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Court Intervention Limits in Solving the Issue of Recognition-Enforcement of the Arbitral Award

The main purpose of the present work is to demonstrate main bases for intervention of courts in solving an issue of recognition-enforcement of the arbitral award. More attention will be paid to corruption, because it destroys main principles of public order of every civilized state that is firmly proved and condemned at the international level. In this work there are discussed main bases, when and within what limits a court can intervene in the decision of the arbitral court when an issue of recognition-enforcement of the decision is being solved. The harmonization of different jurisdictions in relation to this issue will decrease contradictions in practice of international conflicts resolution on issues connected with corruption and other grounds discussed in this article.
Key words: *recognition-enforcement, limits of court intervention, arbitral award, corruptive bargain, mediation agreement, minimal standard of intervention, maximal standard of intervention, intermediate standard of intervention.*

1. Introduction

International arbitration has been an alternative way of international dispute resolution for a long time. The role and importance of arbitration, as an alternative way of dispute resolution between parties is gradually increasing. "It can be said without exaggeration, that compared with state courts the advantage of alternative arbitral award of disputes and conflicts regulation caused from international private relations (and not only from these relations) is generally acknowledged, especially in the field of international economic relations, when one party does not confide the other party's judicial procedures''.[1] Participants of the private-law relations always agree that state intervention in their relations, however favorably this intervention must be, in the point of view of dispute resolution, will not hive such result, as applying to the alternative way of regulation by them.

In relation to the court proceedings there are lots of advantages of arbitration, such as: the capability of the parties to comply maximally a dispute resolution procedure with their demands and interests; to choose arbitrators on the basis of free will considering their qualification and peculiarity of the dispute subject; flexibility, effectiveness and quickness of the process; inadmissibility of appealing of the arbitral decision and others.[2] This latter is affirmed by the finality principle of the arbitral decision, which is a cornerstone of arbitration, as an institute and the most important value, which makes the above mentioned rule of dispute resolution more attractive and favorable.[3]

However in number of circumstances the observance of the finality principle might not be provided to the end and there will be arisen a risk of disaffirming the arbitral award or declining its recognition and enforcement. This risk might be arisen, when public order of the country is jeopardized by recognition or enforcement of the arbitral award. Inadmissibility of breaking of the last one serves to protection of lawful interests and reinforcement of law and order of the country.[4] Accordingly in resolving arbitration disputes two most important principles might be put on scales, inconsideration of either of them might damage fundamental interests of a private individual or a state.

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1 *Liluashvili T.,* International Private Law, Tbilisi, 2012, 167, (In Georgian).

2 *Tsertsvadze G.,* International arbitration, Tbilisi, 2012, 23, (In Georgian).

3 *Auf'mkolk H.,* US Punitive Damages Award before German Courts – Time for a New Approach, in: Freiburg Law Students Journal, Vol. 3, Issue 6, University of Freiburg, Freiburg, 2007, 4.

4 By International arbitration rules and national legislation, it is reinforced that a person might be refused to recognize and enforce the arbitral award, if this award contradicts public order of recognition–enforcement of the country: New York Convention 1958, Article V(2)(b) UNCITRAL Model Law 2006, Article 36(1).

Hence a problematic and actual question is which of them must be preferred to in this or that certain case, so that the balance between the two fundamental interests will be observed maximally and interests either of the litigant or of the country of recognition-enforcement not to be damaged, at the same time reliability and effectiveness of the arbitration institute not to be affected Because of complexity of the issue, it is logical that legislation of different countries and even courts belonged to the same jurisdiction have different approaches in deciding the above mentioned issue; that causes distinguishability and inhomogeneity of court practices.[5]

In practice, many forms might display disturbance of public order, such as, bribing of arbitrators and partiality; agreements contradicting morality principles or/and interests of the country, namely agreements concluded because of fraud and corruptive dealings etc.[6]

In practice when there is displayed the similar circumstance, a dispute might be caused at the stage of recognition-enforcement of the arbitration award. In such a case there might be two questions of crucial importance: *a) choosing suitable law by courts* – it comes from the fact that in legislation of different countries notions of public order and corruption are represented differently, which will have serious influence on the final result of the dispute; b) limits of *review of the arbitral award by courts* – different countries have different approaches and standards in relation to the limits of courts intervention, more exactly in relation to permissible evidence at judicial proceeding that might lead to radically different results.[7]

Therefore, the aim of this work is to study and show how a judge must select suitable law and what limits will be for court intervention in deciding the issue of recognition-enforcement of arbitral award. Accordingly, a conclusion will be made in connection with the most suitable and effective standard of court intervention limits, which will maximally provide balanced protection of two opposite fundamental values – principles of finality and public order. In order to reach the above-mentioned aim there will be used comparative law. In the present work, there is discussed and analyzed as legislation of different countries and court practice, as well as awards of the international arbitration tribunals.

The work consists of introduction, two chapters and conclusion. In the beginning, we are discussing courts intervention limits at the stage of recognition-enforcement of arbitral awards with positive as well as negative sides of different standards existed in relation to them and then based on comparative analysis we are trying to state which of them provides better protection and strengthening of fairness. After that, there are discussed grounds of reviewing of the arbitral award and finally the issue of comparative law and problems connected with this process.

2. Standards of Court Intervention Limits in Arbitral Awards

Arbitral tribunal is authorized to quash or refuse to enforce the arbitral award, if one of the grounds is stated by the international arbitration rules. According to V (2) (b) Article of New York Convention of 1958 on Recognition and Enforcement of Foreign Arbitral Awards and Article 36 (1) of UNCITRAL model law on international commercial arbitration it is provided that:

„The recognition or enforcement of the arbitral award will be refused, if the competent authority of the state, where recognition and enforcement is required, admits that recognition-enforcement of the award is contrary to the public policy of that country".[8]

The same clause is provided by Article 34 (2) (b) (ii) of UNCITRAL model law on international commercial arbitration, according to which the arbitral award can be quashed, if the award is in conflict with the public policy of this state. Accordingly, court is authorized to define the character of unlawfulness

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5 *Park W.*, Why Courts Review Arbitral Awards, 2001, 595, <http://www.williamwpark.com/documents/Why%-20Courts%20Review%20Awards.pdf>, [24.07.2016].

6 *Hwang M., Lin K.*, Corruption in Arbitration: Law and Reality, paper presented at Herbert Smith-SMU Asian Arbitration Lecture, Singapore, 2011, 51.

7 *Sayed A.,* Corruption in International Trade and Commercial Arbitration, Kluwer Law International, Hague, 2004, 391-421.

8 New York Convention, 1958, Article (2) (b); UNCITRAL model law, Article 36 (1).

and decide whether it is reasonable to enforce the award.[9] In deciding a question of recognition-enforcement of an arbitral award, the following important circumstance should be taken into consideration: internal tranquility and finality of the arbitral award. There are many opinions connected with these two issues, which should be foreseen inevitably.

The principle of finality of the arbitral award is reflected in most national and international arbitration rules.[10] This principle clearly reflects the spirit of the international arbitration, for example, dispute resolution without the opportunity of appealing. This principle has several advantages: avoiding discussion all over again on those grounds, which are already resolved in arbitration, growth of prognostication of dispute resolution in international arbitration and respect of transnational tribunals.[11] On the other hand public policy covers a wide circle of state interests and is separating from the aims of public policy to protect the finality principle of the arbitral award. For the case under discussion together with finality of the arbitral award the most important manifestation of public policy is banning of such agreements which contradicts morality principles or/and public policy, for example, agreements concluded in consequence of fraudulence and corruptive bargains. So it is clear that national courts are usually compelled to enforce agreements contradicting main interests of the state where the arbitration was made and fundamental moral values. Consequently this will undermine the unity of fair competition and public management.[12]

An important question arisen in deciding the issue of recognition-enforcement of an arbitral award is that whether court must investigate evidences once again or they must rely only on those evidences which they have already obtained and investigated in the arbitration proceeding. After receiving the arbitration award the party often denies the award on the ground that he/she got considerable evidence of corruption after completion of the arbitration proceeding or the tribunal did not properly investigate evidences, which confirmed corruption. Courts belonged to different jurisdictions have different approaches in deciding the issue of recognition-enforcement of an arbitral award. Limits of arbitral awards review by courts are the following: a) minimal standard; b) maximal standard; c) contextual (informational) standard.[13]

2.1. Standards Types

2.1.1. Minimal Standard

Courts guiding with a minimal standard of intervention, are studying and investigating corruption facts under influence of which arbitral awards are made. In spite of it in some cases it is possible that courts using the minimal standard of intervention might investigate a question connected with corruption and accordingly check up again laws and facts connected with the investigation results of the arbitral award.[14] The first possible version is when the party declares that the arbitral award was made on the basis of corruption and produces newly discovered evidence about it; the second version is a mistake made by the Arbitration Tribunal in using law and the third – fraudulence or compulsion.[15] All of them on different examples will be discussed below.

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9 *Takahashi K.,* Jurisdiction to Set Aside a Foreign Arbitral Award, in Particular an Award Based on an Illegal Contract: A Reflection on the Indian Supreme Court's Decision in Venture Global Engineering, in: American Review of International Arbitration 2008, Vol. 19, Issue 1, Columbia Law School, New York, 2008, 183.

10 German Arbitration Law 1998, Section 1055; Swiss Federal Code on Private International Law 1987, Article 190; English Arbitration Act 1996, Section 98.

11 Unites States Supreme Court, 83-1569, Mitsubishi Motors Corp. v Soler Chrysler-Plymouth Inc, 1985.

12 *Hwang M., Lin K.*, Corruption in Arbitration: Law and Reality, paper presented at Herbert Smith-SMU Asian Arbitration Lecture, Singapore, 2011, 51.

13 *Sayed A.,* Corruption in International Trade and Commercial Arbitration, Kluwer Law International, Hague, 2004, 391-421.

14 *Harbst R.*, Korruption und Andere Ordre Public-Verstöße als Einwände im Schiedsverfahren - Inwieweit Sind Staatliche Gerichte an Sachverhaltsfeststellungen des Schiedsgerichts Gebunden, Zeitschrift für Shciedsverfahren 2007, Vol. 17, Issue 1, Deutsche Institution für Schiedsgerichtsbarkeit, Frankfurt, 26.

15 *Hwang M., Lin K.,* Corruption in Arbitration: Law and Reality, paper presented at Herbert Smith-SMU Asian Arbitration Lecture, Singapore, 2011, 58.

First there will be analyzed a case, when courts are stating high-grade incompliance between the investigations of the Arbitral Tribunal and the awards made basing on them. A good illustration of this important aspect is case *Northrop v. Triad*[16], when court is intervening in the arbitral award within minimal standard.

The American defense company, Northrop Corporation, wanted to sell ammunition and supporting service to the government of Saudi Arabia.

