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RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: THE APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS - CZECH REPUBLIC

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Abstract: *The courts in the Czech Republic do not have any major problems with the application of the New York Convention (hereinafter the “NYConv” or “Convention”). The Czech Republic (respectively the former Czechoslovakia) asserted a reciprocity reservation under Article I (3) of the NYConv. The Czech Republic is also a contracting state of many bilateral treaties on mutual legal assistance, which regularly deal with the issue of enforcement of foreign arbitral awards. Under Czech law, there is no exequatur proceeding. The grounds set out by Article V are not mandatory, as suggested by the English text of this provision (“may be refused”). The official Czech translation also retains this discretionary power. This implies that the judge is not obliged, according to the NYConv, to refuse recognition and enforcement if one of the grounds of Article V exists, and the judge has the discretionary power to grant the recognition and enforcement of an award. It is arguable that in a case in which a ground for the refusal of enforcement is present, the enforcement court nevertheless has the remaining discretionary power to grant enforcement in those cases in which the violation is de minimis. As was explained in the introduction to this questionnaire, the NYConv, as such, creates part of the Czech national legal order. Therefore, the possibility to waive any of the grounds has to be found in the text of the NYConv itself. However, the wording of Article V of the NYConv does not provide any guidance on the mandatory nature of its stipulations.*

Keywords: *applicable law, arbitrability, arbitral award, arbitration, arbitration agreement, arbitration clause, autonomy, enforcement of arbitral awards, exequatur, foreign arbitral award, ICSID Convention, interim award, New York Convention (1958), place of arbitration, recognition of arbitral awards, set aside an award, ultra petita partium*

1. GENERAL INTRODUCTORY NOTE

The present case law of the Czech courts on the NYConv is very scarce. From the public databases, it is possible to find four decisions of the Czech Constitutional Court, mainly dealing with the breach of the principle of due process, and one decision of the Supreme Court of the Czech Republic, dealing with an objection against enforcement on the basis of the fact that the arbitral tribunal didn't provide the party with an opportunity to be heard. Due to the general absence of case law dealing with the issues included in this questionnaire, this report is essentially based on the experience of its author with arbitration proceedings in the Czech Republic, be it as an arbitrator or as counsel before the Czech courts.

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However, the general absence of case law on the local application of the NYConv cannot be observed as a flaw, because it is a clear indication that the application of the NYConv does not pose any significant problems in praxis.

Before we venture into answering the questions provided in this questionnaire, it is important to explain the specifics of Czech law in relation to the hierarchy of the Czech legal order and the position of international treaties therein.

The Czech legal system is monistic in relation to ratified and published international treaties. According to Article 10 of Constitutional Act No. 1/1993 Coll., the Constitution of the Czech Republic, such treaties are part of the national legal system and have precedence in application before domestic law.

Therefore, the NYConv should be used prior to local law. However, the NYConv itself provides for the application of more favorable mechanisms for recognition and enforcement. In relation to the Czech Republic, such mechanisms could be found in bilateral agreements on mutual legal assistance. We also have to mention the European Convention on European Arbitration, which does not expressly cover the issues of enforcement, but deals with, inter alia, issues of the annulment of an award and the effect of such annulment on recognition and enforcement in another country, which are relevant to this questionnaire.

2. IMPLEMENTATION

2.2 In what form has the New York Convention been implemented into national law?

The Convention was originally implemented in the former Czechoslovakia by Ordinance of Foreign Minister No. 74/1959 Coll., on the Convention on Recognition and Enforcement of Foreign Arbitral Awards of November 6, 1959.¹ The traceability of the obligatory effect of the Convention was complicated by the disintegration of the Eastern Bloc in the 1989 and by the following transformation of the Czechoslovak Federal Republic into the Czech and Slovak Federal Republic, and finally by the separation of this new state into the independent Czech Republic and independent Slovak Republic.

The Czech and Slovak Federal Republic ceased to exist on January 1, 1993 by Constitutional Act No. 542/1992 Coll., on the Dissolution of the Czech and Slovak Federal Republic. According to this Act, the Czech Republic and Slovak Republic became the successor states of the Federation. The succession of the obligations stemming from the International Treaties binding upon the Federation was further confirmed by Constitutional Act No. 4/1993 Coll. of December 15, 1992, on Measures Relating to the Dissolution of the Czech and Slovak Federal Republic, which became effective as of January 1, 1993. On September 30, 1993, the Czech Republic officially informed the UN Secretary General of its succession to the International Treaties binding upon the Czech and Slovak Federal Republic effective as of January 1, 1993. Therefore, the continuity of the binding nature of the original Ordi-

¹ In the original: “Vyhláška ministra zahraničních věcí č. 74/1959 Sb., ze dne 6. listopadu 1959 o Úmluvě o uznání a výkonu cizích rozhodčích nálezů”.

nance of 1959 is granted, even if the entry into force of the NYConv for the Czech Republic is officially determined as January 1, 1993, and the succession date to the NYConv as September 30th, 1993.

