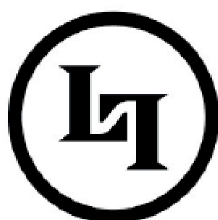
Czech (& Central European) Yearbook of Arbitration®

Czech (& Central European) Yearbook of Arbitration®

Volume XII

2022

Jurisdiction of Arbitral Tribunals



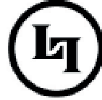
Editors

Alexander J. Bělohlávek
Professor
at the VŠB TU
in Ostrava
Czech Republic

Naděžda Rozehnalová
Professor
at the Masaryk University
in Brno
Czech Republic

Questions About This Publication

www.czechyearbook.org; www.lexlata.pro; editor@lexlata.pro



LEX LATA

COPYRIGHT © 2022

By Lex Lata B.V.

All rights reserved. No part of this publication may be reproduced in any form or by any electronic or mechanical means including information storage and retrieval systems without permission in writing from the publisher.

Printed in the EU.
ISBN/EAN: 978-90-829824-7-3
ISSN: 2157-9490

Lex Lata B.V.
Mauritskade 45-B
2514 HG – THE HAGUE
The Netherlands

The title *Czech (& Central European) Yearbook of Arbitration*®
as well as the logo appearing on the cover are protected by EU trademark law.

Typeset by Lex Lata B.V.

Advisory Board

Anton Baier
Vienna, Austria

Silvy Chernev
Sofia, Bulgaria

Bohuslav Klein
Prague, Czech Republic

Hon. Rajko Knez
Ljubljana, Slovenia

Andrzej Kubas
Warsaw and Krakow, Poland

Piotr Nowaczyk
Warsaw, Poland

Stanislaw Soltysiński
Warsaw, Poland

Jozef Suchoža
Košice, Slovakia

Vladimír Týč
Brno, Czech Republic

Evangelos Vassilakakis
Thessaloniki, Greece

Editorial Board

Alena Bányaiová
Prague, Czech Republic

Radu Bogdan Bobei
Bucharest, Romania

Viorel Mihai Ciobanu
Bucharest, Romania

Marcin Czepelak
Krakow, Poland

Filip Černý
Prague, Czech Republic

Ian I. Funk
Minsk, Belarus

Marek Furtek
Warsaw, Poland

Aldo Frignani
Torino, Italy

Wolfgang Hahnkamper
Vienna, Austria

Vít Horáček
Prague, Czech Republic

Miluše Hrnčiříková
Olomouc, Czech Republic

Lászlo Kecskes
Budapest, Hungary

Vladimir Khvalei
Moscow, Russia

Martin Magál
Bratislava, Slovakia

Ricardo Ma. P. G. Ongkiko
Makati City, Philippines

Niek Peters
Amsterdam, Netherlands

Asko Pohla
Talinn, Estonia

Roman Prekop
Bratislava, Slovakia

Květoslav Růžička
Pilsen/Prague, Czech Republic

Matthias Scherer
Geneva, Switzerland

Thomas Schultz
Geneva, Switzerland

Jiří Valdhans
Brno, Czech Republic

Kamil Zawicki
Warsaw and Krakow, Poland

Address for communication & manuscripts

Czech (& Central European) Yearbook of Arbitration®

Jana Zajíce 32, Praha 7, 170 00, Czech Republic

editor@lexlata.pro

Editorial support:

Jan Šamlot, Dr.TF. Lenka Němečková,
Dipl. Ing. Karel Nohava, Anna Dušková

Impressum

Institutions Participating in the CYArb® Project

Academic Institutions

University of West Bohemia in Pilsen, Czech Republic
Faculty of Law, Department of International Law
& Department of Constitutional Law
Západočeská univerzita v Plzni, Právnická fakulta
Katedra mezinárodního práva & Katedra ústavního práva

Masaryk University in Brno, Czech Republic
Faculty of Law, Department of International and European Law
Masarykova univerzita v Brně, Právnická fakulta
Katedra mezinárodního a evropského práva

Pavol Jozef Šafárik University in Košice, Slovakia
Faculty of Law, Department of Commercial Law and Business Law
Právnická fakulta UPJŠ, Košice, Slovensko
Katedra obchodného a hospodárskeho práva

VŠB – TU Ostrava, Czech Republic
Faculty of Economics, Department of Law
VŠB – TU Ostrava, Ekonomická fakulta Katedra práva

Institute of State and Law of the Academy of Sciences of the Czech Republic, v.v.i.
Ústav státu a práva Akademie věd ČR, v.v.i.

Institute of State and Law, Slovak Academy of Sciences, Slovakia
Ústav štátu a práva Bratislava, Slovenská akadémia vied, Slovensko

Non-academic Institutions Participating in the CYArb® Project

International Arbitral Centre of the Austrian Federal Economic Chamber
Wiener Internationaler Schiedsgericht (VIAC), Vienna

Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania
Curtea de Arbitraj Comercial Internațional de pe lângă Camera de Comerț și Industrie a României, Bucharest

Arbitration Court attached to the Hungarian Chamber of Commerce and Industry
A Magyar Kereskedelmi és Iparkamara mellett szervezett Választottbíróság, Budapest

Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic
Rozhodčí soud při Hospodářské komoře České republiky a Agrární komoře České republiky, Prague

International Arbitration Court of the Czech Commodity Exchange, Prague, Czech Republic
Mezinárodní rozhodčí soud při Českomoravské komoditní burze (Prague, Czech Republic)

ICC National Committee Czech Republic
ICC Národní výbor Česká republika

The Court of Arbitration at the Polish Chamber of Commerce in Warsaw
Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej w Warszawie

Proofreading and translation support provided by:
SPĚVÁČEK překladatelská agentura s.r.o., Prague, Czech Republic
and Pamela Lewis, USA.

Contents

List of Abbreviations xi

ARTICLES

Maciej Durbas | Agata Ziobroń | Maciej Truszkiewicz
Supplying 'the Original Version of the Arbitration Agreement' Under Article IV of the New York Convention when No Such Document Exists 3

Vasily N. Anurov
Domestic Law and Jurisdiction of Arbitral Tribunals in International Investment Disputes..27

Silvia Petruzzino
The Enforcement of Arbitral Interim Measures in the Framework of International Commercial Arbitration 43

Tereza Profeldová
Does Undisputed Jurisdiction of Arbitral Tribunal Also Provide Parties with Effective Control Mechanism from Side of Courts? 63

Andreas Respondek | Tasha Lim
Jurisdiction of Arbitral Tribunals, Kompetenz-Kompetenz and Doctrine of Separability in Selected Countries of Southeast Asia: Status, Development and Global Comparison 93

Mercedes Romero | Rafael Montejo
Validity and Assessment of Pathological Arbitration Clauses in Relation to Judicial Intervention in its Review 117

Anastasia Vezyrtzi
Jurisdiction in Parallel Proceedings: Court Jurisdiction v Arbitration Agreement..133

CASE LAW

Czech Republic

Alexander J. Bělohlávek
Selected Case Law of Czech Courts Related to Arbitration 155

Poland

Kamil Zawicki | Bartłomiej Pobożniak | Angelika Ziarko
The Supreme Court Judgments 203

NEWS & REPORTS

Boris R. Karabelnikov
New Russian Law Allows Russian Companies and Businessmen to Disregard Arbitration Clauses and Jurisdiction Agreements Providing for Consideration of Their Disputes Outside Russia 215

Lenka Náhlovská
On Rise of On-Line Arbitration Means in Czech Republic 233

Johanna Kathan-Spath
The 2021 Rules Revision of the Vienna International Arbitral Centre 239

David Řezníček
International Arbitration Court of the Czech Commodity Exchange in Prague: Current Information on Activities...................249

BIBLIOGRAPHY, CURRENT EVENTS, IMPORTANT WEB SITES

Alexander J. Bělohlávek
Selected Bibliography for 2021 261
Current Events 275
Important Web Sites 277
Index...289

All contributions in this book are subject to academic review.

Neither the editorial board nor the publisher collects any fees or other performance for publishing contributions from the authors and distances itself from such practices. Authors do not receive any royalty or other remuneration for their contributions.

