INSTITUT ZA UPOREDNO PRAVO

INSTITUTE OF COMPARATIVE LAW

STRANI PRAVNI ŽIVOT

FOREIGN LEGAL LIFE

ISSN 0039 2138
UDK 34
Beograd, 2024/ Broj 4/ Godina LXVIII

IUS NULLO CONTINETUR LOCO

1956. BEOGRAD

INSTITUT ZA UPOREDNO PRAVO

UDK 34

ISSN 0039 2138

ISSN (online) 2620 1127

STRANI PRAVNI ŽIVOT

Beograd, 2024/ Broj 4/ Godina LXVIII

Izdavač/ Publisher
INSTITUT ZA UPOREDNO PRAVO/ INSTITUTE OF COMPARATIVE LAW
Terazije 41, 11000 Beograd, Srbija, tel. + 381 11 32 33 213
Za izdavača/ For the Publisher
Prof. dr JELENA ĆERANIĆ PERIŠIĆ

Štampa/ Print
Birograf Comp doo Beograd

Tiraž/ Circulation
100 primeraka/ 100 copies

Prilozi objavljeni u časopisu referisani su u bazama/ Abstracted and indexed in
Directory of Open Access Journals (DOAJ), Central and Eastern European Online Library (CEEOL), European Reference Index for Humanities and Social Sciences (ERIHplus), HeinOnline Law Journal Library, Srpski citatni indeks (SCIndeks), Kooperativni online bibliografski sistem i servisi (COBISS).

Adresa uredništva/ Address of the Editorial Board
Terazije 41, 11000 Beograd, Srbija; tel. + 381 11 32 33 213; e-mail: redakcijaspz@gmail.com
Časopis se objavljuje tromesečno uz podršku Ministarstva nauke, tehnološkog razvoja i inovacija Republike Srbije.

UDK 34

ISSN 0039 2138
ISSN (online) 2620 1127

INSTITUT ZA UPOREDNO PRAVO
STRANI PRAVNI ŽIVOT

Broj 4 *Godina LXVIII* *oktobar–decembar 2024.*

SADRŽAJ/ TABLE OF CONTENTS

ČLANCI/ ARTICLES

Velimir Živković
INTRODUCTION TO CHALLENGES AND PERSPECTIVES OF ARBITRATION IN SOUTH EAST AND CENTRAL EUROPE 477
UVOD U IZAZOVE I PERSPEKTIVE ARBITRAŽE U JUGOISTOČNOJ I CENTRALNOJ EVROPI

Octavian A. Cazac
ARBITRATION AGREEMENTS IN CONTRACTS ESTABLISHING SECURITY INTERESTS – – A MOLDOVAN LAW PERSPECTIVE 487
ARBITRAŽNI SPORAZUMI U UGOVORIMA KOJIMA SE USPOSTAVLJAJU BEZBEDNOSNI INTERESI – – PERSPEKTIVA MOLDAVSKOG ZAKONA

Nastja Merlak
Nejc Humar
ARBITRABILITY OF CONCESSION DISPUTES IN SLOVENIA 505
ARBITRABILNOST KONCESIONIH SPOROVA U SLOVENIJI

Jola Gjuzi
ARBITRATION LAW AND PRACTICE IN ALBANIA: FEATURES, CHALLENGES AND PERSPECTIVES 525
ZAKON O ARBITRAŽI I ARBITRAŽNA PRAKSA U ALBANIJI: KARAKTERISTIKE, IZAZOVI I PERSPEKTIVE

Jelena R. Vukadinović Marković
CHALLENGES AND PERSPECTIVES OF ARBITRATION IN SOUTH EAST AND CENTRAL EUROPE – SERBIA 557
IZAZOVI I PERSPEKTIVE ARBITRAŽE U JUGOISTOČNOJ I CENTRALNOJ EVROPI – SRBIJA

Nikolina Tomović
MONTENEGRO RECAP: THE STANDARD OF FAIR AND EQUITABLE TREATMENT (FET) AS A CATALYST FOR INVESTMENT DISPUTES 575
CRNA GORA: STANDARD FER I PRAVIČNOG POSTUPANJA KAO INICIJATOR INVESTICIONIH SPOROVA

Özge Varis
ARBITRATION UNDER TURKISH LAW:
PRACTICE, ENFORCEMENT & BEYOND 597
ARBITRAŽA U TURSKOJ:
PRAKSA, IZVRŠENJE ODLUKA & POZADINA