2.3 What declarations and/or reservations, if any, did your country make?

At the time of accession, Czechoslovakia asserted a reciprocity reservation under Article I (3) of the NYConv. This reservation, however, does not encompass the second part of Article I(3) concerning limitation of application of the Convention only to commercial legal relationships. As was explained in the answer to Question I(A), since the dissolution of Czechoslovakia on January 1, 1993, the Czech Republic has considered itself bound by multilateral international treaties to which Czechoslovakia was a party, including all reservations and declarations to those treaties. Accordingly, the reciprocity reservation continues to be applicable at present.

2.4 What is the definition of an “arbitral award”? of a “foreign arbitral award”?

Article I(1) of the Convention contains two definitions for a foreign award. The first definition is an award made in the territory of a State other than the State in which recognition and enforcement are sought. The Convention also applies to the recognition and enforcement of an arbitral award that is not considered a domestic award in the State in which recognition and enforcement are sought.

The second definition is only relevant for an arbitral award made in the country in which its recognition and enforcement are sought. There is no category of awards rendered in the Czech Republic that are not considered domestic awards such that the New York Convention would be applicable to them.

2.5 When if ever are measures of provisional relief ordered by an arbitral tribunal considered to constitute “awards” within the meaning of the Convention?

The concept of provisional measures ordered by an arbitral tribunal is alien to Czech law. According to Czech Act No. 216/1994 Coll., on Arbitral Proceedings and the Enforcement of Arbitral Awards (hereinafter “Act on Arbitration”), this power is granted exclusively to the common courts. The term “arbitral award” in the sense of Article I(1)&(2) of the NYConv is constantly interpreted as a final and binding decision on the merits, and therefore it cannot be applied to another form of arbitral decision, especially not to decisions that are merely of a provisional nature.

It is also important to highlight the differences between preliminary awards and interim or provisional measures from the Czech point of law.

A preliminary award has to be understood as an interim or provisional measure in those countries in which arbitrators are entrusted with the power to grant such relief by law. However, even if such measure is called an “award”, the Czech courts shall analyze it according to its real content in light of the requirements stipulated for the arbitral award (finality and binding nature, see above). Therefore, the recognition and enforcement of interim (or partial) foreign awards is generally possible if the award in

question imposes a specific enforceable obligation in the form of a particular duty.² It must be stated that, from the perspective of the Czech authorities, partial awards, like interim awards, play a different role than interim measures, and as such they cannot substitute interim measures.

2.6 May a party seeking recognition or enforcement of a foreign arbitral award, at its option, also rely upon a means other than the New York Convention? If so, which means?

According to Article VII of the NYConv, a party seeking the recognition or enforcement of a foreign arbitral award is entitled to use other multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States, or a party may seek the recognition or enforcement of a foreign arbitral award according to the domestic law of a Contracting State concerning the recognition and enforcement of a foreign arbitral award.

The Czech Republic is a contracting state of many bilateral treaties on mutual legal assistance, which regularly deal with the issue of the enforcement of foreign arbitral awards issued by arbitral courts seated in the territory of the other High Contracting Party.³

It should be noted that the Czech Republic is also a contracting state to the European Convention on International Commercial Arbitration (hereinafter the “European Convention”). Even if the European Convention does not expressly regulate the problematic of the recognition and enforcement of awards, Article IX thereof contains rules for setting aside an award and the effect of such setting aside on the enforcement of the award in a different jurisdiction than the one in which the award was set aside.

Such annulment in one member state does not exclude the recognition and enforcement of the award in another member state, if such award was not set aside in its member state of origin due to the fact that:

- the parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the law of the country in which the award was made; or
- the party requesting setting aside of an award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present their case; or
- the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope

² ICC guide to national procedures for the recognition and enforcement of an award under the NYConv, p. 136.

³ The list of bilateral treaties on mutual legal assistance can be found on the website of the Czech Ministry of Justice: <http://194.213.41.20/justice/ms.nsf/Dokumenty/DFE08ABB357775C6C1256A2A004F250D> (accessed on June 3, 2013). The non-exhaustive list of states with which the Czech Republic has concluded bilateral treaties on mutual legal assistance and which cover the issues of the recognition and enforcement of foreign arbitral awards includes: Albania (Ordinance No. 97/1960 Coll.); Bosnia and Herzegovina, Croatia, Yugoslavia and Macedonia (Ordinance No. 207/1964 Coll.), Yemen (Ordinance No. 76/1990 Coll.), Cyprus (Ordinance No. 96/1983 Coll.), Mongolia (Ordinance No. 106/1978 Coll.), Portugal (Ordinance No. 23/1931 Coll.), Romania (Ordinance No. 1/1996 Coll.), among others.