Maciej Durbas | Agata Ziobroń |
Maciej Truszkiewicz

Supplying 'the Original Version of the Arbitration Agreement' Under Article IV of the New York Convention when No Such Document Exists

Key words:
arbitration agreement | New York Convention on the recognition and enforcement of foreign arbitral awards | recognition or enforcement of foreign arbitral awards | requirements | standard of proof

***Abstract** | This article discusses the practical problem of the recognition and enforcement of foreign arbitral awards based on the provisions of the New York Convention in situations in which the parties have not entered into an arbitration agreement in writing. The Convention was signed in 1958 and, for obvious reasons, only takes the standards prevailing in arbitration at the time into account. Consequently, the Convention explicitly only provides for cases in which the arbitration agreement meets the formal requirements of Article II. It also requires the applicant to supply the original agreement to recognise or enforce the arbitral award (Article IV(1)(b)). The text of the Convention, therefore, does not take into account the growing tendency to relax the formal requirements of arbitration agreements, including allowing arbitration clauses to be concluded implicitly, e.g., by waiving the objection to the jurisdiction of an arbitral tribunal or extended to non-signatories. This article attempts to answer whether, in all those situations, the recognition of*

Maciej Durbas is an attorney-at-law and of counsel at Kubas Kos Gałkowski law firm. As a practitioner, he specialises in court and arbitration proceedings, international commercial law, and private international law. He is also a scholar in arbitration law. He defended his doctorate on the jurisdiction of arbitral tribunals with honours at the Jagiellonian University of Kraków. He has been coaching the Jagiellonian University team in the Willem C. Vis Moot international commercial arbitration competition for many years.
E-mail: maciej.durbas@kkg.pl

Agata Ziobroń is an attorney-at-law and a senior associate at Kubas Kos Gałkowski law firm. She cooperates with the team handling complex proceedings in the field of civil law and broadly defined commercial law, including company law. She provides comprehensive advice to business entities at the pre-litigation stage, prepares litigation strategies, and

an award under the Convention is possible and concludes that the award is recognisable and enforceable if the applicant can demonstrate the jurisdiction of the arbitral tribunal by any evidentiary means.

represents parties in court and arbitration proceedings.
E-mail: agata.ziobron@kkg.pl

Maciej Truszkiewicz is an attorney-at-law and a senior associate at Kubas Kos Gałkowski law firm. He specialises in litigation as well as corporate and civil law. He cooperates with a team that specialises in business law with a specific focus on construction disputes and infrastructure projects.
E-mail: maciej.truszkiewicz@kkg.pl

I. Introduction[1]

1.01. One of the most important tendencies in international arbitration is the increasing liberalization of the formal requirements for arbitration agreements.[2] This also corresponds with the process of recognition of less and less formalized ways of giving consent to arbitration and fits into the debate between consensualism and formalism that has been going on for years.[3] In the context of the requirements of the New York Convention,[4] this debate focuses on Article II (formal requirements of the arbitration agreement) and Article V (grounds for refusal of recognition/enforcement). In our view, Article IV(1)(b) is at least equally important. According to the said provision, 'the party applying for recognition and enforcement shall, at the time of the application, supply [...] [t]he original agreement referred to in article II or a duly certified copy thereof'.

1.02. Under a literal interpretation of Article IV, if a party cannot supply the 'original arbitration agreement',[5] a party cannot

[1] The authors would like to thank Tadeusz Zbiegień for his invaluable support in preparing and reviewing this paper.

[2] JULIAN D. M. LEW & LOUKAS A. MISTELIS & STEFAN KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION, Kluwer Law International (2003), et. 697; Albert J. van den Berg, *When is an Arbitration Agreement in Writing Valid under Article II(2) of the New York Convention of 1958?*, in PIETER SANDERS, EEN HONDERDJARIGE VERNIEUWER, Boom Juridische Uitgevers (2012), et. 325 – 331; ALBERT J. VAN DEN BERG, HYPOTHETICAL DRAFT CONVENTION ON THE INTERNATIONAL ENFORCEMENT OF ARBITRATION AGREEMENTS AND AWARDS EXPLANATORY NOTE (2009), available at: https://www.newyorkconvention.org/draft+convention (accessed on 17 August 2021), et. 17 - 18; Piotr Wiliński, *Should the Miami Draft be given a second chance? The New York Convention 2.0*, 34 SPAIN ARBITRATION REVIEW, Wolters Kluwer España (2019), et. 85 – 86.

[3] EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, Kluwer Law International (1999), et. 361, paragraph 591.

[4] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

[5] In this paper we will only discuss the cases in which a party cannot supply 'a duly certified copy of the arbitration agreement'. Furthermore, this paper does not deal with situations in which the original (e.g., a written) arbitration agreement exists, but the petitioner does not possess it. Cf e.g., a case in which the

successfully enforce an arbitral award. This interpretation could effectively lead to the inability to seek the enforcement of the arbitral awards that were based on the jurisdiction of the tribunal established in a non-traditional manner. Non-traditional manner as used here means cases in which there is no 'classic' arbitration agreement between the parties as prescribed by Article II of the New York Convention. This might be the case, for example, if the jurisdiction has been established through the waiver of jurisdictional objections or extended to non-signatories.[6]

1.03. This creates a paradox – the arbitration agreement (or rather the jurisdiction of the tribunal) exists, but at the same time, cannot be proven for the purpose of enforcement. On the one hand, the arbitral tribunal that rendered the award was competent to hear the case (e.g., because the respondent failed to object to its jurisdiction on time or at all). On the other hand, the literal application of Article IV of the New York Convention would lead to the inability to successfully enforce or recognise the award for the lack of the original of the agreement in such cases. Consequently, a party opposing the enforcement could invoke that the requirements from Article IV of the New York Convention are not met.[7] Such an approach, if adopted, would jeopardize all the effects of interpreting the formal requirements of Article II of the New York Convention broadly.

1.04. To resolve the said paradox, it is necessary to analyse several minor issues directly affecting the final answer. First, what is the nature of Article IV(1)(b) requirements (section 2) and the approach of domestic legal orders to the requirements of Article IV(1)(b), especially in the context of countries with the most liberal approach to the form of arbitration agreements (section 3)? Second, what is their relation to formal and substantive requirements (section 4)? Third, what is the standard of proof under the said provision (section 5)? Finally, how can the

Polish Supreme Court refused a request for document production pertaining to the arbitration agreement in enforcement proceedings as the opposing party claimed it did not enter into such an agreement and the petitioner did not even make its existence probable. See Polish Supreme Court Case No. III CK 510/03, judgement, 3 November 2004.

[6] On the assumption that the issue of non-signatories should be evaluated from the perspective of the validity of the arbitration agreement, rather than entirely autonomously, see GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, Third Edition, Kluwer Law International, 2021, et. 1605 – 1606; STAVROS BREKOULAKIS, THIRD PARTIES IN INTERNATIONAL COMMERCIAL ARBITRATION, Oxford University Press (2010), et. 189; Philipp Habegger, *Extension of Arbitration Agreements to Non-signatories and Requirements of Form*, 22(2) ASA BULLETIN 390 (2004), et. 398.

[7] STEFAN KRÖLL & LOUKAS A. MISTELIS & PILAR PERALES VISCASILLAS & VIKKI ROGERS (eds.), LIBER AMICORUM ERIC BERGSTERN. INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION, Alphen aan den Rijn (2011), s. 321.

said conclusions be applied to non-traditional arbitration agreements (section 6)?

II. The Nature of the Requirements under Article IV(1)(b) of the New York Convention

1.05. There are two approaches to the requirements established in Article IV(1)(b) of the New York Convention.[8] The first view follows the viewpoint that the requirements of the Article are restrictive and may not be lowered by the national laws. The second view is that these requirements are just a maximum above which no national law may exceed.[9]

1.06. This second view is the correct one. Procedures for enforcing arbitral awards are left to the states, which are free to reduce the burden of requirements imposed on the parties seeking enforcement.[10] The Convention is based on a 'pro-enforcement' bias.[11] Therefore, the formal requirements specified by the Convention should be interpreted in a way that allows facilitating to the greatest extent possible the recognition / enforcement.

1.07. Moreover, many of the significant arbitral jurisdictions have already taken advantage of this possibility.[12] This approach resonates with the worldwide criticism of the formal requirements of the Convention.[13]

1.08. The first conclusion is that Article IV(1)(b) of the New York Convention standard is a maximum one and can be reduced by national laws. The said provision (understood as providing only a maximum level of procedural requirements) does not come into play if the state law prescribes for a lower level of such requirements.

[8] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, Third Edition, Kluwer Law International (2021), et. 3706 n. 55.

