International Scientific Conference

The Quality of Legal Acts and its Importance in Contemporary Legal Space

4-5 October, 2012

University of Latvia Press

This publicationa presents a collection of research papers in conjunction with the international scientific conference "The Quality of Legal Acts and its Importance in Contemporary Legal Space", 4-5 October, 2012 at the University of Latvia Faculty of Law, Riga.

Layout: Andra Liepiņa

ISBN 978-9984-45-564-8

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THE QUALITY OF PART 78 OF THE LATVIAN CIVIL PROCEDURE LAW AND ITS IMPORTANCE IN RECOGNIZING AND ENFORCING THE FOREIGN ARBITRAL AWARDS

Keywords: Foreign Arbitral Awards, enforcement and recognition, Civil Procedure law.

Part 78 of Civil Procedure Law of the Republic of Latvia[1] sets the national procedural rules for recognition and enforcement of the foreign arbitral awards. In practice it shall serve as supplementary instrument for New York Convention On Recognition and Enforcement of Foreign Arbitral Awards (further: New York Convention).[2] However, recent developments in international arbitration as well as latest case law on recognition and enforcement of foreign arbitral awards in Latvia showed the legal gaps in the law that shall be fulfilled by correct interpretation of this part or legislation shall be changed.

The aim of this paper is to identify those main legal gaps in Part 78 of Civil Procedure Law. In order to accomplish this aim, the following tasks will be set: to elaborate on the deficiencies in the law and the conflicting national case law, to consider the inclusion of new trends of international arbitration in Part 78 of Civil Procedure Law and to suggest the relevant changes in the legislation.

Introduction

Current version of Part 78 "Recognition and Enforcement of Foreign Arbitral Awards" of Civil Procedure Law was adopted only in 2004. It is part of Chapter F "International Civil Procedure Law"[3] and consists only of seven articles. The case law has showed that the wording of the relevant part of Civil Procedure Law is

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1 Civilprocesa likums. 14.izdevums. Rīga: TNA, 2010.

2 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 330 UNTS 38, 1958. Latvia ratified the convention on 11 March 1992, it became in force in Latvia at 13 July 1992.

3 Law dated 7 April 2004, LV 64 (3012), 23.04.2004. The Chapter includes following parts: part 77 "Recognition and Enforcement Foreign court adjudications", part 771 "Matters regarding Unlawful Movement of Children across Borders to a Foreign State or Detention in a Foreign State", part 772 "Matters regarding the Unlawful Movement of Children across Borders to Latvia or Detention in Latvia'; part 78 "Recognition and Enforcement of Foreign Arbitral Awards", part 79 "International Legal Co-operation"; part 80 "Application of Foreign Laws to Adjudication of Civil matters." There is no separate law on international private law issues in Latvia.

considerably inconsistent thus raises problems of interpretation. In this paper author will deal only with two main challenging issues – right to appeal the court's decision on recognition and enforcement (or non-recognition and non-enforcement) and possibility to recognize and enforce foreign arbitral decisions.

Appeal of Latvia's court decision on recognition and enforcement of foreign arbitral award

Section 5 of Article 649 of *Civil Procedure Law* provides: "a complain[4] can be submitted regarding the court's decision to recognize or not to recognize the arbitral award".

This Section does not specify either such complain can be submitted regarding 1st instance's decision only or also regarding the 2nd instance's. Such ambiguous clause in law raises the conflicting decisions of the courts.[5] For example, in one case the parties have gone through the three tier appeal system – the application for recognition and enforcement was heard in the first, the second and the third instance (Supreme Court)[6], however, in other – recent case – Supreme Court refused to accept the complain of 2nd instance's court decision stating that decision on non-recognition and non-enforcement of foreign arbitral award can be reviewedly in two instances only.[7]

Therefore, it raises the questions: how correctly Section 5 of Article 649 should be interpreted and applied? How many instances can hear the decision of the Latvian court on recognition and execution of the foreign arbitral award?

