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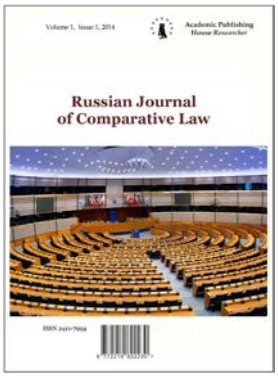

Articles and Statements

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Arbitration and LC Fraud Disputes: a Comparative Approach

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Abstract

Historically, litigation is the method of choice for resolving fraud related disputes in Documentary Letters of Credit (hereinafter - LC). However, it is difficult to meet the standard of proof and obtain injunction and stop bank from paying to fraudulent beneficiary. In late 1990's Blodgett and Meyers proposed for the first time the possibility of referring LC fraud cases to arbitration for the purpose of resolving them by industry experts in shorter period and lower costs in comparison with litigation. Despite the fact that after almost twenty years from Blodgett and Meyer's proposal, arbitration is not a popular method for resolving LC fraud disputes, it can be considered as an open option for resolving fraud disputes by parties to the letter of credit. Current paper, tries to find an answer to the question of why arbitration is not a popular method in resolving LC fraud cases by exploring existence of possibility to handle LC fraud disputes via arbitration and study legal concerns on the way of arbitrating such cases. On this basis, main research questions will be:

(i) whether or not LC fraud cases can be referred to arbitration;

(ii) What can be important aspects of arbitration agreement between parties in LC fraud disputes;

(iii) What types of remedies are available in case of referring cases of LC Fraud to arbitration tribunal;

(iv) Finally, paper will discuss the possibility to resolve LC fraud cases with reference to DOCDEX Rules.

Keywords: International Trade, Arbitration, Documentary Letters of Credit, Fraud, Litigation.

Introduction

Despite the fact that fraud is first recognized exception to the autonomy principle of Documentary Letters of Credit, and fraud rule is recognized in many jurisdictions, still dealing with LC fraud in court has many disadvantages [1; 2]. Among others, defrauded party is dealing with

problems like: different standards of proof and difficulty to obtain injunction, long period and high cost of litigation process [3], challenges for enforcement of interlocutory injunction if account party succeeds in obtaining it from the court and finally, overcoming the court's opinion in undermining the authority of independent principle in smooth operation of documentary letters of credit. In case of LC fraud, difficulty is existence of different contracts. Namely, underlying sales contract between applicant and beneficiary and contract of the Credit from one hand between bank and applicant and from other hand between bank and beneficiary. Although, it is a common practice for parties to sales contract to refer their disputes to ADR (particularly Arbitration), as an intermediary to finance the international transaction, bank has no interest in being involved in arbitration process when disputes arise in the framework of underlying sales contract. Mistrust of banks in resolving disputes via arbitration is attributed by some scholars to their criticism on lack of sufficient knowledge of international national banking practice among arbitrators [4]. Non-involvement of bank in contract of sales between parties has been emphasized in Article 4 of UCP 600:

"Credits v. Contracts

A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfill any other obligation under the credit is not subject to claims or defenses by the applicant resulting from its relationships with the issuing bank or the beneficiary." [5]

Therefore, it is not unexpected that banks take distance from any disputes in underlying contract between applicant and beneficiary by providing standard LC application form with emphasize on jurisdiction of particular court in dispute resolution clause. The same applies to the LC contract between issuing bank and beneficiary where litigation is the only form of dispute resolution proposed in standard contract form between parties [6].

Materials and methods

In this paper author presents study on possibility to use arbitration as a method for dispute resolution in LC fraud disputes. On the basis of electronic research in academic legal databases, an extensive comparative study has taken place among existing literature and case law on using arbitration as method for resolving LC fraud disputes in legal practice and possible remedies for affected party by fraud. In the study the author has applied the method of descriptive and comparative analysis and the method of synthesis.

Discussion

Application of above mentioned condition in contract between bank and parties to the Credit makes it difficult for applicant to seek justice via ADR methods instead of dealing with difficulties of litigation when facing with any potential fraudulent conduct of beneficiary. However, in late 1990s, Blodgett and Mayer proposed the arbitration as alternative to litigation in legal cases relevant to LC fraud in international trade [7]. Their proposal in practice consists of two main parts: Firstly, buyer and seller in the underlying sales contract between agree that, method of payment in their transaction will be Documentary Letters of Credit, applicable law to it will be UCP and all relevant disputes will be referred to arbitration [7, P. 462] . The power of arbitrator further would be defined as issuing award, determination of fees for attorneys and relevant damages (consequential and compensatory) in case of beneficiary's approach with a fraudulent and abusive claim for payment [7]. Parties might even agree on inclusion of punitive damages in arbitral award where evidences establish the outrageous conduct of either party under contract of sales [7].

Secondly, as existence of arbitration agreement between the buyer and seller would not prohibit buyer to seek injunction from court in order to stop bank from payment to seller while facing with his abusive and fraudulent demand for payment, an arbitration clause is proposed for being included in LC contract between bank and applicant [7, P. 462-463]. Blodgett and Mayer formulated an arbitration clause in their proposal as following: "account party agrees that it will not seek to prohibit payment under the LC in any event where the bank receives documents conforming to the credit's requirements; account party agrees that any legal claims or equitable actions arising from the seller/beneficiary's fraud ,the problem of quality, lack of quantity, or non-existence of goods will be pursued directly against the seller whether by arbitration and not litigation" [7]. On the basis of above mentioned arbitration clause in the LC contract between bank

and applicant, the right to seek injunction in court against fraud of beneficiary will be self-denied by applicant and instead the matter should be referred to arbitration tribunal. With reference to above mentioned arbitration clauses in underlying contract of sales and LC contract, court will dismiss any application of for granting interlocutory injunction and case will be automatically referred to arbitration tribunal.