[9] United Nations General Assembly, *Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session* (19 June – 7 July 2006), available at: https://undocs.org/en/A/61/17(SUPP) (accessed on 17 August 2021), et. 28 – 29; United Nations General Assembly, *Settlement of commercial disputes: Form of arbitration agreement, Note by the Secretariat* (19 June – 7 July 2006), available at: https://undocs.org/en/A/CN.9/606 (accessed on 17 August 2021), et. 7; United Nations General Assembly, *Report of Working Group II (Arbitration) on the work of its forty-fourth session* (23 – 27 January 2006), available at: https://undocs.org/en/A/CN.9/592 (accessed on 17 August 2021), et. 16 – 17.

[10] Maxi Scherer, *Article III*, in NEW YORK CONVENTION – COMMENTARY, Beck Hart Nomos (Reinmar Wolff ed., 2012), no. 2, et. 194.

[11] ALBERT J. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION, Boston: Kluwer Law and Taxation (1981), et. 151.

[12] In the context of formal requirements see for example: Luca Beffa, *Enforcement of "Default Awards"*, 31(4) ASA BULLETIN 756 (2013), et. 772 n. 79.

[13] Pieter Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13(2) THE INTERNATIONAL LAWYER 269 (1979), et. 277 – 286. See also Emmanuel Gaillard, *The Urgency of Not Revising the New York Convention*, in ICCA CONGRESS SERIES NUMBER 14, Dublin, Kluwer Law International (A. J. Van Den Berg ed., 2009), et. 689 – 696.

III. The Requirement to Supply the Original of the Arbitration Agreement under National Laws

1.09. One must therefore examine whether Article IV(1)(b) of the New York Convention standard is indeed reduced by national laws. We identified five legislative approaches in this regard. At the same time, there is a growing number of jurisdictions where traditional formal requirements for international arbitration agreements have been loosened or waived.[14]

1.10. First, some jurisdictions maintained both the similar standard of formal requirements from Article II of the New York Convention and the requirement to supply the original of the arbitration agreement from Article IV(1)(b) of the New York Convention. This is the case, e.g., with the Polish law. One must note, however, that this does not change the fact that the Article IV(1)(b) requirement can be interpreted in a relaxed way, as will be discussed below or that there are scholarly propositions to change this state of law.[15]

1.11. Second, some jurisdictions maintained a similar standard of formal requirements from Article II of the New York Convention, but relaxed the requirement to supply the original of the arbitration agreement from Article IV(1)(b) of the New York Convention. The Austrian Code of Civil Procedure requires submitting an arbitration agreement only when requested by the court. Section 1064 of the German Code of Civil procedure does not require submitting the arbitration agreement at all.

1.12. Third, some of these jurisdictions both dropped or relaxed the requirement for the arbitration agreement to be in writing and dropped the requirement to provide the arbitration agreement. Such is the case in Belgium (Articles 1681 and 1720(4) of the CCP, respectively) or Sweden (Section 56 Arbitration Act). The Hypothetical Draft Convention on the International

[14] E.g., France (Article 1507 CCP), Belgium, Scotland, England and Wales (Section 5 Arbitration Act), Sweden, Norway, Singapore (Section 2A International Arbitration Act), Hong Kong (Section 19 Arbitration Ordinance) or New Zealand (Schedule 1 Section 7 Arbitration Act).

[15] Marcin Asłanowicz, *Commentary to Art. 1213 paragraph 3*, in SĄD POLUBOWNY (ARBITRAŻOWY). KOMENTARZ DO CZĘŚCI PIĄTEJ KODEKSU POSTĘPOWANIA CYWILNEGO [COURT OF ARBITRATION. COMMENTARY TO PART FIFTH OF THE CODE OF CIVIL PROCEDURE], C.H. Beck (2017); Tomasz Strumiłło, *Commentary to Art. 1213, paragraph 3*, in KODEKS POSTĘPOWANIA CYWILNEGO. TOM II. KOMENTARZ. ART. 730-1217 [CODE OF CIVIL PROCEDURE. VOL. II. COMMENTARY. ART. 730-1217], C.H. Beck, (J. Jankowski ed. 2019).

Enforcement of Arbitration Agreements and Awards (the Miami Draft) also envisages such an approach.[16]

1.13. Fourth, some jurisdictions dropped or relaxed the requirement for the arbitration agreement to be in writing but maintained the requirement to provide the arbitration agreement.[17] Such is the case in France (Article 1443 and 1515 of the CCP), Scotland (Section 4 and Section 21.1(b) of the Arbitration Act 2010), and Hong Kong (Section 19 and Section 88(b) of the Arbitration Ordinance).

1.14. Fifth, there is a group of countries that adopted a more nuanced approach. The Norwegian arbitration law loosened formal requirements of arbitration agreements. It does not go as far as the Swedish law with its complete elimination of the requirement to produce an arbitration agreement. Still, in Chapter 10 Article 45 of the Arbitration Act, it creates a requirement that: '[d] ocumentary proof for the existence of an agreement or other basis for arbitration may be demanded'. So, first, it limits the requirement to evidentiary matters only; second, in Austrian and German style, it makes it subject to the court's request; third, it does not require 'the original' of the arbitration agreement but merely documentary proof of its existence.

1.15. Finally, New Zealand requires the production of the arbitration agreement only if it was recorded in writing (Schedule 1 Section 35 Arbitration Code).

1.16. The second conclusion of this article is that the formal requirements of the arbitration agreement stemming from a given legal system are irrelevant to solve the paradox as the requirement to supply the original of the arbitration agreement is also present in those systems that relaxed formal requirements under Article II of the New York Convention.

1.17. The third conclusion is that the paradox from Article IV of the New York Convention does not occur in those legal systems that resigned from the requirement to supply the motion for recognition or enforcement with 'the original of the arbitration agreement'. It is also resolved by state laws that do not automatically require the supplying of the original of the arbitration agreement or that allow other evidence in this regard.

[16] ALBERT J. VAN DEN BERG, HYPOTHETICAL DRAFT CONVENTION ON THE INTERNATIONAL ENFORCEMENT OF ARBITRATION AGREEMENTS AND AWARDS EXPLANATORY NOTE (2009), available at: https://www.newyorkconvention.org/draft+convention (accessed on 17 August 2021), et. 17 - 18.

[17] With respect to France: Michael Wietzorek, *The Form of the International Arbitration Agreement under the 2011 French Arbitration Law*, KLUWER ARBITRATION BLOG (7 April 2011), available at: http://arbitrationblog.kluwerarbitration.com/2011/04/07/the-form-of-the-international-arbitration-agreement-under-the-2011-french-arbitration-law/ (accessed on 17 August 2021).

IV. The Relationship between Article IV(1)(b) and Articles II and V of the New York Convention

1.18. If the state law did not relax the Article IV(1)(b) requirements, it is necessary to determine the relationship that exists between this provision and Articles II and V of the New York Convention. Two main approaches can be distinguished. We refused a third approach at the outset, under which Article IV(1)(b) is *lex imperfecta*, that is a provision providing no sanction if the rule specified therein is not fulfilled. It would, in our view, not be correct to interpret certain provisions of the Convention as they had not existed.

1.19. The first approach to Article IV would be to impose a formal and substantive validity examination already at the preliminary stage while analysing the motion on formal grounds. This approach identifies the concept of an arbitration agreement in Article IV with the concept of a valid (Article V(1)(a)) written arbitration agreement (Article II). It reads those requirements 'as a whole'.[18]

1.20. However, adopting this approach would deny the basic premise of the New York Convention by shifting the burden of proof to the party seeking enforcement from the objecting party.[19] Additionally, as rightfully noted by D. Otto and A. van den Berg, authors of the leading commentaries to the New York Convention, one must distinguish between the requirement to 'supply' under Article IV and the requirement to 'furnish proof' under Article V.[20] In this sense, the party objecting to the recognition or enforcement has to prove that there is no arbitration agreement or it is defective.[21] There is no such obligation on the part of the party seeking enforcement.

1.21. The second approach does not assume that the question of validity is examined at the stage when Article IV of the New York Convention applies, i.e., while analysing the motion on formal grounds, but later, when the opposing party objects to

[18] See US Court of Appeals for the 3rd Circuit, *China Minmetals Materials Import and Export Co., Ltd.* v. *Chi Mei Corporation*, Appellant, 334 F.3d 274 (3d Cir. 2003), judgement, 26 June 2003.

[19] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, Third Edition, Kluwer Law International (2021), et. 3712.

[20] Dirk Otto, *Article IV*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION, Kluwer Law International (Herbert Kronke, Patricia Nacimiento et al. eds., 2010), et. 167 – 168; ALBERT J. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION, Boston: Kluwer Law and Taxation (1981), et. 250.

