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ՀԱՅԱՍՏԱՆԻ ԱՄԵՐԻԿՅԱՆ ՀԱՄԱԼՍԱՐԱՆ

## LL. M. Program

ԻՐԱՎԱԳԻՏՈՒԹՅԱՆ ՄԱԳԻՍՏՐՈՍԻ ԾՐԱԳԻՐ

**TITLE**

**Issues in the RA Law on Commercial Arbitration regarding challenge to the arbitrators; the legal capacity of natural persons and legal entities at the time of signing the arbitration agreement and during the process of arbitration; and enforcement of arbitration awards**


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**11700**

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# Introduction

## Introduction to the topic

Halsbury's Laws of England defines arbitration as:[1]

"A process used by agreement of the parties to resolve disputes. In arbitration, disputes are resolved, with binding effect, by a person or persons acting in a judicial manner in private, rather than by a national court of law that would have jurisdiction, but for the agreement of the parties to exclude it."

Arbitration has some advantages: it is less time-consuming, more flexible and cost effective. The parties have more control over the process of arbitration than in the courts. Confidentiality is one of the features of arbitration. This means that it is considered to be private. Hence, the parties and their representatives are the only people who can participate in the proceedings.

The institution of arbitration was introduced in Armenia by the Republic of Armenia ("RA") Law on Commercial Arbitration which was adopted on December 25, 2006, and entered into force on February 10, 2007. The last amendments were made in 2015.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as New York Convention) was adopted on 10 June 1958 and entered into force on 7 June 1959. Armenia acceded to this Convention on March 29, 1998. The RA Law on Commercial Arbitration is based on the UNCITRAL Model Law[2] on International Commercial Arbitration by the United Nations Commission on International Trade Law (UNCITRAL). The Model Law is applicable for "International Commercial Arbitration",

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[1] The definition of arbitration given by Halsbury's Laws of England is taken from this website**.** Anon, (2016). [online] Mayerbrown.com. Available at: https://www.mayerbrown.com/files/News/91090633-1b48-4757-925e-36d64efc439f/Presentation/NewsAttachment/e6a6d784-e500-4c7b-8a14-3825509e6328/LexisNexis_2012_intro-to-arbitration.pdf [Accessed 29 Apr. 2016]. (Page 1)

[2] Data on Armenia - Investing Across Borders - World Bank Group (2016). [online] Iab.worldbank.org. Available at: http://iab.worldbank.org/Data/ExploreEconomies/armenia?topic=arbitrating-commercial-disputes [Accessed 25 Mar. 2016].

Manukyan, M., Commission, J. and Jarusevicius, J. (2016). *New Perspectives and Challenges for International Arbitration in Armenia - Kluwer Arbitration Blog*. [online] Kluwer Arbitration Blog. Available at: http://kluwerarbitrationblog.com/2016/02/26/new-perspectives-and-challenges-for-international-arbitration-in-armenia/ [Accessed 25 Mar. 2016].

while the RA Law on Commercial Arbitration is intended to cover national arbitration. In addition, by the 2015 amendments, it extends to non-commercial disputes.[3]

## The scope of the master paper and its objectives

The subject of the master paper is based on following issues presented in RA Law on Commercial Arbitration. It is about challenge to the arbitrators; the issue of legal capacity of natural persons and legal entities at the time of signing the arbitration agreement but also during the process of arbitration; and enforcement of arbitration awards. The reason I have chosen these issues is that in Armenia, arbitration is in the embryonic stage[4] which means it has not developed well. That is why, at the present time, courts are facing several problems. They become overloaded with different cases and delay in making decisions. In developed countries, arbitration is a popular way to solve disputes. Hence, if Armenia wants to do business with these countries, it should improve its laws and follow the internationally accepted practices and customs concerning arbitration to offer arbitration as an effective dispute resolution method.

## Method and Materials

In order to recommend solutions to these problems, I will study and analyze the arbitration rules of different countries like the United States ("US"), United Kingdom ("UK"), France, Spain, Switzerland, Germany, Poland, Taiwan, Singapore as well as different international treaties.

The method of studying will be the analogy, i.e. by making a comparison between different practices and trying to apply them in the RA Law on Commercial Arbitration. Also, I will bring examples of different case studies to substantiate my analysis.

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[3] Article 1 (5) of the RA Law on Commercial Arbitration stipulates that the present Law extends also to non-commercial disputes in cases where dispute settlement by arbitration is authorized by Law.

[4] Research paper on the establishment of legality and justice through arbitration

Osf.am, (2016). [online] Available at: http://www.osf.am/wp-content/uploads/2014/09/Research_Paper.pdf (Page 7) [Accessed 13 Feb. 2016]. **Cited from** Shahal F. Ali, Consumer Financial Dispute Resolution in a Comparative Content. Cambridge 1 University Press 2013. Pages 190-192,196.

Zaven A. Sargsyan, A Practical Guide to International Commercial Arbitration in the Post-Soviet 2 States: Republic of Armenia. JEL 2012 Vol. 5, No. 3, August 2013

The literature which I used in this paper consists of different arbitration rules and other legal documents and arbitration awards from European countries. I have also read various books for my analysis. For instance, Contemporary Issues in International Arbitration and Mediation by Rovine, Arthur W, Due Process in International Commercial Arbitration by, Matti S. Kurkela and Santtu Turunen.

## Thesis outline

In the First Chapter, the issue concerning what happens if the final award is rendered before the court determines the challenge to the arbitrator is presented and whether or not the replacement arbitrator should rehear testimony and argument at a new hearing will be examined. Moreover, it aims to find out whether the consent of the newly appointed arbitrator to continue the hearing is required.

The Second Chapter discusses what would happen if the party (especially if a legal entity) becomes incapacitated as a result of insolvency during the process of arbitration. Also, based on which law the legal capacity of the natural person to the arbitration agreement or the process of arbitration should be determined.

The Third Chapter discusses the possible methods of proving finality of an arbitral award. In addition,it discusses the enforcement of foreign arbitral awards made in a Non-Contracting State to the New York Convention.

The Conclusion and Recommendation part will sum up all analysis carried out in the three Chapters. Suggestions and recommendations are provided to illustrate the possibility to fill the gaps.

# Chapter 1

## 1.1 Consequences of the Challenge to an Arbitrator

### 1.1.1 What happens if the final award is rendered before the court determines the challenge.

Article 13(3) of the RA Law on Commercial Arbitration[5] provides that "if a challenge under any procedure agreed upon by the parties or under the procedure of paragraph 2 of this Article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court specified in article 6 of this Law to decide on the challenge, which decision shall be subject to no appeal." "*While such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.*" [6] In the last part, the Law does not clarify the outcome of the situation in case the final award is rendered before the court determines the challenge to the arbitrator. The analysis aims to find out whether the arbitral award is considered invalid, in case the court confirms the challenge to the arbitrator after the arbitral tribunal rendered an award. For this purpose a few decisions of courts of other countries are examined.

There are two different court judgments (favorable and unfavorable) to this issue that are presented in the study. At the end, my opinion, by comparing court judgments of two different countries', is provided.

The favorable judgment [7] is from Taiwan High Court.[8] It held that "the party seeking to set aside an arbitral award is required to prove the arbitrator's partiality since the arbitral tribunal may elect not to suspend the proceeding before the withdrawal becomes conclusive." This means that if one of the parties asks the court to invalidate the award, it[9] should bring evidence to convince the court that the arbitrator was biased and the views of the challenged arbitrator affected the award.

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[5] The English translation is taken from the IBT course provided by Prof. Mushegh Manukyan.

[6] Emphasis added

[7] Rovine, AW 2013, *Contemporary Issues in International Arbitration and Mediation*, Leiden: Brill, eBook Collection (EBSCOhost), EBSCO*host*, viewed 16 March 2016. Page 319 7.2 Affirmative Court Judgment: Taiwan High Court judgment no. 96-Year Zhong-Shang-Zi 578

[8] Judgment no. 96-Year Zhong-Shang-Zi 578

[9] It/he used in this paper includes all genders

The court also gave another argument regarding the continuation of the proceedings: in case, the High Court's judgment showed that "the arbitral tribunal should not make an arbitral award until after the court gave its decision on the challenged arbitrator; this would induce the party to keep seeking withdrawal from the court frequently and excessively to deter the arbitration proceeding." Thus, the law can provide the opportunity to continue while the court has not decided yet on the challenged arbitrator. This judgment suggests that until such time as the court has not rendered judgment confirming the challenge, arbitration should continue and may issue an award. The court is not going to set aside the award until the party who wants the award to be set aside proves that the challenged arbitrator was biased.