- of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, such part of the award that contains decisions on matters submitted to arbitration need not be set aside; or
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of the European Convention.

The European Convention also contains a specific provision on the application thereof among the Parties that are also parties to the NYConv. Article IX(2) of the European Convention provides that the aforementioned article limits the application of Article V(1)(e) of the NYConv only to cases of the setting aside of an award under the conditions set in the bullet points above.

One special case of enforcement is an investment award, in which one party is a private subject (investor) and the other is a State party (the Host State), whereas the dispute arose out of an investment made by the investor in the territory of the Host State. Some Treaty mechanisms for Investment Dispute Settlement also include specific enforcement provisions (i.e. the ICSID Convention, of which the Czech Republic is a Contracting State).

Another option is to follow the path set up by Czech Act .No. 91/2012 Coll., on International Private Law (hereinafter “Act on International Private Law”). This current regulation provides that foreign arbitral awards shall be recognized and enforced in the Czech Republic in the same manner as domestic awards under the condition of reciprocity. Reciprocity is also considered as given in a situation in which the foreign state generally proclaims the foreign awards in its territory to be enforceable under the condition of reciprocity. The decision on the enforcement of a foreign award always has to be reasoned.⁴

Under Czech law, there is no *exequatur* proceeding. The court proclaims the foreign award enforceable under the condition that:

- (i) the award is effective and enforceable according to the *lex loci arbitri*;
- (ii) the arbitral award is not in breach of public order (*ordre public*);
- (iii) the award is not faulty due to a defect that serves as grounds for annulling the award:
 - a. the award was issued in a matter that is not arbitrable;
 - b. the arbitration agreement is invalid, does not apply to the matter, or was cancelled;
 - c. an arbitrator who participated in the proceedings was not empowered to do so under the arbitration agreement or otherwise, or the arbitrator was not capable of acting as a arbitrator ;
 - d. the award was not resolved by a majority of arbitrators;
 - e. a party was not given an opportunity to hear the case before the arbitrators;
 - f. the award adjudicates that a party is to provide performance that was not claimed, or performance that is impossible under domestic law or is against the law;
 - g. the arbitrator or a permanent arbitral institution decided a dispute stemming from a consumer contract outside the consumer protection law or evidently in breach of *bonos mores* or public order;

⁴ Articles 120 and 122 of Act on International Private Law.

- h. the arbitral agreement concerning consumer disputes does not include true, complete and correct information on:
 - i. the arbitrator or the permanent arbitral court;
 - ii. the manner and way in which the proceedings shall be initiated and conducted;
 - iii. the arbitrators' fee and the anticipated kinds of costs of the proceedings and the rules for adjudication thereof;
 - iv. the seat of the proceedings, and the means of delivery of the award to consumer; and
 - v. the fact that the final award is enforceable; or
- i. there are facts, decisions or evidence that couldn't be used in the arbitral proceedings and that could lead to a more positive outcome of the proceedings for the pleading party, or if it is possible to take evidence that cannot be taken in arbitral proceedings if such evidence could lead to a more positive outcome of the proceedings for the pleading party.⁵
- (iv) the award has not been annulled in its state of origin or in state under the law of which, that award was made⁶

3. ENFORCEMENT OF AGREEMENTS TO ARBITRATE (N.Y. CONVENTION, ARTICLE II)

3.1 How do the courts interpret the Convention terms “null, void, inoperative or incapable of being performed”? In interpreting the, do they consult any particular choice-of-law rules?

The formulation “null and void” can also be found in Czech Act No. 99/1963 Coll., Code of Civil procedure (hereinafter “Code of Civil procedure”). Article 106 thereof provides a similar mechanism for the court to refer the parties to arbitration at the request of one of the parties and to stay the proceedings. However, the court is not obliged to refer the parties to arbitration, and shall commence the proceedings, if:

- (i) the parties proclaim that they do not insist on the arbitration agreement;
- (ii) the court discovers that the matter is not arbitrable according to Czech law;
- (iii) the arbitral agreement is not valid or is null and void;
- (iv) the matter is outside the scope of powers to arbitrate entrusted to the arbitrators by the agreement; or
- (v) the arbitral tribunal refused to deal with the matter.

It is quite clear that the Czech courts, when dealing with this issue, shall take this article as a point of departure. In praxis, this article doesn't pose any problems. The Act on Private International Law provides that, in relation to the evaluation of the arbitration clause, the

⁵ Articles 120-122 of Act on Private International Law, Article 31 of Act on Arbitration; Article 228, Section 1, Letters a) and b) of Code of Civil procedure.

⁶ Article 121 of Act on Private International Law.