In justification in their proposal, Blodgett and Mayer argue that replacement of litigation with arbitration will reduce the cost of LC operation , correct the fallacy of the belief that litigation is the only way to provide remedy for beneficiary's fraud [7], and it does neither need forum establishment nor problems are too specific that arbitrators would not be able to deal with them [7, P. 464].

According to Blodgett and Mayer, while seller enjoys the benefit of being paid under LC after presentation of complying documents, buyer has the advantage of access to arbitration award including consequential and compensatory damages in case of fraudulent demand for payment by beneficiary. Recognition of the New York Convention on Enforcement of Foreign Arbitration Awards in many jurisdictions guarantee the enforcement of award issued by arbitration tribunal.

After almost 20 years from proposing to use arbitration instead of litigation in cases of LC fraud by Blodgett and Mayer, there is no significant turnout towards using arbitration in banking practice in general and in international LC operation in particular let alone its application to cases of LC fraud disputes. As a result, current paper tries to find an answer to the question of why arbitration is not a popular method in resolving LC fraud cases by exploring existence of possibility to handle LC fraud disputes via arbitration and study legal concerns on the way of arbitrating such cases. On this basis, main research questions will be whether or not LC fraud cases can be referred to arbitration? What can be important aspects of arbitration agreement between parties in LC disputes? What types of remedies are available in case of referring cases of LC fraud to arbitration tribunal? Finally, paper will discuss the possibility to resolve LC fraud cases with reference to DOCDEX Rules.

In order to answer above mentioned questions, paper will take a comparative approach and study the subject matter in different jurisdictions.

Current situation of Arbitration as an alternative to litigation in international LC disputes

As it has been mentioned earlier, almost after 20 years from the proposal of Blodgett and Mayer arbitration could not establish itself as an alternative for litigation in LC fraud disputes. Some of the reasons behind such failure can be traced in limits of proposal. First of all, Blodgett and Mayer completely remove the possibility to use litigation from their proposal. As a result, even in case of committing material fraud by beneficiary, it is impossible to seek for injunction order as the fastest available remedy to stop payment process. Second, proposal only takes into account the fraud committed by beneficiary and totally neglects other possible forms of fraud in LC operation. Finally, there is not clarification in scope of fraud in Blodgett and Mayer's proposal as it does not differentiate the fraud in underlying contract from fraud in LC operation which is totally different issues from technical perspective [8].

While discussing the fraud in LC operation, important role of bank as a party to the LC contract should not be neglected and despite the fact that many scholars confirm positive turnout of banks to arbitration within recent years [9] , still it is not possible to consider arbitration as a popular method for solving financial disputes in banking community [10]. Generally, bankers consider arbitrators as not being aware of principles of their business while arbitrators criticise lack of sufficient appreciation towards their practice among bankers [10].

Connerty [11], comments on different reasons for bank's reluctance to use of arbitration in solving LC fraud disputes. Experience of commercial courts in financial centres seems sufficient for resolving fraud related disputes under the Credit contract, therefore, there is no need for application of arbitration in above mentioned cases. Also, by using arbitration for solving the LC fraud disputes, banks will be deprived from access to summary judgement issued by national courts. Other reasons for lack of bank's interest in using arbitration as dispute resolution method in LC fraud cases can be summarized as: Difficulties of enforcing international arbitral award in comparison with enforcement of national court order and possibility to delay the arbitration process by applying to court for determining jurisdiction of arbitrational tribunal and validity of arbitration agreement.

In practice review of statistics from ICC Court of Arbitration Secretariat in 2003 shows that only in 9 cases banks were involved as parties while at the same time no banker was arbitrator in 1135 pending cases before the same court at that moment.[10]

According to James Byrne, arbitration has not been a successful alternative for litigation in LC disputes as it is easier and less time consuming to get the result in court rather than educating arbitrators about principles of international LC operation [12]. Statistical reports of ICC Arbitration Court confirm Byrne opinion by showing that in 1994 only 11.7% of submitted disputes where relevant to banks [13]. Even Blodgett and Mayer admit that arbitration cannot be the best way for resolving all types of LC disputes, but they confirm that it can be used successfully in cases of fraud and nonexistence of goods [7, P. 464].The unsuccessful experience of International Centre for Letter of Credit Arbitration(ICLOCA) in the USA which was established by International Institute of Banking Law and Practice (IIBLP) can be considered as another evidence for failure of arbitration in replacing litigation to resolve relevant disputes to LC transactions. It has been argued that in the Europe most of LC disputes are resolved through litigation and by agreement between parties rather than using arbitration [14].

In contrast many scholars believe that arbitration as a faster and more cost effective dispute resolution method is becoming more and more popular in banking society [15]. With reference to ICC statistics, Henefeld comments on raise of arbitration cases in banking and finance between 2008 to 2010 from 7.2% to 15%. [16]. Some scholars consider use of experienced arbitrators who are familiar with banking world as a reason behind increasing popularity of arbitration in banking and finance sector in recent years [15, P. 266].

Possibility to resolve fraud disputes by arbitration

Arbitrability is the notion which defines possibility to deal with dispute through arbitration[17]. It can be defined as legal restriction on jurisdiction of arbitral tribunal and validity of arbitration agreement [17].

American law has recognized the jurisdiction of arbitral tribunals which handle fraud cases [18].

In English Law, “matters which are (not) capable of settlement by arbitrators” is the term used in practice more than arbitrabiltiy [17, P. 282]. Arbitrabliity is determined by common law in England as Arbitration Act of 1996 in England and Wales has not determined arbitrability clearly [8, P. 176]. Section 81 (1) of the arbitration act refers determination of arbitrability to “any rule of law” where law is common law. According to Rutherfeld and Sims, arbitrability is defined in a very broad term under English law and it is difficult to find a dispute which does not qualify for settlement by arbitration [19] .However, English Law does not recognize the jurisdiction of arbitral tribunal in case of disputes that “affect public at large” (possible negative effect on public policy) and particular types of illegal contracts [20]. In case of *Lornrho* where the claim was made on the basis of breaching the contract and also on tort (negligence and conspiracy) the court decided that tortuous claim should be referred to arbitration due to connection with contractual claim and existence of arbitration agreement [21; 22]. Some scholars also comment on possibility in English Law to refer fraud cases in LC operation to arbitration tribunal in the same vein as litigations in national courts [8].

