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CHALLENGES AND PERSPECTIVES OF ARBITRATION IN SOUTH EAST AND CENTRAL EUROPE – SERBIA**

Summary

With the adoption of the Law on Arbitration in 2006 (hereinafter referred to as the LA), Serbia has joined the ranks of the countries that have provided for the issue of arbitration in a modern and comprehensive manner. However, over the course of almost two decades of application of this Law, certain ambiguities and lack of clarity have come to surface. This paper aims to addresses only a number of those, focusing on the arbitration agreement, arbitrability, and the appointment of the arbitral tribunal. The author starts from the assumption that fundamental solutions and dilemmas of arbitral decision-making are centred around the issue of arbitrability, and therefore attaches central importance in this paper to the said issue. The author acknowledges the flexibility of the solutions adopted in the Law, nevertheless advocating for an even broader interpretation and extension of the concept of arbitrability to include the so-called grey area disputes.

Keywords: arbitration, Law on Arbitration, arbitrability, Republic of Serbia, challenges of arbitration, perspectives of arbitration.

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IZAZOVI I PERSPEKTIVE ARBITRAŽE U JUGOISTOČNOJ I CENTRALNOJ EVROPI – SRBIJA

Sažetak

Usvajanjem Zakona o arbitraži 2006. godine (u daljem tekstu: LA), Srbija se pridružila redovima zemalja koje na moderan i sveobuhvatan način posvećuju pažnju pitanju arbitraže. Međutim, tokom skoro dve decenije primene ovog zakona, na površinu su izašle određene nejasnoće i dileme. Predmet ovog rada tiče se nekih od nejasnoća pomenutog Zakona, sa fokusom na sporazumu o arbitraži, arbitrabilnosti i imenovanju arbitražnog suda. Autor polazi od pretpostavke da se osnovi rešavanja dilema arbitražnog odlučivanja svode na pitanje arbitrabilnosti, te stoga u ovom radu pridaje centralni značaj tom pitanju. Iako autor ne negira činjenicu fleksibilnosti rešenja usvojenih u Zakonu, ipak se zalaže za još šire tumačenje i proširenje koncepta arbitrabilnosti, tako da on obuhvati i sporove iz takozvanih sivih zona.

Ključne reči: arbitraža, Zakon o arbitraži, arbitrabilnost, Republika Srbija, izazovi arbitraže, perspektive arbitraže.

1. A Brief Summary of Arbitration Regulation in Serbia

The origins of arbitration as an organized dispute resolution method in Serbia should be sought in the Decree of Prince Aleksandar Karađorđević from 1857, concerning the establishment of the Trade Committee in Belgrade (Chamber of Commerce), attached to which was the Elected Court, formed at the time (Vasiljević, 1997, p. 4, fn. 3; Vasiljević, 2000, pp. 3-4). There are two institutional arbitrations in Serbia today: Permanent Arbitration at the Chamber of Commerce of Serbia (PA) and Belgrade Arbitration Centre (BAC). Permanent Arbitration was created by reorganizing two institutions that had previously existed at the Serbian Chamber of Commerce – Foreign Trade Arbitration Court (competent for disputes with a foreign element) (for more on historical development see Pavić & Đorđević, 2016, pp. 304-346; Đorđević, 2010, p. 5)[1] and Permanent Elected Court (competent for domestic disputes)[2]. Today,

[1] Foreign Trade Arbitration Court with seat in Belgrade was founded as a permanent arbitral institution under the Decree on the Chamber of Commerce in Federal People's Republic of Yugoslavia in 1946, and its first Rules were published on 28 April 1947.

[2] The first Rules of the Permanent Court of Arbitration, enacted on 23 December 1966,

Permanent Arbitration is organized as an open and general form arbitration, administering disputes with or without a foreign element.

The other arbitral institution, known as Belgrade Arbitration Centre, was founded by the Arbitration Association in 2013, as a permanent arbitral institution that engages in organizing arbitration, conciliation, mediation, and other dispute resolution methods in accordance with its own rules, as well as providing technical assistance and organizing arbitration according to the UNCITRAL arbitration rules. The Belgrade Arbitration Centre (BAC) has jurisdiction over disputes arising from contracts, business relations, and sports, whether or not they have a foreign element. This is in accordance with the BAC established rules (Pavić & Đorđević, 2014, pp. 245-249; Pavić & Đorđević, 2016, pp. 309 ff.).

