence of a transnational public policy which is not founded on a directly applicable law but on wider considerations of what is appropriate "could undermine the contractual certainty upon which international transactions depend and confer on arbitrators a policy function which might well be regarded as inappropriate for private dispute resolvers."¹⁴ In the United States, a deliberate refusal to apply the applicable law may result in a "manifest disregard of the law" and constitute a ground for setting aside the award.

It is also important to consider that transnational public policy expands over variety of areas of international community life (including environment, labor etc). Should arbitrators test contractual relations between the parties against all of those areas when they are expected

¹³ Ibid, 6

¹⁴ Ibid, 5

to concentrate on nature of dispute between parties and resolve it in a timely and diligent manner? The answer is not that certain. But definitely it is likely to be more certain from the point of view of the parties-businessmen who are looking for faster and relatively inexpensive way of dispute settlement.

However, principles accorded to transnational public policy much more often mentioned in investment arbitration, especially in arbitrations between investor and host country. For example, award made under NAFTA treaty in *S.D. Myers Inc. v. The Government of Canada*¹⁵ was reported to include six such principles.¹⁶ Most obvious reason for this is nature of disputes where public organization (state or state-affiliated corporation) is involved invoking more sources of international public law, frequently considered as one of the main sources of transnational public policy, to be applied.

If one would try to determine the role of transnational public policy in practice of state courts in enforcement proceedings one is unlikely to find any significant number of cases referring to this concept. Courts are organs of the state and it is their main function to apply the law of the forum as a main priority. They are more reluctant to base opinions on some vague concepts of transnational public policy, although apply often international law concepts if it is prescribed or at least permissible under national legal doctrine. On the contrary, it is less challenging for an international forum to reason from common international legal values. But absence of solutions to abovementioned issues shifts concept of transnational public policy mostly to sphere of scholarly writings rather than actual employment by practicing arbitrators and judges. For the same reasons in this paper procedural public policy will not be considered in its transnational perspective, because such perspective is too hazy.

¹⁵ An award may be found on following web-sites: <http://appletonlaw.com> ; <http://www.dfait-maeci.gc.ca> and <http://www.naftalaw.org>

¹⁶ Martin Hunter and Gui Conde E Silva, Transnational public policy and its application in Investment Arbitrations, Vol. 4 No 3, The Journal of World Investment, 367, 370 (2003)

1.2. Scope of Judicial Review

Courts being main decision-makers in the process of enforcement of foreign arbitral awards have been developing manifold theories on mechanism and scope of scrutiny of awards. Different legal traditions and peculiarities of local judicial doctrine have generated different approaches towards these issues.

Little disagreement exists in a general framework of the mechanism of application of public policy by a judge. Following sequence of analysis is usually used by the judge: first, to scrutinize foreign arbitral award, second, to analyze circumstances of arbitral award enforcement in order to contrast result of enforcement with public policy, third, to apply consequences of contradiction to the public policy, if such a contradiction was identified.¹⁷

Another necessary part of public policy mechanism is evaluation ‘in concreto’ which implies contradiction of certain element (may be rule of foreign law applied) of arbitral award against public policy shall be tested against particular circumstances of the case. There may be cases when public policy defence is denied by the national court although formal contradiction of the arbitral award to public policy is found by the judge, based on determined significant circumstances of a case under scrutiny.¹⁸

On the other hand there are peculiarities in scope of review of awards when substantive or procedural public policy examined. There are different approaches taken by various national courts from very narrow scrutiny to relatively wide examination. It is comparatively rare that courts prefer narrowing their analysis down to holding of the arbitral award since it infrequently contains statements against substantive public policy and almost never against procedural public policy, mostly being of neutral nature in terms of public

¹⁷ Lagarde P. Recherches sur l'ordre public en droit international privé // Rev. crit. DIP 1960. 280

¹⁸ See, for example: China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd., Yearbook XX (1995) pp. 671-680

policy analysis. Balanced position was taken by Italian Supreme Court which established following common standard for both substantive and procedural public policy:

This court has already made clear on this point that in proceedings for the enforcement of a foreign arbitral award accordance with Italian public policy must be ascertained only in respect of the dictum [*dispositivo*] of the award ... In the case at issue, the decision to order Vigel to pay damages for defects to which China National allegedly could no longer object is not a violation of Italian public policy.¹⁹

French court practice sets another way of judicial scrutiny when court “being devoid of any possibility to scrutinize an arbitral award on merits, shall direct its analysis at solution of the dispute rather than at evaluation of rights of the parties made by arbitrators.”²⁰

Interesting approach in line with existing trend of restrictive interpretation of public policy has been demonstrated by the High Court of New Zealand in case *Downer-Hill Joint Venture v. Government of Fiji*²¹, where it was required for the petitioner to provide a strong causal link between the alleged breach of a natural justice provision which is part of procedural public policy of New Zealand and its importance to an award’s outcome. Failure to establish at least one of these factors according to the Court must lead to dismissal of the challenge.

Swiss Federal Supreme Court has taken a more thorough approach and made a distinction between scrutiny of arbitral award for a purpose of collusion with substantive or procedural public policy. In *Egemetal v. Fuchs*²² the Court established two-fold approach towards challenge on the basis of substantive public policy. First, it analyses in general as to whether the legal provision or principle put forward by the challenging party in a sufficiently substantiated matter is part of the substantive public policy. Second, the Court examines in the light of the specific circumstances and facts as to whether the *result* reached by the award is also incompatible with the public policy. On the contrary, it was spelled out that such

¹⁹ Vigel S.p.A. v. China National Machine Tool Corporation. Published in Yearbook Commercial Arbitration, A.J. van den Berg (ed.) Vol. XXXI (2006), pp. 802 - 807

²⁰ S. V. Krokhalev, Public Order in International Litigation and Arbitration, § 446 (2006), published in Russian.

²¹ *Downer-Hill Joint Venture v. Government of Fiji* [2005] 1 N.Z.L.R. 554 (H.C.)

²² *Egemetal v. Fuchs*, ASA Bulletin, Vol. 18 No. 3 (2000), pp. 558 - 565

causation is not required in case of procedural public policy. Court held that the requirement of a causal nexus between a violation of public policy and the result of the award could not be applied in the context of fundamental procedural guarantees as their rationale is “not to assure through the challenge procedure according to the Court's limited scope of review “correct” decision on the merits, but to make sure that the parties may benefit from an independent adjudication of the relief sought and submitted in compliance with the applicable procedural rules.”²³

Distinction made by Swiss Court is certainly a positive contribution and may be also supported by reason that procedural public policy violation usually requires deeper scrutiny because it goes to the analysis of procedural decisions taken by arbitrators not reflected as a rule in a result of arbitral award. It is however doubtful that scrutiny may be extended up to review of “any new evidence” presented to the tribunal even in exceptional circumstances as it is suggested in the ILA Final Report. This proposal undermines progress made by doctrine of international arbitration in regard to limiting the scope of review of arbitral awards in enforcement proceedings. It would be nevertheless wrong to claim that general spirit of ILA Final Report goes against current trends concerning scope of review, since mostly it still calls upon for narrower scope proposing wider scrutiny only in cases when violation of public policy rule cannot be established from a mere review of the award and there is a strong prima facie argument of violation of international public policy.