So far, ICC Court of International Arbitration has dealt only with one LC fraud case [23]. In *Bank (Thailand) v. Bank (Spain),* defendant bank (Spanish bank) issued a letter of credit upon request of a Spanish importer in favour of Thai Exporter . The credit was confirmed by a Thai bank and first payment was executed by issuing bank. However, second payment was rejected as result of beneficiary's fraud and presentation of forged document. On the basis of UCP (1974 version) the award established that defendant bank was not obliged to honour the fraudulent presentation by beneficiary [23].

The concept of arbitrability of LC fraud has been supported by different arbitration scholars including Georges Affiki [8, P. 177] . He argues that arbitration can offer advantage of expertise and rapidity more than adjudication; however, suitable mechanism for dispute resolution should be defined on the case to case basis. Therefore, it is possible to conclude that despite the fact that arbitrability is not a clearly defined notion, there is an agreement on possibility to refer LC fraud disputes to arbitral tribunal.

Arbitration Agreement in LC Fraud Disputes

Agreement of parties to solve their disputes in arbitration will result in their rejection of chance to solve same disputes by litigation. Therefore, the main outcome of including arbitration agreement in the contract is withdrawal from the right to decide about disputes in court while having the right to solve existing disputes in a private process [24]. Within the arbitration agreement, parties consent on procedural rules, language, location, governing law and arbitrators in the format of a clause included in the contract of sales.

Many legal systems recognize the principle of Separability of arbitration clause. As a result, arbitration clause might stay valid even when main contract is recognized as void or null [25]. According to the principle of Separability, allegations regarding termination of contract of sales based on its nullity will not remove jurisdiction from arbitrators as validity of arbitration clause solely depends on relevant factors to itself , including genuine submission of arbitration request, capability of parties to agreement as well as formality and content of agreement. Since fraud can affect the validity of the contract, it is necessary to distinguish between situations in which whole contract is affected by fraud and when arbitration agreement is not affected [22]. It has been argued that main incentive of fraudulent party is to benefit from conducting fraud in the underlying contract and as result, in case of implementing the separability principle and taking the matter to arbitration even after nullification of main contract; it will be possible that award to be against fraudster and in favour of affected party. The Separability principle has been recognized globally and by most arbitration laws [26].

For example, under English Arbitration Act 1996, section 7 confirms that invalidity of another agreement will not result in non-existence, invalidity, or ineffectiveness of arbitration agreement since it should be considered as a different agreement. The English court in *Harbor Assurance (UK) Ltd v. Kansa General International Insurance* [27] ordered on separation of arbitration agreement included in the contract from the contract itself. Also the decision of the Court of Appeal and House of Lords in case of *Premium Nafta Products Limited & Others v. Fili Shipping Co & Others* [28] which confirmed separabiltiy of arbitration clause from validity of main contract has received a warm welcome in business society. In this regard, it has been argued that the decision of House of Lords in *Premium Nafta Products Limited & Others v. Fili Shipping Co & Others* limits access of parties to court when they have already agreed to proceed their dispute resolution via arbitration [8].

There is an argument among scholars regarding application of arbitration agreement in underlying sales contract to the cases of fraud in Documentary Letters of Credit [29]. According to the principle of autonomy of Documentary Letters of Credit emphasized in article 4 of UCP 600, banks deal with documents not goods and performance of parties in underlying sales contract will not affect their guarantee of payment under LC [30]. Therefore it is possible to conclude that including arbitration clause in underlying sales contract may not affect the fraud disputes in Documentary Letters of Credit as first of all, the international contract of sales has been signed between importer(buyer) and exporter (seller). But, parties to LC contract are not the same. In Documentary Letters of Credit different contracts exist and parties to them are not the same. For example, contracts in LC operation include: contract between applicant and issuing bank, contract between issuing bank and beneficiary, contract between beneficiary and nominated or confirming bank and finally, contract between nominated or confirming bank and issuing bank where each contract is only binding to its parties. Therefore, banks which are not party to underlying sales contract cannot be affected by its contents.

Secondly, as a sign of mutual assent, agreement on resolving disputes via arbitration should be mentioned freely by involved parties in the contract [24]. As a result, in many national and international laws including section 5 of English Arbitration Act 1996 and article II of New York Convention, it is mandatory for arbitration agreement to be in written format in order to prove agreement of parities [31]. For signatory countries of New Convention, in case of conflict between national law and its content of convention, it has been argued that New York Convention is prevailed over national law [29].

It is possible to conclude that possibility to settle fraud disputes in Documentary Letters of Credit by arbitration depends on involved parties to the dispute , existence of arbitration agreement among those parties and nature of claim (whether it is against parties in underlying contract or parties in LC contract).

Applicable Law and Fraud Disputes in Documentary Letters of Credit

There is no doubt about importance of applicable law in the contracts of sales under which parties agree to refer their disputes to arbitration [32]. While dealing with contractual problems and disputes, contract law is the most important reference. However, fraud is not a fully discovered area either under national contract laws or international frameworks for regulation of international sales contracts. With reference to English Law, fraud is covered under contract law as misrepresentation where misrepresentation of one party will entitle the other one to step out of her liabilities under the contract [33].In addition to the right to claim for damages. Relevant regulations of damages are mostly tort law; however, in English law it is possible to face with liability under tort law and contract law at the same time. English law does not provide clear view on liabilities and rights of affected party when other party commits fraud in the framework of contract.

The United Nations Convention on Contracts for The International Sales of Goods (CISG) is frequently chosen as the applicable law where the arbitration is the preferred method of dispute settlement by parties [29]. Despite the fact that CISG does not provide any direct reference to fraud in international sales contracts, it neither imposes any restrictions on rights and liabilities defined by national law to contract parties affected by fraud. Article 4 of CISG provides excluded issues from the scope of convention. Therefore, by regulating issues resulting from contract, article 4 of CISG in fact safeguards protection of national law for affected party of fraud in an international sales contract [34].