In addition to institutional arbitration, the parties may agree to an *ad hoc* arbitration in domestic and international disputes under Art. 6(3) LA. Previously, agreeing on *ad hoc* arbitration in domestic disputes was not allowed (Milutinović & Đorđević, 2016, p. 285).

The Law on Arbitration (LA), as a comprehensive and modern law (Stanivuković & Pavić, 2021, p. 12) based on the UNCITRAL Model Law of 1985,[3] regulates the most important issues related to dispute settlement through arbitration, including the subject matter, the scope of application, and general provisions on arbitration and arbitrability of disputes. It also covers the organization of arbitration, relation to court proceedings and the role of the court, composition, appointment and jurisdiction of the arbitral tribunal, grounds and procedure for termination of arbitrators' mandate, rules on arbitral procedure, grounds and procedure for making arbitral awards, appeal against the arbitral award, and recognition and enforcement of arbitral awards. The procedural issues that have not been provided for are governed by the corresponding provisions of the Law on Non-Contentious Proceedings and the Law on Enforcement and Security Interest.

2. Characteristics of Dispute Resolution by Arbitration in Serbia

Already at the time of the adoption of the LA, dilemmas arose as to whether a separate law needs to be adopted and whether its application should be limited to foreign commercial arbitration. The legislator opted for a separate law, the application

provided for resolution of domestic cases by arbitration. The Rules on the Permanent Elected Court of the Trades Chamber in Belgrade from 1931 may be regarded as its precursor.

[3] Out of a total of 70 articles in the Law, 16 articles were completely (verbatim) taken from the UNCITRAL Model Law, while most others were accepted with appropriate changes. For more on similarities and differences see Stanivuković, 2024, p. 1 ff.

of which is not limited to commercial arbitration, but also includes other types of arbitration, including labour disputes (see Decision of the Supreme Court of Cassation, RŽ 146/2014, REV2 653/2014, 10 September 2015), consumer disputes, sports arbitration (Decision of Supreme Court of Cassation, PREV 113/2015; Živković, 2013, p. 263), and arbitration of contractual or tort disputes between individuals (Mitrović, 2006, pp. 79-85). Regarding the international element, the LA applies to both international and domestic arbitration (Art. 1). Arbitration with jurisdiction over disputes without a foreign element is defined as domestic or internal arbitration.

Disputes with a foreign element are characteristic of international arbitration. According to Art. 3 LA, international arbitration is defined as arbitration involving disputes arising out of international commercial relations, in particular where:

1. the parties to an arbitration agreement, at the time of entering into such agreement, have their places of business in different States;
2. one of the following places is situated outside the State in which the parties have their places of business:
   - the place of arbitration, if determined in, or pursuant to, the arbitration agreement, or,
   - the place where a substantial part of the obligations from the business relationship is to be performed or the place to which the subject matter of the dispute is most closely connected;
3. the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one State.

Despite the "modern character" of the Law, reflected in the adoption of the UNCITRAL Model Law solutions, so far its application in practice has shown "omissions" (Stanivuković & Pavić, 2021, pp. 12-14). The solution regarding the scope or field of application, provided for in Arts. 2 and 3 LA, has been met with some criticism. Art. 2, para. 1 of the Law provides for application of the Law to "arbitration and arbitral proceedings if the place of arbitration is in the territory of the Republic of Serbia". This solution drew criticism as being incomplete, and requiring an amendment to allow the LA to be applied in other cases as described in the LA. On the other hand, the provisions allowing for the rights of the parties to exclude the application of the legal place of arbitration in international arbitrations, *i.e.,* agreeing to apply a foreign law even if the arbitral tribunal is located in Serbia, are considered to be too liberal and irrational (Mitrović, 2006, p. 81; Stanivuković & Pavić, 2021, p. 12), as that "would open the door to conflicts over international jurisdiction" (Stanivuković & Pavić, 2021, p. 13).