For these reasons the company made a mediatorial agreement with two Liechtenstein companies, which were completely possessed by a famous businessman from Saudi Arabia Mr. Adnan Khashogi. A dispute was arisen because of amount of money which Northrop was asking to pay for the mediatory service. Northrop asserted that the award of Saudi Arabia was banning selling ammunition to the government of Saudi Arabia and accordingly the mediatorial agreement would not be fulfilled. Nevertheless the Arbitration Tribunal came to the conclusion that despite the order of Saudi Arabia according to California law (suitable law) Northrop was enforced to perform the agreement and consequently a decision was made, according to which amount of money for the mediatory service should have to be paid. Despite this, Northrop successfully denied the decision in the United States court, Federal District Appeal Court annulled the decision of the court of the first instance about disaffirming of the arbitral award. The Appeal Court decided:

. . . A simple mistake made in clarification of Californian law will not be an enough ground for justifying the refusal about execution of the arbitrators' decision. Judges should have respect to arbitrators' decisions on legal questions; legal questions were completely shortened and argumented for arbitrators; arbitrators deliberated upon the issue very carefully and decided it with an utmost tolerant opinion submitted in a written form.[17]

It is obvious that the court relied fully on the evidences found by the arbitration tribunal and did not discuss again a question of unlawfulness of the mediatory agreement.

Therefore this court decision shows high obligation of observance of the finality principle of the arbitral awards.

The similar approach of the court was shown in the case of *Thomson-CSF v Frontier* AG.[18] The dispute was connected with the essence of the mediatory agreement governed according to French Law. FrontiernAG must have acted according to French law in order to sell six frigates to Taiwan for transferring them to Thomson-CSF. The parties entered into agreement in 1990, when the government of France in spite of being against the transaction was obliged to satisfy the solicitation with China on selling frigates. Nevertheless in 1991 the government of France legalized the transaction again and did not satisfy the solicitation, after which Thomson-CSF obtained the right to sign the purchase agreement with Taiwan. After Thomson-CSF had refused to pay for service, Frontier AG applied to arbitration in Switzerland. Frontier AG asserted that the aim of the mediatory agreement was to deny the protest of high-ranking Chinese officials basing on legal activities carried out by Mr. Kwan with the purpose of lobbying. On the contrary Thomson-CSF asserted that Mr. Kwan was involved in corruption and was acting unlawfully to override a veto of France. In spite of this the arbitration tribunal denied factual circumstances connected with corruption and took a useful decision for Frontier AG. Thomson-CSF denied the received decision because of different reasons in the federal tribunal in Switzerland. Like *Northop v. Triad* case, one of the reasons of denying the decision was misusing of the law, namely the criminal code of France bans making a commercial contract, if it is made under the influence of something. The court in the reasoning remarked that although the legal norm "was used wrongly" and the refusal of the award was well grounded, it was not sufficient for vacating the arbitral award.[19]

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16 United States District Court, C.D. California, CV83-7945, Northrop Corp. v. Triad Financial Establishment, 1984.

17 Ibid, para. 1269.

18 ICC Rulings: ICC case No. 7664, Frontier AG v. Brunner Sociede v. Thomson CSF, Final Award, 1996; this case was discussed several times in national courts of different countries.

19 *Sayed A.,* Corruption in International Trade and Commercial Arbitration, Kluwer Law International, Hague, 2004, 400.

Accordingly, in the two above mentioned cases courts were compelled to intervene in arbitral awards and elucidate a corresponding law. On the issue *Thomson-CSF v Frontier* AG court was against reinvestigation of factual evidences found by the arbitration tribunal. Especially court denied the argument of Thomson-CSF, that the tribunal based on "the non-existed evidence", when Mr. Kwan's action was not creating corruption.[20]

Anyway there are general minimal intervention limits. These three confined cases will be discussed basing on the examples.

First we will discuss a scenario, when a court begins discussing again the investigation results of the arbitral tribunal basing on newly discovered evidence represented by the party. Strength of evidence can be defined by time or on the basis which of them is newer. The previous evidence might be recognized as inadmissible, because in hearing of the arbitration issue the evidence was available and a litigant was not able to produce it to the tribunal.[21] Westacre case will be a proper illustration of this question.

Westacre entered into the contractual relations with supporting Federal Government of the Yugoslav Socialist Republic (hereinafter - Directorate) and Yugoslav Bank, in relation of which Westacre was participating as a mediator with Kuwait Government on ammunition commerce. The obligation under the agreement was fulfilled in Kuwait according to Swiss legislation and the place of the arbitration proceeding was also Switzerland. After the Directorate had violated the agreement obligations, Westacre applied to arbitration. Directorate declared that Westacre was bribing with Kuwaitis for using their influence with the purpose of making commerce agreements. With this ground the directorate were saying that the agreement was opposed to international public policy and for this reason were demanding vacating of it. The arbitration tribunal decided that the evidences represented by them were not important for proving bribing and declined all the claims connected with bribing.[22] M Moreover arbitrators ascertained that according to Swiss law lobbying with own enterprise for making public agreement is not an unlawful action and does not contradict public policy.

The directorate filed a suit in the Federal Court of Switzerland and tried to annul it according to Swiss law. Litigants connected their suit again with corruption. The Federal Court of Switzerland remarked that they would be able to ground their argumentation only on facts, which are grounded by the Arbitration Tribunal and after the claims about bribing have been discussed and denied by the Tribunal, litigants' demands must be denied in this case too. The court ascertained that there was no ground for appealing and accordingly did not change the decision.[23]

At the stage of recognition-enforcement of the award the directorate appealed again the award in in the Supreme Court of England and later in the appeals court. Basing on the new evidence, which was not produced in the arbitration proceeding, the directorate announced in written evidence that the mediatory agreement was fraudulent for giving bribe to Al-Otaibi (mediator) through Westacre. According to them Westacre was acting as a carrier in order to maintain anonymity of Al-Otaibi and other public officials. Moreover the directorate declared that witnesses had given false testimony to Westacre for concealing a bribery fact in the arbitration proceeding. The judge Lord Justice Mantell remarked that a new claim was based on the facts, which had been known for the plaintiff in the arbitration proceeding and it could have been possible to produce them before the tribunal.[24]

Besides both courts remarked that the award is valid according to the law, which had been chosen by the parties (Swiss law) and, that the competence of decision-makers – Swiss arbitrators - is also undoubted. With it the court wanted to emphasize that court can only investigate anew those evidences which are newly evinced. Accordingly the arbitration award was enforced.[25]

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[20] *Hwang M., Lin K.,* Corruption in Arbitration: Law and Reality, paper presented at Herbert Smith-SMU Asian Arbitration Lecture, Singapore, 2011, 54.

[21] *Enonchong N.*, The Enforcement of Foreign Arbitral Awards based on Illegal Contracts, in: Lloyd's Maritime and Commercial Law Quarterly 2000, Vol.20, Issue 4, LLP Professional Publishing, Vancouver, 2000, 504 – 505.

[22] Westacre Investments Inc. v. Jugoimport – SDPR. Holding Co. Ltd, Arbitral Award, 1994.

[23] Swiss Federal Tribunal, Westacre Investments Inc v Jugoimport-SDRP Holding Company Ltd, 1996.

[24] The High Court of Appeal of England, Westacre Investments Inc v Jugoimport-SDRP Holding Company Ltd., APP.L.R. 05/12, 1999, para. 34.

[25] Swiss Federal Tribunal, Thomson-CSF v Frontier AG, 1997.

A second case of the minimal standard of court intervention is when the arbitration tribunal makes a mistake in using a law.[26] Appeals court case of Singapore *AJU v. AJT* is an exact example of the special aspect of the minimal standard intervention. AJU and AJT entered into contractual relations, according to which AJU was authorized to organize an annual tennis competition in Bangkok during five years. A dispute was arisen and AJT began arbitration procedure against AJU. Meanwhile AJU submitted an application about fraudulence in the special prosecutor's department of Thailand, according to which stated that AJT with a false document had failed to prove that they had had the right of organizing a competition. According to Thailand law fraudulence is considered as a compromised crime, while document falsification or using of a false document is not compromised. It means that the application would have only been finished with criminal proceeding in relation to fraudulence and not to falsification of the document.

At the following stage of study a file of the case the parties concluded a conciliatory act, according to which AJT would have to finish the arbitration procedure, if AJU represented the proof that they would withdraw, dismiss the case or would finish all the criminal cases in Thailand. AJU was also demanded to pay for conciliatory payment 470 000 US $. AJU performed all their obligations according to the conciliatory act. As a result of it government agencies of Thailand ceased criminal proceeding on fraudulence and because of the insufficient evidence about starting criminal proceeding there was not issued a writ based on the document falsification. Despite it AJT declined the ending of the arbitration proceeding. They declared that AJU had not fulfilled obligations foreseen by the conciliatory act when there had been the possibility of renewal of the proceeding connected with document falsification in case of submitting additional evidences.

AJU submitted an application to the arbitration tribunal on finishing the arbitration proceeding with the ground that the parties would reach the final agreement. On the other hand AJT raised a claim that the agreement had been invalid, based on compulsion, exorbitant influence and unlawfulness. On making award the arbitrators envisaged that the both parties' positions were represented considering advisers. Accordingly AJT must have known about the fact that ceasing of the criminal proceeding on the document falsification was still in hand of a public prosecutor and that ceasing of the proceeding was not a guarantee of the investigation completion. The tribunal also stated that the arbitration agreement was real and accordingly denied both claims and made an intermediate decision on termination of the arbitration proceeding.

AJT applied to high court for vacating the award on the ground of public policy. They asserted that the arbitral award was unlawful after it had been made only for one purpose. This purpose was to suppress criminal proceeding on falsification of the document and corruption was involved in not to issue a writ about starting criminal prosecution. The court denied the last ground and agreed on the previous on and therefore re-examined the investigation results of the arbitration tribunal about the authenticity of the arbitration agreement. After having re-assessed the evidences court came to the conclusion, according to applicable law (Singapore law) and according to law of the place of performance of obligations (Thailand law) that the arbitration agreement was unlawful and for this reason annulled the interlocutory award.

At the stage of appealing investigation key questions were: whether the court of the previous instance was right in re-investigation of evidences connected with the arbitration award and whether the judge came rightly to the conclusion that the arbitration agreement was unlawful.

The court examined two contradictious approaches of case-law of England: on the one hand, "small-dosed intervention", which was used in the case of *Westacre* and on the other hand, "more-dosed intervention", which was used in the case of *Soleimany v. Soleimany,* when they applied to a two-stage intervention method. Considering the finality principle of the arbitration award the court preferred the approach used in the case of *Westacre* and concluded that the court of the previous instance did not have the right to re-investigate the evidences, which had been already investigated by the arbitration tribunal. Afterwards the chief judge remarked that the arbitration tribunal had discussed all the important facts and the court had not been able to re-investigate or change the evidences investigated by the arbitration tribunal. The court had been entitled to do this only when there had been made a mistake in using the admissible law.

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[26] *Doraisamy R.*, AJU v. AJT: Drawing the Line for Judicial Intervention in Arbitral Awards, official legal opinion on AJU v. AJT case of Dueanne Moriss & Selvam LLP (law firm), 2012, 3.