1.3. Public order in Russia

Russia was chosen for an analysis in order to demonstrate development of the concept of procedural public policy in regard to enforcement of foreign arbitral awards in a particular country which role in international trade has been increasing over last two decades. But not everything goes as smooth as foreign investors and partners of Russian businessmen would

²³ Christoph Brunner, Procedural Public Policy as a Ground for Setting Aside International Arbitral Awards, ASA Bulletin, Vol. 18 No. 3 (2000), pp. 566 – 581

like to see in order to safely pursue their investments in Russia. There are many factors that contribute to such state of affairs, but it is only our goal to scrutinize few elements of arbitration practice given that arbitration have become one of the major mechanisms of dispute settlement between Russian parties and their foreign partners who are not generally willing to bring the case in Russian courts that received image of unpredictable, bias and corrupt dispute solvers from the beginning of 90s. Notwithstanding significant improvement in the operation of court system over last 10 years, international arbitration is becoming even more popular due to increase of its usage in international business and improved quality of its treatment in Russian courts.

In fact, I reckon that an analysis of Russian court practice and scholarship concerning procedural public policy is sort of litmus paper that allows us to judge on history and general trends in attitude of Russian courts towards enforcement of foreign arbitral awards in general. However, for better understanding of situation with enforcement of foreign awards in Russia it is important to realize a number of factors that can explain most of the existing deficiencies.

Development of arbitration-related judicial practice in Russia

First of all, it is necessary to consider the fact that history of enforcement of foreign arbitral awards is relatively short comparing to most of the other jurisdictions. First cases of this kind were brought to Russian courts in the beginning of 90s. Before that, as the President of the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry A. Komarov testifies, there was no single case brought to Soviet courts to enforce foreign arbitral award, notwithstanding the ratification of New York Convention by USSR in 1960.²⁴ This is quite often explained by the fact that state-owned

²⁴ A. Komarov, The Development of an Arbitration Culture within the State Judiciary in the Russian Federation, in ICCA Congress series no. 8 (Seoul/1996), p. 230

foreign trade companies²⁵ having used international arbitration mechanism extensively were dominantly honoring awards rendered against them by foreign arbitral tribunals.

Secondly, jurisdiction over cases on enforcement of both domestic and foreign arbitral awards has shifted starting from 2002 to arbitrazh courts²⁶ from courts of general jurisdiction as a result of another stage of court system reform which is still ongoing. According to effective jurisdiction rules lower arbitrazh courts²⁷ are entitled to hear any enforcement case which then can be challenged to appellate²⁸, cassation²⁹ and supervision³⁰ instances. Change of jurisdiction rendered both negative and positive impact on development of arbitration enforcement practice. Obvious negative consequence is that arbitrazh courts judges faced with a new sophisticated category of cases not having sufficient practical skills for this particular area. Moreover, experience of judges from courts of general jurisdiction accumulated over first ten years of enforcement proceedings was to large extent lost, although certain trends reflected in abstracts of court practice of 90s were followed by arbitrazh courts later. On the other hand, arbitrazh courts have more specialized knowledge on commercial (including international commerce) issues than courts of general jurisdiction that shall allow arbitrazh courts to develop relevant competencies faster in order to get in line with international standards of enforcement of foreign arbitral awards.

²⁵ As USSR was a planned economy and excluded all, but state-owned enterprises from foreign trade, only these enterprises had an opportunity to be involved in international arbitration cases

²⁶ Arbitrazh courts (“arbitrazhnie sudy”) which are also referred as “commercial courts” represent a separate subsystem of Russian judiciary which have exclusive jurisdiction over disputes of commercial nature (corporate disputes, bankruptcy, tax disputes, all kinds of disputes between companies and/or individual entrepreneurs etc). See more in Federal Constitutional Law “On Arbitrazh Courts in the Russian Federation” dated 28.04.1995 (last amended on 28.04.2008).

²⁷ Every federal unit of the Russian Federation has one lower arbitrazh court. Total number as of March 1st 2009 is 83.

²⁸ There are 20 appellate arbitrazh courts established in court circuits. Appellate courts are empowered to reconsider the case on the merits with emphasis on identifying mistakes of law and fact.

²⁹ There are 10 federal arbitrazh courts given a jurisdiction to carry out check of lower courts judgments on limited grounds without re-consideration of the case on the merits.

³⁰ Supreme Arbitrazh Court is a highest arbitrazh court accepting small portion of cases from lower courts for review at its own discretion with a purpose of setting uniformity in practice of the whole system of arbitrazh courts.

Third factor that plays an important role is influence of Russian legal doctrine³¹. Although general concept of arbitration is a subject of many treatises, many separate elements were developing in conditions of absence of relevant court practice in Russian courts which did not allow examining correctness of theoretical conclusions. Influence of Soviet law doctrine is also still felt in certain areas including arbitration, although often Soviet legal scholars have not provided solutions to legal issues to be used in free market environment which sometimes lead to unsatisfactory outcomes. Current Russian doctrine of international arbitration is developing rapidly, trying to be more consistent with internationally recognized standards. But still number of specific topics (including procedural public policy) remains undeveloped. It is also applicable to Russian legal system that there is certain time lag between recognition of certain solutions by scholars and its implementation by legislature and/or courts.

Statistics concerning quantity of enforcement cases is also interesting to demonstrate the scale of the issue. According to the data summarized by the Supreme Arbitrazh Court average number of cases on enforcement of foreign arbitration awards and foreign judgments³² between 2004 and 2008 was around 70 annually (with deviations to 54 in 2005 and 106 in 2007).³³ In contrast, the scale of domestic arbitration adjudication has increased from 1287 cases in 2004 to 2113 in 2008³⁴ which demonstrates general trend of using arbitration as one of the main dispute resolution mechanisms in Russian business relations supported with increased number of domestic arbitration institutions (238 institutions as of

³¹ Russia is a country with civil law system where court precedent is not considered as separate source of law. Legal doctrine, on the other hand, plays important role in development of legal system and court practice which often follows development of doctrine.

³² Data on cases of enforcement of both arbitral awards and judgments is provided only in consolidated format and statistics for enforcement of foreign arbitral awards is unavailable.

³³ Statistics is available in Russian language on the web-site of the Supreme Arbitrazh Court: <http://www.arbitr.ru/news/totals/> (last visited on March 30th of 2009)

³⁴ Ibid.