Earlier legal solutions drew a "sharp distinction" (Pavić, 2010, p. 8) between the treatment of international and purely domestic arbitrations. Firstly, arbitration was

international only if at least one of the parties was a foreign natural or legal entity. The current Law on Arbitration allows the parties to an arbitration agreement to choose the place of arbitration outside the territory of Serbia (Law on Arbitration, Art. 34, para. 1) and thus "trigger" international arbitration. This issue was also addressed by the Higher Commercial Court (Higher Commercial Court, Decision Pž. 9058/2006, 2007), which confirmed the enforcement of an arbitration agreement between a University in Serbia and a Serbian company concerning the collection of tuition fees, conducted before the arbitral tribunal in Paris. The claimant argued that the agreement was invalid because it contained no foreign element other than the place of arbitration. The court held that it was still an international arbitration. In practice, this means that a dispute which is by its very nature a domestic dispute can become international by virtue of the choice of the seat of arbitration. Such a solution may lead, as already mentioned, to the abuse of rights both in substantive and procedural terms, and a more specific definition of international arbitration should be considered in a future amendment to the Law.

The practical implications of distinguishing between domestic and international arbitrations are reflected also in the choice of applicable procedural and substantive law. As a result, some disputes considered to be arbitrable according to the rules of one State, may not be interpreted in the same way in other legal systems, and furthermore the validity of an arbitration agreement may be interpreted according to the predefined applicable law. This solution is envisaged in Art. 2 of the Law on Arbitration, as well as in Art. 58, para 1, Item 1. On the other hand, the parties are allowed to agree on application of foreign law even though the place of arbitration is in Serbia (Law on Arbitration, Art. 2, para. 2). This choice is limited by the mandatory application of the provisions of the Law, which may not be excluded by the parties when the place of arbitration is in Serbia (Art. 2, paras. 2 and 3). Art. 2 of the Law opens up the possibility for a conflict over international jurisdiction in situations where the parties agree on a foreign law, rather than the law applicable in the respective territory. Which jurisdiction the court functions of assistance and supervision may belong to in such arbitration, is an issue that may be particularly open to dispute (Stanivuković & Pavić, 2021, p. 13).

The choice of the seat of arbitration affects the "nationality" of the resulting award and the legal remedies available against such an award, since a foreign award cannot be challenged in Serbia by an application for annulment, but only in the procedure for recognition and enforcement (Law on Arbitration, Art. 57, para. 1 and Art. 64). According to Art. 64, para. 3, a foreign award is an award made in a place of arbitration outside the Republic of Serbia, but also an award made by an arbitral tribunal in Serbia if a foreign law was applied to the arbitral proceedings.

3. Arbitration Agreement

According to Art. 9, para. 2 of the Law on Arbitration, an arbitration agreement may be concluded either in the form of an arbitration clause (concluded before the dispute has arisen) or as a submission agreement (concluded after the dispute has arisen). The LA does not contain a list of essential elements of an arbitration agreement, but based on an interpretation of Arts. 9 and 10 LA it can be concluded that an arbitration agreement is valid if it fulfils the following requirements: it relates to a dispute or disputes arising from a specific legal relationship, which is concluded in writing, the parties to an arbitration agreement have the necessary capacity to conclude the agreement, the dispute to which it relates can be settled by arbitration, and it was not concluded with defects of consent (Perović, 2002, p. 42; Stanivuković, 2013, p. 88).

The solutions of the Law on Arbitration regarding the form of arbitration agreement are a slightly modified original version of Art. 7 of the UNCITRAL Model Law (1985), providing that arbitration agreements shall be in writing. Although set imperatively, this requirement has been interpreted in a more liberal manner (Vukadinović Marković, 2023, pp. 280-285; Radomirović & Vukadinović Marković, 2023, pp. 91-107; Petrović, 2013, pp. 479-497). Pursuant to Art. 12 LA, the requirement that an arbitration agreement should be in writing is satisfied not only if it is recorded in a document signed by both the parties, but also if there is evidence that the agreement was concluded through an exchange of messages using means of communication that provide a written record of the agreement reached. An arbitration agreement is also deemed to exist if the parties refer to another document containing an arbitration agreement, provided that the purpose of such reference is to make the arbitration agreement part of the contract (Vukadinović, 2016, pp. 287-299). The written agreement requirement is also implicitly fulfilled if the claimant initiates an arbitral proceedings and the respondent expressly accepts arbitration in writing or by a statement, recorded in the minutes of the arbitral proceedings, or if the respondent participates in the arbitral proceedings and does not contest the existence of the arbitration agreement or the jurisdiction of the arbitral tribunal before engaging in the discussion of the subject matter of the dispute (Law on Arbitration, Art. 12, para. 5).