Firstly, it is nationally[8] and internationally acknowledged that law "cannot base itself on a purely grammatical interpretation of the text"[9]; it shall be reviewed also in the light of the aim and system of the law. Therefore, the text of the discussed section shall be filled with content giving appropriate meaning, especially, if the wording is not clear enough.

Secondly, considering the historical development of relevant norms, it is evident that until 30 April 2004 there were joint norms and procedure for recognition and enforcement of foreign arbitral and court judgments.[10] Mirror rule of current Section

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4 Blakus sūdzība – in Latvian, appeal on procedural aspects.

5 The views and opinions expressed in this article are those of the author. The outcome of each court case depends upon many factors, including the facts of the case, evidence and legal reasoning etc, thus the cases at hand are analyzed in light of interpretation of Article 649 only.

6 Supreme Court of Republic of Latvia decision in case No SKC-395/2010 [2010], available in Latvian: http://www.at.gov.lv/lv/info/archive/department1/2010/ [viewed 10 April 2012].

7 Supreme Court of Republic of Latvia decision in case No SKC – 953/2012 [2012], not published.

8 Meļķisis E. Iztulkošanas metodes. Juridiskās metodes pamati. 11 soļi tiesību normu piemērošanā (E. Meļķiša zin.red.). Riga: Ration iuris, 2003, p. 116.

9 ICSID case No. ARB/08/15: Cemex Caracas Investments BV et all v, Bolivarian Republic of Venezuela, Decision on Jurisdiction § 103. Available:http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1831_En&caseId=C420 [viewed at 25 June 2012].

10 Article 636 of Civil Procedure Law: "Recognition and enforcement of the judgments of foreign courts and arbitrations (further: foreign courts) shall be conducted in accordance with this Law and international agreement binding to the Republic of Latvia." Civil Procedure Law edition

5 of Article 649 was included in Section 5 of Article 638 stating that a complain can be submitted regarding the court's decision on recognition the foreign court or arbitral judgments. Due to Latvia's accession to EU the national procedurals laws was harmonized, inter alia with Brussels I Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,[11] in result the chapters concerning the recognition and enforcement of foreign court judgments and arbitral awards was separated. Now Part 77 of Civil Procedure Law provides for the detailed procedure on recognition and enforcement foreign court judgments including the three thier appeal system for the decision of the court as required by the Regulation (Article 641 of Civil Procedure Law), however, the norms on the recognition and enforcement of arbitral awards basically was left the same as before. Unfortunately legislator did not modernized and harmonized also this part of law.

Thirdly, and most importantly, the discussed Section shall be read systematically. Namely, recognition and enforcement of arbitral awards is a part of the international civil procedure thus the Part 78 is included in the Chapter F of Civil Procedure Law. Hence, the subject matter of the international civil procedure is entirety of national rules correlated to procedural legal relations involving foreign element.[12] Moreover, the international civil procedure establishes particular forms for the implementation of international legal norms in the national process, thus they help to provide assistance in the cases with international element. Therefore international civil procedure norms in the Civil Procedure Law are lex specialis.

Besides, recognition and enforcement of foreign judgments itself involves multistage procedure unemployed in the pure domestic process, that is, the court shall comply not only with procedural aspects of recognition and enforcement but also shall evaluate the grounds for non-recognition, i.e, decide whether it can accept (recognize) the foreign judgment or award in its legal system.

Therefore the legal norms included in the Chapter F are exceptional and shall be read autonomously from the norms setting the domestic civil procedure as the national procedure is not part of international civil procedure and it does not involve multi stage assessment. For example, Section 5 of Article 649 of Civil Procedure Law shall not be reviewed in the light of national proceedings of the submission of the (ancillary) complaints enshrined in Part 55.[13] In opposite, this Section shall be interpreted systematically with the norms included in the Chapter F "International Civil Procedure", more specifically with norms included in Article 641 of Part 77 "Recognition and Enforcement of Foreign Court Adjudications" providing clear three

as from 10 March 2004 to 30 April 2004 available in Latvian at http://www.likumi.lv/doc.php?id=50500&version_date=10.03.2004 [viewed 1 July 2012].

