Non-Recognition of Foreign Arbitral Awards Pursuant to Article V 1 d of the New York Convention

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This paper provides an analysis of the scope of Article V part 1 d of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the application of the relevant article by courts in Latvia and abroad. It is argued that although parties can freely agree on the arbitration process and the appointment of arbitrators, they cannot waive rights to due process or agree on arbitrators discriminating him/her based on religion, views, handicap, age or sexual orientation. Moreover, the author concluded that Section 497 of Latvia's Civil Procedure Law providing the requirements of professional qualifications for arbitrators cannot be seen as an imperative norm in international arbitration procedure and that this norm must not be applied to an international arbitration procedure unless the parties to the case have agreed otherwise.

Keywords: New York Convention, arbitration agreement, arbitration procedure, recognition and enforcement of a foreign arbitral award.

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Introduction

Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (further: *New York Convention or Convention*)[1] contains an exhaustive list of grounds for non-recognition of foreign arbitral awards. One reason is found in Article V part 1 d of the Convention, which states that the recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that first of all, arbitral tribunal or, secondly, that the arbitral procedure was not in accordance with

the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where arbitration took place (*lex arbitri*). The Convention ensures that the appointment of the arbitrators and conduct of the arbitral procedure in accordance with parties' agreement or applicable law are of a particular importance in a due process. Thus the purpose of this paper is to examine the content of this norm in the New York Convention and the specifics of its application in practice. The author has particularly focused on Section 497 of the Civil Procedure Law, which sets out detailed professional requirements for arbitrators in Latvia.

In Latvian court practice, Article V part 1 d) of the New York Convention has been applied in four cases. In two cases the court made reference to the article, but did not explain why it was applied.[2] In one case the respondent made a reference to the article, but the court did not apply or analyse it.[3] In another case, Article V part 1 d) of the New York Convention served as a legal reason to refuse to recognise and enforce a foreign arbitral award.[4] Because court practice in Latvia in this regard has been insufficient, the author will look at foreign cases in which the relevant norm of the New York Convention has been applied.

1 Basic prerequisites for the application of Article V of the New York Convention

Before taking a detailed look at the application of Article V part 1 d) of the New York Convention, the author would like to examine the scope of this article. The main prerequisite for the application of Article V of the Convention is that the respondent must bear the burden of proof, which means that it is not enough to object the recognition and enforcement of arbitral award. Instead, the respondent must submit the evidences that the reasons for the refusal have been justified. A court cannot refuse to recognise the arbitral award on its own initiative in accordance with Article V part 1. The words "a court may refuse" in the formulation of the article allow judges to decide whether or not to recognise a foreign arbitral award. The Convention does not specify what kind of procedural violation can lead to the non-recognition of a foreign arbitral award, but the author believes that the violation must be one which substantially influences the results of the case.

2 Arbitrators are not appointed in accordance with the arbitration agreement or with the law of the country where the arbitration took place

Article V part 1 d of the New York Convention sets out a specific procedural framework and a chronological order for its application. When a respondent asks a court not to recognise the arbitral award, judge must evaluate the content of the arbitration agreement. If there is no specific agreement as to procedural rules and the rules of the arbitration institution, the court must refer to the law of the country where the arbitration took place.

The arbitration agreement is at a higher level of priority when it comes to rules of arbitral institution or international/national law. Namely, if the parties have agreed on the procedure in the arbitration agreement, the national law is not applied at all. This means that in practice courts very seldom have to apply national law on appointing the arbitral tribunal, because the parties usually agree on this in the arbitration agreement. If there is no such agreement, the rules of arbitral institution

are applied. One exception might be a case in which the parties have directly agreed that the arbitrators will be appointed in accordance with a national law, for example, with the Latvian Civil Procedure Law. In that case, the arbitrator and procedure must satisfy the criteria that are enshrined in Latvian law.

It has to be noted here that *lex arbitri* do not automatically become a part of an arbitration agreement between the parties in a direct or indirect way.[5] If that were the case, a court would always have to evaluate national rules of the country where arbitration took place on every occasion, irrespective of the procedures to which the parties have agreed in their arbitration agreement. That, however, is not the intention of the New York Convention.