2009).³⁵ It should be reasonable to predict that increasing usage of domestic arbitration should also cause development of international arbitration in close future.

All these factors have significant impact on judicial practice with regard to enforcement of foreign arbitral awards in Russia. However it is likely that other factors inherent to the developing judiciary and rule of law in Russia also affected current trends in the area under examination.

Russian public policy interpretation in enforcement proceedings

By way of deduction I will move now to brief analysis of application of the public policy ground in enforcement proceedings in Russian courts.

Public policy ground is one of the most often relied on by Russian parties opposing enforcement of foreign arbitral awards that was caused by broad interpretation of this concept by the Russian courts. However, it is possible to demonstrate trend of narrowing down the construction of public policy through examples of several cases.

In 90s broad concept of public policy was more common than during last 5-7 years, but the example that will be given refers to 2003 when such interpretation was more an exception rather than a general trend. The decision of Federal Arbitrazh Court for Volga-Vyatsky Circuit has been widely criticized for its anti-arbitration and protectionist attitude. The Court held that enforcement of foreign arbitral awards shall be refused on the basis of public policy because enforcement would violate the principle of equity based on the allegation that payment of damages under the award by the respondent, large enterprise in Nizhny Novgorod, would lead to its bankruptcy and thus negatively impact on economic situation in the city, region and the country.³⁶ Such an interpretation of the public policy without any doubts contradicts to both international and prevailing Russian standards. To

³⁵ According to survey conducted by major domestic arbitration journal in Russia “Treteysky sud”. Data is available at the web-site of the journal at <http://www.arbitrage.spb.ru/sud/SPISOKTS/spisokts.html> (last visited on March 30th of 2009).

³⁶ Judgment of FAC for Volga-Vyatsky circuit dated February 17th of 2003.

show prevailing point of view taken by arbitrazh courts I will cite two decisions of the Federal Arbitrazh Court for Moscow Circuit.³⁷ In first decision the Court accepts violation of public policy:

[...] in case when its enforcement will result in actions prohibited by the law, or causing damage to sovereignty or security of the state, affecting interests of large social groups, inconsistent with fundamental principles of economic, political and legal system, affecting constitutional rights and freedoms of citizens and conflicting with basic principles of civil legislation such as equality of the parties, freedom of the contract and sanctity of the property.³⁸

This determination though being still broad enough underlines that only fundamental legal values may bar enforcement of an award. Another decision of the same Court brings an example of even more narrow interpretation - “[v]iolation of Russian public policy is understood as an impingement on basics of legal order or morality, but not as violation of legal principles of separate branch of law.”³⁹

If construction of the public policy given in the latter case will be followed this will allow to bring Russian judicial practice even closer to international standards. But even current level of interpretation allows courts to refuse the public policy defence in most of the cases. Another conclusion from analysis of court practice is that there is no distinction between domestic and international public policy made reflecting insufficient level of judicial knowledge of current international practice. In general, this brief overview shows, that although there is significant inconsistency in judicial construction of the public policy concept the trend for more narrow approach is developing as experience of the arbitrazh courts in enforcement proceedings grows.

Scope of judicial review

³⁷ It is well recognized that Moscow Circuit together with the court of first instance in Moscow being the major forums for enforcement cases (at least 30-40% from all cases in Russia) are most experienced and example-setting courts within the arbitrazh branch of judiciary when it concerns issues of private international law including arbitration-related proceedings.

³⁸ Decision of FAC for Moscow Circuit dated April 3rd of 2003.

³⁹ Decision of FAC for Moscow Circuit dated October 11th of 2006.

Russian courts have become more consistent when the parties are trying to rely on arguments based on public policy going into the merits of the foreign arbitral award. Scope of review in most of the cases does not extend over merits of the award unless there is exceptional reason for it. Basic approach may be demonstrated in following reasoning of the FCA for Moscow Circuit:

Target for scrutiny by an arbitrazh court is compliance of the international arbitration award with public policy, respect of fundamental legal principles in rendering the award, i.e. major basics of law, which are universal, highly imperative and of particular general significance, because only such violations may become a successful ground for challenging an award, rather than issues of evidence analysis or correct application of substantive and procedural rules of law by an arbitration panel.⁴⁰

Such an approach shall be met with approval, although so far it has not received reflection in positions taken by the Supreme Arbitrazh Court especially in its Information Letter on the state of judicial practice of Russian arbitrazh courts on matters relating to the recognition and enforcement of foreign court decisions, the challenge of arbitral awards and the issue of enforceable orders for their enforcement.⁴¹

⁴⁰ Ibid.

⁴¹ Under Article 127 of the Russian Constitution the SAC has the power to issue guidelines of interpretation which are binding on the lower courts. Such guidelines usually taking form of information letters represent selection of most important, according to SAC's position, decisions of lower courts and its own. For more information, see: L. Ponty, Comments on Information Letter, Vol. 23(5), Journal of International Arbitration, 425 (2006)

Chapter II. Procedural Public Policy – an Independent Ground for Refusal of Enforcement and Recognition of Foreign Arbitral Awards?

2.1. Procedural public policy in relation to other Article V procedural grounds for refusal of enforcement and recognition of foreign arbitral awards

There are three grounds procedural in nature under Article V of NY Convention that may become a limit to enforcement of foreign arbitral awards: (i) due process ground under clause 1(b); (ii) irregularities of arbitral procedure or composition of the arbitral authority under clause 1(d); and (iii) procedural public policy under clause 2(b). There is certain procedural content in grounds of V1(c) (for example, in regard to procedural decisions beyond the scope of submission to arbitration) and V1(e), but it is relatively narrow and has little relationship to procedural public policy. Therefore I will further limit our research on initially mentioned grounds, try to identify nature and differences of these grounds and answer the question of their applicability. Our goal in this part of paper is to identify notion of procedural public policy through qualifying its correlation with other two grounds of similar nature. To reach this goal I deem it would be reasonable to commence our analysis by presenting idea of procedural public policy as a general term in relation to the other two.

Without any doubt it is Swiss courts which have been making significant contribution to thorough scrutiny of procedural public policy concept in recent decades. Therefore numerous citations will be made referring to Swiss case law to shed light on this category. The Federal Supreme Court stated position that the fundamental procedural guarantees including the principle of procedural public policy shall assure that the parties benefit from an independent decision making process in respect of those claims and factual allegations that have been submitted to the tribunal in compliance with the applicable procedural rules.⁴² According to the other decision of the Court, procedural public policy is violated when

⁴² Egemetal v. Fuchs, *supra*, 563

fundamental and generally recognised principles were not respected, thus leading to an unsustainable contradiction with the sentiment of justice, so that the decision appears inconsistent with the values recognized by a state ruled by law.⁴³ At the same time, as correctly spelled out by Brunner, it means that “even a mistaken or arbitrary application of the relevant procedural rules of arbitration is not in itself sufficient to constitute a violation of the procedural public policy.”⁴⁴ When considering these conclusions of the Court, it is important to perceive them in aggregate with previously mentioned dicta about the general theory of public policy given in the previous chapter of this paper⁴⁵, because only putting these ideas together it allows us to see complete picture of international procedural public policy from Swiss perspective.