Filip Balcerzak
THE LAW AND PRACTICE OF COMMERCIAL
AND TREATY-BASED ARBITRATION IN POLAND:
RECENT DEVELOPMENTS AND CURRENT TRENDS. 619
ZAKON I PRAKSA TRGOVINSKE ARBITRAŽE
I ARBITRAŽE NA OSNOVU SPORAZUMA U POLJSKOJ:
NAJNOVIJI RAZVOJ DOGAĐAJA I AKTUELNI TRENDOVI

Dániel Dózsa
Lili Hanna Fehér
Balázs Muraközy
THE UNTAPPED POTENTIAL OF ARBITRATION IN HUNGARY 639
NEISKORIŠĆENI POTENCIJAL ARBITRAŽE U MAĐARSKOJ

Petr Bříza
René Cienciala
SELECTED CHALLENGES
AND PARTICULARITIES OF ARBITRATION IN CZECHIA 657
ODREĐENI IZAZOVI
I SPECIFIČNOSTI ARBITRAŽE U ČEŠKOJ

Toni Deskoski
Vangel Dokovski
ARBITRATING DISPUTES
IN THE REPUBLIC OF NORTH MACEDONIA 675
ARBITRAŽNI SPOROVI
U REPUBLICI SEVERNOJ MAKEDONIJI

Paula Poretti
Mirela Župan
INTERNATIONAL INVESTMENT ARBITRATION –
– AN OUTLOOK FROM CROATIA 691
MEĐUNARODNA INVESTICIONA ARBITRAŽA –
– IZ PERSPEKTIVE REPUBLIKE HRVATSKE

Tsvetelina Dimitrova
CLARIFYING ARBITRATION AGREEMENTS' VALIDITY,
BUT CONFUSING ENFORCEMENT:
BULGARIA'S ARBITRAL TANGO. 715
VALIDNOST ARBITRAŽNIH SPORAZUMA
I PROBLEMI U NJIHOVOM SPROVOĐENJU:
BUGARSKI ARBITRAŽNI TANGO

Eirini Roussou
INTERNATIONAL ARBITRATION IN GREECE 733
MEĐUNARODNA ARBITRAŽA U GRČKOJ

Michal Hrušovský
Pavel Lacko
ARBITRATION IN THE SLOVAK REPUBLIC:
MODERN TRENDS AND LEGAL CHALLENGES 745
ARBITRAŽA U REPUBLICI SLOVAČKOJ:
SAVREMENI TRENDOVI I PRAVNI IZAZOVI

Cristina Alexe
Oana Şoimulescu
ARBITRATION IN ROMANIA:
LOOKING GOOD, HOPING FOR MORE 761
ARBITRAŽA U RUMUNIJI:
IZGLEDA DOBRO, NADAMO SE DA ĆE BITI BOLJE

Fahira Brodlija
INTERNATIONAL COMMERCIAL ARBITRATION LAW
AND PRACTICE IN BOSNIA AND HERZEGOVINA:
LESSONS FROM INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) REFORM . . . 783
PRAVNI OKVIR I PRAKSA MEĐUNARODNE
TRGOVINSKE ARBITRAŽE U BOSNI I HERCEGOVINI:
"LEKCIJE" IZ REFORME REŠAVANJA SPOROVA
IZMEĐU INVESTITORA I DRŽAVE (ISDS)

UPUTSTVO AUTORIMA 805

Velimir Živković*

Introductory note
UDC: 336.765(398) (292.432)
doi: https://doi.org/10.56461/SPZ_24401KJ

INTRODUCTION TO CHALLENGES AND PERSPECTIVES OF ARBITRATION IN SOUTH EAST AND CENTRAL EUROPE

Summary

This issue of Foreign Legal Life is dedicated to the challenges and perspectives of arbitration in South East and Central Europe, with contributions on 16 jurisdictions. The articles aim to highlight the positive developments, challenges and trends in their individual jurisdictions, offering pointed discussions of the most pressing matters, but also allowing for a comparative overview of broader trends. As the contributions show, arbitration is a well-entrenched phenomenon in the respective jurisdictions, with enthusiastic legal communities and broad support from the state and courts. General and jurisdiction-specific challenges do remain, however, and more needs to be done to realize the full potential that arbitration can, if properly used, bring to local communities.

Keywords: arbitration, South East Europe, Central Europe, legal reform, ADR.