In most cases, the parties which agree on arbitration, add special rules in the arbitration agreement in relation to procedural issues such as the number, qualification and appointment of arbitrators. Moreover, the text in the Convention, stating that "*the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties*" indicates that of importance is not just the initial arbitration agreement, but also all other procedural agreements that have been agreed on during the arbitration procedure. These agreements can be in writing, expressed directly or indirectly, or based on conclusive actions.[6] For instance, the parties can agree on a different international arbitration institution after the dispute has occurred. It may be that the initial agreement indicated that the dispute shall be settled in the Arbitration Institute of Stockholm Chamber of Commerce, but subsequently the claimant decided that the dispute should instead be heard in the German Arbitration Institute. If the respondent does not object to the jurisdiction of the German Arbitration Institute during arbitral proceedings, but then – in the recognition and enforcement procedure objects that the procedure has not been in line with the initial arbitration agreement, the court has every reason to rule that the parties have legally amended their agreement, and, consequently, there is no reason to refuse recognition of the relevant award.[7]

2.1 The number and appointment of arbitrators

In their arbitration agreement the parties can agree on the number of arbitrators and on their appointment. The agreement on the number of arbitrators may be based on practical reasons, because issues related to costs, speed and experience must be taken into account. The point is that a panel of three arbitrators usually costs three times more than a single arbitrator. At the same time, however, three arbitrators might be more competent and supplement one another's reasoning and this may be not the case when a single arbitrator shall be appointed.

The parties can choose various ways of appointing arbitrators, following the model clauses prepared by arbitration institution or special recommendations.[8] In classical terms, if the parties choose sole arbitrator, that usually means that the arbitrator is appointed by parties, but if parties are unable to agree on arbitrator, he/she shall be appointed by the court or competent authority. In arbitration with three arbitrators, each party shall appoint one arbitrator, and then those two arbitrators shall appoint the third one. If the two arbitrators fail to agree on the third arbitrator, then upon request of a party, the appointment shall be made by a court or other institution.[9]

If procedure on appointing arbitrators is not provided in the arbitration agreement, then rules of arbitral institution shall be applied as when the parties agree on a specific arbitral institution, they usually reach direct or indirect agreement on the relevant rules. This means that the rules are of a legal nature, and so this source has priority

status in relation to national law, and usually it is fully self-sufficient in regulating the arbitration process. The importance of arbitration rules is also recognised in Article IV of the European Convention on International Commercial Arbitration Courts:[10]

> *"The parties to an arbitration agreement shall be free to submit their disputes to a permanent arbitral institution; in this case, the arbitration proceedings shall be held in conformity with the rules of the said institution."*

This is also confirmed in Section 499 of the Civil Procedure Law stating that the procedure for appointing arbitrators shall be agreed by the parties (the first paragraph of the section) but if the parties have not agree on the procedure for appointing the arbitrators, then the arbitral tribunal is appointed in accordance with the rules of the particular arbitral institution, however, in all cases the equal rights of the parties shall be taken into account (the third paragraph of the section).

2.2 The individual and professional capabilities of arbitrators

The principle of parties' autonomy in a dispute makes it possible to agree also on other criteria in relation to arbitrators. For instance, in international arbitration agreement the parties may agree that the arbitrators are not of the same nationality as the parties themselves.[11] If the parties have agreed on the linguistic skills of arbitrator, it shall be take into account in appointing arbitrators. For example, if the arbitration agreement provides that the procedure must be in English, then a person who does not speak that language cannot be appointed as an arbitrator in the case.[12] It must be added here that if the rules of an arbitration institution state that if arbitrator does not speak the relevant language, then he/she can ask for a translator, that contradicts the principle that arbitrator must be competent and that the relevant arbitration institution must guarantee that competence, i.e., only arbitrator speaking relevant language can be appointed and no translator for arbitrator shall be used in such proceedings.

