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# **Twenty Years of Change in Post- Soviet Europe**

Tremezzo, 20 April 2013



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# Introduction



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# Poland



<b>NY Convention</b>	<b>1 January 1962. (Source: Dz. U. 1962 No. 9, item 41.)</b>
<b>Model Law country</b>	<b>Yes (2005)</b>
<b>Main arbitration institutions</b>	<b>Major: KIG Arbitration Court &amp; Lewiatan Arbitration Court Total. ca, 40 institutions including Nowy Tomyśl Court of Arbitration (focus on Eastern countries), Polish Bank Association Arbitration Court, Arbitration Court at Cotton Association in Gdynia etc.</b>
<b>Total number of arbitration cases</b>	<b>Between 300-600 a year</b>
<b>Other facts</b>	<b>The New York Convention was originally signed subject to a reservations regarding (i) reciprocity, (ii) limitation to commercial relationships. Poland never ratified those reservations and those are not considered binding in practice.</b>



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# Georgia



<b>NY Convention</b>	<b>31.08.1994</b>
<b>Model Law country</b>	<b>YES (2009)</b>
<b>Main arbitration institutions</b>	<b>Total number: over 150</b> <b>Major institutions:</b> <b>Dispute Resolution Center (DRC)</b> <b>Tbilisi Arbitration Chamber (TAC)</b> <b>TIAC at the Georgian Chamber of</b> <b>Commerce and Industry (under</b> <b>establishment)</b>
<b>Total number of arbitration cases per year</b>	<b>~ 4000 per year</b>
<b>Major stages of transition</b>	<b>NYC accession (1994)</b> <b>Law on Private Arbitration (1996)</b> <b>Law on Arbitration (2009)</b>



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# Ukraine



<b>NY Convention</b>	<b>08.01.1961</b>
<b>Model Law country</b>	<b>Yes</b>
<b>Main arbitration institutions</b>	<b>2: ICAC at UCCI and MAC at UCCI</b>
<b>Total number of arbitration cases</b>	<b>~300 per year</b>
<b>Other facts</b>	<b>Law of Ukraine “On International Commercial Arbitration” 24.02.1994</b>



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# Latvia



**NY Convention**

**13.07.1992**

**Model Law country**

**No!**

**Main arbitration institutions**

**Total number: 213**

**Total number of arbitration cases**

**~3000 per year**

**Other facts**

**Civil Procedure Law D part**



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# Sovetikus Case

- Arbitration Clause

- a) “The present dispute shall be resolved either by courts of law or by arbitration, at claimant’s discretion, in Kiev, Ukraine.”
- b) “The present dispute shall be resolved by Arbitration in Riga, Latvia.”
- c) “The present dispute shall be resolved by arbitration in Tbilisi, Georgia. Claimant shall have right to choose the arbitral institution.”



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# Sovetikus Case

## Requests:

- Sustain jurisdiction
- Find the dispute arbitrable
- Assignment of arbitration agreement
- Language of procedure
- Applicable law
- Witness
- Award
- Recognition and enforcement





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# Jurisdiction

- Polish expert:



Art. 1161.2 of the Civil Procedure Code (“CPC”) excludes asymmetry providing for equal treatment of the parties requirement; asymmetric provisions are ineffective.

- Georgian expert:



Pursuant to the practice of the Court of Appeals asymmetric arbitration clauses are considered invalid.

- Ukrainian expert:



May be rather problematic in terms of enforcement



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# Jurisdiction

- Latvian expert:
  - ▬ Arbitration agreement is not valid if the arbitration clause does not include reference to the correct name of the institution as contract which asks for the impossible is “not in effect” (CL Art. 1543)



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# Arbitrability: bankruptcy

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## Ukrainian expert :



Commercial claims against a bankrupt company (against whom bankruptcy proceedings are pending) are arbitrable, however the jurisdiction of the tribunal may be limited to a declaratory award to ensure the claims are properly considered and granted in the bankruptcy proceedings

- Polish expert :



Art. 142 of the Polish Bankruptcy Law provides for the invalidation of the arbitrations clause as of the date of the bankruptcy decision and proceedings discontinuance. Amendments proposed. Other issues: (i) COUNCIL REGULATION (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings; (ii) Vivendi v Elektrim ([4A 428/2008](#)) & Swiss Federal Tribunal award of 16.10.2012 - [4A 50/2012](#)



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# Arbitrability: bankruptcy

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## Latvian expert:



The disputes regarding the rights and duties of such persons as who, up to the taking of the award of the arbitration, have been declared insolvent are not arbitrable.




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# Assignment of Arbitration Agreement


- **Ukrainian expert:**

 Problematic, parties are advised to expressly agree on assignment of the arbitration clause to ensure that the assignment encompasses the arbitration agreement as well

- **Latvian expert :**

 According to Civil Law (Art 1793) only assignment of claims is possible thus the arbitration agreement cannot be assigned

## Georgian expert:

 Automatically enforceable without specific reference to the assignment of the arbitration agreement.