[21] STEFAN KRÖLL & LOUKAS A. MISTELIS & PILAR PERALES VISCASILLAS & VIKKI ROGERS (eds.), LIBER AMICORUM ERIC BERGSTERN. INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION, Alphen aan den Rijn (2011), s. 329.

the recognition/enforcement.[22] In this view, the Article IV(1)(b) requirement is merely a preliminary obligation to demonstrate the existence of an arbitration agreement.[23] This approach is based on three premises: (i) Article IV is a provision that merely establishes evidentiary requirements designed to 'set in motion' the enforcement procedure,[24] (ii) it sets an independent standard for evaluating procedural requirements,[25] (iii) it refers to supplying the 'original' of the arbitration agreement, but it does not specify the form of this original. Some authors go even further and argue that Article IV establishes the presumption of the existence of an arbitration agreement.[26] Consequently, for instance, under Article IV of the New York Convention, it is not necessary to show the authority of the parties to enter into the arbitration agreement. This is solely an issue under Article V raised on objection by the opposing party.[27]

1.22. As the rules governing the procedural requirements are, in most part, based on Article II,[28] any form allowed under the New York Convention is appropriate from the perspective of Article IV. Therefore, Article IV must be seen in the light of Article II and

[22] ICCA, ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES (2011), et. 75.

[23] Albert J. van den Berg, *New York Convention of 1958: Refusals of Enforcement*, 18(2) ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN 1 (2007), et. 34; England and Wales Court of Appeal, *Yukos Oil Co* v. *Dardana Ltd*, [2002] 1 All ER (Comm) 819, judgement, 18 April 2002.

[24] Beata Gessel-Kalinowska vel Kalisz, *Admissibility of Electronic Awards in the UNCITRAL Model Law Jurisdiction: Polish Law Example*, 38(2) JOURNAL OF INTERNATIONAL ARBITRATION, Kluwer Law International 147 (2021), et. 155 – 156.

[25] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, Third Edition, Kluwer Law International (2021), et. 3709; UNCITRAL Secretariat Guide on the Convention on the Recognition of Foreign Arbitral Awards (New York, 1958) (2016), et. 114 – 115 paragraph 65; ICCA, ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES (2011), et. 75; Maxi Scherer, *Article III*, in NEW YORK CONVENTION – COMMENTARY, Beck Hart Nomos (Reinmar Wolff ed., 2012), et. 218 – 219. See England and Wales Court of Appeal, *Yukos Oil Co* v. *Dardana Ltd*, [2002] 1 All ER (Comm) 819, judgement, 18 April 2002.

[26] Albert J. van den Berg, *New York Convention of 1958: Refusals of Enforcement*, 18(2) ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN 1 (2007), et. 34; Stefan Kröll, *The Arbitration Agreement in Enforcement Proceedings of Foreign Awards. Burden of Proof and the Legal Relevance of the Tribunal's Decision*, in LIBER AMICORUM ERIC BERGSTERN. INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION, ALPHEN AAN DEN RIJN (S. Kröll, L. A. Mistelis, P. Perales Viscasillas, V. Rogers eds., 2011), et. 324.

[27] Dirk Otto, *Article IV*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION, Kluwer Law International (Herbert Kronke, Patricia Nacimiento et al. eds., 2010), et. 166.

[28] UNCITRAL Secretariat Guide on the Convention on the Recognition of Foreign Arbitral Awards (New York, 1958) (2016), et. 114 – 115 paragraph 67; Dirk Otto, *Article IV*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION, Kluwer Law International (Herbert Kronke, Patricia Nacimiento et al. eds., 2010), et. 160 – 161. Stacie I. Strong, *What Constitutes an "Agreement in Writing" in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act*, 48(1) STANFORD JOURNAL OF INTERNATIONAL LAW 47 (2012), et. 56. For similar reasoning see: US Court of Appeals for the 11th Circuit, *Czarina, L.L.C.* v. *W.F. Poe Syndicate*, 358 F.3d 1286, judgement, 4 February 2004, and Supreme Court of Spain, *Glencore Grain Limited (United Kingdom)* v. *Sociedad Ibérica de Molturación, S.A. (Spain)*, judgement, 14 January 2003, in: ALBERT J. VAN DEN BERG (ed.), YEARBOOK COMMERCIAL ARBITRATION, Volume XXX (2005), et. 605 - 609.

thus cannot undermine the rationale of the Convention's formal requirements.[29] Consequently, as the Convention allows for arbitration agreements to be contained in a signed document,[30] a document referring to standard business terms,[31] in an e-mail exchange,[32] the presentation of these signed documents or a print-out of these e-mails would suffice from the perspective of Article IV(1)(b) requirements. Therefore, the rules of interpretation of Article II will affect the evidence that must be provided under Article IV.[33] In a nutshell, as correctly noted by an English court, it is sufficient for the applicant to supply: 'valid documentation, containing an arbitration clause, by reference to which the arbitrators have accepted that the parties had agreed on arbitration or in which the arbitrators have accepted that an agreement to arbitrate was recorded with the parties' authority'.[34]

1.23. The fourth conclusion of our analysis is that the courts should analyze the requirements from Article IV(1)(b) only from the procedural side. The courts should not *sua sponte* examine the prerequisites of the formal validity of the arbitration agreement under Article II or grounds for refusal of recognition or enforcement under Article V of the New York Convention at the stage when they assess whether the applicant supplied its motion with 'the original of the arbitration agreement'. However, Article II of the New York Convention governs the acceptable form of entering into the arbitration agreement. Thus it also determines the form of the 'original of the arbitration agreement' that needs to be supplied under Article IV(1)(b) of the Convention.

V. Standard of Proof under Article IV.

1.24. Even taking the view that Article IV is only of a procedural or evidence nature does not solve the paradox described at the outset. Procedural or not, this requirement needs to be satisfied.

---

[29] Polish Supreme Court Case No. V CSK 323/11, judgement, 13 September 2012.

[30] Polish Supreme Court Case No. I CKN 240/00, judgement, 29 August 2000.

[31] Polish Supreme Court Case No. III CSK 406/16, judgement, 28 November 2018; Polish Court of Appeals for Katowice Case No. V AGo 11/17, judgment 26 April 2018; Polish Court of Appeals for Katowice Case No. V AGo 11/18, judgment 4 September 2017.

[32] Polish Supreme Court Case No. V CSK 323/11, judgement, 13 September 2012; Polish Supreme Court Case No. V CSK 672/13, judgement, 23 January 2015; Polish Supreme Court Case No. III CSK 406/16, judgement, 28 November 2018.

[33] UNCITRAL Recommendation regarding the interpretation of Article II, paragraph 2, and Article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006); ICCA, ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES (2011), et. 42 – 50.

[34] England and Wales Court of Appeal, *Yukos Oil Co* v. *Dardana Ltd,* [2002] 1 All ER (Comm) 819, judgement, 18 April 2002.

1.25. The most widely accepted approach to Article IV is that it only creates a requirement of a *prima facie* arbitration agreement.[35] Such is the approach in Singapore. Section 30(1)(b) of the Singapore International Arbitration Act requires the person seeking enforcement to produce 'the original arbitration agreement under which the award purports to have been made, or a duly certified copy thereof' to the court. Section 30(2) clarifies, however, that such a document shall be treated merely 'as *prima facie* evidence of the matters to which it relates'.

1.26. But there can be no *prima facie* agreement if there is no agreement at all (e.g., when a non-signatory was a party to the proceedings). From that perspective, the *prima facie* standard does not help. With no parties to the arbitration agreement identified (or with a non-existent party identified) in the evidence provided, courts have rejected enforcement.[36] However, it is worth noting that the case law in question dates back almost 25 years. Since then, arbitration law has developed theories of extending the effectiveness to non-signatories.[37]

1.27. Therefore, one needs to analyse other approaches. These approaches need to be examined while considering that Article IV of the New York Convention shall be interpreted following the pro-enforcement bias of the Convention.[38] Consequently, evidentiary formalities cannot overshadow the principles of the New York Convention and the fact that Article IV is only a procedural regulation.[39]

1.28. The Polish Supreme Court underlined that in the event the arbitration agreement is concluded via e-mail, there is no 'original' thereof within the meaning of Article IV(1)(b) of the

[35] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, Third Edition, Kluwer Law International (2021), et. 3711; Dirk Otto, *Article IV*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION, Kluwer Law International (Herbert Kronke, Patricia Nacimiento et al. eds., 2010), et. 167 – 168; UNCITRAL Secretariat Guide on the Convention on the Recognition of Foreign Arbitral Awards (New York, 1958) (2016), et. 114 – 115, paragraph 65; ALBERT J. VAN DEN BERG, THE NEW YORK CONVENTION OF 1958: AN OVERVIEW, ICCA Website (2003), et. 13.
LEW, supra note 2, at 704.