In international proceedings, the parties can also agree on the professional capabilities of arbitrator, because representatives of the relevant industry can particularly help in the arbitration process, for example, dealing with technical cases. An engineer, builder, doctor, etc., can be appointed as an arbitrator, and the parties can agree that the dispute will be resolved by non-lawyers.[13] Nevertheless, in Latvia's context it is important to evaluate whether such agreement by the parties would not be in violation with the latest amendments to Section D of the Civil Procedure Law on qualifications of arbitrators.[14] The one the main criteria set in Section 497 of Civil Procedure Law provides that the arbitrator must have qualification of lawyer. Therefor it is topical, if the parties have agreed on non-lawyer as their arbitrator in the arbitration procedure despite those latest amendments, will such appointment influence the recognition and enforcement of arbitral award rendered by Latvian arbitration institutions? This question arises also because Latvia's Civil Procedure Law does not differentiate between international and national arbitral procedure, and this creates the issue of how these rules on the qualifications of arbitrators may be applied in international proceedings. As noted above, the domestic law is only applied if the arbitration agreement does not include relevant procedural rules but it happens very seldom. Therefore it is important to reply whether Section 497 of the Civil Procedure Law is imperative in the international arbitral proceedings, i.e., whether the norm is one which neither party can waive.[15]

Initially, it must be noted that such requirements for arbitrators as provided in the Section 497 of Civil Procedure Law are not a common phenomenon in the

national law, and the author has not found any similar examples anywhere else in the world.[16] On the contrary, national laws do not set out any limitations related to the qualifications of arbitrators, only stating that the parties are free to specify the way in which arbitrator are appointed.[17] The author believes that such amendments to the Civil Procedure Law are in violation of the principle of autonomy, because "*to ensure that the intentions of the parties prevail, all restrictions on their freedom of choice must either be limited or removed entirely.*"[18] The Latvian Constitutional Court has also ruled that "*some of advantages of an arbitration procedure are (..) the professional specialisation of arbitrators, the finality of the award, the ability to reach agreement on a procedure which differs from general jurisdiction courts, as well as confidentiality.*"[19] Currently, there are unjustified limitations in terms of the choice of arbitrators in Latvia. What, for instance, happens to an arbitration agreement in which the parties have stated that one of the three arbitrators must be an expert in relation to coffee and must have the education of a food technologist? Do these requirements in the Civil Procedure Law also apply to foreign arbitrators? If not, then could an engineer from Estonia be appointed as an arbitrator in a national dispute? If that is not possible, would that not be in violation of Article 3 of the European Convention, which states that foreign citizens can be appointed as arbitrators? All that this means is that the legislature has been too rushed in adopting amendments to Section 497 of the Civil Procedure Law without thinking about the justification for all of the requirements contained therein.

Sheppard has argued that the imperative procedural norms in terms of arbitration are the ones which do not offer the parties any alternative choices, i.e., norms which do not include the statement "*unless parties have reached another agreement.*"[20] In the Civil Procedure Law, for instance, these may involve rules about the termination of arbitrator's mandate (Section 503.1), the equality of parties (Section 505), etc., because these norms do not allow the parties to select an alternative or to reject the rules. Section 497 part 4 of the Civil Procedure Law states that a person who does not satisfy the requirements of the second paragraph of that section cannot be appointed as an arbitrator,[21] which means that during the national procedure, the parties cannot waive this rule in terms of putting opposing rules in their arbitration agreement. If an arbitrator does not satisfy the requirements of this section of the law, the court has the right to refuse to issue a writ of execution in accordance with Section 536 part 1 paragraph 6 of the Civil Procedure Law, which strictly states that "*a judge shall refuse to issue a writ of execution if the arbitrator does not satisfy the requirements of Section 497 part 2 of this law.*" Most importantly, that in the national process of compulsory execution of arbitral award the court can, at its own initiative, reject the issuance of writ of execution of arbitral award.