It is thus clear that procedural public policy represents core procedural values of certain legal community that it deems to be widely recognized. This view in general is shared by most leading commentators, although there is still debate going on as to what exactly procedural values falls under umbrella of this relatively broad concept. I will concentrate on main of them in the next section.

Due process is considered to be one of the cornerstones of both litigation and arbitration procedure. It has therefore very close relation to the procedural public policy. This connection is understood in a different ways in various legal communities. In one of the most authoritative treatises it is claimed that “due process is related to the concept of international public policy in the sense that due process is embodied in the broader concept of procedural public policy.”⁴⁶ This statement is proved with the fact that some of the jurisdictions even considered unnecessary to treat a breach of the due process as a separate ground for setting

⁴³ X (S.p.A.) v. Y (S.r.l.), ASA Bulletin, Vol. 24 No. 3 (2006), pp. 550 - 560

⁴⁴ Brunner, *supra*, 579

⁴⁵ See X (S.p.A.) v. Y (S.r.l.) case, *supra*, at the p. 9 of present paper

⁴⁶ Fouchard, Gaillard, Goldman on International Commercial Arbitration, E. Gaillard and J. Savage (eds.)(1999), p. 947

aside or refusing to enforce an award.⁴⁷ Similar point of view is demonstrated in ILA Final Report: “Procedural public policy rules overlap with the requirements of due process, prescribed in Article V.1(b) of the New York Convention.”⁴⁸ Another treatise takes position that procedural international public policy is a synonym to due process⁴⁹, although it must be noted that due process has been given broad meaning here exceeding limits set out in the Article VI(b) of New York Convention. Opposite position had been demonstrated by USSR doctrine which interpreted Article V of New York Convention in a literal way and simply distinguished procedural grounds found in both Article VI(b) and VI(d) from public policy ground on the basis that they are mentioned in different clauses of New York Convention.⁵⁰ I prefer to take a moderate position on this question, because it really depends from perspective of which legal system this question is approached, and there could be hardly any universal answer that suits every system. Both of these grounds being very comprehensive concepts include certain legal principles, and in different countries those principles are accorded to only one, both, or none of these notions. I deem though that most of the civilized nations share certain principles that may be equally included into both due process and procedural public policy. The problem then arises for a judge in enforcement proceedings is which ground should he/she invoke in case of violation of such a principle.

Let us consider how US Court of Appeals for 2nd Circuit has dealt with these issues in *Parsons & Whittemore case*.⁵¹ Article VI(b) according to the Court “essentially sanctions the application of the forum state’s standards of due process”⁵², but these standards are not the same as “court process”. Courts in USA interpret due process as “the opportunity to be heard

⁴⁷ See e.g. art. 1076 of the Netherlands Arbitration Act, in force 1 December 1986 and effective to 30 June 2004

⁴⁸ Full text of Report may be found on the web-site of International Law Association in a section on International Commercial Arbitration: <http://www.ila-hq.org/en/committees/index.cfm/cid/19> (last visited on March 25th of 2009)

⁴⁹ M. Kurkela, *Due Process in International Commercial Arbitration*, 2004, p. 12.

⁵⁰ K. Razumov, *Public Policy as a Condition for Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in the USSR*, in ICCA Congress series no. 3 (New York/1986), pp. 348-352.

⁵¹ *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l’Industrie du papier (RAKTA)*, 508 F.2d 969, 975 (2d Cir. 1974)

⁵² *Ibid.*

at a meaningful time in a meaningful manner.”⁵³ Distinction made by the Court suggests that certain procedural defects in arbitration could be tolerated by a confirming court as “a risk inherent in an agreement to submit to arbitration.”⁵⁴ *Parsons & Whittemore* is also famous for defining US public policy as “most basic notions of morality and justice” and setting standard of its restrictive interpretation in view of “general pro-enforcement bias” present in the New York Convention. As it turns out this approach has been mostly followed, and as it was concluded in one of the recent case reviews “US courts are closed to novel attempts at putting a “public policy gloss” on other Article V defenses.”⁵⁵

The ground contained in Article VI(d) also represents one of the core procedural guarantees preventing enforcement in case when either composition of arbitral tribunal or arbitration procedure itself was against applicable rules. It was an important achievement of New York Convention that arbitration agreement received priority as a source of applicable procedural rules comparing to *lex arbitri*. However, contractual will of the parties is not unlimited. Both due process and procedural public policy are natural limits to the right of the parties to agree on how the proceedings are conducted. In the absence of agreement of the parties, the panel has the power to conduct the proceedings in its discretion subject to the same due process and *lex arbitri* provisions (including procedural public policy of *lex arbitri*).

This ground was tested by Judge Kaplan of the Supreme Court of Hong Kong in a case where the parties had agreed to arbitrate disputes at CIETAC's headquarters in Beijing, whereas proceedings had been held in fact at CIETAC's sub-commission in Shenzhen, and defendant invoked irregularity in constitution of arbitral tribunal ground only in enforcement proceedings without making this claim at any point before.⁵⁶ Judge Kaplan found that wrong

⁵³ *Iran Aircraft Industries v. Avco Corp.*, 980 F.2d 141, 146 (2d Cir. 1992)

⁵⁴ *Parsons & Whittemore case*, *supra*.

⁵⁵ Reed L., Freda J., *Narrow Exceptions: A Review of Recent U.S. Precedent Regarding the Due Process and Public Policy Defenses of the New York Convention*, 25(6), *Journal of International Arbitration*, 649, 656 (2008)

⁵⁶ *China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd.*, *supra*.

constitution of the tribunal took place, but dismissed objections of defendant by employing a notion that Van den Berg indicated as “residual discretionary power to enforce”⁵⁷ following from interpretation of Article V stating that “recognition and enforcement of the award *may* be refused” by the competent authority. This solution poses a question what are the limits of such a judicial discretion and under which circumstances it may be applied. In a given case it was a theory of estoppel that became a link between facts of the case and employing judicial discretion to avoid refusal of enforcement. Judge Kaplan held that the defendant breached the duty of good faith by not bringing its objections concerning constitution of the tribunal to the CIETAC Commission in Beijing or to the arbitral tribunal itself, and therefore was estopped from invoking this defense in enforcement proceedings. Even though decision in this particular case seems to be serving goals of justice and fairness, it also created risk that discretion of the judges in enforcement proceedings may take form of abuse of right leading to consequences opposite to following widely recognized procedural values. Perspectives of discretionary power to enforce are uncertain and as noted by Van den Berg “it is not yet clear whether the discretion can be applied to all grounds for refusal of enforcement listed in Article V.”⁵⁸

Another issue bordering with the concept of estoppel is whether procedural rights guaranteed under New York Convention may be waived. It is well recognized by courts in different jurisdictions that party cannot refer to violation of its procedural right if it waived right to object by not raising it as soon as violation became known. Timely objection is part of the duty of good faith, as Judge Kaplan held in the abovementioned case, that each party acquires as soon as it steps into arbitration proceedings. But not all procedural rights can be waived. Certain rights that constitute hard core of the arbitral procedure cannot be waived completely. For example, right to present one’s case may be waived only to a limited extent.