* PhD (LSE), LL.M (Belgrade), MJur (Oxon), Associate Professor, University of Warwick – School of Law.
E-mail: *velimir.zivkovic@warwick.ac.uk*
ORCID: *https://orcid.org/0000-0003-0313-5421*

UVOD U IZAZOVE I PERSPEKTIVE ARBITRAŽE U JUGOISTOČNOJ I CENTRALNOJ EVROPI

Sažetak

Ovo izdanje Časopisa Strani pravni život posvećeno je izazovima i perspektivama arbitraže u jugoistočnoj i centralnoj Evropi. Članci imaju za cilj da istaknu pozitivne pomake, izazove i trendove arbitraže u svojim jurisdikcijama, nudeći istaknute diskusije o najhitnijim pitanjima, ali i omogućavajući komparativni pregled širih trendova. Kao što analize pokazuju, arbitraža je dobro ukorenjena pojava u obrađenim nacionalnim pravnim sistemima, i tako takva uživa široku podršku država i njihovih sudova. Ipak kako bi se ostvario puni potencijal arbitraže, potrebno je u budućnosti dalje ulagati dodatne napore u tom smeru.

Ključne reči: arbitraža, Jugoistočna Evropa, Centralna Evropa, pravna reforma, ADR.

1. Introduction – Arbitration and South East and Central Europe

Arbitration, much like the world itself, does not stand still. In particular in its international iteration, looking at resolving disputes among parties coming from different jurisdictions and of varying types, it is a flux of new legal, theoretical and technical challenges, as well as a laboratory for further development of international dispute settlements. Unlike international and national courts, arbitration - both *ad hoc* and institutional - has inherently a larger potential for adopting reforms to respond to the needs of the parties using it. Adoption of a new set of institutional rules or creativity of the parties in crafting new ways of regulating the arbitral process is vastly more suited to reform than a national legal change or adopting amendments to international legal instruments.

But for all the promise of adaptability (and taking due account of inspired delocalization theories) States do remain critical actors for international arbitration. Whether as parties to the New York Convention, or with their legal systems being *lex arbitri,* or their courts being in multifarious relationships with the arbitration process, or States themselves being parties to some of the biggest cases in history of international dispute settlements, the role of States remains critical.

To all of the above an honest observer can and should add the role of narratives surrounding arbitration, its 'brand' and image, and its public relations. When reading

law firm bulletins about international arbitration, the reader will find glowing narratives of efficiency of transnational justice and many other advantages. Reading more critical accounts, mostly academic or activist ones in particular concerning investor-State arbitration, the reader might see arbitration rather as a tool of exploitation of poorer States and subjugation of public interests to the interests of global corporations. And there are of course many more narratives in between those.

It is within this matrix of private and public, promotion and reaction, challenges and perspectives that this special issue comes in with a particular focus on South East and Central Europe. It is worth sharing a few preliminary remarks about the idea and scope of this issue, before diving more into the excellent contributions that constitute it.

For one, this issue is not aimed to be yet another country-by-country report that lays out, sometimes almost mechanically, the black letter law of arbitration in a given jurisdiction (as much as such reports do hold immense practical and comparative value). The idea is to allow a broader discretion to address the most contentious issues, provide personal perspectives (even anecdotal ones), and offer in that sense a more unique take on the respective jurisdictions, whilst also providing sufficient information and context for each country.

Secondly, and relatedly, the idea is thus to take stock of both 'good' and 'bad', of both pressing challenges/inadequacies, but also perspectives, positives and opportunities for or accounts of already happening reform. The contributions do not promote arbitration in general or their respective jurisdictions as panaceas to all dispute related ills, nor do they put the inevitable issues front and centre to the extent that no reasonable person would ever think of concluding an arbitration agreement ever again. Whilst the breadth and depth of challenges and positives inevitably vary across the countries in this issue, the honest approach taken is, or so the editor and contributors hope, a refreshing take in sometimes extremely polarised set of views on international arbitration.

Finally, the freedom and discretion to address contentious issues has extended to the concept of arbitration being understood as broadly as possible for the purposes of this issue. In that light, contributions variously address both international and domestic regimes, as well as subfields of arbitration ranging from typical commercial arbitration, consumer arbitration, labour arbitration, and investor-State arbitration.