The solutions envisaged in Art. 12 refer to the disputes with the place of resolution in Serbia. However, Serbian courts may also apply these rules to arbitration agreements that provide for arbitration abroad, instead of the less favourable New York Convention rules.[4]

[4] Recommendation on the interpretation of Art. II (2) and Art. VII(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, prepared in New York, on 10 June

An arbitration agreement produces legal effect only if it is concluded between persons who meet the requirements stipulated by the Law. The criteria for concluding an arbitration agreement are provided in Art. 5, paras. 2 and 3, which relate to arbitrability. It is provided that any natural or legal person, including the State, its agencies, institutions and undertakings in which the State has a proprietary interest, may consent to arbitration. Any person having the capacity to be a party in civil proceedings pursuant to the provisions of the Code of Civil Procedure may agree to arbitration. Professor Stanivuković (2024, p. 12) rightly notes that the Law does not set any limits regarding the age of a natural person concluding the agreement, and it would be desirable to recognize this right only for persons of legal age (in domestic law, these are persons of eighteen years of age). With regard to the States and their instrumentalities, Art. 5 of the Law on Arbitration adopts a solution in line with Art. 2 of the European Convention on Arbitration, according to which States and legal entities governed by public law may conclude arbitration agreements.

In Serbian law, as well as in other laws, arbitration agreements enjoy autonomy in the substantive and procedural sense (Law on Arbitration, Art. 28; Perović, 2008, pp. 535-544). Under Art. 28 para. 3 LA, the nullity of the primary contract does not automatically entail the nullity of the arbitration agreement. On the other hand, under the provisions of Art. 13 LA, the arbitration agreement remains in force also in the case of assignment (cession) of contracts or claims, subrogation, and in other cases of transfer of claims, unless otherwise agreed.[5]

4. Arbitrability

In general terms, arbitrability is the ability of a dispute to be resolved by arbitration. It can be seen also as the capacity or jurisdiction of the arbitral tribunal to hear and determine the merits of the subject of the dispute (Perović, 2002, p. 107; Uzelac, 2010, p.108) or as a set of general restrictions that determine the admissibility of arbitration (Stanković *et al*., 2002, p. 98). Viewed in this way, arbitrability provides an answer to the question of which types of disputes cannot be resolved by an arbitral tribunal either for public policy reasons or because such disputes fall outside the scope of the arbitration agreement. The substance of arbitrability, however, is neither fixed, nor permanent in terms of time or space. The answer

1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session.

[5] Decision 58/2016 dated 6 October 2016 of the Supreme Court of Cassation dealt with the effect of the assignment of claims on a group of persons bound by the arbitration agreement (Decision of the Supreme Court of Cassation, No. 58/2016).

would depend on the type of arbitration and the stage of the proceedings when the question is raised. Consequently, disputes accepted as arbitrable before some arbitrations are not deemed as such before other arbitrations. Furthermore, disputes considered until a few decades ago entirely non-arbitrable, or non-arbitrable in some States are now accepted as arbitrable.

Under Art. 10 LA, an arbitration agreement relating to a dispute that is not capable of being settled by arbitration is null and void. However, when the arbitration agreement relates to multiple disputes, some of which are capable of being resolved by arbitration and some of which are not, the agreement will not be void. Rather, it will produce no legal effect over the dispute that is incapable of being settled by arbitration.

The arbitrability of a dispute as its capability of being settled by arbitration is a consequence, on the one hand, of the nature of the dispute arising from a disputed relationship, and on the other hand, of its recognition by the public order of the State. The nature of the disputed relationship is determined by the character and scope of rights and obligations. Such tights and obligations vary to a great extent and can be divided into two groups: the rights and obligations that the parties are free to dispose of, and the rights and obligations that the parties are not free to agree on. With regard to the latter criterion, it is possible to distinguish between the property-related rights and obligations, and those not property-related. Art. 5 of the Law on Arbitration determines as arbitrable all property disputes concerning the rights which the parties can freely dispose of, with the exception of the disputes reserved to the exclusive jurisdiction of courts. The wording "property disputes concerning the rights which the parties can freely dispose of" is not intended to limit the arbitrability of disputes arising from contracts where the transfer of rights is conditional on compliance with certain imperative norms, but rather refers to a set of property rights that the parties can generally dispose of (Pavić, 2019, p. 376). Arbitrability defined in this way is objective arbitrability (*ratione materiae*). At the same time, as noted by Professor Knežević (2008, p. 882), arbitrability defined in this way is limited by the exclusive jurisdiction of courts. Some scholars interpret this type of arbitrability as a special type of arbitrability - *ratione jurisdictionis* (Stanković *et al*., p. 102; Cukavac, 2000, p. 39; Knežević, 1999, pp. 52-53).