[36] See for example Moscow District Court, *Sokofl Star Shipping Co. Inc.* v. *GPVO Technopromexport* (decided 1997) quoted in Dirk Otto, *Article IV*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION, Kluwer Law International (Herbert Kronke, Patricia Nacimiento et al. eds., 2010), et. 164, 187.

[37] See point 5.4 below.

[38] Albert J. van den Berg, *New York Convention of 1958: Refusals of Enforcement*, 18(2) ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN 1 (2007), et. 2, 32-34.

[39] Martin Frederik Gusy, *The Validity of an Arbitration Agreement Under the New York Convention – Remarks on the Order of OLG Schleswig, March 30, 2000 (16 SchH 5/99)*, 19(4) JOURNAL OF INTERNATIONAL ARBITRATION, Kluwer Law International 363 (2002), et. 368.

Convention; in such a case supplying the court with written confirmation of the agreement is sufficient.[40]

1.29. It has also been held that it is sufficient to show by any means provided by law that parties consented to arbitration (e.g., transcription of the hearing) – thus making the question of being 'in writing' effectively a secondary issue.[41]

1.30. Even if only an arbitration agreement with one party's signature was provided, but the other party's agreement is possible to interpret from other documents, it should be deemed satisfying the requirements of Article IV. Whether such arbitration is valid would depend on the applicable law in question, and the wording of Article II of the New York Convention is restrictive in that respect.[42] The burden of proof then shifts to the party opposing enforcement, and it will be free to present its case under Article V(1)(a).[43]

1.31. Not always satisfying requirements from Article IV(1)(b) using 'documents upon which the tribunal based its jurisdiction', as advocated by S. Kröll who tackled the discussed paradox as well, based on English case law,[44] would be sufficient or possible to solve the paradox discussed. This would not be possible if the tribunal has not referred to any documents. Such a reference and even the reference to the basis of the tribunal's jurisdiction is not required in all cases, e.g., by Article 31 of the Model Law determining the content of the award. Also, the lack of the original arbitration agreement may become a point at issue only at the enforcement stage.

1.32. Therefore, the fifth conclusion of our analysis is that authorities allow for the existence of an arbitration agreement to be proven under Article IV(1)(b) of the New York Convention by any means permitted by law, not just by providing the arbitration agreement in writing itself.

---

[40] Polish Supreme Court Case No. V CSK 323/11, judgement, 13 September 2012.

[41] Dirk Otto, *Article IV*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION, Kluwer Law International (Herbert Kronke, Patricia Nacimiento et al. eds., 2010), et. 171.

[42] ICCA, ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES (2011), et. 49; Dirk Otto, *Article IV*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION, Kluwer Law International (Herbert Kronke, Patricia Nacimiento et al. eds., 2010), et. 161.

[43] Maxi Scherer, *Article IV*, in NEW YORK CONVENTION – COMMENTARY, Beck Hart Nomos (Reinmar Wolff ed., 2012), no. 2, et. 216.

[44] STEFAN KRÖLL & LOUKAS A. MISTELIS & PILAR PERALES VISCASILLAS & VIKKI ROGERS (eds.), LIBER AMICORUM ERIC BERGSTERN. INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION, Alphen aan den Rijn (2011), et. 331.

VI. Fulfillment of Requirements in the Cases of a Non-traditional Arbitration Agreement

1.33. The above considerations can now be transferred to the problem of non-traditional arbitration agreements.

VI.1. Waiver of Jurisdictional Objections

1.34. The legal principle prohibiting self-contradictory behaviour forms a part of the New York Convention.[45] This principle is also widely recognised in both common and civil law jurisdictions.[46] The consequence of this is the recognition of arbitration agreements concluded by failure to object. This is also the method of consent recognised by Option 1 of Article 7 of the UNCITRAL Model Law.

1.35. There are older judgments that take a restrictive approach to evidence of such agreements.[47] But this approach has changed. It is now recognised, for example, that even the delivery of correspondence in which the other party recognised the jurisdiction is sufficient to satisfy the requirements of Article IV(1)(b) of the New York Convention if the other party has not raised jurisdictional objections.[48] It would also be entirely reasonable in such a case to resign from this requirement altogether[49] or to allow the applicant to prove the arbitral jurisdiction in another way. Moreover, the Polish Supreme Court supported the view that a party that has entered an arbitration without objecting to the tribunal's jurisdiction (e.g., on the grounds of the ineffectiveness of the arbitration clause) waives its right to object in postarbitral proceedings. The essence of the New York Convention is that the parties are required to act in accordance with the principles of good faith

[45] Martin Frederik Gusy, *The Validity of an Arbitration Agreement Under the New York Convention – Remarks on the Order of OLG Schleswig, March 30, 2000 (16 SchH 5/99)*, 19(4) JOURNAL OF INTERNATIONAL ARBITRATION, Kluwer Law International 363 (2002), et. 371 – 372.

[46] Celle Court of Appeals Germany, OLG Celle, OLGR Celle 2007, 664, judgement, 31 May 2007; US Court of Appeals for the 4th Circuit, *International Paper Co*. v. *Schwabedissen Maschinen* & *Anlagen GmbH*, 206 F.3d 411, judgement, 14 March 2000; England and Wales Court of Appeal, *Yukos Oil Co* v. *Dardana Ltd*, [2002] 1 All ER (Comm) 819, judgement, 18 April 2002.

[47] For example, see: Netherlands Court of Appeal of The Hague, *James Allen Ltd*. v. *Marea Producten B.B*, judgement, 17 February 1984, in PIETER SANDERS (ed.), YEARBOOK COMMERCIAL ARBITRATION, Volume X-1985, Kluwer, Netherlands (1985).

[48] See, for example Brazil Superior Court of Justice, *L'Aiglon SA* v. *Textil Uniâo*, SEC 856, judgement, 18 May 2005.

[49] Celle Court of Appeals Germany, OLG Celle, OLGR Celle 2007, 664, judgement, 31 May 2007; Spain Supreme Court *Shaanxi Provincial Medical Health Products I/E Corp*. v. *Olpesa, SA*, ATS 599/2003, judgement, 21 January 2003. For an overview of the ways in which the New York Convention has been interpreted in Eastern European countries, including the issue of formal validity, see in particular: Christoph Liebscher, *Application of the New York Convention in Austria and Eastern Europe*, 25(6) JOURNAL OF INTERNATIONAL ARBITRATION, Kluwer Law International 771 (2008).

and morality, and therefore prohibited from acting contrary to those principles. This interpretation makes it impossible to act disloyally towards the co-parties and the arbitral tribunal, causing unnecessary costs and wasting time. There is no fear that a party's procedural rights will be restricted, as it decides on the agreement autonomously.[50] This approach is, in our view, a correct one.

1.36. In another case, the Polish Supreme Court further clarified that the applicant's failure to submit the agreement referred to in Article IV(1)(b) of the New York Convention does not preclude the possibility of granting the application if the existence of a foreign arbitration clause is undisputed.[51] This is in line with the approach present in many jurisdictions under which courts should exempt the applicant from supplying the arbitration agreement in case 'its existence, wording, and authenticity are undisputed.'[52] However, the Polish Supreme Court found that if the defendant objects to the jurisdiction, the requirements from Article IV(1)(b) of the Convention are not relaxed. Such requirements should be interpreted strictly, and statements made by both parties must be made in writing.[53]

1.37. Whether signing of the terms of reference can be treated as an arbitration agreement remains an open question.[54] It seems, in our view, that the sole signing of the terms is insufficient to establish proof under Article IV of the New York Convention. On the one hand, if a party does not raise a procedural objection, signs the terms of reference, and enters into a dispute on merits, one may, in certain circumstances, find that this party waived its objection. On the other hand, where one party has already raised a jurisdictional objection, the mere signing of the terms of reference would not automatically 'overwrite' that objection.

VI.2. Oral and Tacit Arbitration Agreements

1.38. As shown above, oral arbitration agreements are permitted under certain legal systems, or at least these systems relaxed the Article IV(1)(b) requirement. At the same time, some legal systems (e.g., France, Scotland, and Hong Kong) decided to maintain the said requirement despite relaxing the formal

[50] Polish Supreme Court Case No. V CSK 323/11, judgement, 13 September 2012.