The unfavorable judgment was rendered by the Shilin District Court [10] of Taiwan[11]. The District Court rendered the judgment in 2007. It held that "the challenged arbitrator cannot take part in the arbitration proceedings." The court did not examine the extent of the participation of the challenged arbitrator. The court also did not look if the challenged arbitrator was impartial or not. It substantiated that "if there was a challenge for disqualification of the arbitrator, the arbitral award would be subject to setting aside." There is no indication whether the arbitral proceedings were conducted by a sole arbitrator or by a panel.[12] The wording, however, suggests that if the arbitration was being conducted by a sole arbitrator, the award would be considered as void and, if by a panel, to ensure validity of the award the challenged arbitrator should be replaced. There is also a similar decision made by the Taiwan Supreme Court.[13]

Another unfavorable judgment[14] is from the Federal Supreme Court of Germany ("*Bundesgerichtshof"*) which states that "an arbitral award can be set aside if one of the arbitrators was successfully challenged in the courts after the tribunal reached a unanimous decision on the case presented by the parties."

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[10] Judgment no. 96-Year Zhong-Su-Zi 1

[11] *Supra* note 7, page 318 7.1 Negative Court Judgment Shilin District Court judgment no. 96-Year Zhong-Su-Zi 1

**[12]** Arbitral tribunal which consists of two or more arbitrators

[13] Judgment no. 96-Year Tai-Shang-Zi 1845.

**[14]** Arbitrations seated in Germany: Due to the dynamics within arbitral tribunals, an award can be set aside even if only one of the arbitrators was successfully challenged in the German courts and the decision was made unanimously. (2015). [online] Herbert Smith Freehills - Arbitration notes. Available at: http://hsfnotes.com/arbitration/2015/07/14/arbitrations-seated-in-germany-due-to-the-dynamics-within-arbitral-tribunals-an-award-can-be-set-aside-even-if-only-one-of-the-arbitrators-was-successfully-challenged-in-the-german-courts-and-the-de-2/ [Accessed 16 Mar. 2016].

The *Bundesgerichtshof* set the arbitral award aside. It applied Sec.1059 (2) (d) ZPO[15] providing that "an arbitral award might have been set aside if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with a provision of the rules governing arbitration in the ZPO or with an admissible agreement of the parties." The Supreme Court thought that there was a possibility that the biased arbitrator would influence the views of the other arbitrators during the deliberations and decision making. It held that "the mere fact that they might have made a decision differently by the presence of the challenged arbitrator could be a reason to invalidate the award."

The above referred decisions of the Federal Supreme Court of Germany ("*Bundesgerichtshof"*) and one of the District Courts and Supreme Court of Taiwan are completely in contrast with the judgment of the Twain's High Court.[16] The Federal Supreme Court of Germany and Taiwan's Supreme and District Court did not demand evidence to see whether the arbitrator was partial. They held that as the challenged arbitrator participated in the arbitral proceedings, he might have had an influence on the other arbitrators' opinion.

Based on the above mentioned, the favorable judgment of the Taiwan Court is much more acceptable than the unfavorable judgments of the German Federal Supreme Court and the Shilin District Court of Taiwan. Armenian legislation, as well as laws of several other countries, provide that the process of arbitration may continue and the arbitral tribunal can make an award. Thus, participation of the challenged arbitrator can be accepted as long as the partiality of the arbitrator is not proved. The mere fact that the challenged arbitrator has participated in the proceedings cannot be a reason to set aside the award.

The arbitration rules of some countries may give the option of suspending or continuing the proceedings. The arbitration rules do not allow to make an award until the court renders its judgment. Suspension of the proceedings or not making an award may delay the whole process of the arbitration. This, in turn, may cause a problem when the arbitration has a fixed time. If the law allows the parties and the arbitral tribunal to suspend the proceedings, they should take into consideration the time limitation, in order not to exceed the time provided in the agreement between the parties. Therefore, it would be better to continue the proceedings and allow the arbitrators to render an award by giving the possibility to the parties to appeal. The appeal should include presenting appropriate evidence. When the challenging party proves that the arbitrator was partial, then the award

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**15** Zivilprozessordnung (ZPO) is the German code of civil procedure.

[16] Taiwan High Court judgment no. 96-Year Zhong-Shang-Zi 578.

may be set aside. Otherwise, the award will be considered to be valid and binding for the parties.

Article 15 (3) of the CAM Santiago Arbitration[17] Rules provides that[18] "a change in the composition of the arbitral tribunal does not invalidate by the mere fact the resolutions rendered by the arbitral tribunal prior to the substitution of an arbitrator".

The composition of the arbitral tribunal can be changed during the process of the arbitration, for example, if one of the arbitrators becomes incapacitated or there is a challenge to an arbitrator.[19] It can be concluded that if the challenge is successful and the substitute arbitrator is appointed, the partial or interim award rendered by the previous arbitrator will remain valid.

The reasoning of previously mentioned judgments can help to interpret Article 34 (2) (1) (d) of the RA Law on Commercial Arbitration. This Article stipulated a ground for setting aside the award based on the composition of the arbitral tribunal, if not in conformity with the provisions of the law or the agreement of the parties. The Law does not directly require evidence to prove the partiality of the arbitrator. However, when the question of invalidation of an arbitral award arises, it can be assumed that the parties could also present evidence concerning the partiality of the arbitrator to invalidate the arbitral award. It is suggested that the party seeking to have the award set aside can use this Article and challenge the composition of the tribunal on the grounds of partiality of the arbitrator.

[17] Centro de Arbitraje y Mediación de Santiago ( Santiago Arbitration and Mediation Center)

[18] Anon, (2016). [online] Camsantiago.com. Available at: http://www.camsantiago.com/files/reglamento_arbitraje_internacional_en.pdf [Accessed 17 Mar. 2016]. (Page 17)

[19] *Ibid*., page 16 (Article 14 of the CAM Santiago Arbitration Rules)

### 1.2 Appointment of substitute arbitrator

#### 1.2.1 Whether the replacement arbitrator should rehear testimony and arguments at a new hearing.

#### 1.2.2 Whether the consent of the newly appointed arbitrator to continue the hearing is required or the other two arbitrator's consent is already sufficient.

Article 15 (2) of the RA Law on Commercial Arbitration[20] states that "unless otherwise agreed by the parties, if under articles 12, 13 and 14 a sole arbitrator or a presiding officer of the arbitral tribunal is substituted, any hearings held previously shall resume, or, *if any, other arbitrator is substituted, such prior hearings may resume at the discretion of the arbitral tribunal.*" [21] Two sub-issues arise in this paragraph concerning:

→ Whether or not the replacement arbitrator should rehear testimony and argument at a new hearing.

→ Whether or not the consent of the newly appointed arbitrator to continue the hearing is required or the other two arbitrator's consent is already sufficient.

There is no concrete and clear answer to these questions. The RA Law on Commercial Arbitration gives the discretion to the arbitral tribunal to decide whether they want to rehear the prior hearing(s). To leave this discretion to the newly constituted arbitral tribunal can be a fair solution for the issue. The decision is made by the majority of the arbitrators (including the substitute arbitrator).[22] However, question arises when two original arbitrators do not agree with substitute arbitrator to recommence the proceeding.

The RA Law on Commercial Arbitration does not exactly state that the tribunal should repeat the proceedings from the beginning or repeat some parts of the proceedings. The Canadian Law on Arbitration provides a clearer answer to this question.

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[20] The English translation is taken from the IBT course provided by Prof. Mushegh Manukyan.

[21] Emphasis added

[22] Swiss Rules of International Arbitration - Second Edition. (2016). [online] Google Books. Available at: https://books.google.am/books?id=Pgb7AwAAQBAJ&pg=PA180&lpg=PA180&dq=Repeating+Prior+Proceedings+After+the+Replacement+of+an+Arbitrator&source=bl&ots=pCoEzrTXQX&sig=IjbWcpzwuS0RXG1beTWQBmbpbHM&hl=en&sa=X&ved=0ahUKEwiIrNyoocPLAhXm73IKHQZ_D20Q6AEIKzAE#v=onepage&q=Repeating%20Prior%20Proceedings%20After%20the%20Replacement%20of%20an%20Arbitrator&f=false [Accessed 17 Mar. 2016]. (Page 181)

According to the Arbitration Law of Canada,[23] if the arbitrator is replaced during the oral hearings, it would be necessary to repeat the process of arbitration from the beginning, including witness testimony. In case the replacement takes place before oral hearings, the substitute arbitrator may examine and review the evidence without resuming the proceedings.

Sometimes the arbitral tribunal may find it unnecessary to repeat all prior proceedings. They may choose to repeat some parts of the proceedings in an expedited or streamlined way. Also, they can examine only the testimony of some significant witnesses previously heard. In this way, they would save extra costs and time.[24] It is submitted that this would encourage the newly constituted arbitral tribunal to repeat only some parts of the procedure. This repetition may have a positive effect on final award. This will help the substitute arbitrator to make a decision based on more information received during the repetition of the oral hearings.