The Serbian legislator has used a positive approach in determining arbitrability, or a general clause system where all disputes that meet the predetermined requirements are deemed arbitrable. Arbitrability determined by means of a general clause can be narrowed down in two ways: by individually listing (*numerus clausus*) the disputes that are arbitrable, and by providing for exclusive jurisdiction of domestic courts for certain disputes. The former method was used in one of the earlier Rules on Foreign Trade Arbitration. Thus, Art. 12 of the Rules on Foreign Trade Arbitration at the Chamber of Commerce of Yugoslavia listed the following disputes as "international

business relations" that can be submitted to arbitration: 1. regarding vessels, aircraft, *i.e.,* international disputes governed by aviation and maritime laws; 2. arising from a contract on the establishment of a company, and other forms of mixed-ownership enterprises; 3. arising from a contract on foreign investments; 4. arising from concession contracts: 5. arising from a contract on intellectual property rights (copyright and related rights, industrial property rights, legal protection of know-how, rights in the field of unfair competition) and disputes on company protection; and 6. other disputes arising from international business relations.

The present LA provides for the latter method of limiting the general arbitrability clause - prescribing exclusive jurisdiction of courts. Exclusive jurisdiction of courts exists when the law stipulates that only a state court can decide on a specific issue (Stanivuković, 2013, p. 105). In disputes with an international element, prescribing exclusive domestic jurisdiction completely excludes the jurisdiction of foreign courts, and rendering the jurisdiction of domestic courts the only available option (Bordaš, Varadi & Knežević, 2001, p. 489). Thus, under Art. 56 of the Law on Resolving Conflicts of Law, exclusive jurisdiction of courts is provided in disputes concerning property rights and other real rights in immoveable property, disputes concerning trespass to immovable property, as well as disputes arising from lease or rental relationships concerning immovable property, or contracts on the use of apartments or business premises, providing that the immovable property was situated within the territory of Serbia (Art. 56, Law on Resolving Conflicts of Laws with Regulations of Other Countries). In addition to the exclusive jurisdiction that is provided for property disputes arising from property rights, there is also the so-called "relative jurisdiction" (Pavić, 2010, pp. 17-18), which is best reflected in the jurisdiction to resolve disputes arising from the so-called administrative contracts (Vukadinović Marković, 2024, pp. 165-179). In this type of disputes, if the parties have not agreed on dispute resolution by arbitration, under Art. 60 of the Law on Public-Private Partnerships and Concessions, the Serbian courts shall have exclusive jurisdiction. In other words, the exclusive jurisdiction of domestic courts is provided for in disputes with an international element, and parties cannot entrust their settlement to a foreign national court, but are free to submit property-related disputes to arbitration in the country or abroad (Vukadinović Marković, 2024, pp. 165-179).

A special group of disputes belong to the so-called "grey area of arbitrability". We will further address disputes in intellectual property, competition law, and bankruptcy. The jurisdiction of arbitration to decide on disputes in intellectual property rights field (for more details see Janjić, 1982; Marković, 1997; Marković, 2007; Besarović, 2011; Popović, 2013; Vukadinović Marković, 2017a, pp. 133-145) is still a subject of scholarly discussions and practical considerations. When addressing this issue, it is necessary to distinguish between two types of relations/disputes: those concerning

the validity of registration of intellectual property rights, and the disputes concerning the exercise of rights where one of the parties is the owner (holder) of the protected right. The disputes related to the use of rights whose registration is not required, such as copyright, make a special group of disputes. In other words, a distinction needs to be drawn between the disputes concerning the very registration of a right, the fulfilment of material requirements related to the entry of such right in a register, and the disputes related to the use of a right so registered. The first group of disputes are considered non-arbitrable for reasons of preserving public order and protecting third-party interests (Cukavac, 2000, p. 39). On the other hand, the disputes concerning the use of intellectual property rights (licenses) and pledges are considered arbitrable (Vukadinović, 2016, p. 207 ff). These disputes are mainly concerned with damages arising from the license agreement violations. These are therefore property disputes relating to the rights the parties may freely dispose of, providing that no exclusive jurisdiction of domestic courts has been stipulated. From the analyses of the relevant Serbian intellectual property regulations and decisions pertaining to the organization of judiciary, it cannot be inferred that these disputes are exempt from arbitration (Popović, 2017, p. 175). However, to ensure legal certainty, this issue needs to be clarified when amending the existing regulations relating to intellectual property rights and arbitration, as well as the organization of court jurisdiction. This would contribute to Serbia's becoming a more attractive place for arbitration.