⁷ Article 117 of Act on Private International Law.

admissibility of the arbitration clause has to be evaluated according to Czech law.⁷ Other requirements of the arbitration clause shall be evaluated according to law of state, where the award shall be issued. The law applicable to the arbitration clause is also applicable to the form of the arbitration clause. It is, however, sufficient if the conditions stipulated by the law of the place in which such will was expressed were met.

In the absence of the choice of applicable law by the parties, the courts are obliged to apply the domestic conflicts of law rules to identify the applicable law for the arbitral agreement according to the doctrine of separation independently of the main contract according to the rules stipulated in the previous paragraph.

If the conflicts of law rules refer to Czech law, the Czech rules of interpretation shall be used. Linguistic expression of legal act contained in a contract must be interpreted in accordance with Czech law firstly by grammatical, logical and systematic means. Simultaneously, the court has to evaluate the will of the parties at the moment of the conclusion of the agreement; however such will has to be compatible with the language of the agreement in order to could be taken into account. The rules of interpretation must not change the meaning of the demonstration of the will of the parties. The application of these rules of interpretation shall only lead to the interpretation of the act in accordance with the time and circumstances under which it was made. If the act was done in writing, the certainty of the expression of will is given by the content of such document.⁸

However, these rules of interpretation are taken from Czech law and are of a substantive nature, and therefore if the parties shall stipulate a different substantive law, the court shall apply it accordingly. As there is an absence of any previous decisions in this matter, it is most probable that the court shall follow the wording of Article 106 of the Code of Civil Procedure. This provides a substantially clearer and broader basis for staying the proceedings in case of the existence of a valid arbitration agreement/ clause. The only difference between the wording of the NYConv and Article 106 is the inclusion of “inoperability” and “incapability of performance”, which at first glance are much more general than the specific situations described in Article 106. At second glance, however, such inoperability is more general than the specific Section (i), and this incompatibility provides an overarching term for Section (iv) above. Therefore, from my point of view, Article 106 of the Code of Civil Procedure is fully compatible with the NY-Conv, which, on the other hand, regulates a broader spectrum of situations. From a practical point of view, however, even if the Czech court, when dealing with this issue, applies Czech law, it should not reach an interpretation that is contradictory to an independent interpretation of the Convention.

This is, however, case-specific, and the current case law does not provide enough guidance as to how Czech Courts can cope with this issue.

⁸ Decision of the Supreme Court of the Czech Republic of September 15, 2010, Docket No. 33 Cdo 4731/2008.

3.2 Which kind of objections to arbitration (whether jurisdictional or non-jurisdictional) are the courts willing to entertain prior to the arbitration, if a party resisting arbitration so requests? And which kind of objections will the courts not entertain, but instead allow the arbitral tribunal to decide in the first instance?

The list of the objections was already provided in Q III(A) in relation to the commentary on Article 106 of the Code of Civil Procedure. It has to be highlighted that the objections included in this paragraph are not analyzed by the court *ex officio*, but must be raised by the opposing party at least during its first action on the merits.

Further objections relate to the ones listed under Article 106, but are anchored in Act on Private International Law (its article 121) and Act on Arbitration. Act on Arbitration in this context includes definition of the content and form of the arbitration agreement/arbitration clause.

An arbitration clause can be concluded in relation to property disputes among the parties, excluding disputes originating in relation to enforcement proceedings and disputes stemming from insolvency proceedings. Further, it is only possible to validly conclude an arbitration agreement in relation to matters concerning which the parties are free to reach a valid settlement.

The arbitration agreement can concern:

- (i) an individual existing dispute; or
- (ii) any and all disputes arising in future out of a given legal relationship or out of a given range of legal relationships.

Therefore, any other form/extent of the agreement should be regarded as invalid, and should therefore serve as grounds for an objection to arbitration proceedings.

Another issue is the form of the arbitration agreement. As required under the NYConv, the Act on Arbitration also stipulates that the agreement should take the written form.⁹ The written form is preserved if the agreement is concluded by telefax (facsimile), telegraph or by other electronic means that provide for the permanent capturing of the content and the parties to such agreement. The agreement can also be included in the general terms and conditions, if it is clear that the accepting party agrees with the wording of the arbitration clause.

There are also further specifics and limitations in relation to consumer contracts and any arbitration agreements contained therein.

4. GROUNDS FOR REFUSAL OF RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (N.Y. CONVENTION, ARTICLE V)

4.1 General

1. When, if ever, do courts recognize or enforce a foreign arbitral award, even though a ground has been established that would permit them to deny recognition or enforcement of the award?

⁹ Article 117 of Act on Private International Law indirectly refers to Act on Arbitration.

The grounds set out by Article V are not mandatory, as suggested by the English text of this provision (“may be refused”). The official Czech translation also retains this discretionary power. This implies that the judge is not obliged, according to the NYConv, to refuse recognition and enforcement if one of the grounds of Article V exists, and the judge has the discretionary power to grant the recognition and enforcement of an award.