The ICSID Arbitration Rules [25]also give the opportunity to the newly appointed arbitrator to recommence the oral hearings, considering this to be essential to have unbiased final awards.[26] This rule does not make a distinction whether it is a sole arbitrator or a panel.[27] This solution could help us to fill the gap under RA Law, in cases where arbitration is conducted by a panel. This is because while the RA Law on Commercial Arbitration states that "if a sole arbitrator or a presiding officer of the arbitral tribunal is substituted, any

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**23** Arbitration Law of Canada. (2016). [online] Google Books. Available at: https://books.google.am/books?id=FDbSAwAAQBAJ&pg=PA342&lpg=PA342&dq=what+happens+if+the+substitute+arbitrator+is+in+minority+that+decided+to+repeat+the+procedure?&source=bl&ots=MTyAlNeMSg&sig=Vh4FlY8zM_4PuXk80ktI8a3_0TM&hl=en&sa=X&ved=0ahUKEwj7lMihp8LLAhVlQpoKHR0NC8sQ6AEIGTAA#v=onepage&q=what%20happens%20if%20the%20substitute%20arbitrator%20is%20in%20minority%20that%20decided%20to%20repeat%20the%20procedure%3F&f=false [Accessed 17 Mar. 2016]. (Page 343)

**24** Swiss Rules of International Arbitration - Second Edition. (2016). [online] Google Books. Available at: https://books.google.am/books?id=Pgb7AwAAQBAJ&pg=PA180&lpg=PA180&dq=Repeating+Prior+Proceedings+After+the+Replacement+of+an+Arbitrator&source=bl&ots=pCoEzrTXQX&sig=IjbWcpzwuS0RXG1beTWQBmbpbHM&hl=en&sa=X&ved=0ahUKEwiIrNyoocPLAhXm73IKHQZ_D20Q6AEIKzAE#v=onepage&q=Repeating%20Prior%20Proceedings%20After%20the%20Replacement%20of%20an%20Arbitrator&f=false [Accessed 17 Mar. 2016]. (Page 183, paragraph 19)

**25** Rule 12 of the ICSID Arbitration Rules defines that as soon as a vacancy on the Tribunal has been filled, the proceeding shall continue from the point it had reached at the time the vacancy occurred. *The newly appointed arbitrator may, however, require that the oral procedure be recommenced, if this had already been started.*

**26** SICE - ICSID - Rules of procedure for arbitration proceedings (arbitration rules). (2016). [online] Sice.oas.org. Available at: http://www.sice.oas.org/dispute/comarb/icsid/icsid2a.asp [Accessed 17 Mar. 2016]. (Rule 12)

**27** Arbitral tribunal which consists of two or more arbitrators.

hearings held previously shall resume." [28] In case of a panel, where the challenged arbitrator is not the presiding officer, it provides that the tribunal will decide.

The second paragraph of article 11 of ICDR Arbitration Rules [29] stipulates that "the newly constituted arbitral tribunal has sole discretion to decide to repeat the hearings or not and the tribunal has no obligation to ask the views of the parties."[30] The replacement arbitrator merely reviews the evidence from transcripts. This would raise some problems for the arbitrators. The arbitrators would not have the same opportunity to examine the evidence and render an award. Also, the proceedings might have been affected by the arbitrator who had already been removed, because of being biased. Therefore, the preferable solution will always be for the newly constituted arbitral tribunal to repeat the prior hearings.

In all circumstances, however, the solution to this problem should be based on a case by case assessment. The arbitrators may not be inclined to repeat the whole process due to the costs and delay.[31] The newly constituted tribunal should balance the time and cost. The impartiality and independence of the arbitrators should be taken into account too. Also, it should respect the right to be heard by the parties. The tribunal should make its decision by taking into consideration all the conditions.[32]

After examining all above referred opinions and comments, it can be concluded that there is no definite solution to the problem connected with the arbitral tribunal giving authorization to the replacement arbitrator to rehear the oral procedure at a new hearing (in whole or in part). Moreover, the situation causes another problem when the majority of arbitrators do not have the same opinion with the substitute arbitrator concerning the repetition of the hearings. As mentioned, the RA Law on Commercial Arbitration gives a

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[28] The RA Law on Commercial Arbitration, article 15 (2)

[29] Gusy, M, Schwarz, F, & Hosking, J 2011, *A Guide to The ICDR International Arbitration Rules*, Oxford: OUP Oxford, eBook Collection (EBSCOhost), EBSCO*host*, viewed 17 March 2016. (Pages 131-132, paragraph 11.11, 11.13, 11.14)

[30] Similarly, the RA Law on Commercial Arbitration, article 15 (2)

[31] A Guide to the NAI Arbitration Rules. (2016). [online] Google Books. Available at: https://books.google.am/books?id=ky1-HCrvYlYC&pg=PA104&lpg=PA104&dq=effect+on+prior+proceedings+in+arbitration+after+replacement+of+arbitrator&source=bl&ots=qj1GYrBam8&sig=V5pM0oq0PCp2s1cy8g-y1d5_oEo&hl=en&sa=X&ved=0ahUKEwjX2PPnlMPLAhXF2SwKHVTLByQQ6AEIKTAD#v=onepage&q=effect%20on%20prior%20proceedings%20in%20arbitration%20after%20replacement%20of%20arbitrator&f=false [Accessed 17 Mar. 2016]. (Page 105)

[32] *Supra* note 29, page 132, paragraph 11.14

definite answer only about rehearing the proceedings for the sole arbitrator and the presiding arbitrator.

The issue can be clarified and the gap filled by adding the following provision to the 2nd paragraph of Article 15 of the RA Law on Commercial Arbitration: "The new arbitral tribunal shall determine, after requesting comments from the parties, whether and to what extent previous stages of the arbitration shall be repeated." [33] This can help to avoid possible conflicts that may arise between the newly appointed arbitrator and other arbitrators.

The ICC Rules of Arbitration[34] provide that "[t]he court may take into account the views of the parties before making a decision." According to Swiss Arbitration Rules,[35] "[t]his consultation may be required by the fundamental principle of fair hearing and right to be heard."[36]

The same provision is stated in the Vienna International Arbitration Rules. There are also similar provisions in Singapore Arbitration Rules[37]and Korean Arbitration Rules.[38] These provisions will protect the right to be heard by the parties. Moreover, by inviting the parties and participating in the deliberations, the whole arbitral tribunal may have the opportunity to

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**33** Vienna International Arbitral Centre - Vienna Rules 2013. (2016). [online] Viac.eu. Available at: http://www.viac.eu/en/arbitration/arbitration-rules-vienna/93-schiedsverfahren/wiener-regeln/144-new-vienna-rules-2013 [Accessed 17 Mar. 2016]. (Article 22 (2))

**34** The ICC Rules of Arbitration, article 15(4) | Arbitration | Arbitration & ADR | Products & Services | ICC - International Chamber of Commerce. (2016). [online] Iccwbo.org. Available at: http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/ICC-Rules-of-Arbitration/#article_15 [Accessed 17 Mar. 2016].

**35** Swiss Rules of International Arbitration - Second Edition. (2016). [online] Google Books. Available at: https://books.google.am/books?id=Pgb7AwAAQBAJ&pg=PA180&lpg=PA180&dq=Repeating+Prior+Proceedings+After+the+Replacement+of+an+Arbitrator&source=bl&ots=pCoEzrTXQX&sig=IjbWcpzwuS0RXG1beTWQBmbpbHM&hl=en&sa=X&ved=0ahUKEwiIrNyoocPLAhXm73IKHQZ_D20Q6AEIKzAE#v=onepage&q=Repeating%20Prior%20Proceedings%20After%20the%20Replacement%20of%20an%20Arbitrator&f=false [Accessed 17 Mar. 2016]. (Page 182)

**36** PILS, article 182 (3) which is similar to the ICC Rules, article 15 (4)
PILS, article 182 (3) Regardless of the procedure chosen, the arbitral tribunal shall ensure equal treatment of the parties and the right of both parties to be heard in adversarial proceedings.
The ICC Arbitration Rules, article 15(4) when an arbitrator is to be replaced, the Court has discretion to decide whether or not to follow the original nominating process. Once reconstituted, and after having invited the parties to comment, the arbitral tribunal shall determine if and to what extent prior proceedings shall be repeated before the reconstituted arbitral tribunal.

**37** Amin, Z. (2016). *Singapore International Arbitration Centre | SIAC Rules 2013*. [online] Siac.org.sg. Available at: http://www.siac.org.sg/our-rules/rules/siac-rules-2013#siac_rule15 [Accessed 17 Mar. 2016]. (Rule 15)

**38** KCAB (2016). [online] Kcab.or.kr. Available at: http://www.kcab.or.kr/jsp/kcab_eng/law/law_02_ex.jsp#article14 [Accessed 17 Mar. 2016]. (Article 14 (4))

equally assess their opinions. Besides, it would help them to render a more precise award and reduce the danger of challenging the final award.

# Chapter 2

## 2.1 The incapacity of the parties during the process of arbitration

### 2.1.1 What will happen if the party (especially a legal entity) becomes incapacitated as a result of insolvency during the process of arbitration?