⁵⁷ A. Van den Berg, *The Application of the New York Convention by the Courts*, in ICCA Congress series no. 9 (Paris/1999), p. 29

⁵⁸ *Ibid.*

“If waived totally or substantially, the waiver deprives the proceedings of their status as legal proceedings and the award will not qualify for enforcement and it will remain an unenforceable recommendation or opinion.”⁵⁹ The same may be argued about most basic procedural principles included in procedural public policy that are deemed to be vital for arbitration: equality of the parties, impartiality of arbitrators and others. It does not however release parties from their duty of good faith, but punishment for violation of this duty should not undermine the basis of arbitration itself.

There are also cases where there is a basis for refusing enforcement on all three procedural grounds from Article V. One of the recent cases of this kind was decided by Court of First Instance in Amsterdam.⁶⁰ The case involves two companies agreed on arbitration in Moscow under Rules of International Commercial Arbitration Court (ICAC) of the Chamber of Commerce and Industry of the Russian Federation. It was alleged by Media Most initiated arbitration that chairman of arbitral tribunal made a phone call to the office of Media Most and under a mistaken assumption that he was talking to representative of respondent Goldtron urged Media Most’s representative to submit a counter-claim. After subsequent late submission of counter-claim by Goldtron, and its acceptance by tribunal in violation of Rules of procedure agreed by the Parties, Media Most challenged the chairman, but challenge was dismissed by ICAC on formal grounds without any reasonable motivation. An award was rendered in favor of Goldtron, which went to the Netherlands to enforce it. Dutch court agreed with defences brought by Media Most that recognition of the award would violate due process as accepted in Netherlands as well as arbitral procedure was not in accordance with the arbitration rules agreed upon by the parties, but, what is interesting, finally applied the public policy ground to refuse enforcement.

⁵⁹ Kurkela M. *Due Process in International Commercial Arbitration*, 2004, p. 185.

⁶⁰ *Goldtron Limited v. Media Most B.V.*, reported in *Yearbook XXVIII (2003)* pp. 814-820

Article V provides another difference in application of grounds under examination. Grounds V1(b) and V1(d) as all grounds mentioned in section 1 of Article V may be brought “*at the request of the party* against whom it [the award] is invoked” while V2(b) does not require initiative of the opposing party and may result in recognition of enforcement “*if the competent authority [...] finds* that the recognition or enforcement of the award would be contrary to the public policy of that country” i.e. may be invoked *sua ponte*. But given the presumption that due process ground overlaps with procedural public policy, it is possible to conclude that initiative in case when violation of such double-sided principle occurs can be taken by both judge and the party. Although in practice it is likely that opposing party will use defence under both V1(b) and V2(b) if it finds any insignificant infringement of its right to a due process. On the other hand, would a party that has not brought objection in this situation be considered as breached its duty of good faith and thus waived right (or barred under estoppel doctrine) to be protected by defense under V1(b)? Should the court take this into account and employ its discretionary power to enforce award even though it lacks procedural integrity because of procedural public policy violation? I suggest that given narrow (and thus fundamental) character of procedural public policy standards the court should be in a position to refuse enforcement of award in such a case, although it is impossible to exclude possibility of enforcement under very exceptional circumstances like grave violation of duty of a good faith by opposing party.

2.2. Major principles of international procedural public policy

As it was shown in the first chapter it is international public policy that represents a limit for enforcement of foreign arbitral awards rather than domestic and transnational public policy. Domestic public policy is mostly limited in scope to domestic awards and thus falls out from coverage of our investigation. Transnational public policy is too controversial, fuzzy and has dominantly theoretical nature, as opposed to the international procedural public

policy that demonstrate visible consensus as to a number of fundamental procedural values shared by civilized nations. I will turn to examine basic procedural maxims grouped in principal areas of arbitral procedure in following order: appointment and conduct of arbitrators and arbitral proceedings. Procedural issues related to the rendering of an award and its content will not be examined essentially because procedural layer there is relatively thin and there is no much commonly accepted principles related.

Appointment and conduct of arbitrators

There is no doubt that when speaking about procedural guarantees in relation to arbitrators the most important and obviously constituting part of procedural public policy principle is impartiality of arbitrators. In this respect private arbitrators are often placed on the same footing as state judges on the basis that their decisions are equal to court judgments “in respect of legal validity and enforceability and which must therefore provide the same guarantee of impartial decision-making.”⁶¹ As the Swiss Court underlined “there must be a guarantee that no circumstances outside of the proceedings exist which could influence the decision in a manner that would improperly benefit or harm either party.”⁶² In this case a plaintiff tried to challenge award rendered against him alleging bias of the chairman of the tribunal resulted from the fact that chairman with the help of police revealed that plaintiff has employed a detective agency to carry out surveillance over the chairman and his family for a period of several weeks and even attempted to obtain information about his banking accounts suspecting him to be bribed by the other party. When examining claim made the Plaintiff, the Court endorsed the view developed by jurisprudence that bias is assumed if circumstances exist which, when viewed objectively, could call into question the impartiality of an arbitrator. However, the court having determined that “reaction of the Chairman to the surveillance by a detective agency and the attempt to obtain information about his financial

⁶¹ A. Ltd. v. B. Inc. case, published in ASA Bulletin, Vol. 23 No. 2 (2005), pp. 337 – 351

⁶² Ibid.

situation was, viewed objectively, appropriate and does not permit the drawing of a conclusion of bias against one of the parties”⁶³, found no violation of procedural public policy and dismissed claim of the Plaintiff.

However there is at least one authoritative point of view that attribution of impartiality to procedural public policy has no basis, because concept of impartiality is highly subjective.⁶⁴ I disagree here and position of the Swiss court in the case cited above provides appropriate argument about necessity to employ objective standard of evaluation. The following case gives another endorsement of impartiality belonging to procedural public policy.