So it became difficult when there was found the difference between the fact statement and conclusion on applicable legal question. In connection with it the appeals court in the conclusion on a issue of law clarified what meant a mistake in using a law. If the arbitration tribunal finds that the arbitration agreement was unlawful according to applicable law and despite it decides that it can be enforced in Singapore on the basis of agreement performance, which was unlawful according to applicable law that does not contradict to public policy of Singapore it will be ascertainment of the fact. So according to this scenario the court had the right to intervene and re-investigate the evidences of the arbitration tribunal in order to correct a mistake made in using a law.[27] From this consideration we can conclude that the second limitation connected with the approach of minimal standard of intervention is a mistake in the law, which from this example can be defined as ascertainment of the truth wrongly or the wrong explanation of public policy of the arbitration proceeding place.[28]

As opposed to it admitting the agreement to be unlawful is ascertaining the fact, which will not be a sufficient ground for intervention, unless there is not *„fraudulence, violation of natural law obligations or any other negative factors*".[29]

The third limitation of intervention using a minimal standard is those above-mentioned factors, which are discussed in the case of *Thomson-CSF v Frontier AG,* when this case after the refusal to annul the arbitration award on Thomson-CFS's claim came to the federal tribunal of Switzerland for the second time. The argue was based on the evidences investigated by French experts, which revealed that a real object of the interlocutory agreement was to exert influence on the Minister of Foreign Affairs of France in order to discuss again his declarations connected with commerce.[30] Mr. Kwan (mediator) concealed fraudulent machinations had been governed by French companions of Frontier AG. In spite of this, as it was already mentioned above, Frontier AG was declaring that Mr. Kwan was acting in order to deny solicitations of Chinese high-rank officials in a lawful way. So it became clear that Frontier AG had made a fraudulent action in presenting the evidence to the arbitration tribunal. The court stated that the arbitration tribunal had been misled by a procedural lie, which consequently had a direct influence on the arbitration award. As a result of it the federal tribunal of Switzerland annulled the arbitration award and presented the case for discussion first to the arbitration tribunal.

2.1.2 Maximal Standard

The usage of the maximal intervention standard in the arbitration award can be defined as perfect studying of factual circumstances of evidences investigated by the tribunal and using of the law.[31] The main basis of using this approach by courts is to protect main national values and interests depicted in public policy.

First, the main approach of intervention in the arbitration award using the maximal standard is investigation of the evidences again.

The court has the right to assess again factual circumstances of the evidences and to recheck not only the wrong usage, but also misinterpretation of the law.[32] Second, the court might admit that the evidence, which was accessible in arbitral proceedings, was not submitted to the tribunal by the litigant.[33] Third, the court has "full control" of review of factual circumstances connected with all the applications even if they

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27 *Doraisamy R.*, AJU v. AJT: Drawing the Line for Judicial Intervention in Arbitral Awards, official legal opinion on AJU v. AJT case of Dueanne Moriss & Selvam LLP (law firm), 2012, 4.

28 *Hwang M., Lin K.*, Corruption in Arbitration: Law and Reality, paper presented at Herbert Smith-SMU Asian Arbitration Lecture, Singapore, 2011, 55.

29 The Singapore Court of Appeal, SGCA 41, AJU v. AJT, 2011, para. 65.

30 The noted investigations were completed after the arbitration award had been appealed in the Federal Tribunal of Switzerland.

31 *Sayed A.,* Corruption in International Trade and Commercial Arbitration, Kluwer Law International, Hague, 2004, 24.

32 Ibid, 407-408.

33 *Enonchong N.,* The Enforcement of Foreign Arbitral Awards based on Illegal Contracts, in: Lloyd's Maritime and Commercial Law Quarterly 2000, Vol. 20, Issue 4, LLP Professional Publishing, Vancouver, 2000, 514.

are denied by the arbitration tribunal.[34] Several issues will be discussed below in order to elucidate special aspects of using a maximal standard of intervention in the arbitral award.

First of all we will discuss the well known case *Thomson-CSF v Frontier AG*, which was also discussed at the stage of enforcement in France by the appeals court of Paris.[35] Frontier AG submitted the arbitral award for enforcement in France after the federal tribunal of Switzerland had denied the solicitation of Thomson-CSF to annul the arbitral award.[36] The first instance court of Paris issued an order for enforcement the arbitral award, which was appealed by Thomson-CSF in the appeals court of Paris.

Thomson-CSF ascertained that the evidence submitted by Frontier AG to the arbitration tribunal was fraudulent and false that was against public policy and on this ground filed a claim with regard to criminal case demanding to investigate fraudulent machinations, in which companions of Frontier-AG were taking part. The plaintiff also demanded ceasing the proceeding, until the end of the criminal investigation.[37] The appeals court of Paris satisfied the demand and issued an order to cease the proceeding immediately (until disclosing the fraudulent machination), aiming at revealing fraudulence and that did not mean intervention with a minimal standard into factual circumstances of the evidences investigated by the arbitration tribunal. Besides the court noted that denying of the arbitral award on the ground of the international public policy was giving the court the legal right to investigate thoroughly the investigation results made by the arbitration tribunal with neglecting the fact whether the appellant would submit the evidence of proving fraudulence.[38] The court in its argumentation emphasized several times the importance values of public policy and decided that arbitrators were requested to have "capability to assess the factual circumstances and all the elements of choosing the law, which allowed them to justify especially the application in relation to the international public rule and define the lawfulness of the agreement on certain ground".[39]

The court made the same ground on the issue *Alsthom v Westman*[40], where the parties came into a mediatory agreement, according to which Westman was obliged to support the auction process of gas turbines of Althom to obtain the preliminary qualification status for doubtless oil-chemical projects in Iraq, Iran. After gaining the preliminary qualification status Westman demanded the service payment, but Alsthom declined to pay. Consequently Westman applied to the arbitration of the International Chamber of Commerce. In hearing of the arbitration process Alsthom was asserting that the mediatory agreement was unlawful with its intentions and aims considering the fact that the principal aim of this agreement was giving bribe to high-ranking officials. Despite this the arbitration tribunal made a decision that there had not been enough evidence for proving unlawfulness of the mediatory agreement and adopted a decision, obliging Alsthom to pay the service payment.[41]

Alsthom changed its name and was renamed European Gast Turbines (to avoid obscureness there will be used the old name Alsthom), demanded to annul the arbitral award before the appeals court of Paris. It ascertained that enforcement of the award was against public policy because of two grounds: first, the decision would enforce the agreement, which was disaffirmed and annulled after its main aim had been transportations based on influence and bribery; second, the arbitral award was based on false counting of expenditures submitted to the arbitration by Westman. To prove its position Alsthom represented new evidences, which could have been found in the arbitration proceeding, but was not represented to the tribunal. The

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34 *Sayed A.,* Corruption in International Trade and Commercial Arbitration, Kluwer Law International, Hague, 2004, 408-409.

35 Paris Court of Appeal, Thomson-CSF v. Frontier AG, 1998.

36 In spite of the above-mentioned fact this award was successfully annulled in the Federal Tribunal of Switzerland in appealing for the second time (see subchapter 1.1.1).

37 *Nicholls C., Timothy D., Bacarese A., Hatchard J.*, Corruption and Misuses of Public Office, 2. edition, Oxford University Press, Oxford, 2011, 310 – 311.

38 *Sayed A.,* Corruption in International Trade and Commercial Arbitration, Kluwer Law International, Hague, 2004, 60.

39 Paris Court of Appeal, Thomson-CSF v Frontier AG, 1999.

40 Paris Court of Appeal, Alsthom Gas Turbines SA v. Westman International Ltd, 1993.

41 *Timothy M.*, An International Arbitration and Corruption: Evolving Standard, in: Transnational Dispute Management 2004, Vol. 1, Issue 2, 38.

court asserted that the presented evidence was not sufficient for stating the corruptive nature of the agreement and decided that the second ground for vacating the arbitral award was reasonable. Accordingly the appeals court of Paris annulled the arbitral award on the ground of public policy.[42]

So the court on this issue was orienting on review of the investigation results of the arbitration tribunal. The judges admitted that they must have had to discuss unlawfulness of the main agreement, which had already been discussed by the arbitration tribunal. They also obtained new, but not newly manifested evidence, which could have been represented in the arbitration proceeding.

The present analysis shows that courts, which are using a maximal standard of intervention, show less compulsion to abstain from protecting the finality principle of the arbitral award and is more "solicitous for protection of the national values and policy".[43]

A maximal standard of intervention is shared by many European courts, such as, for example, Appeals Court of Brussels, Appeals Court of Hague, Higher Court of Dusseldorf[44] and Federal Court of Germany.[45] All of them admit that they are authorized to intervene into the arbitration award according to court rules.

However the latest practice shows that the approach of European courts in relation to the maximal standard of intervention has changed a bit. Below there will be discussed several issues where courts using the maximal standard of intervention are declining to use "total control" and accordingly are not adhering to the *de novo* principle, in other words are not reviewing anew factual circumstances of the investigation results of the arbitration tribunal and are not examining rightness of choosing the law. To illustrate this let's return to *Thomson-CSF v Frontier AG case* (which was ceased in 1999), the final arbitral award of which was made in 2010. In spite of revealing the corruption aim of the agreement, representing falsified documents and misleading the arbitration tribunal, Frontier AG started proceeding again and tried to enforce the arbitral award on the ground that the finality principle of the arbitral award would overweigh the values of public policy. The court denied this argument and refused to enforce it. Nevertheless in its substantiation court noted that the decision on re-investigation of results of the arbitration tribunal had been made as a result of procedural fraudulence.[46]

So in this issue in spite of obtaining the new evidence, the court applied to a minimal standard after having admitted the existence of falsified documents as one of restrictions of a minimal standard.

Apart from this the attitude of the appeals court of Paris of adhering to the *de novo* principle was withdrawing its own decision on the issue *SA Thales Air Défense v. Euromissile case*[47], where the court had made the decision based on public policy on the ground that the arbitral award can be reviewed by *de novo* principle and recognition and enforcement ofthis arbitralaward "willviolatethelawful order of France by the "inadmissible action", which is the obvious violation of main or fundamental principles.''[48] Accordingly in France there was not any longer the unanimous approach in relation to the maximal standard of intervention.

Similarly Courts of Germany in several issues were against using a maximal standard of intervention into the arbitral award. In the regional Higher Court of Hamburg a litigant denied enforcement of the arbitral award received in Swiss arbitration on the ground that the payable amount according to the agreement

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42 *Hanotiau B.*, Satisfying the Burden of Proof: The Viewpoint of a Civil Law Lawyer, in: Arbitration International 1994, Vol. 10, Issue 3, Oxford University Press, Oxford, 1994, 268-269.

43 *Sayed A.,* Corruption in International Trade and Commercial Arbitration, Kluwer Law International, Hague, 2004, 393.

44 *Hwang M., Lin K.,* Corruption in Arbitration: Law and Reality, paper presented at Herbert Smith-SMU Asian Arbitration Lecture, Singapore, 2011, 61.

45 *Harbst R.,* Korruption und Andere Ordre Public-Verstöße als Einwände im Schiedsverfahren - Inwieweit Sind Staatliche Gerichte an Sachverhaltsfeststellungen des Schiedsgerichts Gebunden, Zeitschrift für Shciedsverfahren 2007, Vol. 17, Issue 1, Deutsche Institution für Schiedsgerichtsbarkeit, Frankfurt, 26.