It is arguable that in a case in which a ground for the refusal of enforcement is present, the enforcement court nevertheless has the remaining discretionary power to grant enforcement in those cases in which the violation is *de minimis*.

Simultaneously, as the Czech Republic asserted a reservation according to Article I(3) of the NYConv in relation to reciprocity, this element also has to be taken into account.

The Act on Arbitration does not provide any discretionary power to the judge on recognition and enforcement in the Czech Republic. Foreign awards shall be recognized and enforced if reciprocity is ensured. Reciprocity is deemed to be ensured if such foreign state generally proclaims foreign arbitral awards to be enforceable under the condition of reciprocity.

2. Are any of the grounds for denying recognition or enforcement of a foreign arbitral award under the Convention subject to waiver by the parties? If so, which ones, and what constitutes waiver?

Some arbitration agreements and institutional rules contain language waiving the parties’ rights to oppose the recognition and enforcement of an arbitral award. In principle, the parties’ autonomy to waive at least some grounds for resisting the recognition of foreign arbitral award should be respected. Nonetheless, in the Convention, there are obviously limits to the parties’ autonomy to waive defenses to the recognition of an award. The parties’ autonomy would likely not extend to matters of public policy and non-arbitrability, to claims that no valid arbitration agreement was ever concluded, or to defenses to recognition based on fraud or similar claims.

As was explained in the introduction to this paper, the NYConv, as such, creates part of the Czech national legal order. Therefore, the possibility to waive any of the grounds has to be found in the text of the NYConv itself. However, the wording of Article V of the NYConv does not provide any guidance on the mandatory nature of its stipulations.

It is obvious that the court should also look to Czech law, especially Article 121 of the Act on Private International Law, which regulates the reasons for denying of the recognition and enforcement of an arbitral award. These reasons are obligatory and cover the reasons for setting aside the award (with reference to Article 31 of the Act on Arbitration, which generally corresponds to Article V(1) of the NYConv (for details, see Q I(E) above), conflicts with public policy, and the absence of the power and enforceability of the award in its country of origin. Article 121 of the Act on Private International Law, like Article 31 of the Act on Arbitration, is of a mandatory nature, and therefore no waiver by the parties is possible here, or, respectively, such waiver shall not be binding upon the court when deciding on the recognition and enforcement of such foreign arbitral award. According to this parallel with domestic law, I am persuaded that the court shall not accept any contractual waiver under Article V(1) of the NYConv.

4.2 Particular Grounds

1. How do courts interpret and apply Article V(1)(a) (“The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”)

(In particular, do courts follow the sequence of choice of law rules prescribed here for determining whether an agreement to arbitrate is valid – i.e. “the law to which the parties have subjected [the agreement] or, failing any indication thereon, ... the law of the country where the award was made”?)

As was stated in the answer to Q II (A) above, the Act on Private International Law, in relation to the evaluation of the arbitration clause, provides that the admissibility (validity in terms of the NYConv) of the arbitration clause has to be evaluated according to Act on Arbitration.¹⁰ The law applicable to other requirements of the arbitration clause is also applicable to the form of the arbitration clause; however, it is sufficient if the conditions stipulated by the law of the place or places where the will was expressed were fulfilled. In any case, any express choice of law has precedence over the application of domestic choice of law rules.

It is therefore apparent that the sequence of applicable law as stipulated in the NYConv and in the Czech law is different; therefore, precedence could be given to the sequence as stipulated in Article V(1)(a) of the NYConv.

However, this doctrine first has to be confirmed by the praxis, as the current case law does not address this issue. As to the legal capacity of the parties, according to Act on International Private Law, the legal capacity of a natural person is ruled by the laws of the country of their residence whereas the legal capacity of an artificial legal person is ruled by the laws of the country of their incorporation. If the Act was performed in the Czech Republic by a foreigner, it is sufficient if the conditions of Czech law are fulfilled.

2. How do courts interpret and apply Article V(1)(b) (“The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case”)

(In particular, do courts apply the same standards of proper notice and fair hearing as required by domestic constitutional law?)

The grounds incorporated in Article V(1)(b) of the NYConv differ from those included in domestic law. As was stated above in relation to Question I(E), the court shall refuse enforcement if the award is flawed according to Article 31 of the Act on Arbitration (which provides reasons for setting aside the Award - see above). Among the relevant reasons to set aside an award according to domestic law, only the inability to present the case in front of the arbitrators corresponds to the reasons stipulated in Article V(1)(b) of the NYConv. It is important to highlight the fact that the Czech Constitutional Court has repeatedly assumed that, by resorting to arbitration, the parties have voluntarily given up their right to

¹⁰ Articles 117-122 of Act on Private International Law; articles 2-3 of Act on Arbitration.