This issue concerns Article 34 (2) (1) (a) of the RA Law on Commercial Arbitration which defines that "an arbitral award may be set aside by the court specified in paragraph 2 of article 6 of this Law only if: (1) The party making the application furnishes proof that: *(a) a party to the arbitration agreement referred to in article 7 of this Law has been under some incapacity as per the law applicable thereto*;[39] or the arbitral agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the Republic of Armenia; or…" [40]

There is a situation where a party (a legal entity) becomes incapacitated during the process of arbitration as a result of insolvency and a liquidator or administrator is appointed. Thus, a question arises whose interests is the liquidator or the administrator required to protect, if that happens?

In the case of a natural person, according to Article 34[41] of the Civil Code of Armenia[42] a guardian is appointed who works as a representative of the incapacitated person. According to this Article, the guardian conducts all necessary transactions in the name and the interest of the incapacitated person. It is, therefore, not very likely that an issue of conflict of interest may arise for the guardian in normal circumstances.[43]

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[39] Emphasis added

[40] The English translation is taken from the IBT course provided by Prof. Mushegh Manukyan.

[41] The English Translation is taken from Translation Centre Translation Centre. (2016). [online] Translation-centre.am. Available at: http://www.translation-centre.am/eng/ [Accessed 7 Apr. 2016].

[42] Article 34 of the Civil Code of RA defines that 1. Guardianship is established over minors who have not attained fourteen years and also over citizens recognized by a court as lacking dispositive capacity as the result of mental disorder. 2. Guardians are representatives of the wards by force of statute and conduct all necessary transactions in their names and in their interests.

[43] Article 10 of the RA Law on Bankruptcy also states that the application for compulsory bankruptcy can be presented or withdraw by natural person or his/her representative.

If the dispute involves both bankruptcy and arbitration, however, "it presents a conflict of near polar extremes: Bankruptcy policy exerts on exorable pull towards centralization while arbitration policy advocates a decentralized approach towards dispute resolution." [44]

The insolvency proceedings protect the creditor's rights (collective procedures). The arbitration proceedings resolve a private dispute between two or more parties (they can be legal entities or natural persons). That is why it may create a conflict between arbitration and insolvency proceedings.[45]

During the insolvency proceedings, the debtor loses his legal capacity and the administrator or liquidator steps into the shoes of the debtor. He manages the estate of the debtor and participates in legal proceedings. For instance, Chinese Insolvency Law expressly provides that "the administrator is the one who should participate in legal actions, arbitrations or any other legal procedures on behalf of the insolvent." Under the US Insolvency Law, upon insolvency order, "the trustee becomes the representative of the estate and has the capacity to sue and be sued." [46] The Law does not mention that these provisions are applied specifically for arbitration. However, it can be assumed that they may also be applied in the arbitration procedure.

The question to be answered, therefore, is whether under RA legislation the arbitration proceedings should stay or be terminated in such circumstances.

Each country's insolvency laws decide how to solve this problem. The RA Law on Bankruptcy does not foresee whether the proceedings should stay or be terminated. However, Ministry of Justice of Armenia offers a project to make changes in the RA Law on Bankruptcy. According to this project, [47] Article 39 of the RA Law on Bankruptcy is about

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**44** Anon, (2016). [online] Arbitrationacademy.org. Available at: http://www.arbitrationacademy.org/wp-content/uploads/2014/01/Arbitration-Academy-Klaus-Sachs.pdf [Accessed 18 Mar. 2016]. (Page 16)
III. THE INTERACTION AND CONFLICTS BETWEEN ARBITRATION AND INSOLVENCY **cited from** Société Nationale Agérienne, supra note 1.

**45** *Ibid*.

**46** Anon, (2016). [online] Repositorio.ucp.pt. Available at: http://repositorio.ucp.pt/bitstream/10400.14/13332/1/Domestic%20Insolvency%20and%20International%20Commercial%20Arbitration%20A%20Portuguese%20Perspective.pdf [Accessed 18 Mar. 2016]. (Page 18) **cited from** YANG, op. cit. and Section 323 US Code.

[47] ՀՀ սնանկության մասին օրենքում փոփոխություններ և լրացումներ կատարելու մասին Արդարատադության Նախարարության կողմից նախագիծ (project concerning making amendments in provisions of Bankruptcy Law from the Ministry of justice of Armenia)

https://www.google.am/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjPhZyjqcrLAhVo_HIKHezwCvgQFggaMAA&url=http%3A%2F%2Firavaban.net%2Fwp-content%2Fuploads%2F2015%2F06%2F%25D5%2580%25D5%2580-%25D6%2585%25D6%2580%25D5%25A5%25D5%25B6%25D6%2584%25D5%25AB-%25D5%25B6%25D5%2

the moratorium on the satisfaction of the claims of creditors. This project proposes to change point (c) of the 2nd paragraph to read:

2. "From the moment the judgment in declaring the debtor bankrupt, enters into legal force:

(c) civil, ***administrative and arbitration***[48] proceedings related to the bankruptcy proceeding or impacting the process thereof, and giving rise to liabilities in term of the debtor, where the debtor is a defendant or a third party on the side of the defendant having no independent claims in regard to the subject of dispute as regards the creditor, shall be terminated." [49]

In terms of the debtor as plaintiff, the Law does not stipulate the consequences of the civil proceedings. Also, the project of the Ministry of Justice does not envisage any consequences for arbitration proceedings.

Termination of arbitration proceedings will help to solve the conflict, especially in cases where the arbitration agreement has fixed time. The obligation will be on the court to decide the claim originally submitted to arbitration. There is a similar provision in the declaration of bankruptcy of the Polish Law that states "any arbitration agreement concluded with an insolvent party is considered ineffective and discontinues any pending arbitration proceedings." [50] As a result of the discontinuation, there would not be any conflict between the debtor and creditor.

Other countries like UK, US, Germany, and France decide differently and provide the stay of proceedings.

For example, in the UK,[51] during the administration procedure (reorganization procedure), there is a moratorium against legal proceedings. This means that the arbitral proceedings may not continue unless the administrator or the court gives its

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5A1%25D5%25AD%25D5%25A1%25D5%25A3%25D5%25AB%25D5%25AE-%25D5%25B0%25D5%25AB%25D5%25B4%25D5%25B6%25D5%25A1%25D5%25BE%25D5%25B8%25D6%2580%25D5%25B8%25D6%2582%25D5%25B4-%25D5%25BF%25D5%25A5%25D5%25B2%25D5%25A5%25D5%25AF%25D5%25A1%25D5%25B6%25D6%2584%25D5%25B6%25D5%25A5%25D6%2580.docx&usg=AFQjCNGE3w26vWmA3Q_nLyv8mhYheqvD4g

**48** Emphasis added

49 Translation is taken from Translation Centre. Anon, (2016). [online] Translation-centre.am. Available at: http://www.translation-centre.am/pdf/Translat/HH_orenk/Law_Bankrup/Law_Bankruptcy_en.pdf [Accessed 7 Apr. 2016].

**50** Anon, (2016). [online] Nortonrosefulbright.com. Available at: http://www.nortonrosefulbright.com/files/us/images/publications/CharteredArbit-SutcliffeRogersMay2010.PDF [Accessed 18 Mar. 2016]. (Page 284) **cited from** Polish Bankruptcy and Reorganization Law, article 142

51 *Supra* note 44, page 25

consent. Thus, the UK Law gives an option to the parties of the arbitral proceedings to continue the arbitration. Moreover, the administrator will also have the choice whether or not to continue the proceedings. In case of liquidation, the proceedings will be automatically interrupted unless the court or the administrator authorizes to continue. The court or the administrator should balance the interest between the parties to the arbitration and other creditors and make the decision to give or deny authorization to continue the proceedings accordingly.[52] Before resuming the arbitration proceedings, the arbitral tribunal should provide enough time to the administrator to get familiar with the case. It can be assumed that the administrator is the person who balances the interest between two parties.

Section 362 of the US Bankruptcy Code automatically stays all proceedings as well as insolvency proceedings or potential claims against the debtor.[53] There is no need to get authorization from the court or administrator. Under this Law, The stay of proceedings "continues until such property is no longer property of the estate."[54] "The stay of all other acts continues until the case is closed or dismissed or, if the debtor is an individual until the debtor is granted or denied a discharge." [55]

In *Maritime Elec. Co. Inc. v. United Jersey Bank* case,[56] the court held that "automatic stay serves the interests of both debtors and creditors, it may not be waived and its scope may not be limited by the debtor."[57] From this case and Section 362 of the US Bankruptcy Code, it can be concluded that the Law does not provide for circumstances when the debtor is a plaintiff in the arbitration procedure.