46 *Hwang M., Lin K.,* Corruption in Arbitration: Law and Reality, paper presented at Herbert Smith-SMU Asian Arbitration Lecture, Singapore, 2011, 62.

47 Paris Court of Appeal, No. 2002/60932, SA Thales Air Défense v. Euromissile, 2002.

48 *Gaillard E.*, Extent of Court Review of Public Policy, in: New York Law Journal, Oxford University Press 1994, ALM, New York City, 2007, 3.

was bribe and not the amount paid for service. Despite this the regional Higher Court of Hamburg acknowledged the right of the court, that intervention into the arbitration award was limited in relation to procedural mistakes and thus it was inadmissible to re-investigate the results of the arbitration tribunal.[49]

The same approach was fixed by the regional higher court of Bavaria, which took a decision, that it is generally banned for the court to change the evidence of the arbitration tribunal for its own evidence and emphasized the independence of the arbitration and the finality principle of the arbitration award.[50]

So, in spite of the fact that courts belong to the same jurisdiction, there might be different approaches connected with their intervention into the arbitration award.

2.1.3. Interim Standard

In order to keep the balance of the importance of public policy – on the one hand, for maintaining the international arbitration award and on the other hand, for suppression of corruption in the international commerce, in resolving the issue of recognition-enforcement of the arbitral award courts must be guiding with a contextual standard. The contextual review is a two-stage method of checking the award.[51]

A leading model of a two-stage system is offered in case *Soleimany v. Soleimany,* where English court after having examined thoroughly the arbitration award received by Beth Din at the enforcement stage, admitted the discussed questions to be corruption and the main agreement to be unlawful. It is interesting the opinion of Waller L.J.[52] in connection with this case, where he was explaining how the court must study the arbitration award, which could not state unlawfulness of the agreement presented before the parties. The court fixed *obiter dictum* opinion and remarked that for protection of public policy there should have been used a two-staged system. At the first stage the court should have defined whether a complainant would be able to submit *prima facie evidence* and after that would be guiding by the preliminary investigation (full-scale investigation) in order to see whether the arbitration award was reliable.[53]

Waller L.J noted that it was not necessary to investigate the case thoroughly at the first stage, because if the court had examined the case thoroughly from the very beginning, there would have been arisen the hazard of that harm, for avoidance of which the arbitration is directed''.[54] After the court has stated that the arbitral award is not reliable, *at the second stage* the full-scale investigation of unlawfulness will be begun.[55]

Westacre case can illustrate which factors must be discussed at the first stage in order to define it is necessary or not to use the second stage (at the second stage a question of lawfulness-unlawfulness of the final award is stated). Sayed is naming the following factors:

1) Suitable evidence for stating lawfulness-unlawfulness;

2) By what means could the arbitrator reach the unlawful decision;

3) Arbitrators' competence quality;

4) By what were guiding arbitrators? There will be stated very cautiously how the award was made by fraudulence, cheating the court or by.[56]

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49 High Regional Court of Hamburg, 6 U 110/97, 1998.

50 High Regional Court of Bavaria, 4Z Sch 23/02, 2003.

51 *Leong C.Y.*, Commentary on AJT v. AJU, Singapore International Arbitration Centre, 2010, 4.

52 He was a judge declaring a special opinion on the award made by the higher appeals court of England on case *Westacre.*

53 *Enonchong N.,* The Enforcement of Foreign Arbitral Awards based on Illegal Contracts, in: Lloyd's Maritime and Commercial Law Quarterly 2000, Vol.20, Issue 4, LLP Professional Publishing, Vancouver, 2000, 506.

54 Court of Appeal of England, 97/0882 CMSl, Sion Soleimany v. Abner Soleimany, 1999, para. 824.

55 *Leong C.Y.*, Commentary on AJT v AJU, Singapore International Arbitration Centre, 2010, 3.

56 *Sayed A.,* Corruption in International Trade and Commercial Arbitration, Kluwer Law International, Hague, 2004, 15.

In spite of this judge Waller in Westacre case developed a two-staged system and substantiated, that unlawfulness could have been revealed even at the first stage. Despite this in the opinion of the other judges unlawfulness can only been revealed at the second stage. At last judges came to the following conclusion:

First, it was directly represented to the arbitration tribunal that it was a commercial agreement. Second, arbitrators clearly expressed that the agreement was not unlawful. Third, the arbitrators' incompetence was doubtless. And finally it cannot be supposed that there was any unlawfulness in making the award.[57]

Accordingly the majority remarked that on *Westacre* case there had not been the necessity of conducting a full-scale investigation at the second stage even if the two-staged system had been suitable to this case.

Judge Waller L.J. explained that in deciding unlawfulness of the agreement (on both stages) the court had had freedom to discuss not only newly revealed circumstance but also the one that had been existed before, even those submitted to the arbitration tribunal. Such a wide authority on all kinds of evidence points out the maximal standard of intervention (in relation to the facts of court intervention and law). At the first stage evidences are not investigated thoroughly, which means considering evidences, investigated by the tribunal, according to the minimal standard.[58] So the contextual intervention standard takes an interim position between minimal and maximal intervention standards.

2.2. Opinions Connected with Advisability of Standards

It is very important to define which of the above-mentioned approaches is better to protect balance of two important aspects of public policy – adherence to the finality principle of the international arbitration award and suppression of corruption in the international commerce.

First of all we will begin our discussion with a minimal standard of intervention, which is greatly honored in the international arbitration and for protection of the finality principle of the arbitration award. In spite of the fact that by protection of the finality principle of the arbitration award many issues are honored and accordingly has many advantages, it is not debatable that the minimal standard of intervention denies other fundamental principles of public policy, for example, agreements made as a result of corrupt bargaining contradict public policy. For demonstrating weak points of the minimal standards we will take the already discussed case of *Thomson-CSF v Frontier AG.* For example, if the French or Swiss court enforced the arbitral award against Thomson-CSF before the completion of investigation of the criminal case (as we already know evidences connected with corruption have been revealed by investigation), Frontier AG would become unable to pay, after which the enforcement of the arbitral award would become unjustified and accordingly directed against public policy of France and Switzerland. Besides the results connected with it would not become abrogative after the impossibility of correction of harm caused to the fundamental principles of public policy of both countries.[59]

Accordingly, by the approach of the minimal standard the party, which managed to make a contract using bribery, in most cases (a subject of limitation of a minimal standard), will be able to enforce the arbitral award containing corruption.

In contrast to it, the maximal standard denies objectives of public policy for protection of the finality principle of the arbitration award. It is substantiated correctly that arbitration must not "ignore principles of

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[57] The High Court of Appeal of England, Westacre Investments Inc v. Jugoimport-SDRP Holding Company Ltd., APP.L.R. 05/12, 1999, para. 71.

[58] *Hwang M., Lin K.,* Corruption in Arbitration: Law and Reality, paper presented at Herbert Smith-SMU Asian Arbitration Lecture, Singapore, 2011, 66.

[59] Ibid, 74.

public policy".[60] Accordingly, the contextual review, which is taking an interim position between the maximal and minimal standards of intervention, will be a convenient means for maintaining the balance of two mutually opposed aspects. Below there will be discussed in short the convenience of this opinion.

If the court used the interim standard in *Thomson-CSF v Frontier AG* case and there were corruption in the mediatory agreement, it would be revealed anyway. Despite that the investigation of the case at the first stage is dictated by the basics, it would reveal several features of corruption. Besides the probability of revealing corruption is increasing at the second stage of the checking up process, which is offered by Waller L.J. in *Westacre* case, will have its influence, after "lawfulness nature" has been estimated at the first stage. As a result of it the court will investigate the evidences thoroughly at the second stage. Thus it is obvious that the interim standard of intervention gives a bigger opportunity of detecting corruption or some other unlawfulness than using a minimal standard.

On the other hand it is presumable that the first stage of the interim standard will protect the objectives of public policy in relation to the finality principle of the arbitration award, as at the first stage the evidences are not investigated in the plaintiff's favor. It means that if the arbitral award lacks reliability because of the represented evidences and argumentation, the court will investigate the evidences of the arbitration tribunal fully, which will be a guarantee of the reliable arbitral award.[61]

Finally I will discuss whether the two-staged checking is effective or not, which is offered by Waller L.J. in *Soleimany v. Soleimany* case or in Westacre case, where the judge expressed a special opinion. Commentators think that the latter has an advantage.[62] Excluding of "unlawful nature" at the first stage means that if arbitration acts according to "the high standard of the arbitrators of the International Chamber of Commerce"[63] and there is no doubt about partiality of the arbitrators, the court will not begin the second stage and satisfy the award despite the seriousness of unlawfulness. For example the plaintiff in *Thomson-CSF v Frontier AG* case declared that Minister of Foreign Affairs of France was involved in a corruptive machination, but other factors studied at the first stage were balanced rightly. If the approach used in *Soleimany v. Soleimany* were suited to this scenario, then the court would not have the right to study the case fully at the second stage and consequently the agreement containing corruption would not be fulfilled.[64] On the contrary to it for protection of the finality principle of the arbitration award the court must enforce the arbitral award, if factors arisen after the first stage are balanced accurately and there is no serious statement connected with unlawfulness.

In spite of this the commentators are declaring that Waller L.J. has gone even farther saying that the court must not consider the evidence submitted to the arbitration tribunal either. In this case Waller L.J.'s vision is excessively extreme and violates the finality principle of the arbitration award.[65]

On the contrary the majority thinks that intervention into the arbitral award can be only justified in case of representing the newly revealed evidence.[66]

So we can conclude that the interim approach, which allows courts to intervene into the arbitration award, where there is newer evidence, not inevitably revealed, is the most suitable standard for keeping the balance of the above-mentioned two aspects.

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60 *Hanotiau B.,* Satisfying the Burden of Proof: The Viewpoint of a Civil Law Lawyer, in: Arbitration International 1994, Vol. 10, Issue 3, Oxford University Press, Oxford, 1994, 804.

61 *Hwang M., Lin K.,* Corruption in Arbitration: Law and Reality, paper presented at Herbert Smith-SMU Asian Arbitration Lecture, Singapore, 2011, 76.

62 Ibid, 76-77.

63 The High Court of Appeal of England, Westacre Investments Inc v. Jugoimport-SDRP Holding Company Ltd., APP.L.R. 05/12, 1999, para. 70.

64 *Enonchong N.,* The Enforcement of Foreign Arbitral Awards based on Illegal Contracts, in: Lloyd's Maritime and Commercial Law Quarterly 2000, Vol.20, Issue 4, LLP Professional Publishing, Vancouver, 2000, 800.

65 *Hwang M., Lin K.*, Corruption in Arbitration: Law and Reality, paper presented at Herbert Smith-SMU Asian Arbitration Lecture, Singapore, 2011, 77.

66 *Enonchong N.,* The Enforcement of Foreign Arbitral Awards based on Illegal Contracts, in: Lloyd's Maritime and Commercial Law Quarterly 2000, Vol.20, Issue 4, LLP Professional Publishing, Vancouver, 2000, 199.