court protection as guaranteed by procedural and constitutional law. Therefore, from the point of view of Czech case law, the absence of a proper notice of appointment of the arbitrator, like the notice of the proceedings, is not regarded as a ground for setting aside the award. The issue of service (delivery), like the identification of the proper address for service, is up to the parties; the arbitrators are generally not obliged to inspect the validity of changes in the delivery address of the parties. Simply taken, the strict rules applicable to civil proceedings that are protected by constitutional law do not apply to arbitral proceedings. From this point of view, Article V(1)(b) of the NYConv provides a significantly broader spectrum of grounds for refusing enforcement than does local law. However, this issue shall be extremely case-specific, because the reasons covered by Article V(1)(b) of the NYConv could fall under the reasons for setting aside stipulated in Article 31 of the Act on Arbitration. Simultaneously, it must be repeatedly highlighted that the NYConv has application priority over domestic law. However in accordance with article VII(1) of the NYConv a party seeking the recognition or enforcement of a foreign arbitral award is entitled to use other multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States, or a party may seek the recognition or enforcement of a foreign arbitral award according to the domestic law of a Contracting State concerning the recognition and enforcement of a foreign arbitral award.

3. How do courts interpret and apply Article V(1)(c) (“The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration ...”)
(In particular, does an award “deal with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration” when the award grants a remedy specifically excluded by the main contract?)

As stated in the previous answer, this question relates directly to the grounds for setting aside the award according to the Act on Arbitration, because these reasons set the ground for the refusal of the recognition and enforcement of the foreign award according to domestic law. Article 31, Letter f) of the Act on Arbitration, together with Article 121, Letter c) of the Act on International private law provides that the arbitral award shall not be recognized and enforced if it the award adjudicated a performance that was not claimed, or performance that is impossible or prohibited under domestic law. Simultaneously, another reason for setting aside the award that shall serve as grounds for refusing the recognition and enforcement of the award is the requirement established in Section 31, Letter b), which provides that the award shall be set aside if the arbitration agreement/clause does not cover the stipulated dispute. Even if there is no case law of the domestic courts on Article V(1)(c) of the NYConv, it is most probable that, when dealing with this issue, the aforementioned Articles of Czech law shall serve as a point of departure for their argumentation. From this point of view, it is most probable that a Czech court facing the facts and grounds presumed by Article V(1)(c) of the NYConv shall refuse to enforce such award. Going behind the scope of this question, it is interesting to mention situations in which the award is *ultra petita partium*, or when the award also covers counterclaims stemming from the agreements that do not include an arbitration clause. These situations are case-

specific, and also dependent on the nature of the proceedings, be they ad hoc proceedings or institutionalized proceedings, as the institutional rules often cover these issues. For example, the Rules of the Czech Arbitration Court Attached to the Agrarian Chamber of the Czech Republic and Economic Chamber of the Czech Republic generally allow counterclaims under their Article 31. Such counterclaims shall be entertained under the same conditions as stipulated for claims (esp. evidence of the jurisdiction of the arbitral court, i.e. the existence of an arbitral clause). However, different international forums may handle this issue differently.

4. How do courts interpret and apply Article V(1)(d) (“The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place”)

(In particular, what do courts do in the case in which the parties expressly adopted an arbitral procedure that is not in accordance with the mandatory law of the country where the arbitration took place?)

Also, do courts treat an award as not in accordance with the agreement of the parties if the arbitral tribunal applied to the merits of the dispute a body of law other than the body of law that the parties selected in their contract as the governing law?)

Like in the previous question in this section, it is necessary to look to the domestic Act on International Private Law. Article 121, letter a) thereof provides that the Czech court shall refuse to recognize and enforce a foreign award that is ineffective or unenforceable according to the law of the state in which it was issued.

The court dealing with this issue should analyze this question according to the *lex arbitri*. In any case, it is important to stress that, according to Article V of the NYConv, there is no obligation (as opposed to local regulation) to refuse to recognize and enforce the award. Therefore, it is at the discretion of the court to evaluate the legal situation and decide on recognition and enforcement. From the international praxis, there are known cases in which the award was recognized and enforced under the NYConv, even though the award was previously set aside in its country of origin. No similar case has been reported for the Czech Republic.

5. How do courts interpret and apply Article V(1)(e) (“The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”)

(In particular, under what circumstances, if any, will courts recognize or enforce a foreign arbitral award, even though it has been set aside by a competent court of the place of arbitration?)

See the answer to the previous question. As previously stated, there is no obligation to refuse the recognition and enforcement of the award, even if it was previously set aside in its country of origin. However, the current case law of the local courts has not dealt with this issue yet.

Concerning the new regulation of domestic law on the enforcement of foreign arbitral awards, which became effective as of January 1, 2014, it has to be mentioned that among

the reasons for refusal of recognition and enforcement, the New Act on International Private Law introduced a new reason, specifically the fact that the award was set aside in its country of origin or according to applicable law. Therefore, the new domestic doctrine towards foreign awards which shall be enforced outside of the scope of the NYConv became stricter in this regard as of January 1, 2014.