I tis suggested by the author that in international arbitral process[22] this norm of the Civil Procedure Law is not imperative. In international procedure, arbitrator has extensive freedom in terms of organising the arbitration process. First tribunal shall follow the parties' agreement and failing such agreement, the arbitral tribunal can conduct the arbitration in such manner as it considers appropriate. This includes the right to choose the most appropriate applicable procedural norms,[23] which means that an arbitrator can avoid the application of national procedural law and hear the case exclusively on the basis of the arbitration agreement or rules of arbitral institution. This is also confirmed by doctrine, which states that the authors of the New York Convention had intention that arbitration agreement prevails over any national rules, irrespective of whether or not those rules are imperative.[24] Article IV of the

European Convention also does not refer to the national law, thus facilitating the independence of the arbitral procedures from the national process. Consequently, it is not defence that, "*although the composition of the arbitral tribunal or the arbitral procedure was in accordance with the agreement of the parties, it was not in accordance with mandatory provisions of the law governing these matters.*"[25] For example, the respondent may argue that the arbitral award rendered by the Latvian arbitral institution should not be recognized and enforced in the foreign court because the parties' agreement that the dispute shall be settled by arbitrator- engineer contradicts the mandatory rules of Latvian civil procedure. Nevertheless, such respondent's position shall not be reason for non-recognition and non-enforcement of the arbitral award.

In some cases the failure to apply mandatory norms could be seen as a violation of international public order, however, as mentioned before, Section 497 of the Civil Procedure Law should not be treated as imperative in the international context. According to a recommendation from the International Law Association, international public policy includes fundamental principles to justice or morality, rules designed to serve the essential political, social or economic interests of the state and the duty of the state to respect its international obligations.[26] The violations of procedural public order in the recommendation include a lack of impartiality or corruption among arbitrators, as well as parties' unequal footing in the appointment of tribunal, but the aforementioned definition and examples do not refer to the qualifications of arbitrators. In addition, the recommendation also provides that the failure to observe the imperative norms does not *per se* give a reason to refuse to recognise the arbitration award.[27]

At the international level, it has been admitted that arbitrators, irrespective of their profession and education, must be able to make an enforceable arbitral award. Moreover, the examined Section 497 of the Civil Procedure Law cannot bind foreign arbitrator in an international arbitral process held in Latvia. It goes without saying that Section 497 of the Civil Procedure Law cannot be used as an excuse for a respondent's objection against an arbitral award recognized and enforced in the foreign court.

2.3 The principle of equal rights in appointing arbitrators

The principle of equal rights as part of a due process is a very important element, and according to Article V part 1 b) of the New York Convention, if this principle is not foreseen during arbitral procedure, recognition and enforcement of the arbitral award may be refused.[28] It is demonstrated by some of the foreign court cases. For example, in the "Dutco" case there were three parties participating in arbitral proceedings but arbitration agreement provided that two parties had to appoint an arbitrator, then they would agree on the chairman.[29] Taking into consideration that initial arbitration clause was drafted with intention that in the dispute only two parties will participate, it was proposed to two respondents agrees on one arbitrator. The respondents objected, arguing that as the claimant, Dutco must submit separate claims against each respondent and that this order of appointment of arbitrator violated the principle of equal rights for the parties. The tribunal made partial award in the case, but it was set aside by the French cassation court, which argued that indeed the principle of a due process had been violated, because the equal rights of the parties and the award in question were in violation of public order.

In another arbitration agreement, the parties agreed that the arbitrator must be a "respected member of the community of Ishmaelites", but after the dispute arised,

one of the parties appointed someone who was not a part of that community. The dispute over this procedural violation reached the Appeals Court of England and Wales.[30] After evaluating the arbitration agreement the court applied Council Directive 2000/78/EC (27 November 2000) defining a unified system in terms of equal attitudes toward employment and professions.[31] The aim of the Directive is to combat discrimination on the grounds of religion, beliefs, handicap, age or sexual orientation (Article 1). It must be added, however, that the principle of an equal attitude only applies to those categories, but it does not apply to the person's competence, education and ability to do the job (Paragraph 17 of the preamble to the Directive).

The appeals court ruled that the arbitrator was an employee in the sense of the Directive, because it is to be applied to all types of employment in the broadest sense of the word. The court found that the arbitration clause violated the principle of equal rights as the Directive applies to the public and private sectors and those sectors shall implement the principle of equal treatment (Article 3). Accordingly, the court acknowledged the arbitration clause void.

Consequently if, an arbitration agreement states that the arbitrator must be a man (or state any other limitation that is in the scope of Directive No. 2000/78), and then the relevant arbitrator makes an award, then the court can, at its own initiative, refuse to recognise and enforce the arbitral award because it violated public order in Europe (Article V part 2 b of the New York Convention). The respondent cannot make a reference to Article V, part 1 d of the New York Convention, if a woman is appointed in place of a man, nor can the respondent use this argument to suggest that the arbitrator violated the rules of the relevant arbitration agreement.