[51] Polish Supreme Court Case No. V CSK 672/13, judgement, 23 January 2015.

[52] Maxi Scherer, *Article IV*, in NEW YORK CONVENTION – COMMENTARY, Beck Hart Nomos (Reinmar Wolff ed., 2012), no. 27-29, et. 224-226 and caselaw cited therein.

[53] Polish Supreme Court Case No. III CSK 81/17, decision, 4 April 2019.

[54] JULIAN D. M. LEW & LOUKAS A. MISTELIS & STEFAN KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION, Kluwer Law International (2003), et. 532.

requirements of the arbitration agreement, therefore deepening the described paradox.

1.39. Irrespective of the formal requirements of the arbitration agreement, the solution would be to either dispose of the Article IV(1)(b) requirement when there is no written arbitration agreement (as is the case, e.g., in New Zealand) or interpret the requirement as to allow any other evidence to show the tribunal's jurisdiction in a given case. In the case of oral arbitration agreements, a transcript of the consent expressed by the parties orally suffices.[55]

1.40. As to the tacit arbitration agreements in some cases, even an arbitration agreement with only one party's signature was recognised.[56] Nevertheless, additional evidence would be required to show the consent of the other party.

1.41. However, a Polish court found that if the applicant believes that the presented documents constitute an arbitration agreement in writing, the court should not request supplementation of the motion on formal grounds (by supplying the original of the agreement), but hear the case and establish, at a later stage, whether indeed the documents submitted meet the requirements of Article II of the Convention.[57] This approach is beneficial and allows the case to proceed at the substantive stage (where the court applies Articles II and V of the Convention) when there is no traditional arbitration agreement.

1.42. Polish case law further underlines that the requirements to present the original of the arbitration agreement are of 'a double, formal and substantive nature'. Consequently, if the requirement of Article IV(1)(b) is not met, the motion should be rejected on formal grounds. If it is not and the court initiates the case and only later discovers the lack of the agreement, it denies the motion on substantive grounds.[58]

VI.3. Extension Over Non-Signatories

1.43. Parties may also face challenges in supplying the original of the arbitration agreement concluded in the event of the extension of the scope of the arbitration agreements. Such challenges will, however, not occur in those systems that do not directly

[55] Beeatrice Castellane, *The New French Law on International Arbitration*, 28(4) JOURNAL OF INTERNATIONAL ARBITRATION, Kluwer Law International 371, 374 (2011).

[56] Swiss Federal Tribunal, *Compagnie de Navigation et Transports SA* v. *MSC Mediterranean Shipping Company SA*, DFT 121 III 38, judgement, 16 January 1995; United States Court of Appeals for 3rd Circuit, *Standard Bent Glass Corp.* v. *Glassrobots OY* [Fin.] 333 F.3D 440, judgement, 20 June 2003.

[57] Kraków Court of Appeal Case No. I ACo 53/16; decision of 28 October 2017.

[58] Polish Supreme Court Case No. III CK 510/03, judgement, 3 November 2004; Polish Supreme Court Case No. I CSK 186/12, judgment, 23 January 2013; Polish Supreme Court Case No. V CSK 257/15, judgment, 25 May 2016..

apply the requirements for the arbitration agreement to the question of extension, as is the case under Swiss law in certain circumstances.[59] In such a situation, it is sufficient to provide the initial agreement itself. Indeed, the problem of non-signatories, if anything, exists primarily under Article V(1)(a).[60] International authorities seem to support this view.[61]

1.44. Nevertheless, there is still a second view, which does not allow to separate the issue of extension from the issue of the arbitration agreement itself. Courts have required plaintiffs to provide the initial arbitration agreement together with the documents justifying the changes of the parties to the agreement.[62] The Polish Supreme Court has required these documents to be in the form appropriate for concluding the arbitration agreement itself.[63]

1.45. It is also questionable whether the requirements of Article IV can be satisfied by solely relying on the arbitral tribunal's findings. S. Kröll argued that one needs to give at least 'the benefit of the doubt' to the tribunal's decision on jurisdiction, which means, as we assume, that in cases where the tribunal explicitly confirmed its jurisdiction, the standard of Article IV(1)(b) needs to be reduced.[64] However, this would make the Article IV(1)(b) requirement redundant in all such cases. We excluded such a '*per non est*' reading of this provision at the outset. A US court found, in turn, that '[t]he requirement to submit the [...] arbitration agreement cannot be overcome by any findings of an arbitration tribunal that such agreement

[59] Swiss Federal Tribunal, *X. S.A.L., Y. S.A.L. A.*v. *Z. Sàrl*, DFR 129 III 727, judgement, 16 October 2003. Elliott Geisinger, *Implementing the New York Convention in Switzerland*, 25(6) JOURNAL OF INTERNATIONAL ARBITRATION, Kluwer Law International 691 (2008), et. 695 – 696.

[60] STAVROS BREKOULAKIS, THIRD PARTIES IN INTERNATIONAL COMMERCIAL ARBITRATION, Oxford University Press (2010), et. 189.

[61] Martin Frederik Gusy, *The Validity of an Arbitration Agreement Under the New York Convention – Remarks on the Order of OLG Schleswig, March 30, 2000 (16 SchH 5/99)*, 19(4) JOURNAL OF INTERNATIONAL ARBITRATION, Kluwer Law International 363 (2002), et. 367.

[62] Dirk Otto, *Article IV*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION, Kluwer Law International (Herbert Kronke, Patricia Nacimiento et al. eds., 2010), et. 173 - 174. See also Canada Court of Appeal of Manitoba, *Sheldon Proctor* v. *Leon Schellenberg*, AI02-30-05317, judgement, 11 December 2002 and Polish Supreme Court, C. III. 778/34, judgement, 8 February 1935 where many years before the New York Convention was signed it was held that the signature of the legal predecessor must be regarded as equivalent to the signature of the plaintiff themselves as assignee.

[63] Polish Supreme Court Case No. V CSK 257/15, judgment, 25 May 2016.

[64] STEFAN KRÖLL & LOUKAS A. MISTELIS & PILAR PERALES VISCASILLAS & VIKKI ROGERS (eds.), LIBER AMICORUM ERIC BERGSTERN. INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION, Alphen aan den Rijn (2011), s. 331-334.

existed'.[65] This approach was followed in other jurisdictions.[66] The latter approach seems to be more appropriate.

1.46. The above examples lead us to our sixth and final conclusion. The applicant should be able to prove the existence of an arbitration agreement under Article (IV)(1)(b) of the New York Convention by any means permitted by law, not just by providing the arbitration agreement itself. This should also be the case where the applicable law allows the arbitration to take place despite no written arbitration agreement (in a 'classic' form) between the parties (e.g., through the waiver of a procedural objection or by extension to non-signatories). In such a case the first, procedural phase of the enforcement proceedings can be continued even if the applicant has not submitted the arbitration agreement at all.[67]

VII. Conclusions

1.47. The findings of our analysis can be summarized as follows.

1.48. Article IV(1)(b) of the New York Convention provides for a maximum standard and can be reduced by national laws. The said provision (understood as providing only a maximum level of procedural requirements) does not apply if the state law prescribes for a lower level of such requirements.

1.49. The formal requirements of the arbitration agreement stemming from given legal systems are irrelevant to solve the paradox. The requirement to supply the original of the arbitration agreement is also present in those systems that relaxed formal requirements under Article II of the New York Convention.

1.50. The paradox from Article IV of the New York Convention is also resolved by state laws that do not automatically require supplying the original of the arbitration agreement or that allow other evidence in this regard. Therefore, the requirement to provide the original of an arbitration agreement is a principle

[65] See for example: United States Court of Appeals for 11th Circuit, *Czarina L.L.C.* v. *W.F. Poe Syndicate*, 358 F.3d 1286, judgement, 4th February 2004.

[66] Maxi Scherer, *Article IV*, in NEW YORK CONVENTION – COMMENTARY, Beck Hart Nomos (Reinmar Wolff ed., 2012), no. 23, et. 223-224.

[67] STEFAN KRÖLL & LOUKAS A. MISTELIS & PILAR PERALES VISCASILLAS & VIKKI ROGERS (eds.), LIBER AMICORUM ERIC BERGSTERN. INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION, Alphen aan den Rijn (2011), s. 331.

with exceptions permitted in particular circumstances or where it is possible under domestic law.[68]

1.51. The requirements from Article IV(1)(b) should be analysed by the courts, if at all, only from the procedural side. The courts should not *sua sponte* examine the prerequisites of the formal validity of the arbitration agreement under Article II or grounds for refusal of the recognition or enforcement under Article V of the New York Convention at the stage when they assess whether the applicant supplied its motion with 'the original of the arbitration agreement'.