A similar situation surrounds disputes arising from competition rules violations. Two types of relationships and disputes are distinguished in competition law as well. One type relates to determination and assessment of whether or not there has been a competition rules violation, while the other type has to do with damages incurred by such violation. The former are the disputes arising from the so-called application of competition law in terms of the public law, which are decided by the European Commission in the EU and independent regulatory bodies in Member States in the administrative procedure, while the latter entail application of competition law in terms of the private law. It seems indisputable that the matter of damages arising from a competition rule violation already established by the Commission for the Protection of Competition can be decided by arbitration (Vukadinović, 2019, p. 62). However, the issue of arbitrability is raised with regard to the authority of the arbitration to decide on application of the public law, or rather to establish the competition rule violation, as well as with regard to the legal effects of a decision made by the regulatory bodies on decision-making by arbitration. Analyses show that the so-called commercial disputes are accepted as arbitrable, and that there is a growing tendency to accept other disputes as arbitrable as well, by way of determining the existence of a competition rule violation as a preliminary issue (Vukadinović, 2016, p. 227 ff; Marković Bajalović, 2017, pp. 363-380).

In disputes where bankruptcy proceedings have been opened against one of the parties, the question arises as to whether their fate will be decided according to the bankruptcy procedure rules or the arbitration agreement (Stanivuković, 2014, p. 121; Vukadinović Marković, 2017b, pp. 127-143). In domestic law, the solution should be sought in the provisions of the Law on Bankruptcy, the Law on Arbitration, and the corresponding provisions of the Law on Civil Procedure. Upon the opening of bankruptcy proceedings, the bankruptcy debtor loses the business and procedural capacity (Jankovec, 1999, pp. 210-231; Velimirović, 2000, pp. 175-201; Vasiljević, 2013, pp. 557-584) and may neither enter into a new arbitration agreement, nor be a party to arbitration procedure under the existing arbitration agreement. If no arbitration agreement (compromissory clause) had been concluded earlier, after the opening of bankruptcy proceedings, the bankruptcy debtor will not be able to agree on arbitration, even by means of a compromise, as the debtor's business capacity has expired with the opening of the bankruptcy proceedings, and therefore it cannot conclude any other legal transaction that is directed at the property in bankruptcy. Hence, the issue of the impact of bankruptcy can be raised only in cases where the arbitration agreement was concluded before the opening of bankruptcy proceedings. Based to the decisions accepted in domestic law, it should be deemed that the opening of bankruptcy proceedings does not invalidate the previously concluded arbitration agreement. This interpretation is suggested by the provisions of the Law on Arbitration, which does not provide for the opening of bankruptcy proceedings as grounds for terminating an arbitration agreement, as well as the provisions of Arts. 94-100 of the Law on Bankruptcy in the section titled "Consequences of Opening Bankruptcy Proceedings Pertaining to Legal Transactions" (Stanivuković, 2014, p. 122). However, even a valid arbitration agreement may be inoperative if the bankruptcy debtor does not have the means to cover the arbitration costs (Živković, 2012, p. 40; Vukadinović, 2013, pp. 356-360).

In addressing the issue of arbitrability of these disputes, we need to distinguish the procedures related to the opening of bankruptcy proceedings, the appointment of a bankruptcy administrator, the determination of the amounts to be paid from the debtor's property, as well as verification, inventory, reorganization, collection and distribution of the bankruptcy estate assets, and other requests that serve to protect the public interest, including criminal liability for certain acts (Vukadinović, 2016, p. 245). The other type of disputes concerns requests from creditors to establish the existence of claims, disputes related to contesting the claimed amounts, petitions concerning illegal behaviour of the bankruptcy administrator, and different types of claims. As a general rule, it has been accepted that the former issues are decided by the bankruptcy court and that, due to the nature of bankruptcy, bankruptcy proceedings may not be conducted before

arbitration, even if the parties were to agree on this (Stanivuković, 2014, p. 122). In this regard, the provisions of Art. 6 of the national Law on Bankruptcy, providing for the "principle of conducting proceedings by the court", and the provision of Art. 16 of the same Law, stipulating that bankruptcy proceedings shall be conducted by the court with territorial jurisdiction over the place of the bankruptcy debtor's registered office, should be interpreted as the exclusive jurisdiction of courts. There are no legal obstacles, in respect of the other group of disputes, to be submitted to arbitration.