3. Possible Cases of the Court Intervention

By the result of the arbitral award one of the parties always remains unsatisfied.[67] The arbitral party does not often agree with the arbitration decision directed against it, does not perform the imposed obligations and appeals the decision, which was made against it, in a court on this or that ground for the purpose of vacating the arbitration decision. In the international arbitration law and the national arbitration legislation there are a number of grounds for vacating the arbitral award. In this chapter there will be discussed those important grounds, which are given in a UNCITRAL (United Nations Commission on International Trade Law) model law and shared with the Georgian law on arbitration, namely: partiality of arbitrators, violation of the procedural rights by arbitrators of the arbitral party and solving a question beyond the arbitrators' competence. It is also important to discuss a case, when a court is intervening into the arbitration decision, when it is made basing on corruption or/and fraudulent bargains. Though the latter is not foreseen directly by UNCITRAL model law and the Georgian law on arbitration, but because of the complicated corrupt situation in Georgia and its actuality it is important to discuss it.

In UNCITRAL model law grounds for vacating the arbitration decision are strictly limited. Nevertheless in reviewing the arbitration awards states are trying to suit the national legislation to the model law and decrease the grounds for vacating the arbitration award. Such an approach was favorable for parties; therefore it was an incitement for them to make international arbitration agreements, as there was no ground or very few grounds for vacating the arbitral award.

The model law does not consider substantive intervention in the arbitration decision, though many states admit such an approach. Substantive review of the arbitrators' decision implies various forms of review and different rates of intervention. But as it was already noted, because of the problematic nature and spreading of corruption in Georgian reality and international practice, a special attention was paid to decisions connected with this question; that is why there were discussed limits of court intervention in decisions on cases connected with corruption. All these substantive interventions differ fundamentally by the grounds of the model law. They are connected with correctness of the arbitrators' final decision, rather than complaints submitted in the process of arbitration.

For the last several decades according to the UNCITRAL model law and also the United States of America has refused to intervene in the arbitration award with a substantive form. A central element in the modern international arbitration process is the shortage of grounds of intervention in arbitral decisions.[68]

Such approach to the intervention into arbitral awards is envisaged by England, Ireland, China, Australia, Singapore, Abu-Dhabi, Libya, Saudi Arabia, Egypt and the United States of America. In addition, in other legal space courts agree to intervene in those circumstances of the case, on the ground of which the arbitral award was made and intervene for protecting public policy and with a motive whether the arbitrators exceeded their competence or not.[69]

3.1. Recognition-enforcement and Vacatur as Concrete Mechanisms of Court

3.1.1. Partiality of Arbitrators

One of the grounds for refusal of recognition and enforcement of an arbitral award might become the partiality of arbitrators. On submitting a motion connected with arbitrators' partiality courts are saying that a fact of "showing arbitrators partially" is a sufficient ground itself; but instead of it there must be "evident partiality", i.e. an arbitrator must have really done a partial action.[70] There are at least three judicial interpretati-

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67 *Mcilwarth M., Savage J.,* International Arbitration and Mediation, A Practical Guide, Kluwer International, Hague, 2010, 327.

68 Hall Street Assoc., LLC v. Mattel, Inc. 128 s. Ct 1396 (U.S. S. Ct. 2008), 341.

69 *Born G.,* International Commercial Arbitration, Kluwer International, Hague, 2009, 2637-38.

70 ICCA Guide book on definition of New York Convention of 1958: reference book for judges, International Council for Commercial Arbitration, Hague, 2011, 151.

ons regarding evident partiality: (1) an "appearance of partiality" standard, (2) an "actual partiality" or can be called interest standard, and (3) a "reasonable impression of partiality" middle-ground standard.

However courts have worked out these three standards there is no common approach for definition of evident partiality.[71]

Most arbitration acts are concretizing what is meant in arbitrators' partiality. According to Article 12(2) of UNCITRAL model law "appointment of an arbitrator is possible to be appealed only in case if there are circumstances causing grounded doubts connected with the arbitrator's impartiality and independence or if the arbitrator does not have qualifications agreed by the parties. The party is authorized to decline the arbitrator appointed by it or the arbitrator, in whose appointment it was participating itself only for the reason which became known for it after the appointment".

This approach is also shared by other national legislations. According to one of the decisions of the United States of America an arbitral award must be vacated, "if the interested party confirms that an arbitrator was partial to any of the parties of the arbitral process". Analogously according to English Law the adopted standard of partiality is there, where exists a great probability and the opportunity of partiality", or "where a fair and informed supervisor" can conclude that there is "a real opportunity".[72]

There are different grounds for revealing arbitrators' partiality. *Compulsory appointment of an arbitrator* – this is a case, when an arbitrator does not consider a case in its own discretion, i.e. in this case parties agree that this or that arbitrator will consider an arbitration dispute but with the ground of making some influence on the party the arbitrator is forced to conduct case. As a rule courts don't enforce the arbitral awards adopted in such a way. *Financial interest in the dispute* – in such a case an arbitrator is interested in the arbitral award, because as a result of it he/she he expects a financial profit. *Current joint work* – in such a case an arbitrator and an arbitration party might have labor relations. *Preliminary intervention in the dispute* - one of the reasons for grounding of partiality is the preliminary intervention of an arbitrator in the dispute as a corporation official, an advocate or a witness. *Domestic or personal relations with the arbitration party* – an arbitrator's relation with an advocate also causes disqualification of the arbitrator. *Business relation with the arbitration party* – if the party and the arbitrator have considerable business relations, it will be partiality, but if their activity is insignificant, it will not be counted as the arbitrator's partiality. *Contact during the arbitration process* – the party's independent contact with an arbitrator is banned by many institutional rules and codes of arbitrator's ethics. *Appointment of an arbitrator repeatedly by the same party* – if an arbitrator is appointed repeatedly by the same party or advocate, it might cause a grounded doubt that the arbitrator is partial. *Conflict of issues* – in this case an arbitrator might have expressed his/her opinion with the current dispute.[73]

In order to state evident partiality of arbitrators it is necessary to define from where the uncertainty connected with their activities starts. In *Commonwealth Coatings Corp. v.Continental Casualty Co.* the Supreme Court in 1968 noted that in this case the Supreme Court was acting in connection with an issue of impartiality, which is inevitable necessity for any judicial proceeding and is used in an arbitration dispute. In spite of the fact that the court gave a positive answer to that question, that arbitrators' impartiality was one of the main grounds for enforcing an arbitral award, the definition of a partiality standard was not clear anyway.[74]

In Chapter 3 (Articles 10-15) of UNCITRAL model law there is given in detail a procedure of appointing of an arbitrator, which will strengthen a question of arbitrators' impartiality and independence.[75] Many legal systems vacate an arbitral award, if an arbitrator does not meet the relevant standard of impartiality and independence. These grounds of vacating an arbitral award are not given word-for-word in Article 34(2) of UNCITRAL model law or in Article V of the New York Convention, and several arbitration acts contain expressively the

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71 *Windsor K.,* Defining Arbitrator Evident Partiality: The Catch 22-of Commercial Litigation Disputes, <http://scholarship.shu.edVau/cgi/viewcontent.cgi?article=1033&context=circuit_review>, [25.05.2015].

72 ASM Shipping Ltd of India v. TTMI Ltd of England [2005] EWHC 2238 (Comm.) (Q.B.).

73 *Born G.,* International Arbitration: Law and Practice, Kluwer International, Hague, 2012, 134-135.

74 Ibid. 195.

75 UNCITRAL Model Law on International Commercial Arbitration, Explanatory Documentation prepared for Commonwealth Jurisdictions, The Commonwealth Secretariat, London, 1991, 5.

above-mentioned grounds for vacating an arbitral award. Despite it a plaintiff's claim in connection with impartiality might be based on Article 34(2)(a)(ii) of the model law, because a partial tribunal denies the opportunity of the arbitration party to represent his/her case; it may be also based on Article 34(2)(a)(iv) because a partial tribunal is not established according to the agreement of the parties or suitable law; similarly it can be based on Article 34(2)(b)(2) of the model law, as a partial tribunal violates procedural principles of public policy. Here must be noted that all the above-mentioned grounds are connected with challenges of arbitrators.

As opposed to UNCITRAL model law the Federal Arbitration Act (FAA) of America contains several formulations stated by law, which are exactly when an arbitration tribunal concretizing what is meant when an arbitration tribunal does not meet the main principles of a fairness standard. According to Article 10 of the Federal Arbitration Act an arbitral award must be vacated, if there was "evident partiality" or arbitrators were guilty or they misbehaved and as a result of this action the party's interests were harmed" (Paragraph 10).

Though it is not expressed explicitly in the law that partiality and dependence of arbitrators might become a ground for vacatur of an arbitration award, almost all the national courts admit the above-mentioned ground for vacatur of an arbitration award. Impartiality of a tribunal is a central issue of the arbitration process, as in most legal systems it is admitted that an award made by a partial arbitrator will not be enforced.

Challenge of an arbitration award grounded on partiality of arbitrators might give rise to such issues, as disclaim a right and/or obstacles to carrying out actions. In many legal systems (including UNCITRAL model law) partiality can be risen in national courts during the arbitration proceeding, before making an arbitral award. Moreover, many institutional rules provide for a challenge procedure, by means of which an arbitrator might be challenged from the arbitration process. In such cases the submitted application will be discussed before making an arbitral award.[76]

If the party fails to challenge an arbitrator on the ground of partiality according to some law or an institutional mechanism, in spite of the factual ground of the challenge being notified, there will be made a decision to refuse an application of the party asking for vacating the arbitral decision on the same grounds. In such a case an arbitration party is appealing the arbitrator's partiality before making an arbitral award.[77]

However there are cases when after receiving the arbitration award the arbitration party discovers facts, which for him/her would not have been known in advance. These facts are based on arbitrators' partiality. In such cases there might be grounds for vacatur of final arbitration award even in those jurisdictions (including UNCITRAN model law), where challenge of an arbitrator in the course of the arbitration process is a usual procedure.[78]

When the party is basing on challenging procedures in the course of the arbitration process, strengthened at law level and regulated at institutional level, and an arbitrator is not challenged, there will be arisen an obstacle of carrying it. When court acting on the territory of arbitration refuses an application on the ground that there is not sufficient evidence for confirming arbitrators' partiality, this interim application will be persuasive for vacatur the arbitration award.[79]

In some legal space (especially in the United States of America) it is impossible to submit an application connected with an arbitrator's partiality in course of the arbitration process and the party has only one opportunity to submit it after an arbitration award is made and to demand to vacate the award on the same ground. In these cases the party should archive and submit his/her application at recognition-enforcement stage of the arbitral award requesting to vacate it.[80]

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76 *Born G.,* International Arbitration: Law and Practice, Kluwer International, Hague, 2012, 323-324.

77 AAOT Foreign Economic Ass'n (VO) Technostroyexsport v. Intl'l Dev. And Trade Sers. Inc., 139 F.3d 980 (2d Cir.1999).

78 Judgement of 14 March 1985, DFT 111 Ia 72 (Swiss Federal Tribunal); Judgement of 12 December 1996, 1998 Rev. arb. 699 (Paris Cour d'appel), Judgement of 23 March 1995, 1996 Rev. arb 446 (Paris Cour d'Appel).