This means that when a foreign arbitral award has been recognised and enforced, with the respondent making objections in relation to this part of the New York Convention, the court must judge whether the arbitration agreement includes rules about the appointment of the arbitrators, what are the rules and the issue of whether the agreement has been violated.[32] The court must find whether the respondent has filed objections during the arbitration procedure in relation to this type of violation as the doctrine of "waiver" has been strengthened in the international and national arbitral procedure.[33] Namely, the foundation of this doctrine is the belief that if a party does not object against procedural violations, then it has lost all rights to file further objections. Objections must be filed within term provided in the rules of arbitral institution, and if the objections about the appointment of the arbitrator are not filed during the procedure, with the respondent being aware of the fact that the procedure was not in line with the rules, the court can recognise and enforce this particular arbitral award.[34]

It is also true that if a party has not participated in the arbitral proceedings, it cannot later complain that the procedure did not occur in accordance with the agreement, provided that the violation has not fundamentally influenced due process. There was a case, for instance, in which the respondent did not appoint an arbitrator in accordance with the arbitration agreement, and so the arbitrator was instead appointed by the arbitration institution in accordance with the rules of the institution.[35] Thus the case was heard by two arbitrators. The court rejected the complaint of the respondent that the process was held in violation of the arbitration agreement, because the respondent did not take a part in the process. The respondent's reference to the Italian Code of Civil Procedure, which states that there must be an odd number of arbitrators, was also rejected, as the norm applies to national procedures and is not of significant in the recognition of foreign arbitral award.

3 The arbitration process was not in accordance with the arbitration agreement or the law of the country where the arbitration took place

A court may refuse to recognise or enforce a foreign arbitral award if the respondent submits evidence showing that the procedure was not in accordance with the agreement between the parties or, if there is no particular agreement regarding the conduct of arbitral procedure in the arbitration clause, in accordance with the law of the country where the arbitration took place. The concept of an "arbitration procedure" must be interpreted very broadly, including everything that happens from the moment when the request of arbitration is submitted in the arbitration and until the post-award procedures are completed.[36] The Convention does not, however, provide possibility to appeal all procedural decisions made by a foreign arbitration institution. The aim of this norm is not aimed at refusing to recognize or enforce an award if the court called upon is of a different legal view than the arbitrators, weather or to hear a witness, to allow re-cross examination or how many written submissions they would like to allow.[37]

Pursuant Article V part 1 d of the New York Convention first the arbitration agreement shall be taken into account, then the rules of arbitral institution, and only then the law of the country where the arbitration took place should be applied. If, for instance, an international arbitration procedure takes place in Latvia, it is very possible that Section D "Arbitration" of the Civil Procedure Law will not apply. For example, an appeals court in Bremen rejected the respondent's objections that an arbitral procedure took place in Turkey but it was not in accordance with Turkey's Civil Procedure Law, because tribunal did not accept the respondent's request for the hearing and new evidences. The court held that the tribunal handled the procedure in line with its arbitration rules and that the parties to the case had agreed on application of those rules.[38]

There are fairly few examples in which arbitral awards have been refused to recognise and enforce in accordance with the Article V part d of the New York Convention as this norm is not categorical and it does not contain exhaustive list of the procedural violations making award non-recognizable. This, in turn, allows judges to apply the Convention in a very narrow way.

Nevertheless, there is one case in which the respondent has been successful thus it is worth a particular attention. When a dispute about a purchase agreement arose the parties agreed that the tribunal must render award within four months' time after the date when the arbitrators were appointed.[39] In the case at hand, the tribunal made an award 22 days after the deadline and for that reason a court set aside the award, and a claimant sued arbitrator the for compensation of damages. This case illustrates the principle enshrined in the Article V part 1 b of the New York Convention – that arbitration agreements are of the overriding importance. The parties provided a mandate for the arbitrators, and they were required to observe it precisely. Furthermore, it can be found that the deadline has been particularly important to the parties because of the specifics of the dispute. Yet, the question is whether those 22 days fundamentally influenced the outcome of the dispute and whether the tribunal would have handed down a different ruling 22 days earlier.