There are no provisions in the positive law of Serbia stipulating that arbitration proceedings conducted in Serbia must be suspended if bankruptcy proceedings are opened against one of the parties. Art. 88 of the Law on Bankruptcy provides that all judicial and administrative proceedings against the bankruptcy debtor or its assets shall be suspended upon the opening of bankruptcy proceedings. Judicial proceedings may resume once the bankruptcy administrator assumes the proceedings from the bankruptcy debtor. When the bankruptcy debtor appears as defendant, proceedings may resume when the creditor (plaintiff) has filed its claim in bankruptcy proceedings and when the bankruptcy administrator has contested such claim. The Law on Bankruptcy stipulates that a court of general jurisdiction or a commercial court conducting relevant proceedings shall declare itself incompetent and cede the case to the court conducting bankruptcy proceedings. However, such obligation is not provided for in case of arbitral tribunals, and it is debatable whether or not it may be applied by analogy. Notwithstanding the above, granting a temporary stay of arbitration may be advisable in order to secure the right to be heard by allowing the bankruptcy administrator sufficient time to become acquainted with the case. With regard to the contested claims, when the bankruptcy proceedings are conducted in Serbia, the bankruptcy judge will instruct all creditors whose claims have been contested by the bankruptcy administrator to initiate a civil lawsuit, or to resume an on-going lawsuit or arbitral proceedings to establish the existence of the contested claim, within 15 days of the receipt of the decision by the bankruptcy judge. Although Art. 117, para. 1 of the Law on Bankruptcy equates civil and arbitral proceedings with regard to the resumption of the already initiated proceedings, it does not treat them equally if the proceedings had not already been initiated at the time the claim was contested. In such case, the creditor is instructed to initiate civil proceedings, while the initiation of arbitral proceedings based on an already existing arbitration agreement is not provided as an option. We believe that no distinction should be made in this regard; otherwise it would mean that the arbitration agreement is inoperative (Stanivuković, 2024, p. 12).

5. Composition of Arbitral Tribunal

According to the Art. 19, para. 1 LA, any natural person having business capacity, irrespective of their nationality, may be an arbitrator. Business capacity is determined according to the personal law. An arbitrator may be a person from any State, not only from the States whose citizens are the parties to the dispute. Hence, it is not at all uncommon for a party, led by the principles of expertise and trust, to propose as their arbitrator a person from a third State, and not from their own State. The parties may agree that the presiding arbitrator should be from the same State as one of the parties. In one case before the domestic Permanent Arbitration, the issue of whether the presiding arbitrator may be a citizen of the same State as one of the parties to the dispute was raised as contentious. The Arbitration Board rightly held that there was no express prohibition for this (see case T-9/17 before the Permanent Arbitration in Belgrade). Under Art. 19, para. 4 LA, an arbitrator cannot be a person sentenced to an unsuspended sentence of imprisonment while the consequences of the conviction are in effect.

The parties to the arbitration proceedings are free to determine the number of arbitrators, and the appointment procedure (Law on Arbitration, Arts. 16 and 17). While the Law does not provide any special conditions for the appointment of arbitrators, the parties may specify special conditions an arbitrator is required to meet. Judges may also be arbitrators, but such appointments are rare (Stanivuković, 2024, p. 15). When constituting the arbitral tribunal, the parties can opt for one or more arbitrators, providing that that must be an odd number. If the parties fail to determine the number of arbitrators, their number shall be determined by the appointing authority, and in the absence of such authority, by the competent court. In arbitration at the permanent arbitral institution, according to Art. 16 para. 4 LA, the permanent arbitral institution shall act as the appointing authority.