Result contrary to the previous case was reached in case between a Danish buyer and a German seller decided by German court of the Cologne in enforcement proceedings. Present case have challenged procedural rules used by the Copenhagen Arbitration Committee for Grain and Feed Stuff Trade which provided that the president of the Committee is entitled to choose the arbitrators for a case from a publicly available list, but identities of chosen arbitrators remain secret to the parties thus depriving them an opportunity for challenge. The award however was rendered, but in enforcement proceedings German court refused recognition of the award because of violation of fundamental right to challenge arbitrators forming important guarantee of impartiality. It was held that impartiality of arbitrators is a “fundamental principle of both German and international legal order”⁶⁵ and due to the fact that right to challenge “has a fundamental meaning for a fair arbitral procedure, the exclusion of this right constitutes a violation of the German public order.”⁶⁶

Arbitral proceedings

⁶³ Ibid.

⁶⁴ Fouchard, Gaillard, Goldman on International Commercial Arbitration, E. Gaillard and J. Savage (eds.)(1999), p. 958

⁶⁵ Danish buyer v. German seller, Yearbook of Commercial Arbitration Vol. IV (1979), p. 260

⁶⁶ Ibid

Certain comments have been already made about correlation of due process to procedural public policy. In this chapter I will concentrate only on core elements of due process that are also considered to be a part of international public policy. Two such elements are obvious from reading of Article V1(b): fair notice and opportunity to present one's case. Principle of equal treatment of the parties is also referred by some scholars as being a part of "international due process"⁶⁷, but it is possible to agree with this statement only when speaking in terms of doctrinal meaning of due process concept. In New York Convention it does not fall under V1(b) ground which automatically brings it under umbrella of V2(b) ground as part of procedural public policy.

Notice to the parties on appointment of arbitrators and arbitral proceedings belongs to the very beginning of the arbitration procedure. It can be indicated as a part and pre-condition of more broad right to present one's case. What is also important is that "in international context courts will look to the substance of whether notice was actually received, rather than to whether the technical service requirements of its domestic law were met."⁶⁸ Timing is also crucial in regards to giving fair notice. Notice shall be given in order to give a party sufficient time to fulfill certain procedural motion mentioned in the notice. Courts when examining defense concerned with notice time periods are likely to apply a test whether provided time period given facts of the case precluded the objecting party from either making appointment of arbitrator, or preparing for and appearing at a hearing.⁶⁹

The right to present one's case or right to be heard as some national laws and international conventions refer to it, are essentially similar principles treated as fundamental both to due process and procedural public policy. Only objective ability to present a case is subject to protection, while subjective ability (professional skills, strength of argumentation

⁶⁷ Schwebel S., Lahne S., Public Policy and Arbitral Procedure, in ICCA Congress series no. 3 (New York/1986), p. 216

⁶⁸ Ibid. p. 217

⁶⁹ See *Danaos Shipping Co. v. Fratelly Variola S.p.A.* published in Yearbook of International Arbitration, Vol. IX (1984), p. 425

etc.) is not. This principle is one of those which extends over the whole process of arbitral proceedings and thus present utmost importance. Its significance is underscored by the fact that this principle is reflected in many constitutions all over the world and constitutes one of the basic procedural guarantees regardless of whether it is court or arbitral procedure. Swiss court in one of the cases gave an excellent comprehensive description of this principle:

It [right to be heard] contains the right of the parties to participate in proceedings and to exert influence on the decision-making process. The Jurisprudence derives from these rights, in particular, the right of the parties to plead on all facts relevant to the decision, to argue their legal position, to submit relevant evidentiary requests, to participate in the proceedings, and the right to inspect records. A denial of rights by the court (as defined in the sense of a denial of the right to be heard) is deemed to have occurred if a party is prevented from expressing its position in the proceedings so that the court, in arriving at its decision, does not take it into account, and therefore the party was disadvantaged in the proceedings.⁷⁰

Right to present a case also applies to handing of evidence during the proceedings. Let us examine two German cases in this regard. First case was reviewed by the Hamburg Court of Appeal and concerned conduct of arbitrator who did not forward to Party F one of the letters provided by Party P, and then disregarded another letter submitted by Party F which in fact contradicted to letter Party F has not received. In the absence of oral hearings on the merits, such a failure by the single arbitrator to duly process written evidence received was considered by the German court as violation of German public policy. Moreover, the Court held that “only in extreme cases, where a party had not been able to present his case in arbitration abroad, would the basic principles of German legal order be violated. The Court of Appeal deemed that such an extreme case was present”⁷¹. It was also added that “a violation is present as soon as it cannot be excluded that a hearing could have led to a more favorable decision”⁷². Enforcement was refused.

Second case was brought to the Bremen Court of Appeal for enforcement of the second award rendered in arbitration between the parties after the first award rendered by Arbitral Commission of the Istanbul Chamber of Commerce was quashed in Turkey.

⁷⁰ A. Ltd. v. B. Inc. case, published in ASA Bulletin, Vol. 23 No. 2 (2005), pp. 337 – 351

⁷¹ Firm P v. Firm F case, Yearbook of International Arbitration, Vol. II (1977), p. 241

⁷² Ibid.

Defendant presented two major points for examination by the Court. First issue concerned the decision of the arbitral tribunal not to admit any new evidence in second arbitration except of those provided by the defendant in first arbitration. The Court reasoned that this behavior could only constitute a violation of due process if the new evidence would have affected the outcome of the arbitration. Second issue was public policy defence against the contents of the award. The Court then considered whether the reasons given for the Second Award – which did not discuss the individual claims and objections thereto and simply stated that all facts and evidence had been examined and considered, that the arbitral tribunal decided not to take into account certain expert reports and that it reached its conclusion based on the course of events, applicable legal provisions and trade usages – violated German international procedural public policy. After scrutiny of the award the Court concluded that

[...] such reasons [for the award] would hardly meet the requirements of German domestic procedural public policy. However, German international public policy is violated only when the decision of the foreign court or arbitral tribunal was rendered in proceedings that are to such extent at odds with basic principles of German procedural law, that in the German legal system the decision cannot be deemed to have been rendered in proper legal proceedings, because of a grave defect that affects the principles of state and economic life.⁷³

Last cited case not only demonstrated well one of the main principles of procedural public policy, but also provided a good example of few other procedural issues. First is lack of reasoning in arbitral award. German court took a position which is currently mostly recognized that reasoning of awards does not constitute a part of international public policy, although it admitted that in case of German domestic arbitration such an award may be refused enforcement. There are jurisdictions that take different attitude on this issue. For example, in the USA an arbitrator is not required to give reasons in award⁷⁴. Other countries as well as UNCITRAL Arbitration Rules and Model Law on International Commercial Arbitration establish requirement of reasoned awards.