The German Code of Civil Procedure provides a mandatory stay of proceedings after the commencement of insolvency proceedings. The purpose of this stay is to

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[52] *Ibid*., page 25-26

[53] *Ibid*., page 24

[54] 11 U.S.C. § 362(c) (1). **Cited from** Anon, (2016). [online] Srz.com. Available at: http://www.srz.com/files/News/98ebc8a9-8de5-4621-9db9-31420ee6ca86/Presentation/NewsAttachment/0d64a217-cceb-471d-a227-661d219b3699/filesfilesCook_Fainman_The_Bankruptcy_Codes_Automatic_Stay_2008.pdf [Accessed 29 Mar. 2016]. (Page 6)

[55] *Ibid.*

[56] 959 F.2d 1194 (3d Cir. 1991)

[57] Anon, (2016). [online] Srz.com. Available at: http://www.srz.com/files/News/98ebc8a9-8de5-4621-9db9-31420ee6ca86/Presentation/NewsAttachment/0d64a217-cceb-471d-a227-661d219b3699/filesfilesCook_Fainman_The_Bankruptcy_Codes_Automatic_Stay_2008.pdf [Accessed 29 Mar. 2016]. (Page 2 II. The Automatic Stay. Part A. When Effective. (3)

give adequate time to the newly appointed trustee to become prepared for the arbitral proceedings.[58] Article 240 of ZPO[59] does not stipulate the duration of the stay of the proceedings. It states that "the proceedings shall be interrupted to the extent they concern the insolvent estate until they can be resumed in accordance with the rules applying to the insolvency proceedings, or until the insolvency proceedings are terminated."[60]

In France,[61] the suspension of the individual actions is done by creditors. This suspension is a part of national and international public policy. For example, if the arbitrators failed to suspend the arbitral proceedings; it would show that the arbitrators disregard the principle that "all proceedings against persons in bankruptcy shall stay…" Thus, this can be considered as being against the national and international public policy of France.[62]

The French Law stipulates that "[w]here the debtor is the plaintiff, the arbitral proceedings will restart from the part that they were interrupted by the consent of the administrator." In the situation where the debtor is the defendant, "[t]he procedure is suspended until the plaintiff has filed a declaration of the insolvency proceedings. The plaintiff should register the claim in order to start the proceedings." [63]

If decision is made to continue the proceedings, the possibility of conflict of interest arises between the administrator/liquidator and the creditor (parties to the arbitral proceedings).

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**58** *Supra* note 50, pages 283-284 **cited from** for the German position see Kroll, "Arbitration and Insolvency Proceedings" in Mistelis and Lew (eds), Pervasive Problems in International Arbitration, 2006, paras 18-28/30 and 18-36/37.

**59** Zivilprozessordnung (ZPO) is the German code of civil procedure.

**60** Code of Civil Procedure. (2016). [online] Gesetze-im-internet.de. Available at: http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p0883 [Accessed 27 Apr. 2016].
The German code of civil procedure, article 240

61 *Supra* note 44, page 23

**62** Foucahrd Gaillard Goldman on International Commercial Arbitration. (2016). [online] Google Books. Available at: https://books.google.am/books?id=3V0vsEcETPMC&pg=PA345&lpg=PA345&dq=public+policy+in+bankruptcy+law+in+france&source=bl&ots=5G8HTNHaGk&sig=fQTkirE_UZfIu4ktgLlmB0t--kk&hl=en&sa=X&ved=0ahUKEwiHjZvq0ubLAhXDfiwKHXZED28Q6AEIHzAB#v=onepage&q=public%20policy%20in%20bankruptcy%20law%20in%20france&f=false [Accessed 29 Mar. 2016]. (Page 345)

63 *Supra* note 44, page 23

Article 29 of the RA Law on Bankruptcy states the powers of administrators.[64] It is important to mention that according to the 3rd paragraph of the same Article, "the administrator shall act *on behalf of the debtor and at his or her own responsibility*[65] while exercising the powers defined by this Law." Article 47 (3) defines the property of the debtor and its disposal.[66] Article 55 is about the maintenance and realization of property belonging to the debtor. These articles show that the administrator is the successor[67] of the debtor. Also, Article 47[68] and 48[69] of the same Law shows that the debtor or the governing bodies of the debtor have an obligation in special cases to cooperate with the administrator. In addition, it should be noted that there are situations where the decision of the court is binding such as when the court makes a decision and approves the list of claims of the creditors.[70]

It can be understood, from these provisions, that the administrator protects the debtor's rights. He is the representative of the debtor. He has to do everything to

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**64** According to this article, the administrator apply to courts on behalf of the debtor, arrange the inventory and maintain of property of the debtor, analyze the financial condition of the debtor and exercise other powers prescribed by law.

**65** Emphasis added

**66** The disposal of the property belonging to the debtor shall be carried out by the Administrator in the manner prescribed by this Law after the decision on liquidation of the debtor.

67 The German Supreme Court also justified this view with the argument that with the beginning of insolvency proceedings the trustee takes up the legal position of the debtor as it stands (BGH, DZWIR 2004, 161). https://www.google.am/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&cad=rja&uact=8&ved=0ahUKEwjfpI2qrcrLAhWL8nIKHZsBDwUQFghEMAY&url=http%3A%2F%2Fwww.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUid%3DEF5FD466-A2E6-4EFC-87B7-B3B420054849&usg=AFQjCNGMxKPhf7E3giYqxcGieIAqJV0ojQ (page 3 III. The Consequences of Insolvency on Arbitration Issues under German Law 2. The binding effect of pre-commencement agreements to arbitrate.

68 Article 47 of the RA Law on Bankruptcy defines that (2) after declaring the debtor bankrupt and before adopting a decision on liquidation thereof, the executive of the debtor shall act upon the consent and under control of the Administrator. The executive of the debtor shall be prohibited to dispose of the property of the debtor or carry out any operation that creates liability in rem for the debtor without the permission of the Administrator. (3) The disposal of the property belonging to the debtor shall be carried out by the Administrator in the manner prescribed by this Law after the decision on liquidation of the debtor. After liquidation, the executive of the debtor shall be deprived of the rights to disposal and management of the property.

69 Article 48 of the RA Law on Bankruptcy defines that the governing bodies of the debtor shall be obliged to provide the Administrator with all the necessary documents and reliable information regarding the activity and assets of the debtor, as well as information on alienation of property or any other decrease in assets of the debtor during the three years preceding the declaration of the debtor as bankrupt.
2. The executive of the debtor, as well as persons with material responsibility shall bear the obligation of cooperation provided for by this Article till the closure of the bankruptcy case. In case of failure to fulfil this requirement, the persons concerned shall bear responsibility in the manner prescribed by the legislation.

**70** The RA Law on Bankruptcy, article 46

perform the debtor's obligations (it can be payments to the creditors). The RA Law[71] also stipulates that the administrator has to take everything under his own responsibility. Thus, it can be assumed that this would be a good incentive for an administrator to present the debtor's rights and obligations. In case of financial recovery,[72] the administrator will protect debtor's right to survive the corporation from liquidation.[73] If they reorganize the company, the debtor will be able to continue his business. Hence, the creditors will not be the only ones who will benefit from the survival of the debtor's business. Based on discussed articles and international practices, it can be concluded that the liquidator or administrator protects the debtor's rights. In addition, the cooperation of the debtor and its governing bodies and decisions of the court will reduce the probability of conflict that may arise during the process of the arbitration which may continue despite bankruptcy of one of the parties thereto.

If despite all above there may still be the risk of a conflict of interest between the parties, it will be hard to find a single solution to this issue. As already mentioned above, it is submitted that in such cases the termination of the arbitration proceedings would appear to be an only way to solve this issue and prevent the possible conflict between the parties.

### 2.1.2 Based on which law the legal capacity of the natural person to the arbitration agreement or the process of arbitration is determined?

Parties to a contract must have the legal capacity to enter into an arbitration agreement, otherwise, the contract is invalid. Parties to an arbitration agreement can be

[71] The RA Law on Bankruptcy, article 29 (3)

[72] Rescuing the corporation from liquidation

[73] Article 65(2) of the RA Law on Bankruptcy defines that under the supervision of the Administrator, the debtor shall be obliged to implement all the measures provided for by the financial recovery plan.

natural persons or legal entities like corporations, partnerships, states and state agencies.[74] The courts have different opinions on determining the capacity of the party to enter into a contract.[75] For example, they may decide based on *lex domicile* [76] or *lex loci contractus*.[77]

In the case of incapacity of the party to the contract, there are provisions in the RA Law on Commercial Arbitration[78] and the New York Convention,[79] which refuse to enforce the arbitral award or consider the arbitration agreement as invalid.