Ground (e) also provides that the enforcement of an award can be refused if the party against whom the award is invoked proves that the award has been suspended by a court of the country in which, or under the law of which, the award was made. The courts have held that a suspension of the award by operation of law in the country of origin (e.g. because of the initiation of an action for setting aside the award) is not sufficient for a refusal of enforcement according to ground (e). In order for the suspension to be a ground for refusal of the enforcement of the award, the respondent must prove that the suspension of the award has been effectively ordered by a court in the country of its origin.

**6. How do courts interpret and apply Article V(2)(a) (“The subject matter of the difference is not capable of settlement by arbitration under the law of [the] country”)
(In particular, what kinds of disputes are considered legally incapable of settlement by arbitration?)**

The Act on Arbitration provides a positive definition of arbitrability, whereas for the dispute to become arbitrable, the following conditions have to be met (cumulatively):

- The dispute has to arise between the parties to the arbitration agreement;
- Such dispute has to be dispute relating to property
- Such dispute cannot relate to enforcement proceedings;
- Such dispute cannot relate to insolvency or bankruptcy proceedings;
- The subject matter of the dispute could be settled by a voluntary settlement among the parties;
- The dispute shall otherwise be subject to Czech court or other Czech authority jurisdiction.

There also exist specific categories of disputes that could stand between these positive conditions. These specific categories cover the following disputes, which are arbitrable, under certain conditions and/or law:

1. Disputes in energetics or telecommunications; however, both categories of disputes are subject to specific procedural rules and exclusive jurisdiction of the administrative organs;
2. A specific category of disputes stemming from labor law under the condition that these disputes arise out of property;
3. Disputes stemming from promissory notes subject to a valid arbitral agreement; and
4. Consumer disputes- these are exclusively anchored in the Act on Arbitration, subject to specific conditions.

By argument *a contrario*, it is possible to extract categories of disputes that are not arbitrable under Czech law, and these generally include:

1. Non-contradictory disputes- these kinds of proceedings are of a specific nature, because they can be in general initiated without the will of the parties, *ex officio*. Since it is not possible to voluntarily settle such disputes, they are therefore not arbitrable (i.e. proceedings on the termination of undivided joint ownership). Into this category also falls a specific kind of criminal proceedings called adhesive proceedings, in which the victim of the crime claims damages against the perpetrator. Even if such dispute could arise out of property, these proceedings are regularly bundled with criminal proceedings, which are generally not arbitrable;
2. Disputes stemming from inheritance proceedings;
3. Procedural disputes- these disputes are of a procedural nature, and are not disputes on the merits.

7. How do courts interpret and apply Article V(2)(b) (“The recognition or enforcement of the award would be contrary to the public policy of [the] country”)

(In particular, under what circumstances is a foreign award deemed to be contrary to the public policy of the country? In other words, what constitutes a violation of public policy for these purposes?)

(Also, does the law draw a distinction for these purposes between “international public policy” (ordre public international) and “domestic public policy” (ordre public interne)?)

Article 121 of the Act on International Private Law provides for the refusal of the enforcement and recognition of a foreign arbitral award if such award runs counter to public order. This ground for denial of the recognition and enforcement of the award has to be applied unconditionally. The effect of such denial is to prevent a negative effect of the award in the territory of the Czech Republic that shall contradict the principles of the social and state establishment, which must be unconditionally respected. In this regard, it must be stressed that procedural public order is at stake. There are no differences between the evaluation of the strictness of the public order rules in relation to domestic or foreign awards.

Generally, any foreign award that imposes duties that contradict mandatory rules of the place/territory of the state in which enforcement shall take place shall be considered to be against Czech “public order”. At the same time, awards imposing duties, the performance of which shall be subjected to public sanction or another similar penalty, shall also be deemed to be against the Czech public order. However, Czech doctrine does not equate public order with mandatory rules. Generally, public order is a different category, which embraces some of the issues regulated by mandatory rules.¹¹

Generally, domestic law does not draw a distinction between domestic and international public policy / public order for the purposes of recognition and enforcement proceedings, because of the fact that the legal order of the Czech Republic is of a monistic nature, and therefore international obligations stemming from binding international Treaties and Conventions were incorporated into national law.

¹¹ For details, see BĚLOHLÁVEK, A. *Arbitration in the Czech Republic: Law and Practice*. Huntington. New York: JurisNet LLC, 1995, p. 1380 et seq.

5. PROCEDURAL ISSUES

5.1 What is required in order for a court to have personal jurisdiction over the award debtor an action to enforce a foreign arbitral award?

Because there is no *exequatur* proceeding in the Czech Republic, the recognition and enforcement proceedings fall together under enforcement proceedings.