As it was mentioned earlier, CISG does not provide any direct guidance for cases involving fraud, however, problem of fraud has not been totally excluded from the Convention. According to article 74 of the CISG, it is possible to consider the fraudulent conduct as breach of contract and conducting fraudulent conduct by one party provides other party with eligibility to benefit from damages for breach of contract [35].

Remedies for fraud in arbitration proceeding

In the arbitration process, interim measures are those remedies which are granted before announcement of final award [24]. Power of arbitration tribunals to award interim measure was limited for many years, or not recognized in many jurisdictions as it was considered to be granted only under court's discretion [36].After coming into force of the UNCITRAL Model Law on International Commercial Arbitration, granting interim measures are included among powers which signatory countries provided for arbitral tribunals [37]. It also worth of discussion that the term "interim measure" has not been reached a harmonized interpretation and still different jurisdictions provide different guidelines about how, where and when to use them [38]. Despite the fact that jurisdiction of arbitration tribunals to grant interim measures has received global consent, there is no global agreement on whether or not to include interlocutory injunction or freezing order among such measures [17]. Granting *ex parte* order without notice of beneficiary in case of emergency is another necessary issue which is facing with silence of different national and international arbitration regulations [26]. Another important issue in this regard is the difference between granting interim measures against parties to the arbitration agreement or against third parties as arbitration agreement can limit the power of arbitrator to issue awards only against parties to the agreement [22].

In this section, paper studies English, American and German approaches to interim measures in arbitration in general and in case of fraud.

England

In England, Arbitration is regulated under Arbitration Act 1996, the New York Convention, the Geneva Convention 1927, the Administration and Justice Act 1920, the Foreign Judgement Acts 1933 and Common Law [39]. On the basis of Arbitration Act 1996 , according to agreement between parties, the arbitrators are entitled to power of ordering security for costs, inspect property, preserve property and preserve all evidences [40]. Therefore, Arbitration Act 1996 entitles the arbitrators to use freezing orders and interlocutory injunctions as interim measure upon express agreement of parties.

In the case of *Mobil Cerro Negro Ltd v. Petroleos de Venezuela SA* [41] with reference to section 44 in the Arbitration Act 1996, English court supported the New York ICC Arbitration award between Petroleos de Venezuela SA and Mobil Cerro Negro Ltd by granting a freezing order which clearly shows the power of English Courts to support foreign arbitration awards. However,

supportive attitude of English courts towards enforcement of foreign arbitration awards does not mean that they will use their power in awarding interim measures as they preferably refer the case to arbitration tribunal when parities have inserted an arbitration agreement in their contract and included such measures into the arbitration agreement [18]. For Example in *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd* [42]"the HL decided that it had jurisdiction, but refused to issue the injunction order because of the potential conflict between the court's tentative assessment of the merits of a case and respect for the choice of arbitral tribunal by the parties" [8].

The United States of America

Federal Arbitration Act of 1925 and Uniform Arbitration Act of 1955 are two federal statues for regulating arbitration [43]. According to Huela, in ratification FAA and UAA at federal level, Congress was following goals of overcoming traditional hesitance of U.S. Courts in accepting arbitration as recognized form of dispute resolution and making sure that U.S. States will enact mandating statues relevant to arbitration agreement's enforcement [44]. The USA is member of New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, European Convention on International Commercial Arbitration of 1961 and Inter American Convention on International Commercial Arbitration (Panama Convention of 1975) are other international treaties on arbitration applicable in the United States of America. Despite the fact that membership in Panama Convention seems a logical act due to high level of trade between the USA and other counties in American Continent, the United States joined the European Convention on International Commercial Arbitration (1961) due to its supplementary role to the New York Convention (1958) and convention's provision which was providing State to be a party to arbitration agreement [45; 46]. At the Federal level, it has been argued that American Congress enacted the FAA in order to convince American courts about legitimacy of arbitration as an alternative method for dispute resolution and overcome reluctance of US in enacting statues on enforcement of arbitration agreements [43].

Although, the FAA and UAA are both silent regarding capability of arbitration tribunal to award interim measures; it has been held by US Courts that arbitrators have power to grant such measures as long as it is not contradictory with content of arbitration agreement between parties [47].

In case of *Pacific Reins. Mgmt Corp vs Ohio Reins Corp* [48], the Ninth Circuited argued: "temporary equitable relief in arbitral proceedings can be indispensable to preserve assets or enforce performance which if not preserved or enforced may render the final award meaningless" [48]. In accordance with pivotal rule of FAA on enforceability of arbitration agreements .there is no American authority which shows that according to FAA, arbitration tribunal cannot grant interim measures despite express agreement of parties [47]. However, only few courts referred to FAA on lack of arbitration tribunal's authority to award interim measures where parties have not clearly such capability to it by parties to arbitration agreement [47]. For example, low court of *Swift Indus.Inc. v. Botany Indus,Inc* [49] held that : "having reviewed the agreement in the light of its language, its context and the parties' apparent intent , and in terms of the question of the arbitrator's authority to fashion relief we conclude that the arbitrator's award of a six million USD cash surety bond does not draw its essence therefrom and that it is in manifest disregard thereof and must be set aside" [49]. As a source of arbitration tribunal's power to grant interim measures, arbitration agreement in the contract complies with applicable rules chosen for arbitration agreement like, *lex loci arbiri*, rules of international institutions for arbitration and law of the seat of arbitration [50].