If the party discovered that the other party does not have the capacity to start the arbitration, "he would ask the court to stop the arbitration based on the incapacity of the party."[80] At the end of the arbitration, if the requesting party found out that the other party did

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**74** Law and Practice of International Commercial Arbitration. (2016). [online] Google Books. Available at: https://books.google.am/books?id=9mBqDaSB-ZwC&pg=PA145&lpg=PA145&dq=legal+capacity+in+arbitration+agreement&source=bl&ots=lBje5ah66j&sig=f561bQwr8f5UgKgZF9l9Igfuzro&hl=en&sa=X&ved=0ahUKEwjJ65-onc3LAhWrj3IKHbgUBQYQ6AEIJDAC#v=onepage&q=legal%20capacity%20in%20arbitration%20agreement&f=false [Accessed 20 Mar. 2016]. (Page 145, paragraph 3.25)

**75** Private International Law in India. (2016). [online] Google Books. Available at: https://books.google.am/books?id=UzclIL6onHkC&pg=PA81&lpg=PA81&dq=capacity+of+the+natural+person+based+on+Lex+loci+contractus&source=bl&ots=e6IRoH8ClG&sig=EWHkxjTnTSmYhpXIK3RA40U8grA&hl=en&sa=X&ved=0ahUKEwip3ceooIHMAhWDd5oKHeDaDkMQ6AEIKzAE#v=onepage&q=capacity%20of%20the%20natural%20person%20based%20on%20Lex%20loci%20contractus&f=false [Accessed 9 Apr. 2016]. (Page 81, paragraph 157)

[76] Law of the domicile in the conflict of laws.

**77** Law of the place where the contract is made in the conflict of laws.

**78** Article 36 (1) (1) (a) defines that recognition or enforcement of an arbitral award, whether made in the territory of the Republic of Armenia or in the territory of another member state of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, may be refused only:

> (1) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
> (a) a party to the arbitration agreement referred to in article 7 of this Law has been under some incapacity as per the law applicable thereto; 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; or

[79] Article V of the 1958 New York Convention reads as follows: "1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (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.

**80** Law and Practice of International Commercial Arbitration. (2016). [online] Google Books. Available at: https://books.google.am/books?id=9mBqDaSB-ZwC&pg=PA145&lpg=PA145&dq=legal+capacity+in+arbitration+agreement&source=bl&ots=lBje5ah66j&sig=f561bQwr8f5UgKgZF9l9Igfuzro&hl=en&sa=X&ved=0ahUKEwjJ65-onc3LAhWrj3IKHbgUBQYQ6AEIJDAC#v=onepage&q=legal%20capacity%20in%20arbitration%20agreement&f=false [Accessed 9 Apr. 2016]. (Page 145, paragraph 3.25) **Cited from** the New York Convention, Article II (3); Model Law, Article 8(1)

not have capacity during the process of the arbitration, he would ask the court not to recognize and enforce the arbitral award.[81]

There is no definite answer, however, as to which law will apply to determination of the legal capacity of individuals. The Private International Law of each country decides which law is applicable.

Regulations and examples from different countries will be presented to offer an answer to this question.

The basic legal status of a natural person is the legal capacity and the capacity to act which can be regulated by the personal law.[82] Based on above mentioned, the legal capacity of a natural person can be regulated under Section 10, Article 1262 of the Civil Code of RA [83] which states that "[t]he personal law of a citizen shall be considered to be the law of the state whose citizenship this person has." "If a person has two or more citizenships, his personal law shall be considered to be the law of the state with which the person is most closely connected." "The personal law of a person without citizenship shall be considered to be the law of the state in which this person lives permanently." [84]

Article 11 of the Rome Convention on the law applicable to contractual obligations[85] which applies to the countries member to European Union states that "[i]n a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence." [86]

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[81] *Ibid.* **cited from** the New York Convention, Article V 1(a); Model Law, Article 36 (1) (a).

[82] Yearbook of Private International Law. (2016). [online] Google Books. Available at: https://books.google.am/books?id=10wzATdyh4MC&pg=PA150&lpg=PA150&dq=the+capacity+of+the+person+in+private+international+law&source=bl&ots=cRLLviXUv7&sig=Gy8Vz9SdXMxv-yoOfllbIqHr-Mw&hl=en&sa=X&ved=0ahUKEwiSxPGcgIHMAhXHwBQKHUXKCO8Q6AEISDAG#v=onepage&q=the%20capacity%20of%20the%20person%20in%20private%20international%20law&f=false [Accessed 9 Apr. 2016]. (Page 150)

[83] Section 10 of the Civil Code of Armenia is about the Private International Law (Articles start from 1253 to 1292)

[84] The English Translation is taken from Translation Centre Translation Centre. (2016). [online] Translation-centre.am. Available at: http://www.translation-centre.am/eng/ [Accessed 7 Apr. 2016].

[85] EUR-Lex - 41998A0126 (02) - EN - EUR-Lex. (2016). [online] Eur-lex.europa.eu. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A41998A0126(02) [Accessed 19 Mar. 2016].

[86] *Supra* note 74, Page 146, paragraph 3.26

This Article will give the possibility to the person to refer to his own country's law (personal law). However, there is a condition that the other party should be aware that the person does not have the legal capacity or as a result of the party's negligence is not aware of the incapacity of the person.

Under US choice of law rules, the capacity maybe be decided according to the law that parties chose to apply to their contract.[87] It is also common among practitioners to rely fully on the law chosen by the parties and to disregard any other laws- on the basis that the international tribunal will rely on their selected law. However, the law decided by the parties to govern the contract does not regulate and decide whether the parties have the legal capacity to enter into a contract. These issues are decided by the law applicable to each party.[88] As already mentioned this would be the personal law of each party.

The German Private International Law ("PIL") [89] Article III.3, is about personal status. The German PIL stipulates that "[l]egal questions raised by the personal legal status of a natural person are governed by the law of the state which the person has nationality". "The nationality criterion is applicable as regards the right to bear a name and the legal capacity of natural persons."[90]

The Private International Law of Spain[91] also states that "[t]he personal law applicable to an individual shall be determined by his nationality. Such law shall govern capacity [92] and

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[87] Yearbook of Private International law 2010. (2016). [online] Google Books. Available at: https://books.google.am/books?id=eeqAzlJKY_oC&pg=PT67&lpg=PT67&dq=legal+capacity+of+parties+to+the+arbitration+agreement+in+private+international+law&source=bl&ots=rRklxk2aCr&sig=5t4f6x30mvuKwPDfPuCon6suRP4&hl=en&sa=X&ved=0ahUKEwjKuJyDvc3LAhXEvXIKHQAKAQQQ6AEIQzAH#v=onepage&q=legal%20capacity%20of%20parties%20to%20the%20arbitration%20agreement%20in%20private%20international%20law&f=false [Accessed 20 Mar. 2016].
(Page 53 part b incapacity of party V 1 (a))

[88] International Commercial Contracts. (2016). [online] Google Books. Available at: https://books.google.am/books?id=Sa6BAwAAQBAJ&pg=PA239&lpg=PA239&dq=legal+capacity+of+parties+to+the+arbitration+agreement+in+private+international+law&source=bl&ots=jUMsv5D523&sig=X-StJ_2eu_-hSpDrWelb3sCfWaI&hl=en&sa=X&ved=0ahUKEwjKuJyDvc3LAhXEvXIKHQAKAQQQ6AEIRTAI#v=onepage&q=legal%20capacity%20of%20parties%20to%20the%20arbitration%20agreement%20in%20private%20international%20law&f=false [Accessed 20 Mar. 2016]. (Page 239)

[89] European Commission - European Judicial Network - Applicable law - Germany. (2016). [online] Ec.europa.eu. Available at: http://ec.europa.eu/civiljustice/applicable_law/applicable_law_ger_en.htm#III.3. [Accessed 20 Mar. 2016].

[90] Emphasis added

[91] Spain: Civil Code (approved by Royal Decree of July 24, 1889). (2016). [online] Wipo.int. Available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=221319#LinkTarget_6337 [Accessed 20 Mar. 2016]. (Article 9 of Civil Code of Spain)

[92] Emphasis added

civil statutes, family rights and duties *mortis causa* succession. A change in personal law shall not affect the coming of age acquired in accordance with the former personal law."

The Law of Ukraine on Private International Law ("PIL")[93] states that "the beginning and the termination of the legal capacity of the natural person is regulated by his personal law."[94] The PIL also determines the legal regime for a person who has two or more citizenship and a person without citizenship.[95]

Section 3 paragraph 1 of PIL of Czech Republic states that "the capacity of a person to legal acts shall be governed by the law of the state of which he is a national unless the present act provides otherwise." Thus, it can be concluded that the generally recognized criteria for determination of the legal capacity of the natural persons is the nationality.[96]

The issue arises in case one party to the arbitration did not have legal capacity according to his personal law when signing the arbitration agreement but had capacity in the jurisdiction where the arbitration was held or the award is presented to court for enforcement; or visa versa. If the person is considered as incapacitated under his personal law, the process would be stopped based on *lex patriae.*[97] Although the court should assess each case separately, whether to apply the personal law of each party it can be concluded that based on private international rules of different countries if an issue arises concerning the capacity of the person, the more accepted rule is to apply the personal law and decide whether the person has capacity under his national law.