[11] Regulation (EC) No. 44/2001 of 22.12.2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters replacing the Brussels Convention of 1968, JO C 27.

[12] Шак Х. Международное гражданское процессуальное право: Учеб.: Москва, 2001, ст. 4.

[13] For example, such complains can be submitted against decision on non-prolonging procedural terms (Article 53, part 4), decision to leave a claim unadjudicated (Article 221, part 1), decision to refuse to accept an appellate complain (Article 421), decision refusing to issue a writ of execution in the national arbitration process (Article 535, part 3) etc.

tier system of appeal.[14] Such interpretation is justified as Article 641 and 649 are part of international civil procedure therefore has the same aim.

In addition, recognition and enforcement of foreign judgments are based on the principle of more favorable right[15] and this right is also incorporated in Article VII (1) of New York Convention. The rationale of the more-favorable-right provision is to allow interested parties to rely on more favorable regime available inter alia in national law thus if national civil procedure law allows, even by analogy, to apply three-tier appeal system for the decision to recognize arbitral awards then it shall be used.

Such interpretation would give also certainty what should be decided in the court's decision. For example, in result of interpretation of Section 5 of Article 649 in light of the national procedure on submission of ancillary complains the second instance, even several times, can return the case to the first instance for re-adjudication of the matter and then the case on recognition and enforcement of arbitral award can be lengthy carousel of re-deciding. For the sake of clarity and efficiency of the process each instance shall only decide to recognize and enforce the foreign arbitral award as similarly provided in the provisions of law on recognition and enforcement of foreign court judgments.[16]

In the author's opinion the three-tier appeal system is absolutely necessary for the recognition and enforcement of arbitral awards as the Supreme Court as the highest instance is the developer of judicature and there is necessity for clear and unified interpretation of the New York Convention and international civil procedure law.

Enforcement of foreign arbitral decisions

Article 636 of the Civil Procedure Law provides that "an adjudication of a foreign arbitration is a binding adjudication made by a foreign arbitration court irrespective of its designation". Misleadingly this norm suggests that both foreign arbitral decisions and awards can be enforced in Latvia. Namely, reading Article 636 in conjunction with next article providing that "the foreign arbitral adjudications (both awards and decisions) shall be recognized in accordance with Civil Procedure Law and binding international treaties," it may be concluded that only arbitral awards can be enforced for the reason that Latvia has become party only to the conventions that do not regulate the recognition and enforcement of arbitral decisions. For example, European Convention on the International Commercial Arbitration[17], Latvia is also part of,

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[14] Section 1 of Article 641 reads: "In respect of a decision by a first instance court in an adjudication of a foreign court recognition matter, an ancillary complaint to the regional court may be submitted, and a decision by the regional court in respect of an ancillary complaint may be appealed to the Senate by submitting an ancillary complaint".

[15] Шак Х. Международное гражданское процессуальное право: Учеб.: Москва, 2001, ст. 32.

[16] Section 1 of Article 642 provides: A regional court and the Senate in adjudicating an ancillary complaint have the right to: 1) leave the decision unamended, and reject the complaint; 2) set aside the decision fully or a part thereof and decide the issue of the recognition of the adjudication of the foreign court; or 3) amend the decision.

[17] European Convention on International Commercial Arbitration. 484 U.N.T.S. 364, 1961. In Article Vi (4) it is only provided that "a request for interim measures or measures of conservation

does not cover matters connected with the recognition and enforcement of arbitral awards or decisions. Even thought the debate exists whether the arbitral tribunal's decisions can be enforced in accordance with New York Convention[18], however "the prevailing view, confirmed also by case law in some States, appears to be that the Convention does not apply to interim awards."[19]

But in practice, the parties can delegate the arbitral tribunal to apply provisional or interim relief[20] in their arbitration agreement. Moreover, in many jurisdictions both the arbitration rules[21] and arbitration acts[22] provide that the arbitral tribunals are competent to take such decisions.[23] But the tribunal's decision on interim measures is not self-

addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court."