Why South East and Central Europe? To an extent, this choice is dictated by the need to draw a boundary somewhere (lest the special issue turns into a global encyclopaedia of international arbitration), and the logical focus of Foreign Legal Life as the review of the Institute of Comparative law in Belgrade. But the reasons go beyond these more general ones. For one, the 'borders' of the issue do not extend more to the West as there is no real lack of accounts of arbitration in Western

Europe, from various angles and using varied approaches and methodologies. They do not extend to the East as in the current situation of tragic and ongoing warfare, the challenges and perspectives are fundamentally different and are likely deserving of a special issue of their own.

But South East Europe and Central Europe deserve closer attention for their own reasons. Some of the countries discussed are, for example, at the very forefront of cutting-edge developments in international (investment) arbitration (such as Czechia and Poland). All across these jurisdictions, arbitration is on the rise more generally, with new arbitration centres being formed and efforts put in to promote this method of dispute settlement. In some jurisdictions, such as Bosnia and Herzegovina, arbitration faces unique challenges that are hardly replicated elsewhere in Europe. At the same time, one cannot resist the feeling that there are not enough open-access and generally accessible materials (in English) on these jurisdictions, written also by local experts. Rectifying this has been one of the aims of this special issue, and in that sense, the authors have delivered a fantastic set of contributions.

Before providing a more granular introduction to these contributions, it is possible to identify further cross-cutting features that characterize all or a group of individual jurisdictions. To take it in this order – one general feature, already mentioned above, is that in virtually all the jurisdictions there is at least nominally an arbitration-friendly approach in legislation (mostly based on the UNCITRAL Model Law on International Commercial Arbitration), attempts by the courts to try and support arbitration, and an enthusiastic community of arbitral practitioners. This is coupled with another general feeling – that more could be done to popularize arbitration, to raise awareness about its benefits, and to move (as much as possible) the seats of international arbitrations from the more established (Western) centres eastward and southward.

A number of submissions, across a range of jurisdictions (Albania, Romania, Croatia, Hungary) have an interesting focus on legal history of arbitration, offering valuable insights into its development over time. In particular, these submissions show how for many jurisdictions the modernization and reform of arbitral legal frameworks was a facet of the transition from (usually) communist legal orders into market-based and Western-focussed legal and economic systems. It is indeed fascinating to see how arbitration can be seen both as a tool in facilitating this transition, but also a reflection of it, with the causes and effects remaining deeply intertwined.

Moving into the present, however, is another aspect of transition and/or arbitration that cuts across a number of these jurisdictions. Protection of foreign investments, usually accompanied by providing foreign investors a possibility to arbitrate on an international plain when claiming alleged wrongdoings by the state, has also been a marked feature of the post-Cold War transition. However, today that is a

pressing matter for a large number of countries in Central and South East Europe that have found themselves at the forefront of high-value investment arbitration claims. The importance is such that the contributions concerning Croatia and Montenegro indeed primarily focus on investor-State arbitration issues, both from the perspective of intense and costly engagement with it (Croatia) and through the lens of particular standards and possibilities for reforming investment (arbitration) policies (Montenegro). Investor-State arbitration is also a large part of discussions in Czechia, Poland and Albania.

Equally valuable insights come from jurisdiction-specific, sometimes quite idiosyncratic, issues and trends in individual jurisdictions. These will be briefly addressed now, without keeping to any particular alphabetic or other order of the countries themselves.

2. Arbitral Journey Across the Regions – Individual Contributions

To start with, the contribution on Moldova by Octavian Cazac illustrates how adopting a Model Law and implementing it in practice are two different prospects. For one, different laws govern international and domestic arbitration, although a draft law is in preparation to "unite" them. The enforcement of arbitral awards, however, seems to be affected by the courts imposing an ad valorem stamp duty on recognition and enforcement of foreign arbitral awards, increasing expenses and limiting attraction of foreign arbitration. But the courts seem to be on the right side of another contentious issue – recognition of validity of asymmetrical (arbitration/litigation) dispute settlement agreements in international financing contracts. The author's extensive and comparative discussion of this issue offers useful lessons beyond just the context of Moldovan law.

The article on Slovenia, by Nastja Merlak and Nejc Humar, focusses on concession agreements and a somewhat recent turbulence about allowing arbitration as a method of dispute resolution for these arrangements. Slovenian legislator, using a considerably controversial tool of "authentic interpretation," has sought to restrict arbitrability of concession disputes, something that was hardly controversial for a long time. Although the officially stated rationale is that arbitration leads to "lower legal certainty" than litigation, it seems that the true reasons might be rather found in negative (in terms of outcome) experiences that the Slovenian state and its local entities had with such arbitration disputes. As arbitration is generally seen as a good choice for concession disputes for those interested in concluding concession agreements, one can hope that the backlash by (among others) arbitration community should lead to rethinking this recent development.