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**93** *Supra* note 82, page 149-150

**94** *lex patriae* is the law of nationality in the conflict of laws (Article 17(1) and 18)

95 The Law of Ukraine on Private International Law states that if a person has two or more citizenship, his personal law shall be the law of the country with which such person has closest connection. The personal law of a person without citizenship is considered to be the law of the country of his place of residence or, if none such exists, of the place where he is staying.

**96** Private International Law in the Czech Republic. (2016). [online] Google Books. Available at: https://books.google.am/books?id=rvuLczkXpHcC&pg=PA80&lpg=PA80&dq=the+capacity+of+the+person+in+private+international+law&source=bl&ots=cm50ChSpCB&sig=H8rK0RaVe2q5ZMETfeXwgqJIVCc&hl=en&sa=X&ved=0ahUKEwiSxPGcgIHMAhXHwBQKHUXKCO8Q6AEIPjAE#v=onepage&q=the%20capacity%20of%20the%20person%20in%20private%20international%20law&f=false [Accessed 10 Apr. 2016]. (Page 80)

97 the law of nationality in the conflict of laws

# Chapter 3

## 3.1 Proof of the finality of an arbitral award

The finality of the arbitral award is a characteristic in arbitration and a key factor in an arbitration agreement.[98] The finality is a condition to enforce an arbitral award before a national court, and minimize the risk of a challenge or appeal of that arbitral award. The arbitral award becomes enforceable as a civil judgment through the process of confirmation. [99]

[98] Richmond, F., Peterson, L. and Smutny, A. (2009). *When is an arbitral award final? - Kluwer Arbitration Blog*. [online] Kluwer Arbitration Blog. Available at: http://kluwerarbitrationblog.com/2009/09/10/when-is-an-arbitral-award-final/ [Accessed 22 Mar. 2016].

[99] Anon, (2016). [online] Coma.com. Available at: http://coma.com/sites/default/files/enforcing-arbitration-awards.pdf [Accessed 21 Mar. 2016]. (Page 1294) **cited from** See STEPHEN PATRICK DOYLE & ROGER SILVE HAYDOCK, WITHOUT THE PUNCHES: RESOLVING DISPUTES WITHOUT LITIGATION 8–12 (1991) (explaining various methods of alternative dispute resolution).

The question is how the finality of the arbitral award can be proved? i.e. whether or not a challenge to the award is pending at court. This question is more relevant especially in international arbitration cases.

The RA Law on Commercial Arbitration does not contain provisions regarding means of proving to the court that the arbitral award is final. Article 35 of the same Law only provides that "if the party wants to apply to the court to enforce the arbitral award he should supply the duly authenticated original award or a duly certified copy thereof, as well as the original arbitration agreement or a duly certified copy thereof." The finality of the award cannot be proved only by these two documents. After receiving the arbitral award "the parties to the agreement do not have the right to make an application to set aside the award after three months have passed from the date which parties received the award."[100] If there is no application for setting aside the award the parties may ask the court to confirm the award. Moreover, the parties have to submit documents to prove that the award is final.

In the *Orgaworld Canada* case,[101] Article 25.1 (d) of the arbitration agreement itself said that the decision of the arbitrator "shall be final and binding on the parties and there shall be no appeal therefrom." Based upon this wording, the court held that there was no right of appeal. The last sentence in the arbitration agreement in the *Orgaworld Canada* case indicates that there shall not be an appeal to the award. Therefore, if the arbitration agreement or clause provides for no appeal, this can serve as sufficient evidence that there would be no appeal to the award and the court may consider the award as final and enforce the award.

Any of the parties to the arbitration (the winning party or the opposing party) may seek to confirm the award. The US Federal Arbitration Act ("FAA") requires presentation of certain documents to approve the award.[102] The first document is the motion or the petition that requires the court to confirm. Similar to the RA law[103] also the New York Convention[104] require that the party seeking enforcement should also present the arbitration agreement and

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**[100]** The RA Law on Commercial Arbitration, article 34 (3)

**[101]** Heintzman, T. (2016). *Arbitral Rules Held To Exclude Right To Appeal Arbitration Award | Heintzman ADR*. [online] Heintzmanadr.com. Available at: http://www.heintzmanadr.com/appeal/arbitral-rules-held-to-exclude-right-to-appeal-arbitration-award/ [Accessed 22 Mar. 2016].

[102] *Supra* note 99, page 1303 **cited from** U.S. Code § 13

**[103]** The RA Law on Commercial Arbitration, article 35 (2)

[104] Article VI of the New York Convention

the award. According to the Convention Article on confirmation of the arbitral award,[105] there can be a requirement of a separate affidavit setting forth the facts of the arbitration agreement, the hearing, and the award signed by the party and notarized.[106] Hence, it can be assumed that if the above mentioned documents are approved by a notary, the court will consider the arbitral award as final. Alternatively, the winning party who wants to confirm the arbitral award may present a memorandum of law to support the request for confirmation.[107] In the memorandum of law, the party may mention that they did not receive any notice from opposing party during three months after receiving the award.[108]Therefore, the party can conclude that there is no appeal to the arbitral award. It can be considered by the court to be a conclusive evidence of finality of the award.

After submitting the documents for confirmation, the parties to the agreement may require the court to conduct a hearing[109] (by notifying the opposing party about the hearing). During a hearing, the opposing party may affirm that he has no demand to modify or correct the award. This affirmation can be considered as evidence. Based on this evidence, the judge may consider the award as final and order its enforcement.

The International Institute for Conflict Prevention & Resolution ("CPR") Rules[110] provides that "the opposing party should commence the appeal by sending a written notice thirty days after the award is received by both parties." If the parties to the arbitration agree to become a party to the appeal, they should waive their right to enforce the original award until the appeal process is finished. Thus, in case of CPR Rules, it can be said that if there is no written notice or agreement to participate in appeal hearings (it can be mentioned in the memorandum of the law) the arbitral award will be considered as final and the court will enforce it.

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**105** *Supra* note 99, page 1305

**106** *Ibid.* **cited from** Worldwide Asset Purchasing, LLC v. Karafotias, 801 N.Y.S.2d 721, 725 (N.Y. Civ. Ct. 2005) (finding that petition verified only by party's attorney "on information and belief" is not prima facie evidence of an arbitration agreement).

107 *Ibid.*

**108** Similarly**,** the RA law on Commercial Arbitration, Article 34 (3)

109 *Supra* note 99, page 1306

**110** CPR Appellate Arbitration Procedure. (2016). [online] Cpradr.org. Available at: http://www.cpradr.org/RulesCaseServices/CPRRules/AppellateArbitrationProcedure.aspx [Accessed 22 Mar. 2016]. (**Rule 2. Commencement of Appeal)**

There is no provision in the RA Law, which makes a list of the documents required for submission to the court to prove the finality of the arbitral award. The FAA requires some documents that was mentioned above. It can be assumed that the memorandum of the law would be a convincing evidence. An agreement signed by the parties confirming their submission to the award can also prove that as the parties do not wish to appeal and, therefore, the award is final and enforceable.

An article is published in the King & Spalding Energy Newsletter which states that "the seat of the arbitration ordinarily governs arbitral procedure, including any local court involvement in aid of the arbitration or review and recognition of the award."[111] Therefore, an alternative to prove the finality of an arbitral award is when the winning party who wants to enforce the arbitral award in any country obtains an enforcement order from the court of the Seat of Arbitration.

In the above-mentioned article, it is also stated that "[u]nder both the New York Convention and pre-existing arbitration jurisprudence, the courts of the place in which the arbitration was held or whose procedural law governed an arbitration have primary jurisdiction to review an award and determine its validity. That is, the only place where an arbitration award may be set aside or invalidated is the place where the award was issued; *i.e.*, the seat of arbitration. The courts of other jurisdictions have secondary jurisdiction and may only determine whether to enforce the foreign award in their jurisdiction."[112] Thus, there is a possibility of obtaining a confirmation from the offices of the competent court of the Seat to the effect that no appeal has been filed within the time limit.[113] It can be concluded that an enforcement order or a confirmation of no appeal for an arbitral award by the court of the Seat of the Arbitration can be alternatives to prove the finality of an arbitral award.

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[111] King & Spalding: Energy Newsletter | Why Where Matters: The Seat of Arbitration in International Energy Contracts. (2016). [online] Kslaw.com. Available at: http://www.kslaw.com/library/newsletters/EnergyNewsletter/2013/August/article1.html [Accessed 23 Apr. 2016].

[112] *Ibid*.

[113] The time limitation for setting aside an arbitral award is stated in the article 34(3) of the RA Law on Commercial Arbitration. It stipulates that an application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request has been made under Article 33 of this Law, after three months from the date on which that request had been disposed of by the arbitral tribunal.