In another case, a court ruled that the fact that an arbitration hearing was not held in Shanghai, as had been agreed in the arbitration agreement, but instead in Beijing, was not of a decisive importance and did not have any effect on the legality

of the arbitral award.[40] There was a similar case in Latvia, in which the respondent claimed at the first-instance court, that the parties agreed to hold the arbitration hearing in Riga, Latvia, even though initially it had been agreed to do so in Stockholm and Stockholm was the place of arbitration as indicated in the arbitral agreement. The tribunal disregarded this fact, thus at the recognition procedure the respondent claimed there was violation of due process and the agreement between the parties. The respondent argued that because the arbitral process was not in accordance with the agreement between the parties, the recognition and enforcement of the award should be refused on the basis of Section V part 1 d of the New York Convention. The lower court ruled that the case file did not include any information about the fact that the parties amended the arbitration clause so as to determine a different place for the arbitration. Moreover, the arbitration rules provided the tribunal has the right to select a location of the hearing on its own after consultations with the parties. The lower court recognized the arbitral award.[41]

The appellate court disagreed, ruling that in accordance with Article 22 of the Swedish law on arbitration, the seat of an arbitration is determined by the parties or, if the parties cannot agree, by the tribunal. After examining the submissions, "*the Department of Civil Cases concluded that there was no evidence to suggest that the parties repealed their initial agreement on organising the arbitration hearing in Riga, instead agreeing that the session would be held in Stockholm. The Department of Civil Cases believed that the arbitrary initiative of the tribunal in ruling on procedural issues in a manner that was not based on the applicable legal norms or the agreed will of the parties can be qualified as a failure of the tribunal to observe the agreement between the parties. In accordance with Article V part 1 d of the New York Convention, the said circumstances create legal justification for a refusal to recognise and enforce the said award.*"[42]

The above examples demonstrate that Latvian courts tend to take a more formal approach to these matters than the foreign courts do. The appellate court, for instance, ruled that the law of the country where arbitration took place was of a greater importance than the rules of arbitral institution. These considerations also indicate that courts must rule as to how essential a violation of procedure is and how it affects the arbitral award. As noted, the New York Convention is meant to facilitate the recognition of foreign arbitral awards to the greatest possible extent.

Summary

- The recognition of a foreign arbitral awards can be rejected only in exceptional cases and only if, in accordance with Article V part 1 of the New York Convention, the respondent has submitted evidence to show that there are obstacles to recognize award. The court has the right, not the obligation, to refuse to recognise a foreign arbitral award, and no court can refuse to recognise such an award at its own initiative in accordance with Article V part 1 of New York Convention.
- When applying the rules of Article V part 1 d of the New York Convention, the court initially evaluates the procedures to which the parties have agreed in the arbitration agreement. This agreement is of the overriding force. If there is no such agreement or if the agreement has procedural deficiencies, then the rules of the arbitration institution must be applied.
- National procedural norms can be applied only if the parties have not agreed in arbitration agreement or the arbitration rules does not provide for the appointment of arbitrators procedure thus the domestic procedural norms are seldom

directly applicable to international arbitration procedure. If the parties have not reached another agreement, the national procedural norms do not become a part of the arbitration agreement directly nor indirectly.

- The failure to observe imperative norms of domestic law does not *per se* mean that there is a reason to refuse recognition of an arbitral award. In this context, Section 497 of the Civil Procedure Law, which addresses the professional criteria of arbitrators, will not be seen as an imperative norm in an international arbitral procedure, and this norm does not have to be applied to such procedure unless the parties have reached a different agreement.
- Arbitrators and parties in an arbitration must observe the procedures on which the parties have agreed, because otherwise the arbitral award may be refused to recognize. The procedural violation, however, must be substantial – one that has an influence on the results of the dispute. There must also be an examination of whether during the arbitration procedure a party has objected against procedural violations, because if that does not happen, the party loses the right to raise objections about this issue when the award is set aside or recognised. This is the case unless the court finds that there has been a due process violation.
- In their agreement, the parties cannot waive the principles of a fair process. If fairness and equality are not observed in rendering an arbitral award, then the court has a reason to refuse to recognize the foreign arbitral award but the respondent shall prove that Article V part 1 b of the New York Convention has been violated. If the court itself finds that the process was in violation of the international public policy then on its own initiative it may refuse to recognize and enforce foreign arbitral award in accordance with Article V part 2 b. Thus, for instance, the parties cannot agree on discriminatory criteria in their agreement when it comes to the religion, beliefs, differing abilities, age or sexual orientation of the arbitrator.