Albania, discussed by Jola Gjuzi, is an example of a jurisdiction where the general support for arbitration by the law and the arbitral community is not always matched by the expertise of courts or the popularity among businesses/citizens. Whilst Albania has, as noted, experienced quite a streak of investor-State arbitral claims (winning and losing a number of them), on the internal front one noticeable issue is the capacity of courts and judges. Foreign arbitral awards can face years or rarely even decades of waiting for enforcement, and limited experience of judges is sometimes also compounded by the still murky relationship of the law on arbitration and the law of civil procedure. It is to be hoped that initiatives for legislative clarification and capacity/awareness raising concerning arbitration will lead to further improvements in due course.

The article on Serbia, contributed by Jelena Vukadinović Marković, focuses on the ever-important issue of arbitrability. In particular, it highlights the "grey areas" of intellectual property (IP) law, competition law and law of insolvency whose interplay with arbitration continues to cause dilemmas. In particular, there seems to be lack of clarity and certainty concerning the scope of disputes concerning IP and competition law breaches. There is a general academic consensus that disputes concerning registration of IP should not be arbitrable, nor should determinations whether a breach of competition law occurred. On the other hand, commercial disputes about the use and disposing of IP rights, as well as about damages arising from competition law breaches, should be within the scope of arbitrability. Providing official legal clarity through relevant legislation on these points would be welcome. The same goes for clarifying the destiny of both a previously agreed arbitration agreement in cases where insolvency proceedings are open against one of the parties, and of ongoing arbitration proceedings involving such entities.

The contribution on Montenegro, written by Nikolina Tomović, focuses on the topical issue of investor-State arbitration, its ubiquitous and critical standard of fair and equitable treatment that serves as a basis for investor claims, and the experience and prospects of Montenegro in this field. Noting the importance that such high-value claims (potentially involving hundreds of millions of US dollars) can have on smaller states with more limited budgets, the article also connects the situation in Montenegro with broader EU trends concerning investment protection. Montenegro, as an EU candidate country well advanced on its path in that sense needs to rethink its policies, and in particular, as suggested by the author, the prospects for rephrasing and limiting the impact of clauses such as the fair and equitable treatment.

The situation in Turkey, addressed in a piece by Őzge Variş, is characterized by abundant potential for development of arbitration and its constant rise over the years that is contrasted with some pressing issues in terms of court interventions

and the arbitral community itself. One of the key issues to note is the sometimes overly intrusive attitude of the courts towards the arbitration process and arbitration awards, going beyond what is in the otherwise well-drafted arbitration legislation. In particular, lax use of public policy exceptions to address "national security" concerns and inconsistencies in approach between different courts are problems that need to be tackled first. In a broader sense, there are ongoing efforts to promoting arbitration and training of both judges and arbitrators. As for the latter, a somewhat limited pool of arbitrators with expert knowledge in particular sectors has also been identified as an obstacle to remove in further propelling arbitration growth in a such a major economy as Turkey.

Poland, discussed by Filip Balcerzak, is another major player in the investor-State arbitration field, despite never having ratified the globally widespread Convention on the International Centre for Settlement of Investment Disputes (ICSID). In other arbitration fields, however, there are interesting issues as well. One is that post-arbitral proceedings (including recognition and enforcement) can be quite lengthy as the possibility to exhaust a range of legal avenues against an award (including a cassation appeal to the Supreme Court) prolongs the proceedings to a very considerable extent. Another unwelcome development has been the decision of all public authorities from several years ago to stop concluding arbitration agreements and focus only on state court litigation, something likely motivated (as in Slovenia and Hungary) by a less than ideal outcome record before arbitral tribunals. In any case, there are renewed efforts by arbitral institutions to popularize arbitration and put Poland as a potential seat to a role that it would deserve bearing in mind its position, economy and population.