⁷³ Parties are not indicated, Yearbook Commercial Arbitration, A.J. van den Berg (ed.) Vol. XXXI (2006), pp. 640 - 651

⁷⁴ See Holtzmann, National Report United States in Yearbook of International Arbitration, Vol. IX (1984), p. 62

Another issue covered is fundamental power of the arbitrator to examine admissibility and weight of evidence during arbitration proceedings. This power is a natural limit to right of the parties to present one's case. But as German court has established it may turn into violation if wrong decision of the arbitrator will be proved to have a significant influence on outcome of arbitration.

Equality of the parties and adversarial procedure are also often considered under umbrella of international procedural public policy. Both of these principles however overlap with due process ground under New York Convention.

Equality of the parties is very close in meaning to the right of present one's case. It is underlined in UNCITRAL Model Law Article 18 which unites both of the pivotal procedural guarantees. Close correlation of these notions was also endorsed by Swiss court that stated: "[t]he right to equal treatment is substantially similar to the right to be heard. The principle of equal treatment also requires, in particular, that the arbitral tribunal as a matter of principle fundamentally treat the parties equally in all aspects of the proceedings."⁷⁵

Nevertheless this does not mean absolute equality in regard to any single element of procedure. It is important only that "general balance be maintained and that each party be given an equal opportunity to present its case in an appropriate manner."⁷⁶ At the same time parties may have different rights when appointing arbitrators that was recognized in *Dutco* case⁷⁷. This case also established that in France equality of the parties is a part of international procedural public policy.

2.3. Russian Approach towards Procedural Public Policy

It was established in previous chapter that general concept of the Russian public policy is still in the stage of emergence and therefore somewhat inconsistent with

⁷⁵ A. Ltd. v. B. Inc. case, *supra*, P. 347

⁷⁶ Fouchard, *supra*, P. 958

⁷⁷ B.K.M.I. Industrieranlagen GmbH v. Dutco Construction Co. Ltd. Yearbook of Commercial Arbitration, Vol. XVIII (1993). See also comments in Fouchard, *supra*, P. 468

international standards and between different decisions rendered by the arbitrazh courts. In this section analysis will be restricted to application of the procedural public policy by Russian courts.

First question to answer in the framework of the analysis is whether notion of procedural public policy is recognized by the Russian courts as such. To proceed, several cases where procedural grounds for enforcement were in focus will be analyzed.

The Supreme Arbitrazh Court in *Kompas Oversease case*⁷⁸ reversed decisions of lower courts granting enforcement of the award rendered by ICAC in Moscow because they erred in not taking into account fact that part of the amount awarded to Kompas Overseas was supported with false evidence: time charter contract with Delaware corporation provided by Kompas Overseas proved to be invalid because according to the registration certificate obtained by opposing party from the Secretary of Delaware was incorporated almost four years after the effective date of the contract with that company. The Court held that this circumstance testifies violation by Kompas Overseas of its duty faith obligation (abuse of right) and thus violates Russian public policy.

There is also a number of cases concerning due process basis. For example, in *Forever Maritime Ltd. v. Machine-import*⁷⁹ the SAC refused enforcement on the award rendered in London by an ad hoc tribunal on the basis of Article V1(b) because in the absence of oral hearing the award was rendered without giving a proper notice to Russian party. However, in its reasoning the Court supported erroneous conclusion of the lower court that the basis for refusal was that the claimant did not prove that proper notice was served on the respondent which is in clear contradiction with principle of allocating burden of proof on the respondent when he opposes an award under any of Article V(1) defences. This mistake

⁷⁸ Decision of Presidium of SAC dated October 26th of 2004.

⁷⁹ Decision of Presidium of SAC dated June 22nd of 2004.

however was corrected by the same court in *Codest Engineering v. Gruppa Most*⁸⁰ where enforcement of an award of the Arbitration Institute of the Stockholm Chamber of Commerce was allowed because it was the respondent who failed to prove that he was not served proper notice.

Other cases where the procedural grounds are used to oppose enforcement of foreign arbitral awards are also falling within ground of due process.⁸¹ Except of the first case given in the present section, the arbitrazh courts are reluctant to include procedural grounds into definition of public policy, although it seems obvious that definition of the public policy given by Russian courts may include also procedural violations of fundamental characters. Approach may change as courts will be facing new situations where procedural violations will be more significant than improper notice. There are also other reasons why procedural public policy has not received much attention in Russian judicial practice. As it was suggested by representatives of “new scholarship” in the area of arbitration⁸² Russian judicial community does not have solid knowledge of international arbitration practice including modern standards of division of public policy in domestic, international and transnational, or substantive and procedural, because some parts of it are still relatively closed and mistrustful to foreign experience and because of rare judges able to speak foreign languages to enable them efficiently perceive international knowledge. We should not forget also about approach taken by Soviet doctrine on clear distinction of public policy ground from other procedural grounds under Article VI(b) and VI(d) mentioned earlier⁸³ which still seems to have a dominant position among the judicial community.

⁸⁰ Decision of Presidium of SAC dated February 22nd of 2005.

⁸¹ See, for example, overview of cases in: Nikiforov I. Interpretation of Article V of the New York Convention by Russian Courts – Due Process, Arbitrability, and Public Policy Grounds for Non-Enforcement, No. 6, *Journal of International Arbitration*, 787, 800 (2008)

⁸² See Karabelnikov B. Approach of Russian legislation and Russian judicial practice towards public order. Published in Russian language in journal “*Mezhdunarodnoe publichnoe y chastnoe pravo*” (International public and private law), No. 5 (2005)

⁸³ See Razumov, *supra*, page 24.

Conclusion

Efficiency of arbitration as international dispute resolution mechanism is often explained as based on its dynamics and meeting the needs of the parties. In the last several decades the dynamic and flexible nature of arbitration has been developing even more rapidly owing to a large extent to the “pro-enforcement bias” of the courts in major jurisdictions. On the other hand, national courts have been pursuing the goal of protection of most basic values of law and morality covered under the national public policy umbrella. Notwithstanding diversity of national values forming domestic public policies international trade and globalization have brought core values to the common denominator of the international public policy which included both substantive and procedural elements. As I have shown it is now established trend that only these international public policy elements may prevent enforcement of the foreign arbitral awards under Article V2(b) of the New York Convention.

Procedural public policy as it has been demonstrated has become an identifiable concept both within general public policy notion and in comparison with other procedural grounds for refusing recognition under the New York Convention. Most leading jurisdictions have developed their understanding of what procedural principles they consider as a part of the public policy with most of those principles being shared by many rule-of-law countries. I have identified an important development that judicial scope of review has been also adjusted for particular needs of the procedural public policy, however this trend is now present only in few jurisdictions and perspectives of its further expansion are unclear.