Therefore, the legal proceedings for the recognition and enforcement of foreign awards may be brought before the common court that has jurisdiction over the debtor (respondent) with domicile in Czech Republic.¹² The common court having jurisdiction over the debtor is the county court (“*okresní soud*”). If the debtor is not domiciled in the Czech Republic, the applicant seeking the recognition and enforcement of a foreign award must establish that the debtor has assets in the Czech Republic in order for the courts to take jurisdiction.

5.2 What is the statute of limitations (i.e. prescription period), if any, applicable to actions to enforce a foreign arbitral award?

There is no specific limitation period applicable to legal proceedings for the recognition and enforcement of foreign awards. Under Czech law, limitation periods are considered to be a matter of substance, rather than procedure. This means that it is necessary to apply the limitation period under the substantive law applicable to the claims as determined on the basis of conflict of laws rules.¹³ If conflict of laws rules lead to the application of Czech substantive law, the relevant general limitation period is 10 years¹⁴. This limitation period starts to run when the award becomes enforceable. According to the Czech Act on Arbitration, the award becomes enforceable on the day following the expiry of the period determined by the arbitrators for performance pursuant to the award. The length of this period differs depending on the nature of the obligation imposed, but is usually 3 days. The expiry of this period is not examined by the court *ex officio*, but only if objections are raised by the respondent.¹⁵

5.3 On what basis, other than absence of personal jurisdiction or prescription, may a court decline even to entertain an action to enforce a foreign arbitral award?

Generally speaking, there is no *prima facie* reason for which the court will deny to even entertain the action to recognize and enforce the foreign arbitral award, because the proceedings are initiated at the moment of the due service of the action to the court.

The only basis that provides the court with the authority to decline to entertain an action to enforce a foreign award has to be found in procedural rules. The general obstacles for the initiation of proceedings are the procedural barriers of the *Lis Pendens* and *Res Iu-*

¹² Articles 7(1), 9(1), 36a(1), 84–89a, 252(1) and 254(1) of Act No. 99/1963 Coll., Civil Procedure Code; Article 45 of Ordinance of Ministry of Justice No. 37/1992 Coll.

¹³ Articles 1 and 46 of Act on International Private Law

¹⁴ Parties are in compliance with Article 630 of Czech Civil Code allowed to agree on different limitation period which can be negotiated in length from 1 year to 15 years.

¹⁵ Articles 640 and 649 of Act No. 89/2012 Coll., Civil Code.

dicata. If the court is aware of other pending proceedings on the same subject matter, it will stay the proceedings until the first proceedings are resolved. In case of *Res Iudicata*, the court shall reject the claim and halt the proceedings.

A similar situation could rise when the judicial fee is not duly settled. In this regard, it must be highlighted that enforcement in the Czech Republic could be executed in two ways: either through the court or through executors. Executors are self-governed by a chamber, and act independently of the courts (from the moment of their nomination by the court, initiated by a motion for such nomination filed by the creditor according to the award) when collecting the claims against the debtors from the award.

The basic difference in this regard is the fact that the motion for enforcement filed through the executor is not subject to a judicial fee, because the fees of executors do not relate to judicial proceedings, but to the collection of assets stemming from the enforceable decision (award).

5.4 To what extent, if any, does a court that is asked to deny recognition or enforcement of a foreign arbitral award on a particular ground show deference to determinations about that ground previously made by (i) a court that compelled arbitration in the first place, (ii) the arbitral tribunal itself, or (iii) a court of the place of arbitration that was asked to set aside the award?

A court which is asked to deny the recognition or enforcement of a foreign arbitral award on a particular ground does not show deference to determinations about such ground previously made by the abovementioned courts.

6. ASSESSMENT

6.1 In what respects, if any, is the New York Convention subject to criticism in your country?

In the Czech Republic, there is hardly any criticism of the New York Convention, and when so it is terse (for example – the obsolescence of the Convention).

6.2 How would you assess the application of the Convention by the courts of your country?

The courts in the Czech Republic do not have any major problems with the application of the Convention.

6.3 What have been the principal problems, difficulties or controversies surrounding application of the New York Convention in your country? (In answering, you are NOT confined to the issues specified in this questionnaire.)

As was already mentioned in the introductory note, the published court case law on the NYConv so far is so scarce that it is quite problematic to provide a comprehensive overview. Because the conditions stipulated in the NYConv are similar to the conditions stipulated in the Act on Private International Law and the Act on Arbitration, the application of the Convention by the local courts does not give rise to any principal contradictory issues.

6.4 Based on your country's experience, what reforms of the New York Convention, if any, would be useful or appropriate?

Pursuant to Czech practice, which widely recognizes foreign arbitral awards on the platform of the NYConv, no changes or amendments to the NYConv are useful or appropriate. On the contrary, Czech practice shows that the NYConv is a very practical and useful tool, and should not be changed or amended in any respect.