79 *Born G.,* International Commercial Arbitration, Kluwer International, Hague, 2009,, 2613-16.

80 *Born G.,* International Commercial Arbitration, Kluwer International, Hague, 2009, 325.

3.1.2. Violation of Procedural Rights of the Arbitration Process Party by Arbitrators

Vacatur of the arbitration award is possible, if in conducting an arbitration process the arbitration tribunal did not give the defeated party the opportunity of submitting his/her case properly. According to Article 34(2)(a)(ii) of UNCITRAL model law an arbitral award can be vacated "if a petitioner was not informed properly about appointment of an arbitrator or arbitration proceeding or otherwise was restricted to represent his/her own position".

Vacatur of an arbitration award depends on the refusal, on what an arbitrator dismisses the arbitration party to carry out the proper action and give the opportunity to perform procedural issues agreed by the parties. It is a fundamental question that an arbitral award can be vacated because of breaching of imperative legal norms of suitable law regardless of parties being agreed or not on it. It is also important for the parties to define obligatory norms of their arbitration agreement, which they must perform in order to be more guaranteed in carrying out their rights.[81]

The question under discussion concerns whether breaching of a procedural legality standard is a ground of vacating of the arbitral award or not according to the above-mentioned Article and whether local law of the arbitration proceeding states or not such a standard. Most courts have stated that local standards of a fair process must be foreseen for vacatur of the arbitral award.[82] At the same time most have emphasized that in local disputes it is not necessary to use local procedural law; the main point is the observance of fundamental principles of justice.

Guarantees connected with several procedural issues are foreseen by Article 34(2)(a)(ii)of model law: a) right of equal treatment; b) proper opportunity of representing the case; c) being in lawful conditions. These guarantees are considered to be main grounds for protection of procedural rights.[83]

Arbitral awards made on the ground of the above-mentioned article and national courts pursuant to this approach are vacating an arbitral award because of procedural violation of arbitrators. It is especially real when procedural questions are agreed by the parties. It is autonomy of parties recognized by the international arbitration and by Article V(1)(d) of New York Convention. There are limited circumstances when the agreed processual procedures will be admitted so unlawful that it will be considered as violation of procedural norms, but such case is very rare.

An important question is also respect for discretional rights of arbitrators. In case when parties are leaving carelessly procedural issues, national courts are careful towards the processual procedures passed by the arbitration tribunal.

Most arbitration regimes demand from the parties to protect their processual rights in the course of the arbitration process, so that to use it afterwards as a ground of their request of vacatur of the arbitral award. Many institutional rules demand from the parties in case of violation of their processual rights to report immediately about it; though without it the national court will come to the same result anyway. So courts stated, if parties fail to submit an application at once, they will have to prove it on demanding vacatur of the arbitration award.[84]

It is a mistake of the arbitration tribunal, when the arbitration process is not carried out in compliance with the procedure agreed by the parties that causes vacatur of the arbitration award. According to Article 34(2)(a)(iv) of UNCITRAL an arbitration award will be vacated, "if the arbitral tribunal or the arbitration procedure is not in compliance with the agreement of the parties, with the exception of the case when the above--mentioned agreement is not in compliance with the ordinance of this law or in case of non-existence of such agreement it was not in compliance with the law." The similar clause is foreseen by V(1)(d) Article of the New York Convention and in other arbitration acts. Jurisdictions, which don't have these questions regulated

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81 *Born G.*, International Commercial Arbitration, Vol. 2, Kluwer International, Hague, 2015, 2573-75.

82 Int'l Transactions Ltd v. Embotelladora Argal Regiomontana, 347 F.3d 589, 594 (5th Cir. 2003).

83 *Born G.,* International Commercial Arbitration, Kluwer International, Hague, 1770-73, 2572-78.

84 Lucent Tech ., Inc. v. Tatung Co., 379 F.3d 24, 31 (2d Cir. 2004).

at a legal level, will review the procedures agreed by the parties according to general principles and if they find that the processual rights of the party are violated by arbitrators, will vacatur the arbitration award.[85]

Arbitration agreements sometimes contain the arbitration procedure composed by the parties according to their needs. Most courts stated that ignoring this agreement by the tribunal might cause vacatur of an arbitral award. On the contrary Swiss courts stated that violation of procedural issues agreed by the parties will not cause vacatur of an arbitral award.[86] This vision is hard to be shared, because, in case of sharing the autonomy of the parties will be violated.

Most courts demand to consider the importance of the question of violation of procedural rights, in order not to vacate an arbitral award because of violation of an insignificant processual right.[87]

Another ground for vacating an arbitral award is also a case, when an arbitral award is not made in a proper timeframe. According to some arbitral agreements an arbitral award must be made in a limited period of time rather than it is by an arbitration act. In practice national courts often deny the party's petition about vacating of an arbitral award on the ground that the tribunal did not make the decision in the proper terms.[88]

Finally most courts deny the argumentation that arbitrators made a mistake not having performed the procedure chosen by the parties with the purpose that there was not chosen the right law. When an arbitrator is obviously denying conducting an arbitration process according to the chosen law and instead of it applies to the other legal system, in such a case he/she has a mandate to define the essence of the dispute. In such cases the subject of court intervention will be the same as in other essential decisions.[89]

3.1.3. Solution of Questions about Exceeding Limits of Arbitrators' Competence

According to most legal systems, an arbitral award can be vacated when an arbitrator solves the existed issue beyond its limits, i.e. beyond the limits of his/her competence. According to Article 34(2)(a)(iii) of UNCITRAL model law an arbitral award can be vacated "if the arbitral award is made on a dispute, which was not considered by arbitral agreement or concerns an issue, exceeding the limits of the arbitration agreement, considering that if it is possible to separate issues subjected to arbitration from the ones, not subjected, an arbitral award will be only vacated in that part, which contains decision on the issues not subjected to the arbitration". This ground for vacatur of an arbitral award is also given in Article V(1)(c) of the New York Convention and is shared in many arbitration acts.[90] This ground is directly for cases, when a real arbitration agreement exists, but issues settled by the tribunal are exceeding the range of issues considered by the arbitration agreement or exceeding the range of issues represented by the parties to the tribunal. Disputable is also an issue – when a mistake was made by the arbitration in order to prove exceeding of the limits of its competence.

The most usual case of vacating of an arbitral award according to Article 34(2)(a)(iii) of UNCITRAL model law is a case when arbitrators are settling an issue, which was not submitted to them. This case is referred to as *extra petita* or *ultra petita,* issues, not submitted by parties and if such issues are settled by arbitrators, the awards will be vacated by most national courts.[91] In spite of it in practice courts are reluctant to take evidences about exceeding of limits of competence by arbitrators. A disputable question arises for vacating the arbitral award, when the tribunal is applying those issues or satisfies that requests, which were not submitted by the parties.[92] Doubts about requests submitted by parties are ceased as a rule, depending on kinds of interpretation made by arbitrators of issues submitted by the parties.

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85 *Born G.,* International Commercial Arbitration, Kluwer International, Hague, 1747-57, 2596-98.

86 Judgement of 16 March 2004, 22 ASA Bull. 770, 779 (Swiss Federal Tribunal).

87 Karaha Bodas Co. v. Perusahaan Pertambangen Minyak Dan Gas Bumi Negara, 190 F.Supp.2d 936, 945 (S.D. Tex. 2001).

88 Fiat SpA v. Ministry of Fin. And Planning, 1989 U.S. Dist. Lexis 11995 (S.D.N.Y. 1989).

89 *Born G.,* International Arbitration: Law and Practice, Kluwer International, Hague, 2012, 322.

90 See: Netherlands Code of Civil Procedure, Art. 1065 (1)(c); Belgian Judicial Code, Art.1704(2); Japanese Arbitration Law, Art. 44(1)(x).

91 *Born G.,* International Arbitration: Law and Practice, Kluwer International, Hague, 2012, 2605-09.

92 Coast Trading Co. v. Pacific Molasses Co., 681 F. 2d 1195, 1198 (9th Cir. 1982).

Courts are negatively disposed especially to adopt arguments connected with misinterpreting of a norm, ignoring or denying it for carrying out the action, which is directly connected with the agreement made between the parties; in such a case the arbitration tribunal exceeds its competence limits and court takes a decision to review those circumstances on the ground of which the arbitral award was taken. The noted case is not considered as exceeding of the competence limits of arbitrators; it is considered as taking the wrong arbitral award in carrying out their competence.[93]

The noted fact became a ground of the arbitral award on *Lesotho Highlands Development Authority v. Impregilo SpA* case, where the House of Lords denied an argument that the tribunal had used English Law instead of the agreement conditions between the parties that was exceeding of the competence limits and which, according to Paragraph 68 of English Arbitration Act, became a ground for vacating the arbitral award. Lord Steyn-declared that "in Paragraph 68 there is not meant anywhere that a mistake of the tribunal may be counted as "the right decision" and there can be the possibility of disputing about the basis of the above-mentioned article".[94] When the both opinions are right, courts nevertheless don't admit discussing the mistake as the exceeding of the competence limits.

The arbitral award will be also vacated, if issues are not considered by the arbitration agreement. Generally a scope of usage of the arbitration agreement should be discussed in this case.[95] It is important that party, which was basing on this ground for vacating of the arbitral award, presented a complaint connected with using of Law in the course of the arbitration proceeding.

Finally It should be noted that the arbitration tribunal does not consider the issues presented to it (so called *infra petita*), the arbitral award can be vacated according to some national lgislation.[96]

3.2. Arbitration Award Made on Corruption or/and Fraudulent Bargains and Grounds of Appealing It

It is obvious that fraudulence will cause vacating of an arbitral award according to Article 34(2) of UNCITRAL model law (and other arbitration legislation). The mode law does not explicitly imply that fraudulence might become a ground for vacating of an arbitral award, but the history of its creation makes it clear that fraudulence might have been admitted as a ground for vacating of an arbitral award (considering public policy). Similarly arbitration legislation, in which UNCITRAL model law is not foreseen, considers vacating of an arbitral award on the ground of fraudulence. Even in cases, when this ground is not regulated at a law level, courts agree on vacating of such arbitration award. This approach is also considered by the New York Convention for actions to be performed at the stage of recognition of an arbitral award.

Fraudulence in most cases is caused by false testimony of falsified evidence. "False evidence presented purposefully in the arbitration proceeding means fraudulence". Courts worked out a proper standard for vacating of an arbitral award in case of fraudulence. If there is false testimony or its equivalent, an arbitral award will not be vacated on the ground of fraudulence, if a complainant party in arbitration hearing had the possibility of denying its opponent's demands. English courts requested the evidence of intentional fraudulence (neither carelessness nor indifference), which had influence on the arbitral award.[97]

Arbitration legislation of leading jurisdiction in connection with vacatur of the arbitral award complies with the grounds of denying of recognition-enforcement of decisions, which are foreseen by the New York Convention.[98]

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93 *Born G.,* International Commercial Arbitration, Kluwer International, Hague, 2009, 2608-09.