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[8] E.g., "Guidelines for Drafting International Arbitration Agreements", International Bar Association, 7 October 2010. Available: *http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#drafting* [last viewed 01.08. 2014].

[9] E.g.: "*Failing such agreement,(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6.*" 1985 UNCITRAL Model Law on International Commercial Arbitration. United Nations Commission on International Trade Law. U.N. Doc. A/40/17, Annex I, 21 June 1985, Article 11, part 3.

[10] 1961 Eiropas Konvencijas par starptautisko komercšķīrējtiesu: Starptautiska konvencija (The 1961 European Convention on International Commercial Arbitration: An International Convention), *Latvijas Vēstnesis*, No. 23, 12 February 2003.

[11] See International Centre for Settlement of Investment Disputes (ICSID), Arbitration Rules, Rule 3.

[12] *Castiniera, E. and M. Petsche*. "The Language of the Arbitration: Reflections on the Selection of Arbitrators and Procedural Efficiency," *ICC International Court of Arbitration Bulletin*, Vol. 17, No. 1, 2006, p. 38. ISSN No. 1017 284X.

[13] *Gaillard, E. and J. Savage* (eds.) Fourchard, Gaillard, Goldman on International Commercial Arbitration. Hague/Boston/London: Kluwer Law International (1999), p. 459 § 769. ISBN 9041110259.

[14] Amendments to the Law on Civil Procedure (taken effect on 1 January 2013), as implemented on 29 November 2012:

Section 497. Arbitrators

(1) An arbitrator is a person who, in conformity with the provisions of an arbitration agreement and of this Law, is appointed to resolve a dispute.

(2) Any person having the capacity to act may be appointed as an arbitrator, irrespective of his or her citizenship and place of residence, if such person has agreed in writing to be an arbitrator, has a faultless reputation, has completed a higher professional and academic education (except for a first-level professional education), has the qualifications of a lawyer, has at least three years of practical experience as an academic university specialist in the field of law or in another position related to the legal profession, and to whom rules referred to in the fourth paragraph of this section do not apply.

(3) Arbitrators shall perform their duties in good faith, without being subject to any influence; they shall be objective and independent.

(4) An arbitrator shall not be someone who:

1) Does not satisfy the requirements of the second paragraph of this section;
2) Has been a suspect or defendant in criminal proceedings related to a voluntary criminal offence;
3) Has been involved in criminal proceedings related to a voluntary criminal offence which have been ended on a non-rehabilitative basis;
4) Has been sentenced for a voluntary criminal offence irrespective of whether the said sentence has been vacated or eliminated;
5) Has previously committed a voluntary criminal offence but has been exempted from punishment because of an expiration of the statute of limitations, amnesty, or clemency.

[15] *Smit, H.* "Mandatory Law in Arbitration". In: Bermann, G. A. and L. Mistelis (eds.) Mandatory Rules in International Arbitration. Juris (2010), p. 207. ISBN 978-1-933833-66-8.

[16] The law on arbitration courts in China sets out specific criteria for arbitration judges. They must have at least eight years of experience as a lawyer or judge, or eight years of experience in relation

to arbitration courts. This does not, however, completely limit the rights of non-lawyers to become arbitration courts. See *Kurkela, M. and S. Turunen*. Due Process in International Commercial Arbitration. Oxford University Press (2010), p. 178. ISBN 9780195377132.

[17] 1985 UNCITRAL Model Law on International Commercial Arbitration, UN Doc A/40/17, Annex I, adopted by the United Nations Commission on International Trade Law, 21 June 1985, Article 11. See also Article 1451 of the French law on civil procedure, Article 1034 of the German law on arbitration courts, and Article 15 of the British law on arbitration courts.