The common procedure is for each party to appoint one arbitrator, and for the thus appointed arbitrators to appoint the presiding arbitrator. If the parties fail to appoint the arbitrator, or if the appointed arbitrators fail to agree on the presiding arbitrator, the appointment is made, as a rule, by the arbitral institution before which the proceedings are conducted or the appointing authority in *ad hoc* arbitration.[6] As a rule, the appointment is made by the Board of the Arbitration or President of the arbitral institution. The parties may agree from the start that the President of the institutional arbitration should appoint the arbitrators.

[6] Such procedures for appointing arbitrators – sole arbitrator and arbitral tribunal are provided for in the Law on Arbitration (Art. 17), and the rules of the existing arbitrations in Serbia – BAC Rules (Arts. 16 and 17) and Rules of the Permanent Arbitration at the Chamber of Commerce of Serbia (Arts. 18 and 19).

If the parties to an *ad hoc* arbitration fail to agree on the appointment of the sole arbitrator or the presiding arbitrator, the appointment shall be made by the appointing authority. This could be a president of a commercial or another state court competent for resolving commercial disputes in the place of arbitration, a president of the relevant chamber of commerce, etc.,[7] but the parties are in principle free to provide for another solution (Perović, 2012, p. 199). The court will assume the role of the appointing authority if the parties have not specified the mechanism for the appointment of the arbitrators in the agreement (Law on Arbitration, Arts. 16 and 17; Milutinović & Đorđević, 2016, p. 290).

Multi-party arbitration is not addressed in the Law on Arbitration. (Vukadinović Marković & Popović, 2022, pp. 187-204). The question arising in this type of arbitration is whether the principle of equality is violated in cases where, on the one side, there is one claimant authorized to appoint "their own" arbitrator, while on the other side, there are several respondents who must appoint a joint arbitrator, despite the fact that they may have conflicting interests (Perović Vujačić & Vukadinović Marković, 2024, pp. 475-490; Vukadinović Marković, 2022, pp. 81-82). In the provisions of the Permanent Arbitration Rules, and Art. 18 of the Belgrade Arbitration Centre Rules, the party autonomy comes first. If the respondent and the claimant cannot agree on the choice of the arbitrator, the President of Arbitration will appoint the arbitrator according to Art. 19 PA Rules, *i.e.,* the entire arbitral tribunal in accordance with Art. 18 BAC Rules. In doing so, the President may revoke the appointment of or reappoint the arbitrator who has already been appointed, as well as designate one of them as the presiding arbitrator.

Considering that the arbitrator *adjudicates* the dispute, it logically follows from Art. 19 para. 4 LA that the arbitrator must be completely independent and impartial in relation to the parties in the dispute and the subject matter of the dispute. This requirement applies to *all* arbitrators equally: the sole arbitrator, the presiding arbitrator, and the arbitrators appointed by the parties to the dispute. The arbitrator must be and must remain independent and impartial during the entire arbitral proceedings, meaning from the time of acceptance of the appointment until the final arbitral award is made, *i.e.,* the arbitral proceedings are otherwise terminated (Perović Vujačić, 2017, pp. 63-78; Vukadinović Marković, 2022, p. 126). Appointed arbitrators have the duty to disclose any circumstances likely to give rise to doubts as to their impartiality or independence. The disclosure obligation arises from the moment the designated person becomes aware of the possibility of appointment (Law on Arbitration, Art. 21, paras. 1 and 2).

[7] Under the UNCITRAL Rules of Arbitration, if parties have not agreed on the choice of an appointing authority or if the appointing authority refuses or fails to appoint an arbitrator within the agreed time, parties may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority (Art. 6).

The lack of arbitrator's independence and impartiality constitutes grounds for replacing the arbitrator and for challenging the award in the process of its recognition (Perović Vujačić, 2019, p. 157; Jovičić, 2020, p. 24).

6. Closing Considerations - Perspectives of Arbitration

This paper addresses only some of the solutions set forth in the Serbian arbitration rules, which in the author's opinion are important for the future development of arbitration in Serbia. In addition to their study, it is necessary to raise awareness of participants in legal transactions that arbitration is not a model for resolving only international disputes, but it can also be agreed on for internal disputes that need not necessarily involve participation of the so-called "big players". It is along these lines that the amendments of the existing Law on Arbitration should be approached. The issues analysed in this paper seem to show a tendency to expand arbitrability to a growing number of disputes. However, time will tell if the national courts will accept the tendency of their own "self-disempowerment" and the increasing privatization in dispute resolution by establishing new types of arbitrations and expanding the jurisdiction/arbitrability of those already in existence.

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