[18] See: Pietro D. What Constitutes an Arbitral Award Under the New York Convention? In: Gaillard E., Pietro D. [Ed.]. Enforcement of Arbitration Agreements and International Arbitral Awards. Cameron May, 2008, p. 139 et seq.

[19] Note by the Secretariat on Possible future work in the area of international commercial arbitration. UN Doc A/CN.9/460, 6 April 1999, p. 30, § 121.

[20] Article 17 of UNICTRAL Model Law provides that "an interim measure is any temporary measure [..] by which [..] arbitral tribunal orders a party to: (a) Maintain or restore the status quo pending determination of the dispute; (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) Preserve evidence that may be relevant and material to the resolution of the dispute. 1985 UNCITRAL Model Law on International Commercial Arbitration. U.N. Doc A/40/17, Annex I, adopted by the United Nations Commission on International Trade Law on June 21, 1985.

[21] Article 28 of ICC Arbitration Rules. Available: http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf [viewed 11 June 2012]; Article 25 part 1 of LCIA Rules. Available: http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx#article25 [viewed 11 June 2012].

[22] UNCITRAL Model Law on International Commercial Arbitration adopted in many countries provides that unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures (Article 17, part 1). See also Article 25 (4) of Swedish Arbitration Act. Available: http://www.sccinstitute.com/?id=23746 [viewed 11 June 2012]; Article 39 of English Arbitration Act. Available: http://www.legislation.gov.uk/ukpga/1996/23/section/39 [viewed 11 June 2012]; Article 1041 of German Arbitration Act. Available: http://www.dis-arb.de/scho/51/materials/german-arbitration-law-98-id3 [viewed 11 June 2012].

[23] With the Law dated 17 February 2005 Latvia' s legislator deleted the Article "Interim measures" in the Latvian Civil Procedure Law providing the right of arbitral tribunal to award the interim measures.
Article 23 of Rules of Arbitration attached to the Latvian Chamber of Trade and Industry as only institution provide that the arbitral tribunal on its own initiative or pursuant request of one of the parties can issue decision on interim measures in arbitral proceedings or other interim decisions taking into consideration principles of international arbitration process. Available: http://www.chamber.lv/doc_images/regl/rules_of_arbitration.doc [viewed 11 June 2012].
Taking into consideration above mentioned legal norms another discussion may be raised: if the parties have agreed that the arbitral tribunal may grant interim relief but *lex arbitri* is Latvian, does parties' autonomy prevail over *lex fori* or tribunal shall take into consideration kind of transnational rules to justify its competence to award interim measures?! Prof. Born suggest that hereby Article V (1) d of New York Convention shall be taken in account providing that awards may be denied recognition if the arbitral procedures were not in accordance with the parties' agreement to arbitrate and Article II (1) obligating Contracting States to recognized agreements to arbitrate. Born. G.B. international Arbitration. Cases and Materials. Wolters Kluwer, 2011, p. 558, § 5.

enforceable, i.e., if the party does not comply with tribunal ordered interim relief; the interested party shall turn to the court for compulsory enforcement of such decision. National laws "do not typically address enforcement of a foreign tribunal's interim orders,"[24] however, in Germany[25] and England [26] it is included in the national law.