At the same time the standard of international procedural public policy follows the general level of arbitration policy in a given country which in its turn depends on a number of objective and subjective factors that may either facilitate or impede development of pro-arbitration policy. I have revealed that formation of the procedural public policy concept in Russia was hindered due to the lack of judicial knowledge and experience, evolution of the

court system and conservative legal doctrine. The situation is improving now in regard to experience of the judges and the doctrine, but there are still risks concerned with the court system reform and progress of the rule of law. There is no doubt though that Russia needs to develop general “pro-enforcement bias” to encourage international business transactions which will, in the end, have positive impact on economic development. The procedural public policy, on the other hand, may help to protect the most basic procedural principles of Russian law as it was recognized in many countries all over the world.

Bibliography

Books and periodical materials:

1. Bockstiegel K-H., Public Policy and Arbitrability, in ICCA Congress series no. 3 (New York/1986)
2. Brunner Christoph, Procedural Public Policy as a Ground for Setting Aside International Arbitral Awards, ASA Bulletin, Vol. 18 No. 3 (2000)
3. Fouchard, Gaillard, Goldman on International Commercial Arbitration, E. Gaillard and J. Savage (eds.)(1999)
4. Holtzmann, National Report United States in Yearbook of International Arbitration, Vol. IX (1984)
5. Hunter Martin and Gui Conde E Silva, Transnational public policy and its application in Investment Arbitrations, Vol. 4 No 3, The Journal of World Investment (2003)
6. Karabelnikov B. Approach of Russian legislation and Russian judicial practice towards public order. Published in Russian language in journal “Mezhdunarodnoe publichnoe y chastnoe pravo” (International public and private law), 2005, No. 5.
7. Kawharu A., The Public Policy Ground for Setting Aside and Refusing Enforcement of Arbitral Awards: Comments on the New Zealand Approach, 24 (5), Journal of International Arbitration (2008)
8. Komarov A., The Development of an Arbitration Culture within the State Judiciary in the Russian Federation, in ICCA Congress series no. 8 (Seoul/1996)
9. Krokhavev S. V., Public Order in International Litigation and Arbitration (2006), published in Russian language.
10. Kurkela M. Due Process in International Commercial Arbitration, 2004.
11. Lagarde P. Recherches sur l'ordre public en droit international prive // Rev. crit. DIP 1960
12. Lalive P., Transnational (or Truly International) Public Policy and International Arbitration in ICCA Congress series no. 3 (New York/1986)
13. Lunts L., International Private Law (Spark, 2002), in Russian language.
14. Mantilla-Serrano F., Towards a Transnational Procedural Public Policy, in Towards a Uniform International Arbitration Law? Ed. E. Gaillard,163-198 (Juris Publishing, 2005)
15. Nikiforov I. Interpretation of Article V of the New York Convention by Russian Courts - Due Process, Arbitrability, and Public Policy Grounds for Non-Enforcement, No. 6, Journal of International Arbitration (2008).
16. Ponty L., Comments on Information Letter, Vol. 23(5), Journal of International Arbitration (2006)
17. Pryles M., Reflections on Transnational Public Policy, 24 (1), Journal of International Arbitration (2007)

18. Razumov K. Public Policy as a Condition for Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in the USSR, in ICCA Congress series no. 3 (New York/1986).
19. Reed L., Freda J. Narrow Exceptions: A Review of Recent U.S. Precedent Regarding the Due Process and Public Policy Defenses of the New York Convention, 25(6), *Journal of International Arbitration* (2008).
20. Schwebel S., Lahne S. Public Policy and Arbitral Procedure. Published in ICCA Congress series no. 3 (New York/1986).
21. Tapola D., Enforcement of Foreign Arbitral Awards: Application of the Public Policy Rule in Russia, 22, *International Arbitration* (2006).
22. Van den Berg A. The Application of the New York Convention by the Courts. Published in ICCA Congress series no. 9 (Paris/1999).
23. Varady T., Barcelo J., von Mehren A., *International Commercial Arbitration: A Transnational Perspective*, 3rd ed. (2006).

Table of Cases:

1. [FRANCE] B.K.M.I. Industrieanlagen GmbH v. Dutco Construction Co. Ltd. *Yearbook of Commercial Arbitration*, Vol. XVIII (1993).
2. [GERMANY] Firm P v. Firm F case, *Yearbook of International Arbitration*, Vol. II (1977).
3. [GERMANY] Parties are not indicated, *Yearbook Commercial Arbitration*, A.J. van den Berg (ed.) Vol. XXXI (2006).
4. [GERMANY] Danish buyer v. German seller, *Yearbook of Commercial Arbitration* Vol. IV (1979).
5. [HONG KONG] China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd., *Yearbook of Commercial Arbitration* Vol. XX (1995).
6. [ITALY] Vigel S.p.A. v. China National Machine Tool Corporation, *Yearbook of Commercial Arbitration*, A.J. van den Berg (ed.) Vol. XXXI (2006).
7. [ITALY] See Danaos Shipping Co. v. Fratelly Variola S.p.A., *Yearbook of International Arbitration*, Vol. IX (1984).
8. [NAFTA ARBITRATION] S.D. Myers Inc. v. The Government of Canada (available at <http://appletonlaw.com>; <http://www.dfait-maeci.gc.ca> and <http://www.naftalaw.org>)
9. [THE NETHERLANDS] Goldtron Limited v. Media Most B.V., *Yearbook of Commercial Arbitration*, Vol. XXVIII (2003).
10. [NEW ZEALAND] Downer-Hill Joint Venture v. Government of Fiji [2005] 1 N.Z.L.R. 554 (H.C.)
11. [RUSSIA] Decision of FAC for Volga-Vyatsky circuit dated February 17th of 2003
12. [RUSSIA] Decision of FAC for Moscow Circuit dated April 3rd of 2003.
13. [RUSSIA] Decision of FAC for Moscow Circuit dated October 11th of 2006.
14. [RUSSIA] Decision of Presidium of SAC dated October 26th of 2004.

15. [RUSSIA] Decision of Presidium of SAC dated June 22nd of 2004.
16. [RUSSIA] Decision of Presidium of SAC dated February 22nd of 2005.
17. [SWITZERLAND] Egemetal v. Fuchs, ASA Bulletin, Vol. 18 No. 3 (2000).
18. [SWITZERLAND] X (S.p.A.) v. Y (S.r.l.) case. ASA Bulletin, Vol. 24 No. 3 (2006).
19. [SWITZERLAND] A. Ltd. v. B. Inc. case, ASA Bulletin, Vol. 23, No. 2 (2005)
20. [USA] Iran Aircraft Industries v. Avco Corp., 980 F.2d 141, 146 (2d Cir. 1992)
21. [USA] Parsons and Whittemore Overseas Co., Inc. v. Société générale de l'industrie du papier (RAKTA). 508 F. 2d 969 (2d Cir. 1974)