1.52. However, Article II of the New York Convention governs the acceptable form of entering into the arbitration agreement. Thus it also determines the form of the 'original of the arbitration agreement' that needs to be supplied under Article IV(1)(b) of the Convention.

1.53. Finally, and in our view, the most important, the existence of an arbitration agreement under Article (IV)(1)(b) of the New York Convention and the jurisdiction of an arbitral tribunal (where the applicable law allows the arbitration to take place despite no arbitration agreement between the parties) can be demonstrated by any means, not just by providing the arbitration agreement itself. In such cases, the 'original of the arbitration agreement' should be understood as 'proof for the tribunal's jurisdiction'. Such language is also better for Article IV(1)(b) of the New York Convention and can be proposed *de lege ferenda* as a change in the wording of this provision.

1.54. Having said that, we need to clarify that the proposed interpretation of Article IV(1)(b) of the New York Convention would only allow the first obstacle to the recognition / enforcement to be removed by kickstarting the proceedings in cases where the jurisdiction of the tribunal was established in a non-traditional manner. Whether the enforcement court agrees with the arguments proposed by the opposing party on the basis of Article V (in particular (1)(a) and (c), would be decided in the second, substantive stage of the proceedings, which was not discussed in this paper.

[68] See for example: Sweden Hålogaland Court of Appeal, judgement, 16 August 1999, quoted by Gunnar Nerdrum, *Norway*, in INTERNATIONAL ARBITRATION COURT DECISIONS (Stephen Bond, Frédéric Bachand eds., 3rd ed. 2011).

Summaries

FRA [***La question de la production de « l'original de la convention d'arbitrage » selon l'article IV de la Convention de New York en l'absence d'un tel document***]

Le présent article réfléchit sur le problème pratique de la reconnaissance et de l'exécution de sentences arbitrales étrangères en vertu de la Convention de New York dans une situation où les parties n'ont pas conclu de convention d'arbitrage écrite. Il est évident que la Convention, signée en 1958, ne reflète que les normes qui s'appliquaient à la procédure arbitrale au moment de son adoption. Ainsi, elle ne prévoit explicitement que les cas où la convention d'arbitrage remplit les conditions de forme énoncées dans son article II. Par ailleurs, la Convention de New York exige de la partie qui demande la reconnaissance et l'exécution d'une sentence arbitrale qu'elle produise, afin que sa demande soit accueillie, l'original de la convention d'arbitrage (article IV, paragraphe 1, point b)). La teneur de la Convention de New York fait ainsi abstraction de la tendance croissante à l'assouplissement des conditions de forme de la convention d'arbitrage, y compris la conclusion implicite des clauses compromissoires, par exemple en renonçant à la possibilité de contester la compétence du tribunal arbitral, ou en étendant les effets de la convention d'arbitrage aux personnes qui ne sont pas signataires de la clause compromissoire. L'article tente de répondre à la question de savoir si la reconnaissance de la sentence arbitrale en vertu de la Convention de New York est possible dans toutes ces situations. Les auteurs concluent que la sentence arbitrale peut être reconnue et exécutée dès lors que la partie qui demande sa reconnaissance et son exécution a la faculté d'établir la compétence du tribunal arbitral par tout moyen.

CZE [***Předložení „prvopisu rozhodčí smlouvy" ve smyslu článku IV Newyorské úmluvy, když takový dokument neexistuje***]

Článek pojednává o praktickém problému uznání a výkonu cizích rozhodčích nálezů na základě ustanovení Newyorské úmluvy v situacích, kdy strany neuzavřely rozhodčí smlouvu v písemné formě. Úmluva byla podepsána v roce 1958 a ze zjevných důvodů zohledňuje pouze ty standardy, které se v rozhodčím řízení uplatňovaly v době jejího přijetí. Úmluva tak výslovně upravuje pouze případy, kdy rozhodčí smlouva splňuje formální požadavky článku II. Dále Newyorská úmluva rovněž vyžaduje, aby strana, která žádá o uznání a výkon, předložila za účelem uznání a výkonu rozhodčího nálezu prvopis rozhodčí

smlouvy (čl. IV odst. 1 písm. b)). Dikce Newyorské úmluvy tudíž nezohledňuje sílící tendence rozvolňování formálních požadavků na rozhodčí smlouvy, včetně implicitního uzavírání rozhodčích doložek, a to například vzdáním se námitek proti pravomoci rozhodčího soudu nebo rozšířením účinků rozhodčí smlouvy na osoby, které rozhodčí doložku nepodepsaly. Tento článek se pokouší odpovědět na otázku, zda je ve všech těchto situacích uznání rozhodčího nálezu dle Newyorské úmluvy možné, a dochází k závěru, že rozhodčí nález je uznatelný a vykonatelný, pokud může strana, která o uznání a výkon žádá, prokázat pravomoc rozhodčího soudu jakýmikoli důkazními prostředky.

POL [***Wymóg przedłożenia 'oryginału pisemnej umowy arbitrażowej" zgodnie z Artykułem IV Konwencji Nowojorskiej a brak umowy arbitrażowej w takiej formie. Próba rozwiązania paradoksu***]

Konwencja Nowojorska została zawarta w 1958 r. i z oczywistych przyczyn uwzględnia jedynie ówczesne standardy występujące w arbitrażu. Z tego względu Konwencja przewiduje wyłącznie przypadek zawarcia umowy arbitrażowej w formie pisemnej, podczas gdy w ostatnich latach dochodzi do rozluźniania wymogów formalnych zapisu na sąd polubowny. Artykuł stanowi próbę odpowiedzi na pytanie, czy w oparciu o postanowienia Konwencji możliwe jest spełnienie wymogów formalnych wniosku o uznanie lub stwierdzenie wykonalności wyroku sądu arbitrażowego w sytuacji, gdy wnioskodawca nie jest w stanie przedłożyć „oryginału umowy o arbitraż", gdyż takowy nie istnieje. Zdaniem autorów orzeczenie podlega uznaniu i wykonaniu, jeżeli wnioskodawca może wykazać istnienie właściwości sądu polubownego za pomocą jakichkolwiek środków dowodowych.

DEU [***Die Vorlage der „Urschrift der Schiedsvereinbarung" im Sinn von Artikel IV des New Yorker Übereinkommens, dort, wo ein solches Dokument nicht existiert***]

Das New Yorker Übereinkommen wurde im Jahre 1958 abgeschlossen; aus begreiflichen Gründen berücksichtigt es lediglich die schiedsgerichtlichen Gepflogenheiten zum Zeitpunkt des Abschlusses dieses ´Bereinkommens. Deshalb regelt das New Yorker Abkommen den Fall des Abschlusses einerer Schiedsvereinbarung lediglich in schriftlicher Form. In jüngerer Zeit beobachten wir allerdings eine gewisse Lockerung der formalen Anforderungen, die an die Schiedsvereinbarung gestellt

werden. Der vorliegende Artikel unternimmt den Versuch der Beantwortung der Frage, ob auf der Grundlage der Bestimmungen des New Yorker Übereinkommens die formalen Anforderungen im Zusammenhang mit dem Antrag auf Anerkennung oder die Erklärung der Vollstreckung eines Schiedsspruchs auch dort erfüllt sind, wo die antragstellende Partei außer Stande ist, die „Urschrift der Schiedsvereinbarung" vorzulegen – weil eine solche Urschrift gar nicht besteht. Nach Auffassung der Autoren ist der Schiedsspruch auch in einem solchen Fall anzuerkennen und vollstreckbar, soweit die Partei, die die Anerkennung und Vollstreckung begehrt, die Zuständigkeit des Schiedsgerichts mit irgendwelchen Beweismitteln belegen kann.

RUS [***Представление «подлинника арбитражного соглашения» согласно статье IV Нью-Йоркской конвенции в случае отсутствия данного документа***]
Нью-Йоркская конвенция была заключена в 1958 году, и в ней по понятным причинам предусмотрены только те стандарты, которые применялись в арбитраже на момент ее принятия. Следовательно, Нью-Йоркской конвенцией регулируется заключение арбитражного соглашения исключительно в письменной форме. Однако в последнее время произошло некоторое ослабление формальных требований к арбитражному соглашению. В данной статье предпринимается попытка ответить на вопрос о том, позволяют ли положения Нью-Йоркской конвенции выполнить формальные требования в связи с требованием о признании или заявлением о приведении в исполнение арбитражного решения в случаях, когда сторона, добивающаяся признания и приведения в исполнение, не может представить «подлинник арбитражного соглашения», т. к. такого подлинника не существует. По мнению авторов, даже в таком случае арбитражное решение должно быть признано и подлежит приведению в исполнение, если сторона, ходатайствующая о признании и приведении в исполнение, способна подтвердить компетенцию арбитражного суда любыми средствами доказывания.