In the United States, FAA, State Law and the New York Convection govern the enforcement of interim measures granted by arbitrators [51]. According to FAA and the New York Convention interim measures only have an interim function and as a result of tendency to exclude them from final awards [52], it is impossible to enforce them by court. However, with reference to section 9 [53] and 10 of FAA, US case law confirms the view that interim measures are final awards and enforceable in majority of claims [52; 53; 54; 55]. In the case *of Yasuda Fire & Marine Insurance v. Continental Casualty*, an interim measure granted by arbitration tribunal in order to oblige defendant to open an interim letter of credit in response to release request by the plaintiff, court had to decide on the basis of sections 9 and 10 of the FAA whether the granted relief was an award or not. With reference to decision of Pacific *Reinsurance v. Ohio Reinsurance* where interim arbitral order to deposit money under dispute in an escrow account as final, the court held [56; 57]:

"The arbitration panel in this case ordered Yasuda to post an interim letter of credit to protect a possible final award in favour of CAN. [...] Because this relief protects CAN's interests, CAN has the right to confirm the order in the district court, which it has done. Analogously, Yasuda should have the right to attack this relief. The interim relief represents a temporary equitable order [...] calculated to preserve assets [...] needed to make a potential final award more meaningful. [...] We find that an interim letter of credit constitutes an 'award' under section 10 and that the district court had jurisdiction to consider Yasuda's Petition to Vacate".[56]

Germany

The Tenth Book of Code of the Civil Procedure also known as ZPO (*Zivilprozessordnung)* contains the German Arbitration Law. The new German Arbitration Law which is based on 1985 UNCITRAL Model Law in International Arbitration came into force on 1 January 1998 [44]. Also in 1992 Germany recognized institutional framework for national and international arbitration by gathering all existing arbitration institutions under the umbrella of German Institute of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit*) [58].

Enacting the new law of Arbitration in Germany was an end to the dispute regarding power of arbitration tribunal in granting interim measures [59]. On the basis of the article 17 of UNCITRAL Model Law, Section 1041 (1) of ZPO provides arbitrational tribunal with power to grant interim measure [18]. Arbitration tribunal has the power to evaluate which measure is suitable and necessary for each particular case and there is no limit on its power to grant different types of interim measure [60]. In contrary, court can grant interim measures which meet the prerequisites defined in law [61].

Article 1041 (2) provides power for arbitration tribunal to grant interim measures that do not fit the enforcement system in Germany, as according to the provision, court might redesign the measure granted by arbitrators in order to meet necessities for enforcement [61]. This will gain importance where arbitration tribunal grants interim measures that are not ordered in Germany like granting worldwide freezing order similar to English law [61].

Under ZPO, s.1042(2) provides that court has the power to enforce the interim measure granted by arbitrators except for cases that application for similar interim measures has been already done to the court on the basis of s.1033 of same law [62]. It should be notices that German courts only order protection of interim measures which are provided under German law [63]. Section 1062(1) comments on the Court of Appeal to be the competent court for enforcement of measures granted by arbitrational tribunal. However, where party fails to refer the matter to specific court, the District Court of the seat of arbitration has power to enforce interim measures granted by tribunal.

In conclusion, it is possible for arbitrational tribunals in different countries to grant interim measures against cases of fraud. However, having such power depends on inclusion of granting it to the tribunal in arbitration agreement by parties and also providing such possibility to arbitrators by national law of the country in which the arbitration is taking place as well as the country in which interim measure is going to be enforced.

Arbitration Tribunals and Punitive Damages

It has been globally accepted that powers of arbitrational tribunals are not similar to powers of the court as for example arbitrators cannot convict someone to prison or impose fine. Such penalties are generally governed under national law and executed by judges.

In practice, principle of equivalence is governing damages and compensations in the field of civil law and full compensation in tort and contract law establishes that victim must receive such compensation as if harm has never been done. Complementary to this idea is notion of liquidated damages and contractual penalties in cases of anticipatory breach of contract recognized by CISG [64]. However, their enforceability depends on national law [65]. Full or fair compensatory damages seem to be insufficient in international trade and more damages might be required by victim for example in cases of fraud, violence, malice and oppression [66; 67]. Such punitive damages do not follow the goal of compensating victims, but to punish the wrongdoer and prevent such faulty actions in future [68].

According to the proposal of Blodgett and Mayer it is possible to provide arbitrational tribunal (in the frame work of arbitration agreement) with the power to award punitive damages in particular situations. However, area of punitive damages is a debated train as national laws show diversified attitudes towards it.

Since fight against corruption and fraud has become a global phenomenon [69], it is possible that arbitrators respond to such behaviours with awarding punitive damages. On one hand, it is argued that awarding punitive damages by arbitrators will be against the principle of fairness as a result of limited review on arbitral procedure and awards [67]. On the other hand, it is not possible to neglect challenges imposed by applicable law of the seat of arbitration on the awards. Under the English law, authorities are against enforcement of punitive damages and generally, English courts do not enforce the penal law [70; 71]. Although, English law does not consider the enforcement of punitive damages in contradiction with public policy, case law has strong influence on enforcement process [72].

Historically, in the United States of America existence of punitive damages goes back to the case law in England. However, they have more recognition than English law particularly in cases of fraud and extreme civil offences and, it is still valid argument whether or not arbitration tribunal has power to award punitive damages [66; 73]. However, on the basis of Supreme Court's ruling, under the regulation of state law, parties may agree to grant arbitrators with power to award punitive damages [74].

In Civil Law Countries like Germany, punitive damages as legal concept are not popular. German legal system does not recognize punitive damages since they are understood as undue enrichment in favour of victim. Therefore, do not conform to doctrine of proportionality between damage and compensation [66]. German Courts reject enforcement of punitive damages as being against the public policy [66].

As a result, it is possible to conclude that arbitrators should consider different issues while making decision on awarding punitive damages, First of all , such power should be attributed to the arbitrator by parties to the arbitration agreement. Secondly, arbitrators should act upon authority available by applicable law of the dispute. Thirdly, law of the country in which arbitration is taking place should be considered as award is granted in accordance with national law and public policy of the country of the seat of arbitration [67]. Finally, arbitrators should consider the enforceability of the award [73]. Therefore, only having the power to grant punitive damages in not sufficient for awarding them. Arbitrators should carefully observe all relevant aspects of the award before granting it.