[18] Fouchard, Gaillard, Goldman, *op. cit*., p. 456.

[19] Constitutional Court Decision in Case No. 2004-10-01: On the correspondence of Section 132.1.3 and Section 223.6 of the Law on Civil Procedure to Section 92 of the Constitution of the Republic of Latvia, *Latvijas Vēstnesis*, No. 3167, 18 January 2005, § 8.2.

[20] *Sheppard, A.* "Mandatory Rules in International Commercial Arbitration: An English Law Perspective". In: Bermann, G. A. and L. Mistelis (eds.), Juris…, *op. cit*., p. 192. See also "Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards," International Law Association, New Delhi conference, 2012, § 48.

[21] See Reference 12.

[22] For a definition and discussion of international arbitration courts, see *Kačevska, I.* "Starptautiskās komerciālās arbitrāžas tiesības" (*International Commercial Arbitration Law*), dissertation, University of Latvia, academic advisor Prof A. Fogels, Rīga, 2010, p. 19.

[23] 1985 UNCITRAL Model Law…, *op. cit*.

[24] Fouchard, Gaillard, Goldman, *op. cit*., p. 991. See also *Van den Berg, A. J.* The New York…, *op. cit*., p. 323.

[25] *Van den Berg, A. J.*, *ibid*., p. 327.

[26] Final Report on Public Policy…, *op. cit*.

[27] *Ibid.*, § 46.

[28] See *Kačevska, I.* "Taisnīga šķīrējtiesas procesa izpratne Ņujorkas konvencijā par ārvalsts spriedumu atzīšanu un izpildi" (Understanding a Due Process in the New York Convention On he Recognition and Enforcement of a Foreign Arbitral Awards). In: Inovāciju Juridiskais nodrošinājums. LU 70. konferences rakstu krājums (Legal Assurance of Innovations: Collection of Papers from the 70th University of Latvia Conference), Rīga: University of Latvia Academic Publishing House (2012), pp. 526-536, ISBN 978-984-45-542-6.

[29] French Cour de Cassation case: Societes BKMI et Siemens v. Societe Dutco, 7 January 1992. In the 18th Yearbook of Commercial Arbitration (1993), p. 140. ISBN 9789041104328.

[30] England and Wales Court of appeal (Civil Division), Case Jivray vs. Hashwani, 22 June 2010. Available: *http://www.bailii.org/ew/cases/WECA/Civ/2010/712.html* [last viewed 1 August 2014].

[31] O.V.L 3030, 2 December 2000, pp. 0016-0022.

[32] ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges (2010), p. 95. ISBM 9789081725118.

[33] *Kurkela, M. and S. Turunen*. Due Process…, *op. cit.*, p. 33.

[34] See Oberlandesgericht case: Manufacturer vs. Supplier, in liquidation, 15 March 2006. In: Yearbook Commercial Arbitration XXXIV, 2009, Kluwer Law International, pp. 525-531. ISBN 9789041128300.

[35] Corte di Cassazione, First Chamber, Case No. 17312: Nigi Agricoltura srl vs. Inter Eltra Kommerz und Produktion GmbH. In: Yearbook Commercial…, *ibid.*, pp. 412-414.

[36] *Jarvin, S.* "Irregularity in the Composition…", *op. cit.*

[37] ICCA's Guide…, *op. cit.*, p. 98.

[38] Bremen Hanseatisches Oberlandesgericht, case dated 30 September 1999. In: Yearbook Commercial Arbitration XXXI, 2006, Kluwer Law International, pp. 650-651. ISBN 9789065440037.

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[40] High Court of Justice, Queen's Bench Division, Commercial Court case Tongyuan (USA) International Trading Group vs. Uni-Clan Ltd., 19 January 2001. In: Yearbook Commercial Arbitration XXVI, 2001, Kluwer Law international, pp. 886-893. ISBN 9789041124036.

[41] Rīga Northern District Court, Case No. C32262711, 16 June 2011, unpublished.

[42] Rīga Regional Court, Department of Civil Cases, Case No. C32262711, 20 September 2011.