ESP [***Presentación del „original del acuerdo de arbitraje" en virtud del artículo IV de la Convención de Nueva York en situaciones en las que no exista tal documento***]
La Convención de Nueva York se celebró en 1958 y, por razones obvias, solo refleja las normas aplicadas al arbitraje en el momento de su adopción. Por lo tanto, la Convención de Nueva

York solo prevé las situaciones en las que el acuerdo de arbitraje se haya celebrado en formato escrito. Sin embargo, recientemente se ha producido cierta relajación de los requisitos formales del acuerdo de arbitraje. Este artículo intenta responder a la pregunta sobre la posibilidad de cumplir con los requisitos formales establecidos por la Convención de Nueva York a la hora de presentar una solicitud de reconocimiento o declaración de ejecutabilidad de un laudo arbitral en una situación en la que la parte solicitante no pueda presentar „el original del acuerdo de arbitraje" dada su inexistencia. Según la opinión de los autores, el laudo arbitral también es reconocible y ejecutable en tal caso si la parte que solicita el reconocimiento y la ejecución puede probar la competencia del tribunal de arbitraje mediante cualquier prueba.

Bibliography:

Marcin Asłanowicz, *Commentary to Art. 1213 paragraph 3*, in SĄD POLUBOWNY (ARBITRAŻOWY). KOMENTARZ DO CZĘŚCI PIĄTEJ KODEKSU POSTĘPOWANIA CYWILNEGO [COURT OF ARBITRATION. COMMENTARY TO PART FIFTH OF THE CODE OF CIVIL PROCEDURE], C.H. Beck (2017).

Luca Beffa, *Enforcement of "Default Awards"*, 31(4) ASA BULLETIN 756 (2013).

ALBERT J. VAN DEN BERG, HYPOTHETICAL DRAFT CONVENTION ON THE INTERNATIONAL ENFORCEMENT OF ARBITRATION AGREEMENTS AND AWARDS EXPLANATORY NOTE (2009), available at: https://www.newyorkconvention.org/draft+convention (accessed on 17 August 2021).

Albert J. van den Berg, *New York Convention of 1958: Refusals of Enforcement*, 18(2) ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN 1 (2007).

ALBERT J. VAN DEN BERG, THE NEW YORK CONVENTION OF 1958: AN OVERVIEW, ICCA Website (2003).

ALBERT J. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION, Boston: Kluwer Law and Taxation (1981).

Albert J. van den Berg, *When is an Arbitration Agreement in Writing Valid under Article II(2) of the New York Convention of 1958?*, in PIETER

SANDERS, EEN HONDERDJARIGE VERNIEUWER, Boom Juridische Uitgevers (2012).

ALBERT J. VAN DEN BERG (ed.), YEARBOOK COMMERCIAL ARBITRATION, Volume XXX (2005).

GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, Third Edition, Kluwer Law International (2021).

STAVROS BREKOULAKIS, THIRD PARTIES IN INTERNATIONAL COMMERCIAL ARBITRATION, Oxford University Press (2010).

Beeatrice Castellane, *The New French Law on International Arbitration*, 28(4) JOURNAL OF INTERNATIONAL ARBITRATION, Kluwer Law International 371 (2011).

Emmanuel Gaillard, *The Urgency of Not Revising the New York Convention*, in ICCA CONGRESS SERIES NUMBER 14, Dublin, Kluwer Law International (A. J. Van Den Berg ed., 2009).

EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, Kluwer Law International (1999).

Elliott Geisinger, *Implementing the New York Convention in Switzerland*, 25(6) JOURNAL OF INTERNATIONAL ARBITRATION, Kluwer Law International (2008).

Beata Gessel-Kalinowska vel Kalisz, *Admissibility of Electronic Awards in the UNCITRAL Model Law Jurisdiction: Polish Law Example*, 38(2) JOURNAL OF INTERNATIONAL ARBITRATION, Kluwer Law International 147 (2021).

Martin Frederik Gusy, *The Validity of an Arbitration Agreement Under the New York Convention – Remarks on the Order of OLG Schleswig, March 30, 2000 (16 SchH 5/99)*, 19(4) JOURNAL OF INTERNATIONAL ARBITRATION, Kluwer Law International 363 (2002).

Philipp Habegger, *Extension of Arbitration Agreements to Non-signatories and Requirements of Form*, 22(2) ASA BULLETIN 390 (2004).

ICCA, ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES (2011).

STEFAN KRÖLL & LOUKAS A. MISTELIS & PILAR PERALES VISCASILLAS & VIKKI ROGERS (eds.), LIBER AMICORUM ERIC BERGSTERN. INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION, Alphen aan den Rijn (2011).

Stefan Kröll, *The Arbitration Agreement in Enforcement Proceedings of Foreign Awards. Burden of Proof and the Legal Relevance of the Tribunal's Decision*, in LIBER AMICORUM ERIC BERGSTERN. INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION, ALPHEN AAN DEN RIJN (S. Kröll, L. A. Mistelis, P. Perales Viscasillas, V. Rogers eds., 2011).

JULIAN D. M. LEW & LOUKAS A. MISTELIS & STEFAN KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION, Kluwer Law International (2003).

Christoph Liebscher, *Application of the New York Convention in Austria and Eastern Europe*, 25(6) JOURNAL OF INTERNATIONAL ARBITRATION, Kluwer Law International 771 (2008).

Gunnar Nerdrum, *Norway*, in INTERNATIONAL ARBITRATION COURT DECISIONS (Stephen Bond, Frédéric Bachand eds., 3rd ed. 2011).

Dirk Otto, *Article IV*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION, Kluwer Law International (Herbert Kronke, Patricia Nacimiento et al. eds., 2010).

PIETER SANDERS (ed.), YEARBOOK COMMERCIAL ARBITRATION, Volume X-1985, Kluwer, Netherlands (1985).

Pieter Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13(2) THE INTERNATIONAL LAWYER 269 (1979).

Maxi Scherer, *Article III*, in NEW YORK CONVENTION – COMMENTARY, Beck Hart Nomos (Reinmar Wolff ed., 2012).

Maxi Scherer, *Article IV*, in NEW YORK CONVENTION – COMMENTARY, Beck Hart Nomos (Reinmar Wolff ed., 2012).

Stacie I. Strong, *What Constitutes an "Agreement in Writing" in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act*, 48(1) STANFORD JOURNAL OF INTERNATIONAL LAW 47 (2012).

Tomasz Strumiłło, *Commentary to Art. 1213, paragraph 3*, in KODEKS POSTĘPOWANIA CYWILNEGO. TOM II. KOMENTARZ. ART. 730-1217 [CODE OF CIVIL PROCEDURE. VOL. II. COMMENTARY. ART. 730-1217], C.H. Beck, (J. Jankowski ed. 2019).

UNCITRAL Secretariat Guide on the Convention on the Recognition of Foreign Arbitral Awards (New York, 1958) (2016).

UNCITRAL Recommendation regarding the interpretation of Article II, paragraph 2, and Article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006).

United Nations General Assembly, *Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session* (19 June – 7 July 2006), available at: https://undocs.org/en/A/61/17(SUPP) (accessed on 17 August 2021).

United Nations General Assembly, *Report of Working Group II (Arbitration) on the work of its forty-fourth session* (23 – 27 January 2006), available at: https://undocs.org/en/A/CN.9/592 (accessed on 17 August 2021).

United Nations General Assembly, *Settlement of commercial disputes: Form of arbitration agreement, Note by the Secretariat* (19 June – 7 July 2006), available at: https://undocs.org/en/A/CN.9/606 (accessed on 17 August 2021).

Michael Wietzorek, *The Form of the International Arbitration Agreement under the 2011 French Arbitration Law*, KLUWER ARBITRATION BLOG (7 April 2011), available at: http://arbitrationblog.kluwerarbitration.com/2011/04/07/the-form-of-the-international-arbitration-agreement-under-the-2011-french-arbitration-law/ (accessed on 17 August 2021).

Piotr Wiliński, *Should the Miami Draft be given a second chance? The New York Convention 2.0*, 34 SPAIN ARBITRATION REVIEW, Wolters Kluwer España (2019).