DOCDEX Rules and LC Fraud Disputes

In 1997, International Chamber of Commerce introduced Documentary Instruments Dispute Resolution Expertise (DOCDEX) in order to resolve LC disputes with the help of an expert based panel [74]. DOCDEX was revised in 2002 in order to include disputes over demand guarantees and documentary collection in addition to LCs. The main idea behind introduction of DOCDEX was using an independent, prompt expert decision panel to resolve disputes based on content of ICC Rules and financial instrument's contract [75]. DOCDEX process can start by request of one party to the dispute or all involved parties. On the basis of documents submitted by parties, panel of three experts will make decision which should be reviewed by the Technical Advisor of the ICC Banking Commission. DOCDEX decision is non-binding in principle, and unlike arbitration awards, it will not receive any legal follow up regarding enforcement. It is also argued that DOCDEX rules are meant more for resolving disputes on documentary discrepancies in international operation of LCs [11]. Additionally, according to Article 1.1 of DOCDEX, relevant disputes to these rules are connected to ICC regulations. As result, it is questionable whether or not DOCDEX process may resolve LC fraud disputes where UCP 600 takes the silent potion regarding LC fraud and leaves them to be governed by national laws. Other issue which raises doubts about applicability of DOCDEX rules in fraud related disputes of LCs is their procedure and decision making process. It is possible to initiate DOCDEX procedure even by one party in the dispute and without participation of the other party proceedings might continue. Therefore, it is not necessary for parties to agree upon insertion of DOCDEX rules in their contract. Another concerning issue is non-binding nature of DOCDEX decisions where a binding award is necessary in LC fraud disputes as it is unlikely to solve them on the basis of voluntary decisions.

Therefore, it is possible to conclude that DOCDEX rules are more suitable for discrepancy problems and other technical issues in international LC operation and do not provide strong basis for resolving LC fraud disputes.

Results

From technical perspective it is possible and desirable to reduce time and cost of dispute resolution process in LC fraud cases by referring them to arbitration rather than traditional litigation. The trend of considering arbitration for resolving LC fraud disputes started in late 1990s with works of Blodgett and Meyers and received support by that time from different legal scholars and institutions. Despite the fact that parties to LC fraud dispute can benefit from numerus benefits of arbitration, its use in such cases is limited and rare. There are severe problems on the way of replacing traditional approach of resolving such cases via litigation with more flexible dispute resolution methods like arbitration. As a result of conducting research in available legal literature, current paper considers reasons behind unpopularity of using arbitration as a dispute resolution method in LC fraud cases as following: Establishing the jurisdiction of arbitration tribunal for to issue an award in LC fraud disputes, hesitation of banks lack of interest among them in using arbitration as a dispute resolution method, lack of harmonized regulation regarding LC fraud disputes at international level, difficulties on the way to enforcement of international arbitration award and problems to issue punitive damages in arbitration process of LC fraud disputes . Therefore, with emphasize on complicated process of International LC transaction and existing complexities in LC fraud disputes, further research is recommended in order to clarify unclear and vague areas of using arbitration in LC fraud disputes and prepare the ground for more harmonized legal approach to the subject matter at international level.

Conclusion

Current paper tried to review possibility for using arbitration as an alternative method rather than litigation in resolving LC fraud disputes in the field of comparative law. From theoretical perspective and with reference to Blodgett and Mayer, in LC fraud disputes, arbitration can be a faster and more cost effective method than going to court. However, due to complex nature of fraud in operation of documentary letters of credit, referring to arbitration in order to resolve such problems is not easy in practice. By taking a comparative approach among different national laws, it became clear that first challenge for using arbitration in LC fraud disputes is jurisdiction of arbitral tribunal to grant an award in such cases.

Other important challenge is existence of arbitration agreement between parties. Problem will rise when bank is party to LC fraud dispute and since there is no place for arbitration in standard LC contract between banks, beneficiary applicant; banks prefer litigation process rather than arbitration and arbitration agreement does not have any place in standard LC contracts between bank with either applicant or beneficiary.

Other existing challenges for resolving LC fraud disputes by arbitration can be listed as: silence of UCP regarding fraud problem in LC operation, different approaches of national legal systems available remedies for victim which was explored from the perspective of interim measures and punitive damages as well as enforcement problem of arbitral awards in international arena. Therefore, scholars cannot agree on possibility for resolving LC fraud disputes by arbitration better than litigation. However, further research on using other alternative dispute resolution mechanisms instead of litigation in LC fraud cases is highly recommended.

References:

1. UCP 600, Article 5.

2. Baumgartner, Samuel P. (2004), 'Is Transnational Litigation Different?', 25 University of Pennsylvania Journal of International Economic Law 1297, (Winter).

3. Wang, Lili (Chief Ed.) (2004), Case Studies on Legal Risk Control of Banks, Peking: Law Press China, 1st ed, pp. 58-59

4. Cirielli, S.E. " Arbitration, Financial Markets and Banking Disputes" (2003) *Amirian Review of International Arbitration* 243 , p,263 ; Byrne, James, et al. (1996), Special Section, Seminar Proceeding, 'Disputes Involving Letters of Credit', 7 World Arbitration & Mediation Report 185, p. 190

5. UCP 600, Article 4.

6. It worth to mention that in the practice of international LC transaction, there will be at least three contract among involved parties . (i) Underlying contract between account party and beneficiary , (ii) Contract between Account Party and Issuing bank.(iii) Contract between Issuing

Bank and Beneficiary. Number of contracts can be increased after involvement of other parties like Nominated Bank and Confirming Bank.

7. Blodgett, Mark S. & Mayer, Donald O. (1998), 'International Letter of Credit: Arbitral Alternatives to Litigating Fraud', 35 American Business Law Journal 443, Spring

8. Zhang, Yanan. *Approaches to Resolving the International Documentary Letters of Credit Fraud Issue*. University of Eastern Finland, 2011. P. 173.