The situation in Hungary, written about by Dániel Dózsa, Lili Hanna Fehér and Balázs Muraközy, illustrates well a number of trends across the broader region. On the one hand, a developed legislative framework and a long tradition are still not enough to lead to a wholesale embrace of arbitration by the business community, as many Hungary-related matters remain arbitrated in the neighbouring Austria. Clear efforts to make arbitration cost-effective, and in particular a safe choice in light of rule of law backsliding issues, are then somewhat countered by issues concerning arbitrability limitations, introduction of additional grounds for annulment of awards that deviate from the Model Law, and possibilities for retrial in light of new evidence that is not commonly found in international context. Despite (the now reversed) rejection of arbitration agreements by public authorities doing harm to this method of dispute settlement, the efforts of bringing arbitration "on the map" in full sense of the word persist.

Czechia, already mentioned in the investor-State context, and discussed by Petr Bříza and René Cienciala, exhibits strong fundamentals in terms of legislation

and pro-arbitration approach of courts, but with some lingering issues. One relates to a comparatively well-known issue of arbitral tribunals being unable to issue interim measures on their own accord. Beyond that, one issue more specific to Czechia is the link between arbitration law and code of civil procedure, where the provisions of the latter can be "appropriately" used by arbitrators and/or courts when the situation requires it. This has, however, lead to inappropriate overreliance in some situations, as well as to a thorny issue of whether arbitrators are required (as judges would be) to provide legal assistance and instruction to the parties. Recent judgments by the courts, however, seem to indicate a positive approach to resolving these issues.

North Macedonia, analysed in the article by Toni Deskoski and Vangel Dokovski, exhibits a number of unrelated but fascinating examples of challenges that may arise from legislation, court practice, and arbitral institution practice. For one, the authors provide an intriguing look into whether arbitration can be an answer for disputing civil defamation and insult cases after they were removed from the domain of criminal law. At the same time, the piece describes a worrying example where trying to make arbitration (too) affordable can backfire – fixation of arbitrators' remuneration at low levels with the Permanent Arbitration in Skopje has lead to limited and decreasing interest of potential arbitrators. Finally, by using a case study from the local courts, the authors describe how foreign awards should *not* be enforced, raising the call for the vibrant local arbitration community to help with further training and specialization of judges and arbitrators.

The contribution on Croatia, by Mirela Župan and Paula Poretti, focuses in considerable and illuminating detail on the practice of the state in (now quite numerous) investor-State arbitrations. Apart from insightful substantive detail, the article raises important questions about the high cost of representation, effects this has on the access to justice, and the potential need to rethink alternative settlement methods (such as mediation and conciliation) to avoid constant burdens to the budget. Equally, however, the piece raises a hard dilemma of whether promoting more alternative methods that are shrouded in secrecy would ultimately entail unexpected and unacceptable transparency and legitimacy costs – while increasing that same transparency might reduce the readiness of the parties to actually settle. In that sense, challenges and lessons are the same for a large number of countries, in the region and elsewhere, involved with the international regime of investment protection.

In case of Bulgaria, discussed by Tsvetelina Dimitrova, we can find the examples of long-standing issues being resolved, and some persisting and waiting for future action. On a more positive note, a recent pro-arbitration decision by the Supreme Court of Cassation affirmatively resolved an uncertainty as to whether

an assignment of rights under a contract included the assignment of an arbitration agreement. But on a more challenging side of matters, recognition and enforcement of foreign awards, even under the New York Convention regime, remains burdened by formalities of dubious legality. Primarily, the need to provide a certificate that an award entered into force (something arbitral institutions are quite unfamiliar with), obtain certification of documents from the relevant ministry, as well as certification of signatures/capacity of persons issuing awards from a notary public are all cumbersome rules that arguably contravene the spirit of the New York Convention. In light of recent pro-arbitration judgments, the hope is these matters would be tackled next.

Greece, on which Eirini Roussou contributes, is interesting as an example of a recent modernization reform that put it into not just regional, but global spotlight. Going beyond, and arguably improving on a range of issues in the UNCITRAL Model Law, Greece now has some of the most innovative provisions on issues such as multiparty proceedings, validity of arbitration agreements, interim measures, and setting aside of arbitral awards. At the same time, Greece as an EU Member State is part of the uncertainties brought about by the attempts to end intra-EU investment arbitration and how (and if) that will reflect on Greece remains to be seen.