## 3.2 Enforcement of an arbitral award of Non-Contracting State to the New York Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, is one of the key instruments in international arbitration for recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration.[114] Most countries are members of this Convention which helps to enforce the arbitral awards easier. However, there are some countries which have not yet acceded to the Convention.

A question arises that how an arbitral award that has been rendered in a Non-Contracting State to the New York Convention can be enforced?

[114] Convention, N. (2016). *The New York Convention,* [online] Newyorkconvention.org. Available at: http://www.newyorkconvention.org/ [Accessed 23 Mar. 2016].

Article 35 (3) of the RA Law on Commercial Arbitration defines the principle of reciprocity.[115] It states that "arbitral awards made outside the Republic of Armenia shall be recognized and enforced pursuant to the principle of reciprocity throughout the territory of the Republic of Armenia, on the basis of this law, other legal acts and international agreements of the Republic of Armenia. Reciprocity shall be presumed in the absence of proof to the contrary." [116] Thus, if an award is made in a country which is not a member of the New York Convention, that award can be enforced in Armenia based on this Article. We assume that reciprocity exists[117] and we enforce an arbitral award of that country, regardless of whether or not that country will enforce our arbitral award (except if proven otherwise).

Similar provisions may be found in the legislation and practice of other countries some of which are referred below.

In the international arbitration newsletter published by Latham & Watkins LLP, it is said that enforcing an arbitral award is not restricted to only in states that are a member of the New York Convention.[118]

First, some Non-Contracting States belong to regional organizations or have ratified treaties requiring that the State parties enforce arbitral awards from other jurisdictions. For example, although Grenada, St. Kitts and Nevis and St. Lucia are not parties to the New York Convention, they, like the US, are members of the Organization of American States ("OAS"). All OAS States are bound by the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards. This Convention will help the Non-Contracting States to enforce their arbitral awards in the US and the other OAS States.[119]

Second, there are also bilateral agreements between countries that may apply to arbitrations and/or arbitral awards. The parties should pay attention to enforcement and

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[115] In addition to the RA Law on Commercial Arbitration, section 10 article 1257 of the Civil Code of RA stipulates the principle of reciprocity. It states that "The court shall apply foreign law, regardless of whether or not the law of the Republic of Armenia would be applied in the respective foreign state to analogous relations, with the exception of cases when the application of foreign law on the principle of reciprocity is provided by a statute of the Republic of Armenia. If the application of foreign law depends upon reciprocity, it shall be presumed that reciprocity exists, unless it is proved otherwise."

[116] The English translation is taken from the IBT course provided by Prof. Mushegh Manukyan.

[117] *De facto* Reciprocity

[118] International Arbitration Rules newsletter by Latham & Watkins LLP https://www.google.am/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiBn6WBs9fLAhWpd5oKHfNYCN0QFggZMAA&url=https%3A%2F%2Fwww.lw.com%2FthoughtLeadership%2Flw-international-arbitration-newsletter-june-2014&usg=AFQjCNGZr8NpCE58go4Gt7jntRAP4nwYkQ (Page 2)

[119] *Ibid*., page 3

reciprocity provisions in these agreements. For example, in the US practice, treaties of amity and/or friendship, commerce and navigation ("FCN"). There may be provisions in such agreements that may regulate the enforcement of arbitral awards between the US and some Non-Contracting States to the New York Convention. They are not expressly mentioned in the agreements. However, enforcement of arbitral award through these agreements is subject to interpretation. There is an example where the FCN treaty helped the parties to enforce their award. In the *Landegger v. Bayerische Hypotheken and Wechsel Bank*, a federal district court in New York opined that "it would be contrary to the spirit and policy of the FCN in question not to recognize and enforce an arbitral agreement rendered in the treaty partner's territory."[120]

Third, according to the same article, the Federal Arbitration Act ("FAA") is a federal statute which authorizes courts to recognize and enforce arbitral awards. Some courts and commentators have concluded that the FAA is broad enough to reach all foreign arbitral awards." They said that nothing can prevent from enforcing the arbitral awards made in the Non-Contracting States.[121]

Fourth, In the US, the International Arbitration Laws of States like Connecticut, Florida, Georgia and Oregon expressly authorize enforcement of Non-Contracting State awards.[122]

Finally, based on common law, the principle of comity and equity may oblige the courts to recognize foreign arbitral award, regardless where the arbitration was seated. The US Courts may enforce the foreign arbitral awards if the country where the arbitral award is made also enforce the US judgments and awards.[123]

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[120] *Ibid*.
[121] *Ibid*.
[122] *Ibid*.
[123] *Ibid*., page 4

Reciprocity is an important condition to enforce an arbitral award of Contracting State to the New York Convention. Article I (3)[124] and XIV[125] regulates the reciprocity between states.

There is an example of International Private and Procedure Law of Turkey ("IPPL"). IPPL regulates that the competent court renders a decision on enforcement[126] under the following condition: "There is a reciprocity agreement between the Turkish Republic and the State where the decision has been rendered by Turkish court or a statutory provision or actual practice in that country which makes the enforcement of Turkish court decision possible." It also explains that signing an agreement is not a prerequisite for reciprocity. *De facto* reciprocity is adequate. It brings an example from international practice that if a country enforces a Turkish court decision, the court decisions of that country will be enforced in Turkey.[127] This example can be compared to an arbitral award. If a country that is not a member of the New York Convention enforces the arbitral award made in another, that country will be expected to enforce the arbitral award made in that country.

It can be summarized that being a member of the New York Convention is an advantage in a country to enforce an arbitral award easier. However, there are other ways to enforce an arbitral award in a country that is not a member of this Convention. The reciprocity stipulated in the articles of private international law or the arbitration law of different countries will help to solve this problem. Armenia also made reciprocity reservation.[128] In the matter of countries which are not members of the New York Convention, reciprocity is implied.

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[124] Article I (3) of the New York Convention states that when signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

[125] Article XIV of the New York Convention states that a Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention

[126] Conditions of Enforcement, article 54 (1) (a)

[127] The New York Convention and IPPL | IFLR.com. (2016). [online] Iflr.com. Available at: http://www.iflr.com/Article/2617901/The-New-York-Convention-and-IPPL.html [Accessed 24 Mar. 2016].

[128] The RA Law on Commercial Arbitration, article 35 (3)

# Conclusion and Recommendation

Taking into consideration all that was discussed in this paper, it is not easy to give definite answers to the issues. I used different countries' practices and arbitration rules to suggest possible options to solve these problems. For some issues, I have also recommended adding some provisions to the RA Law on Commercial Arbitration which would help to reduce the conflicts that may arise during the application of the provisions. Short conclusion or recommendation to each issue will be presented.

In the first issue, it was concluded that it would be more appropriate to continue the proceedings. The challenged arbitrator should participate in the proceedings and make an

award until the court decided on his challenge. The award cannot be considered to be invalid unless the party who seeks to set aside the award proves that challenged arbitrator was biased.

For the second issue, there was a suggestion that a paragraph be added to the 2nd paragraph of Article 15 of RA Law on Commercial Arbitration to the effect that the new arbitral tribunal shall determine, after requesting comments from the parties, whether and to what extent previous stages of the arbitration shall be repeated. Adding this sentence to the provision can minimize the conflicts that may arise during the implementation this Article.

On the third issue, it is submitted that the administrator or the liquidator is protecting the debtor's rights. It cannot be a conflict of interest because the RA Law on Bankruptcy stipulates responsibility for administrator which is a good incentive to avoid the conflicts that may arise. In addition, if the arbitration agreement has a fixed time, allowing suspension of arbitration proceedings would be a good option to solve the problem regarding the conflict of interest between the creditor and the administrator or the liquidator.

As it has already been mentioned, since there are different approaches to the applicable law to the legal incapacity of the natural person, it is hard to give a precise solution. However, if the person is considered as incapacitated under his personal law at the time of signing of the arbitration agreement or during the process of arbitration, the award should be considered void because the personal law of each individual will be applied.

There are some documents to prove the finality of an award. For example, the memorandum of the law would be a convincing evidence. Also, the agreement signed by the parties which prove that there is no appeal would be an evidence. An enforcement order or a confirmation of no appeal for an arbitral award by the court of the Seat of the Arbitration can be alternatives to prove the finality of an arbitral award.

Concerning the last issue, the emphasis was made on the reciprocity. According to the RA Law on Commercial Arbitration, it is assumed that there is reciprocity between two states. In other words, what the party resisting enforcement will have to prove is "lack of reciprocity" rather than its existence. This would help the states to enforce an arbitral award, which was made in a country that is not a member of the New York Convention. It was concluded that the reciprocity may solve the problem of enforcing the arbitral award. This is a solution that can be applied in situations where the states do not have any bilateral agreements or any other rules to apply.

These solutions and recommendations will somehow help to solve the issues presented in this paper. It would be better to pay more attention to international practices.

These practices would be guidelines to make changes and fill the gaps in the RA Law on Commercial Arbitration.

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