9. Hanefeld, I. (2012). Arbitration in Banking and Finance. NYUJL & Bus., 9, 917. Chicago

10. Affaki, Georges, 'A Banker's Approach to Arbitration', in Kaufmann-Kohler (2003), Arbitration in Banking and Financial Matters, ASA Special Series No. 20 (ASA Swiss Arbitration Association, Conference on 31 January, 2003 in Geneva), August, p. 63

11. Connerty, A. (1999), 'Documentary Credits: A Dispute Resolution System from the ICC', *J.I.B.L., 14 (3)*, 65-71.

12. Byrne, James, et al. (1996), Special Section, Seminar Proceeding, 'Disputes Involving Letters of Credit', 7 World Arbitration & Mediation Report 185, p. 190.

13.1994 Statistical Report, ICC INT'L. CT. ARB. BULL., May 1995, p 3.

14. Jean-Pierre Mattout on Injunctions, The Draft Standby Rules and First Demand Guarantees', DCI (ICC), Summer 1997, Vol. 3, No. 4, p. 11.

15. Cirielli, Stefano E. (2003), 'Arbitration, Financial Markets and Banking Disputes', 14 American Review of International Arbitration 243, p. 263

16. Hanefeld, I. (2012). Arbitration in Banking and Finance. NYUJL & Bus., 9, 922.

17. Poudret, Jean-François & Besson Sébastien (2002), Translated by Berti, Stephen & Ponti, Annette (2007), Comparative Law of International Arbitration, Zurich: Sweet & Maxwell, 2nd ed., p. 281

18. Lew, Julian DM & Mistelis, Loukas A & Kröll, Stefan M (2003), p. 213; see also a case which illustrated this point, Prima Paint Corporation v. Flood & Conklin Mfg Co, 87 S Ct 1801, 18 L Ed 2d 1270.

19. Rutherford, M and Sims, J. (1996), Arbitration Act 1996: A Practical Guide, London: Sweet & Maxwell, para.81.4. p. 238

20. Mustill, M. J. and Boyd, S. C. (1989), The Law and Practice of Commercial Arbitration in England, London and Edinburgh: Lexis Law Publisher, 2nd ed., p. 149.

21. Lonrho Ltd. (UK) Companhia do Pipeline Mocambique Rodesia S. a. r. L (Mocambique) v. The Shell Petroleum Company Ltd. (UK) The British Petroleum Company Ltd. (UK) et al., High court, England, January 31 (1978), Yearbook Commercial Arbitration 1979.

22. Rubino-Sammartano (2001), p. 225; for further discussion and case materials, see pp. 225–231.

23. ICC Award No. 3031, in 1977, Digest of ICC – International Court of Arbitration Awards ICC, Award Abstract and Commentary, JDI 1978, pp. 999-1004.

24. Moses, Margaret L. (2008), The Principles and Practice of International Commercial Arbitration, New York: Cambridge University Press, 1st ed., p. 18.

25. Liu, Jianhong (2004), 'The Autonomy of Arbitration Agreement and the Clause of Silently Citing Arbitration Agreement', published on 11 April, available at www.xxmt.org. cn/ss/explore/exploreDetial.php?sId=612 [accessed 10.01.2016].

26. Tweeddale, Andrew & Tweeddale, Keren (2005), Arbitration of Commercial Disputes: International and English Law and Practice, New York: Oxford University Press, 1st ed., p. 125

27. [1992] 1 Lloyd's Rep. 81.

28. [2007] UKHL 40

29. Zhang. Y (2013), Exploration of Alternatives for Litigating International Documentary Letter of Credit Fraud Disputes, *Vindobona Journal of International Commercial Law & Arbitration*, 17 VJ, 140

30. Article 4 UCP 600

31. Landau, Toby, 'The Requirement of a Written Form for an Arbitration Agreement: When 'Written' Means 'Oral'', in Jan van den Berg, Albert (Ed.) (2003), p. 20.

32. Frick, Joachim G. (2001), Arbitration and Complex International Contracts: With Special Emphasis on the Determination of the Applicable Substantive law and on the Adaptation of Contracts to Changed Circumstances, The Hague: Kluwer Law International.

33. Atiyah, P. S. & Smith, Stphen A. (2005), An Introduction to the Law of Contract, Oxford: Oxford University Press, 6th ed., p. 254; see also Treitel, Guenter (2003), pp. 369-376

34. Honnold, John O. (1999), Uniform Law for International Sales under the 1980 United Nations Convention, Hague: Kluwer Law International, 3rd ed., p. 67

35. Saidov, Djakhongir (2005-06), 'Damages: the Need for Uniformity', Journal of Law and Commerce, Vol. 25: 393;

36. Anne Herrman, Drawing a Contrast: Interim Measures of Protection in International Arbitral Proceedings-The United States v. Germany, 9 VINDOBONA J. INT'L COM. L. & ARB. 49, 67 (2005)

37. Schaefer, J., 'New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared', (1988) 2.2 Electronic Journal of Comparative Law,available at: < http://www.ejcl.org/22/art22-2.html> [acesed 10.01.2016.]

38. Fry, Jason (2003), 'Interim Measures of Protection: Recent Developments and the Way Ahead', International Arbitration Law Review, 6 (5), 153-160.

39. Pinsent Masons, Advice Note, 'Enforcing International Arbitration Awards in England and Wales' // www.pinsentmasons.com/PDF/EnforcingInternationalArbitrationAwards.pdf

40. English Arbitration Act 1996, section 38

41. Mobil Cerro Negro Ltd v. Petroleos de Venezuela SA ,[2008] EWHC 532 (Comm).

42. Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd [1993] AC 334

43. Brunel, A.J., 'A proposal To adopt UNCITRAL's Model Law On International Commercial Arbitration As Federal Law', (1990) 25 TXILJ 43, p. 51.