Nevertheless, as the interim measures of protection were increasingly being found in the practice of international commercial arbitration it was acknowledged that there is need for a uniform regime in this field[27] thus the new – 2006 revisions of UNCITRAL Model Law on International Commercial Arbitration[28] was adopted inter alia dealing with the enforcement of tribunals- ordered provisional matters. Part 1 of Article 17H provides:

> *An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.*

Even though Latvia is not considered the Model Law country, it is suggested that at least the Part 78 on enforcement and execution of foreign arbitral awards of the Civil Procedure Law shall be harmonized with the Model Law, also as regards the recognition and enforcement of decisions on interim measures. Namely, the special sub-part on recognition and enforcement shall be developed, to include not only cited Article 17 H but also specify the grounds for refusing recognition and enforcement of such decisions (Article 17 I of Model Law). It is important also set the procedure for review of such decision in the court. For example, currently, Article 649 Section 1 of Civil Procedure Law provides that application for the recognition and enforcement of the arbitral adjudication shall be reviewed in the court hearing notifying the parties about that. Such procedure would not be suitable for the recognition and enforcement of foreign arbitral decisions on interim measures as the respondent may take the relevant actions to escape the real enforcement till court hearing therefore, it is suggested that following today's trends Part 78 of Civil Procedure Law shall be amended providing ex parte hearing on recognition and enforcement of foreign arbitral decisions.

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[24] Born G. B. international Arbitration. Cases and Materials. Wolters Kluwer, 2011, p. 845, § 7.

[25] Article 1062 of German Civil Procedure Law. Available: http://www.trans-lex.org/600550 [viewed 11 June 2012].

[26] Article 44 of English Arbitration Act. Available: http://www.legislation.gov.uk/ukpga/1996/23/section/39 [viewed 11 June 2012].

[27] Report of the Working Group on Arbitration on the work of its thirty – second session. Doc A/CN.9/468, 10 April 2000, p. 13 et seq, § 60 et seq.

[28] 1985 UNCITRAL Model Law on International Commercial Arbitration. U.N. Doc A/40/17, Annex I, adopted by the United Nations Commission on International Trade Law on June 21, 1985.

Conclusion

1. International civil procedure is set of rules relating to legal relations with foreign or international element. In other words, those are national rules helping to implement international legal norms and international obligations taken by the state via international conventions. In Latvia international civil procedure norms are incorporate in the Section F of Civil Procedure Law. Because of the special nature of those rules they should be interpreted separately from national civil procedure.
2. Legislator of Latvia shall establish unambiguous procedural environment in recognition and enforcement of the foreign arbitral adjudications in order to provide legal certainty and reach the aim of international civil procedure law.
3. Accordingly, Part 78 of Civil Procedure Law on recognition and enforcement of foreign arbitral awards shall be re-drafted, especially amending the norms concerning:
   - the procedure of appeal of the court's decision on recognition and enforcement of the foreign arbitral awards and allowing the three tier appeal system
   - recognition and enforceability of foreign arbitral decisions.
4. Whereas new amendments are not made, Part 78, especially Section 5 of Article 649 providing that "a complain can be submitted regarding the court's decision to recognize or not to recognize the arbitral award", shall be interpreted autonomously from the national civil procedure and in compliance with other norms included in chapter F "International Civil Procedure" providing rules for appeal of decision on recognition and enforcement of foreign court judgment. Namely, Section 5 of Article 649 shall be read in such way that it allows to appeal the second instance's decision on recognition or enforcement of arbitral award also in Supreme court (third instance) since:
   a. this norm shall be interpreted in way so that it achieves the goals determined by international civil procedure considering the spirit and purpose of this provision;
   b. *New York Convention* guarantees that parties can rely on the most favorable right rule and in this case the most favorable rule by analogy is found in Article 641 Civil Procedure Law;
   c. Supreme Court is the main developer of judicature and it is important that the third instance gives its unified and final examination of applicability of *New York Convention* and international civil procedure law;
   d. recognition and enforcement of foreign judgments shall not be more advantageous than recognition and enforcement of arbitral awards as both procedures form integrated international civil procedure;
5. New trends in international arbitration law demonstrate that more often arbitral tribunals make a decisions on interim measures but as those decisions are not self-executive and might be enforced in foreign country the Civil Procedure Law shall provide:
   a. for possibility to recognize and enforce of foreign arbitral decisions;
   b. for procedure *ex parte* to decide on such decisions.

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