94 Lesotho Highlands Dev. Auth. v. Impregilo SpA [2006] 1 A.C. 221, at 29 (House of Lords).

95 HCC Aviation Inc. Group, Inc. v. Employers Reins. Corp., 2005 U.S. Dist. LEXIS 19992 (N.D. Tex. 2005; Judgement of 3 October 2000 Nejapa Power Company v. CEL, DFT 4P.60/2000, cons. 3a, 19ASA Bull. 796 (Swiss Federal Tribunal).

96 English Arbitration Act, 1996, §68(2)(d); Swiss Law on Private International Law, Art.190(2)(c); Italian Code of Civil Procedure, Art.829(4).

97 *Born G.,* International Arbitration: Law and Practice, Kluwer International, Hague, 2012, 327-328.

98 *Born G.,* International Commercial Arbitration, Kluwer International, Hague, 2009, 2552, 2556-2560, 2827-2863.

Corruption as a special issue of public policy might be risen by two possible ways at the stage of taking decision: the first - when an arbitration award might be appealed when the award is a result of corruption, for example, if a corruption act influenced on taking an arbitral award; the second possible scenario is when the arbitration tribunal does not discuss properly those applications connected with corruption, which having been raised in the course of the arbitration proceeding.[99] Both possible cases connected with an arbitral award taken on the ground of corruption will be discussed below.

3.2.1. Appealing of an Arbitration Award Taken on the Ground of Corruption

It is doubtless that in cases, in which arbitrators are receiving pecuniary or non-pecuniary profit in order to take an award in favor of one of the parties, it is admitted that adoption of the award is caused by the ground of corruption; It is opposed to public policy of all civilized states, i.e. contrast to transnational public policy.[100]

There is an international consensus that if an arbitration tribunal is involved in corruption, an arbitral award will not be enforced in spite of the fact, that corruption has influence or not on the award.[101] But in practice we face such cases, when the award will be enforced despite the evidences that the tribunal was bribed. In dispute *Techno v IDTS*[102] a party was trying to enforce the award in courts of the United States of America. Before taking the decision IDTS investigated whether the tribunal had been bribed and stated that it was comparatively easy to bribe arbitrators. After this fact IDTS was still keeping silence and was expecting the decision of the tribunal. After receiving the unfavorable award IDTS decided to appeal of the arbitral award at the stage of enforcement on the ground of public policy but the Appeals Court of the United States of America declined its application and took a decision that in spite of the pre-trial application IDTS did not have the right to prove its request for vacating the decision on the ground of public policy on the basis of its awareness. Nevertheless the court in this case did not express an opinion connected with the reasonableness of the application. If the decision had been even lawful, not presenting a complaint means waiving a right and accordingly it would not have been appealed on the ground of public policy.[103]

Analogously in 1946 court adopted a decision on *San Carlo Opera Co. v. Conley* case: when a party is aware of the facts which might point out partiality of an arbitrator to one of the parties, it must not keep silence and not present later a complaint connected with the arbitral award with this ground. Its silence means to refuse to present a complaint.[104]

The other court also confirmed that attacking on arbitrators' qualification is not successful objectively, when a party has information connected with partiality, but is not producing a complaint until making an award.[105]

3.2.2. Appealing of Material Law of an Arbitral Award

The main ground of appealing by parties why the arbitration tribunal did not discuss properly the applications connected with corruption is that they had not agreed on stating the truth or/and explanation of law, had been carried out by arbitrators for defining the authenticity of the agreement made between the parties.[106]

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99 *Sheppard A., Delaney J.,* The Effect of Allegations of Corruption of International Arbitration Proceedings, in Particular in Relation to the Jurisdiction of the Tribunal and the Enforcement of Awards, paper presented at the 10th International Anti-corruption Conference, October, 2001, Prague, 4.

100 Ibid, 3-4.

101 Ibid, 4.

102 United States Court of Appeals, Second Circuit, 139 F.3d 980, AAOT Foreign Economic Association vo Technostroyexport v. International Development and Trade Services Inc., 1998.

103 Ibid, para. 10.

104 United States District Court, SD New York., 72 F.Supp. 825, San Carlo Opera Co., Ltd. v. Conley, 1946, para. 35.

105 Unites States Court of Appeals, Second Circuit, 449 F.2d 106, Cook Industries, Inc. v. C. Itoh & Co. (America) Inc., 1971; United States District Court, N.D. New York, 83-CV-529, Swift Indep. Packing Co. v. District Union Local One, United Food & Commercial Workers International Union, 1983.

106 *Hwang M., Lin K.,* Corruption in Arbitration: Law and Reality, paper presented at Herbert Smith-SMU Asian Arbitration Lecture, Singapore, 2011, 34-37.

There is consensus connected with the issue that if the agreement is unlawful according to the suitable law, it will be annulled and consequently it will be impossible to perform it.[107] In spite of the connection with corruption matters the question can be arisen, when the agreement between parties is authentic according to suitable law, but it might be a subject of: public policy or imperative norms of law of the country of recognition-enforcement, or of law of the obligations performing country or of law of the arbitration proceeding country, according to which an agreement might be cancelled and accordingly will not be carried out. So arbitrators and judges often face such problematical situations, when they have to decide whether the law chosen by the parties can outweigh the law of country the arbitration proceeding or the law of the obligations performing country. This problem would never been arisen when a case concerns bribery of high rank officials.[108] In relation to such corruption cases a civilized state is not tolerant and consequently it is unlikely that the suitable law will be in conflict with each other, until the authenticity of the agreement concluded between the parties has been stated.[109] Moreover, bribery of high rank public officials and cases connected with such corruption are opposed to transnational public policy and regardless of the law used by the arbitration tribunal or national court, there will be stated punishment of the unlawful action and as a result of it complaints of the party involved into corruption connected with the agreement will not be satisfied.[110]

Correspondingly when corruption in disputes is unambiguous, the arbitration tribunal will not be requested to analyze a conflict of law norms, after the agreement has been announced to be annulled as being opposed to the transnational public policy.[111] In spite of the fact that when disputes are arisen on the ground of mediatory agreements, which are not admitted to be opposing to transnational public policy, elucidation of law conflict will be of great importance, when the possibly suitable legislations might have different approaches in relation to this issue and besides arbitrators and judges are not authorized to vacate awards without taking into account the law suitable on the ground of public policy.[112] Some legal systems are banning mediatory agreements, which are concluded with the purpose of bribery or by the influence of high-rank officials, it does not matter the intention or whether a fact of unlawfulness is proved or not.[113] In contrast to it some jurisdictions support mediatory agreements, if parties do not have an unlawful intention; there is not a fact of bribery or unlawful influence.[114]

In favor of the autonomy and intention of the parties in most cases it is requested to follow the clause of the suitable law of the agreement. Regardless of it in some cases the principle of the autonomy of the parties and the law chosen by them are often outweighed by imperative norms of law of the obligations performing country or of law of the arbitration proceeding country or other principle of public policy. So for stating the authenticity of the mediatory agreement the discussion of the issue of the chosen law is of crucial importance.

Analysis of the norms conflict must be grounded on disputes arisen from the mediatory agreement, but all suppositions can also be applicable for the other types of contracts, which can be discussed according to their suitable law, but might be in contrast to law of the obligations performing country or to law of the arbitration proceeding country; however as it was already mentioned before. such a scenario is less presumable in cases connected with mediatory agreements.

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107 Ibid, 34.

108 *Born G.,* International Commercial Arbitration, Kluwer International, Hague, 2009, 2139-2140.

109 *Hwang M., Lin K.,* Corruption in Arbitration: Law and Reality, paper presented at Herbert Smith-SMU Asian Arbitration Lecture, Singapore, 2011, 70.

110 See, *e.g.,* World Duty Free, International Centre for Settlement of Investment Disputes Washington (''ICSID''), D.C., World Duty Free Company Limited v The Republic of Kenya, ARB/00/7, 2006, para. 157.

111 *Hwang M., Lin K.,* Corruption in Arbitration: Law and Reality, paper presented at Herbert Smith-SMU Asian Arbitration Lecture, Singapore, 2011, 26.

112 Ibid, 71.

113 *Sayed A.,* Corruption in International Trade and Commercial Arbitration, Kluwer Law International, Hague, 2004, 168-169, 192-193.

114 Ibid, 190-230, 348-353.

3.2.2.1 Importance of the Place of Performing Obligation

In most cases parties and their mediatory agreements don't have any or have inconsiderable connection with jurisdiction of the chosen law and instead have close connection with the country, where main agreement obligations were performed.[115] Jurisdiction of some countries foresees the principles of public policy to be reflected in imperative norms of law of obligations, which might have the preferential influence on the chosen law, if they have a close connection with a dispute.[116] An imperative nature of the obligatory norms can make them (but is not inevitable) suitable despite the law applicable between the parties.[117] Whether the law norm will be admitted imperatively depends on the scope of its usage, nature and goal.[118]

The principle that in some cases imperative norms of the place of performing obligations might have more force than the law chosen by parties is stated by Rome I[119] regulation, which allows discretional use of imperative norms of the law of that country "where obligations created from the agreement must be performed or has been performed".[120]

Analogously according to Article 19 of the International Private Law (''PILA'') of 1987, Switzerland, Law of the country most closely connected with the essence of the case can be applicable, if "it is requested by legitimate and obviously preferential interests of the party".[121] In using this article in connection with disputes concerning mediatory services the arbitration tribunals of Switzerland were reluctant to accept the decision to change law chosen by parties and discuss the mediatory agreements according to it. In most cases parties are not able to show "their legitimate and obviously preferential interests" in relation to the issue or that the circumstances connected with a dispute are quite "closely connected" with justice, than that, which is used by parties.[122] Despite this there is some resistance connected with its usage in the international arbitration. Nevertheless Courts of Switzerland adopted a decision, according to which there might be used PILA, when international arbitration disputes are adjudicated in Switzerland, and accordingly Article 187, which defines that first of all there will be envisaged justice chosen by parties. On the second hand the Federal Tribunal of Switzerland has remarked several times that for the convincing authenticity the tribunal must discuss competition law of Europe even when parties have evidently made reference connected with justice applicable in the agreement.[123] So the arbitration tribunals must use Article 187 of PILA as an imperative norm of law of obligations.

Norms of international private law of England, which are used mainly in all Commonwealth countries don't support the principle that in certain cases imperative norms of the place of performing obligations are more preferable compared to law chosen by parties.[124] Nevertheless this principle as an exception was stated for explanation of lawfulness of the mediatory agreement on*Foster v. Driscoll* case,[125] where the agreement on import of whisky in the United States of America was lawful according to the applicable law (English law), but norms of imperative law of the place of performing obligations are breached, i.e. law of the United

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115 *Hwang M., Lin K.,* Corruption in Arbitration: Law and Reality, paper presented at Herbert Smith-SMU Asian Arbitration Lecture, Singapore, 2011, 30.

116 *Born G.,* International Commercial Arbitration, Kluwer International, Hague, 2009, 2172-2173.

117 *Mayer P.,* Mandatory Rules of Law in International Arbitration, in: Arbitration International, 1986, Vol. 2, Issue 4, Oxford University Press, Oxford, 274-294, 275.

118 *Born G.,* International Commercial Arbitration, Kluwer International, Hague, 2009, 2186-2193.

119 Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations, 2008, Article 9(3).