44. Hulea, D.C., 'Contracting to Expand the Scope of Review of Foreign Arbitral Awards: An American Perspective', 29 BKNJIL 313, at pp. 320, 321

45. Redfern, Alan. *Law and practice of international commercial arbitration*. Sweet & Maxwell, (2004).70

46. European Convention of 1961 , Article II, 2 .

47. Bom, G.B., International Commercial Arbitration: Commentary and Materials (2nd. ed, Ardsley, New York, 2001), at p. 924

48. Pacific Reins. Mgmt Corp vs Ohio Reins Corp., F.2d 1019 (9th Cir.1991)

49. Swift Indus. Inc. v. Botany Indus, Inc, 466 F.2d 1125,1134 (3th circuit 1972)

50. Redfern, A.D., 'Arbitration and the Courts: Interim Measures of Protection – is the Tide About to Turn?' (1995) 30 TXILJ 71, at p.71

51. Ministry of Finance and Planning v. Onyx Development Corp., 1989 U.S. Dist. Lexis 11995, 9 (S.D.N.Y. 24 June 1988).

52. Berger, K-P., International Economic Arbitration (Deventer, Boston, 1993), at p. 343

53. U.S.C § 9: If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a non-resident, then the notice of application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court

54. U.S.C § 10: (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration-- 1. Where the award was procured by corruption, fraud, or undue means. 2. Where there was evident partiality or corruption in the arbitrators, or either of them. 3. Where the arbitrators were guilty of misconduct in refusing to postpone a hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other

misbehaviour by which the rights of any party have been prejudiced. 4. Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 5. Where an award is vacated and the time within which the agreement required the award to be made has nit expired the court may, in its discretion, direct a rehearing by the arbitrators. (b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who's adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

55. Carbonneau, T.E., Cases and Materials on the Law and Practice of Arbitration, (3rd edn, Juris Publishing Inc., New York, 2002), at p. 717

56. Yasuda Fire & Marine Insurance v. Continental Casualty, 37 F3d 345 (7th Circuit 1994)

57. Pacific Reinsurance v. Ohio Reinsurance, 935 F2d 1019 (9th Circuit, 1991)

58. Böckstiegel, K.H., An Introduction to the New German Arbitration Act Based on the UNCITRAL Model Law, Arbitration International, (1998) Vol. 14 No. 1, at p. 19

59. Schlosser, P., Zeitschrift für Zivilrechtliche Praxis (ZZP) 99 (1986), p 245, 265, 267

60. Karrer, P.A. and Desax, M., Law of International Business and Dispute Settlement in the 21st Century (Liber Amicorum Karl Heinz Böckstiegel, Köln, 2001), p. 589

61. Schaefer, J., 'New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared', (1988) 2.2 Electronic Journal of Comparative Law // http://law.kub.nl/ejcl/22/art22-2.html

62. Musielak, H-J., Kommentar zur Zivilprozessordnung: mit Gerichtsverfassungsgesetz (3 rd edn, Munich 2002), at §1034, para. 2

63. Baumbach, Adolf/Lauterbach, Wolfgang-Albers, Jan, Zivilprozessordnung, mit Gerichtsverfassungsgesetz und anderen Nebengesetzen, 58. edition, § 1041 para3

CISG, article 74, VI.

64. Schlechtriem & Schwenzer (2005), article 4, 23 (e) Assignments, penalties, p. 74

65. Robin, Guy (2004), 'Punitive Damages in International Transactions', I.B.L.J. 3, 247-267, p. 247.

66. Cremades, Bernado M. (2002), 'Liquidated Damages, Penalty Clauses and Punitive Damages within International Contracts', I.B.L.J. 3/4, 329-345, p. 333.

67. Wier, Tony (2002), Tort Law, Oxford: Oxford University Press, 1st ed., p. 200; see also Feng, Lijia (2009), 'Punitive Damages', Legal System and Society, No. 1 (2nd Issue), 375

68. Vincke, François & Heimann, Fritz (Eds.) (2003), Fighting Corruption – A Corporate Practices Manual, Paris: ICC, ICC Publication 652.

69. Drane v. Evangelou [1978] 1 W.L.R. 455; Kenn v. Preen [1963] 1 Q.B. 499; Perera v. Vandiyar [1953] 1 All E.R. 1109

70. Loble, Steven, 'Enforcement of Foreign Judgments in England', available at www.loble.co.uk/enforcement_of_foreign_judgments.htm [accessed 10.01.2016]

71. S A Consortium General Texitles v. Sun and Sand Agencies Limited [1978] 1 Lloyd's Rep.134 (CA, Civ Div.)

72. Scanlon, Kathleen M. (2003), 'Excluding Punitive Damages in Arbitration Clauses', 21 Alternatives to High Cost Litigation 1, June, p. 1.

73. Gordon, C. A. (1998), 'United States Bad Faith Claims: the English Perspective', *International Insurance Law Review, 6(5),* 143-146

74. DOCDEX, ICC Publication No. 811, 2002, Foreword

75. DOCDEX, article 1.1

УДК 347.469.1

Арбитраж и споры по делам о мошенничестве с документарными аккредитивами: сравнительный подход

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Аннотация. Исторически сложилось, что судебный процесс является одним из способов решения споров по мошенничествам в отношении документарных аккредитивов. Тем не менее, трудно встретить стандарт доказывания и получить судебный запрет и остановить банк от уплаты получателю-мошеннику. В конце 1990-х годов Blodgett и Мейерс впервые предложили обращаться по "аккредитиыным" мошенничествам в арбитраж. Цель – решение спора экспертами в более короткие сроки и снижение затрат по сравнению ссудебным разбирательством. Несмотря на это, арбитраж пока не является популярным методом для разрешения споров по случаям мошенничества с аккредитивами. Автор пытается ответить на вопрос "почему"? Основные проблемы, освещаемые в статье: 1) можно ли и когда передавать в арбитраж мошенничества в отношении аккредитивов; 2) каковы существенные условия арбитражного соглашения по такого рода спорам; 3) какие типы средств доступны в случае рассмотрения таких споров в арбитраже; 4) может ли арбитраж применять Правила DOCDEX?

Ключевые слова: международная торговля, арбитраж, документарные аккредитивы, мошенничество.