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# Assignment of Arbitration Agreement

- Polish expert:



Assignment of the “main contract” and/or “individual items”, in line with its rules, transfers the “arbitration” as well. Issue of knowledge of the parties regarding jurisdiction clause (and potential defenses/consequences) in case of *compromis* (separate agreement).




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# Arbitrators' qualification

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- **Ukrainian expert:**

 No specific requirements, recommendatory list of arbitrators, in 2012 all arbitrators were appointed from the list

- **Georgian Expert:**

 Anyone person, unless:

- lacks or has restricted legal capacity
- is a state /political official or a civil servant;
- has committed crime and criminal records have not been cleared or dissolved.



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# Arbitrators' qualification

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- Polish expert:



No formal requirements but (i) judges of the state courts (active) are excluded and (ii) in case of a sole arbitrator running the case arbitrator should not be related to any of the parties' nationality (international cases) if nominated by the court, (iii) parties' specific requirements should be observed.

- Latvian expert :

 Perfect reputation, higher education, lawyer's qualification, at least 3 years experience, no criminal charges





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# Language of procedure

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- **Latvian expert:**



The arbitral proceedings shall be conducted in the official state language if parties do not agree otherwise

- **Ukrainian expert:**



Ukrainian or Russian by default, or other language as defined by ICAC

- **Polish expert:**



Selected by the parties or - in case of lack of such selection - by the arbitration court. Court may order translation of any documents delivered.




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# Applicable Law

- **Ukrainian expert:**

 In the absence of the parties choice as determined by the arbitrators; *ex aequo et bono* is permitted in case of consent both parties

- **Georgian expert:**

 The Law refers to the “rules of law” to be used for resolution of the dispute;

Tribunal shall also have regard to the agreement of the parties and usages applicable in the similar transactions.

The Law does not incorporate Art. 28 (3) of the ML (*ex aequo et bono or as amiable compositeur*)



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# Witnesses

- Latvian expert:



The procedure does not allow witnesses but...

- Ukrainian expert:

 Written witness statements are admissible but rarely used, instead parties mostly rely on other written evidence



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# Award

- Ukrainian expert:

 Rather concise, akin to court judgment; setting aside at the first-instance court

- Georgian expert:

 In writing, reasoned (unless otherwise agreed by the parties) and signed by the majority of arbitrators. Dissents are allowed. Setting aside within 90 days at the Court of Appeals.

- Latvian expert:

 No set aside procedure



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# Award

- Polish expert:



- Grounds for challenge (setting aside) local award (issued in Poland) – Art. 1206 of the CPC
- 3 months time limit for setting aside application (from the date of delivery) but not later (in case of exceptions) than 5 years from the date of award.
- Appeal and cassation available from a set-aside award – meaning potential length of the procedure; same applies to R&E decisions of foreign awards – see below).



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# Recognition and enforcement



## Poland:

### The court authorized to deal with R&E

- Documents to be presented/formal requirements: (i) the original award or a copy certified by the arbitral tribunal, (ii) the original arbitration agreement or a certified copy prepared by a Polish public notary or, failing that, an apostilled copy. If any document supplied is not in Polish, a certified translation of the document is required.

### Grounds for challenge

- Non recognition/enforcement of the “foreign award” - Art. 1214.3 & 1215 of the CPC

### Fees

- Court fee must be paid when filing a request for recognition or enforcement of a foreign award. That fee is PLN 300 for the recognition and enforcement of the award and PLN 60 for recourse against the court’s decision on recognition or enforcement of a foreign award.



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# Recognition and enforcement



## Ukraine:

- The court authorized to deal with R&E – **1<sup>st</sup>**-instance
- Period of limitation to submit for enforcement – **3** years
- Documents to be presented – award+arbitration agreement/agreement+translation
- Grounds for refusal = **NY Convention** (jurisdictional and procedural on due process are frequently invoked)
- Fees – **0.1** of minimal salary



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# Recognition and enforcement



## Georgia:

- The court authorized to deal with R&E:
  - Courts of Appeal – awards rendered on the territory of Georgia
  - Supreme Court – awards rendered outside of the territory of Georgia
- Documents to be presented:
  - The Award + arbitration agreement in original or certified copy + certified translation if made in language other than Georgian;
  - Minutes of the hearing or the proof that notice of process was duly served (court practice);
  - may also require the proof that the award has not yet been enforced in the country where it was rendered (court practice);
- Grounds: same for domestic and international awards = NYC;
- Fees: 3% of the value of the claim.





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# Recognition and enforcement



## Latvia:

- Domestic v. Foreign
- The court authorized to deal with R&E: 1st instance ; appeal possible
- R&E regulated only by 7 Articles in CPL thus NY Convention sets the basic rules

# Next 20 Years...



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# Conclusions