120 Ibid, Article 9(3).

121 *Hwang M., Lin K.,* Corruption in Arbitration: Law and Reality, paper presented at Herbert Smith-SMU Asian Arbitration Lecture, Singapore, 2011, 33.

122 *Sayed A.,* Corruption in International Trade and Commercial Arbitration, Kluwer Law International, Hague, 2004, 271-272.

123 *Hwang M., Lin K.,* Corruption in Arbitration: Law and Reality, paper presented at Herbert Smith-SMU Asian Arbitration Lecture, Singapore, 2011, 35.

124 Ibid, 35.

125 United States Court of Appeals, KB 287, Foster v. Driscoll and Others, Linday v. Attfield and Another, Lindsay v. Driscoll and Others, 1929.

States of America. Court stated that intention of the parties to perform an action was unlawful according to law of the United States of America and consequently was not enforced. Accordingly in using norms of international private law the arbitration tribunal did not support the mediatory agreement, which had been made between the parties with the intention to breach anti-bribery law of the place of performing obligation.[126] Moreover commentators are substantiating that this principle must be spread on those cases, when only one party intends to act against imperative norms of law of the place of performing obligation. In such a case the party intends (but not an innocent party) that the agreement will not be performed.[127]

Hilmarton case[128] is a good illustration of approaches of different courts and arbitration tribunals connected with this issue. Parties concluded a mediatory agreement, according to which Hilmarton had to draw up building contracts for Omnium de Traitment (OTV) from Algerian government. The main law of the agreement was Swiss Law and the place of the arbitral proceeding was Geneva. One arbitrator reviewed the agreement according to Swiss Law, which was chosen by the parties and Algerian Law as Law of the place of performing obligations. A dispute arose after OTV, for profit of which Hilmarton had concluded the agreement, was requesting to pay a certain sum of money for service, stipulated by the mediatory contract. OTV was substantiated that the agreement was unlawful, was breaching public policy of Algeria and accordingly it should have been vacated. Despite that Swiss Law does not ban commercial agreements made by influence, unless there is stated a bribery act, the agreement will be authentic. The arbitration tribunal accepted application of OTV connected with unlawfulness with the ground that the agreement was unlawful according to Law of the place of performing obligations, it would breach moral principles of Switzerland and as a result would not be performed; in spite of this fact the Federal tribunal of Switzerland invalidated the decision on the ground that Algerian Law was very liberal, was breaching the autonomy principle of parties, while according to Swiss Law the agreement was authentic, if parties did not intend to act unlawfully.[129]

The second arbitration tribunal, which was created after the agreement had been invalidated, found that the agreement was enforceable and issued an order for OTV obliging it to pay Hilmarton for performing the obligation. As a result of it Hilmarton requested enforcement of the arbitral award in High Court of England, where OTV carried out a cross-action and appealed the decision on the same ground – that the agreement between the parties was unlawful according to Law of the place of performing obligations and accordingly was in contrast to public policy to Algeria. High Court of England enforced the award in spite of the judge's acknowledgement that the arbitration tribunal of England recognized that the same dispute might have been settled otherwise. Similar to *Foster v. Driscoll* case, by denying of Hilmarton's application, according to which the parties intended to perform the agreement in the country, where it was banned, mediatory agreements might have played a crucial role.[130]

Based on the above-mentioned reasons we can conclude that norms of the international private law used by an arbitration tribunal or national courts plays a crucial role in defining whether imperative norms of the Law of the place of performing obligations can outweigh the Law chosen by the parties. It is doubtless that if using of imperative law norms is denied, law chosen by the parties will have influence on the agreement. On the other hand, imperative norms, which are banning mediatory agreements, will make Article 19 of PILA start acting, while in countries of general law there is more probability that imperative norms will be acting according to *Foster v. Driscoll* rule. Despite this, before *Foster v. Driscoll* rule has its juridical influence the intention of the parties must be discussed by all means, especially if they have chosen law with

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127 *Hwang M., Lin K.,* Corruption in Arbitration: Law and Reality, paper presented at Herbert Smith-SMU Asian Arbitration Lecture, Singapore, 2011, 36.

128 ICC Rulings: ICC case No. 5622, 1988 and 1992; French Supreme Court, Hilmarton Ltd. v. Omnium de Traitment et de Valorisation S.A, 1994; Swiss Federal Tribunal, Hilmarton Ltd. v. Omnium de Traitment et de Valorisation S.A, 1990; High Court of Justice, Queen's Bench Division, Hilmarton Ltd. v. Omnium de Traitment et de Valorisation S.A, 1999.

129 Swiss Federal Tribunal, Hilmarton Ltd. v. Omnium de Traitment et de Valorisation S.A, 1990.

130 High Court of Justice, Queen's Bench Division, Hilmarton Ltd. v. Omnium de Traitment et de Valorisation S.A, 1999.

only one intention – to avoid restrictions of public policy of the country, which is most closely connected with the dispute. Then the Law chosen by them will be outweighed by the law of the place of performing obligations. This principle is stated in *Peh Teck Quee v Bayerische Landesbank Girozentrale* [131] case, where the complainants were requesting the agreement to be recognized as unlawful according to the law of the place of performing obligations (Malaysian Law) in spite of the fact that according to Singapore Law the agreement should have been regulated according to the Law chosen by the parties. In this case court concluded that the parties had had good reasons for choosing Singapore Law and accordingly did not have intention to avoid regulating acts of Malaysian Law. Hence Law chosen by the parties was taken into account, but court was outright in its substantiation and noted that the intention of the parties had played a decisive role in defining the authenticity of the agreement

Thus unconscientiousness of the parties can be discussed as a ground of declaring mediatory agreements as invalidated according to law, which is most closely connected with the dispute. As opposed to this it should be noted that according to Rome I regulation a human element of the agreement is non-essential. Commentators think that legislators wanted to restrict the bad intention of the parties – avoiding of law of the place of performing obligations.[132] It means that the mediatory agreement of the parties will be declared by courts and arbitration tribunals as juridically invalidated, if the main agreement obligations are performed in the country, which bans such services in this country.

3.2.2.2 Importance of the Arbitration Proceeding Place

For stating the authenticity of the mediatory agreement tribunals should consider Law of the place of the arbitration proceeding and define whether the agreement breaches or not fundamental principles of public policy. Law of of the place of the arbitration proceeding can be used, if fundamental moral principles are violated or if the agreement is closely connected with the place of the arbitration proceeding.[133]

In *Soleimany (the ''father'') v. Soleimany (the ''son'')*[134] case a dispute arose between father and son, which concerned an agreement on carpets-smuggling from Iran. The arbitration proceeding was conducted in London by Beth Din - a Jewish high-rank official using Law of Israel [135] - which acknowledged that actions had been unlawful and opposed to Law of Iran. Nevertheless the decision was performed on the ground that these facts were not significant according to Law of Israel, which was a suitable law for the agreement and according to which any confirmed unlawfulness would not have influence on the rights of the parties. After the arbitration award was made the son applied to court for assessment it. The judge issued an order to suspend the assessment and enforcement of the arbitration award, but at the same time father had the right of applying to invalidate the order for 14 days. Father applied to the Appeals Court of England requesting to suspend the enforcement and asked to cancel the order. Father's motion was successful and the Appeals Court of England refused the enforcement of the award, because it was breaching the fundamental principles of public policy. In this case the agreement was also unlawful according to law of Iran (Law of the place of performing obligations), but principles of public policy of England were breached so obviously, that it was sufficient for not enforcing the decision, despite the suitable law and Law of the place of performing obligations.[136] So the agreement would have been invalidated, if it had been lawful by Law of Iran.

The Law of the place of the arbitral proceeding can be changed for law chosen by the parties even when the agreement concluded between the parties is breaching public policy of the arbitral proceeding, but it

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131 Singapore Court of Appeal, CA 47/1999, Peh Teck Quee v. Bayerische Landesbank Girozentrale, 1999.

132 *Fawcett J., Carruthers J.,* Private International Law, 14. Edition, Oxford University Press, Oxford, 2008, 728-740; *Born G.,* International Commercial Arbitration, Kluwer International, Hague, 2009, 2186 – 2193.

133 *Fawcett J., Carruthers J.,* Private International Law, 14. Edition, Oxford University Press, Oxford, 2008, 142-146.

134 Court of Appeal of England, 97/0882 CMSl, Sion Soleimany v Abner Soleimany, 1999.

135 Beth Din Jewish high rank official, who offered Jewish society civil arbitration and religious rules.

136 The High Court of Appeal of England, Westacre Investments Inc v. Jugoimport-SDRP Holding Company Ltd., APP.L.R. 05/12, 1999, para. 34

must not be fundamental violation of the moral principles. So violation of the law might be domestic and it is not necessary to be international. However in this public policy both - Law of the place of the arbitral proceeding and Law of the place of performing obligations must be violated. On the basis of the mediatory agreement the complainant would have had to renew the agreement by using the influence of high-rank officials of Qatar. After checking up the mediatory agreement Court of England stated that it was against law of the both countries, i.e. Law of the place of the arbitral proceeding (English Law) and Law of the place of performing obligations (Qatar Law). Then court noted that despite that the agreement did not violate the main principles of public policy, yet it would not be enforced, as public policy of both countries was violated. As a result court stated that the mediatory agreement had not been enforceable. Despite that in the given case English Law was suitable for the mediatory agreement, on *Westacre* case the court stated that *Lemenda*-principle is again used even when the agreement is not regulated according to English Law.[137]

Accordingly, *Lemenda* principle courts might invalidate or refuse enforcement of the arbitral award which encourages breaching of public policy of Law of the place of the arbitral proceeding or Law of the place of performing obligations.

5. Conclusion

The main objective of the present work was to illustrate main grounds of court intervention into the arbitration award. More attention was paid to corruption, as it undermines the basic principles of public policy of every civilized state; it is reprimanded at the international level. On the one hand condemnation is really implemented in arbitration and court practice. On the other research clarified that arbitration tribunals, as well as national courts have different approaches to cases connected with corruption. The aim of this work was to explain why there is not a united system in the practice of the international dispute resolution system considering of public policy protection in dealing with disputes on the ground of corruption. The main reasons will be summarized below.

First, different jurisdictions are explaining corruption differently. They have different visions especially about whether a mediatory agreement can be considered as a special example of corruption. Second, arbitration tribunals differ from each other with a standard of evidential burden, which they are requiring from a party to produce in order to prove a corruption fact. Third, arbitration tribunals and national courts using International private law norms of different jurisdictions are leading to different results if Law chosen by parties is outweighed by Law of the place of the arbitral proceeding or Law of the place of performing obligations. On the other hand this issue has a decisive importance for enforcement of corruption containing agreements or/and decisions. The final reason of it is that national courts have different approaches in relation to the scope of intervention into an arbitral award, because of which we have different decisions in spite of the fact that parties might have similar circumstances.

In the present work it was presumably managed to discuss those main grounds when and to what extent court can intervene into the arbitral award in deciding the issue of recognition-enforcement of the decision. It is doubtless that harmonization of different jurisdictions in relation to this issue will decrease contradictions existed in practice of international disputes resolution on matters connected with corruption and other grounds discussed in the work

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