Slovakia, the jurisdiction analysed by Pavel Lacko and Michal Hrušovský, demonstrates considerable potential for growth in its dedicated arbitral community, but also faces constraints on several fronts that can be recognized across the region. One set of these is the need to enhance the public awareness of arbitration, improve transparency of the work of arbitral institutions, and ensure integrity of appointment processes. One the side of legal framework, ambiguities remain concerning appointment and challenge of arbitrators, conduct of proceedings, and setting aside of awards. However, as recent pro-arbitration court decisions concerning judicial intervention show, coupled with other initiatives to raise capacity and knowledge, the opportunities for growth and improvement are there for the taking.

In Romania, as Cristina Alexe and Oana Șoimulescu write, generally positive arbitration environment faces some general and some sector-specific challenges. In more general terms, complications surround arbitrations that have *in rem* rights as their subject matter, as there is both a need to authorize arbitration agreements before a public notary in these cases, and additional scrutiny of awards arising from these cases – making the whole process cumbersome and more expensive. In terms of specific sectors, the authors focus in particular on the construction industry as generally a large generator of arbitral (and other) disputes, and highlight a number of important developments and challenges arising in this sector. Again, similarly to some other larger jurisdictions in the region, there is a sense that there is certainly large untapped potential for further growth.

Bosnia and Herzegovina, discussed by Fahira Brodlija, is perhaps the most curious case of all the presented countries. Reflecting the complex governmental structure and legal compromises involved within it, it exhibits fragmented regulation of arbitral proceedings at different levels, fairly short legislation embedded within the codes of civil procedure, and numerous (sometimes striking) deviations from Model Law norms. These include a very strict understanding of what an arbitral agreement is, and a possibility for the court to retroactively terminate arbitration agreements in cases where the parties cannot agree on arbitrators, appointed arbitrators cannot/refuse to act, or there is no agreement of arbitrators on an award. However, these legislative oddities are coupled with extensive investor-State arbitration practice, including an innovative model bilateral investment treaty that can serve as an inspiration to many other jurisdictions. In light of the efforts of its vibrant and dedicated arbitration community, it is a hope that necessary reforms will not be long in coming.

3. Conclusion – Remembering the Past, Thinking about the Future

To reiterate from the beginning of this introduction, as arbitration changes with the world around it, there might never be a true 'conclusion' to its development, narratives about it, and its everyday practice. South East and Central Europe jurisdictions show how the challenges come in various forms, but also how readiness to reform and improve can help tackle them. As the global economic and geopolitical outlook becomes ever more complex, it is to be expected that reverberations will be felt in both the international arbitration system and individual jurisdictions. Readiness to adapt and overcome, the strength of the arbitration communities and their enthusiasm – demonstrated by the jurisdictions discussed in this issue – give hope that there will not be a final 'conclusion' after all.

Octavian A. Cazac*

Review Scientific Paper
UDC: 347.918(478.9)
doi: https://doi.org/10.56461/SPZ_24402KJ
Received: 27. 9. 2024.
Accepted: 13. 1. 2025.

ARBITRATION AGREEMENTS IN CONTRACTS ESTABLISHING SECURITY INTERESTS – A MOLDOVAN LAW PERSPECTIVE**

Summary

Moldova is a Model Law jurisdiction in statute, but it still has work to do to become a fully Model Law complaint jurisdiction in practice. Still, the availability of and friendliness to arbitration ensures a legal framework favourable to international trade, and especially to international lending to the Moldovan economy. A key factor is the recognition of asymmetric dispute resolution agreements in loan agreements and in supporting security agreements.

Keywords: UNCITRAL Model Law, enforcement of security interest, mortgage, asymmetrical dispute resolution agreement, unilateral litigation clause.

* PhD, Associate Professor, Moldova State University, Chisinau, Moldova.
E-mail: *octavian.cazac@usm.md*
ORCID: *https://orcid.org/0000-0001-9106-9852*

** The author is thankful to Ms Valeria Popa, Vis Moot competition participant, for her comments to an earlier draft of this article.

ARBITRAŽNI SPORAZUMI U UGOVORIMA KOJIMA SE USPOSTAVLJAJU BEZBEDNOSNI INTERESI – – PERSPEKTIVA MOLDAVSKOG ZAKONA

Sažetak

U kontekstu arbitraže, Moldavija je država model zakona, kako u smislu zakonskog okvira, tako i u praksi. Dostupnost i otvorenost prema arbitraži obezbeđuje pravni okvir povoljan za međunarodnu trgovinu, a posebno za međunarodno kreditiranje moldavske ekonomije. Ključni faktor je priznavanje asimetričnih sporazuma o rešavanju sporova u ugovorima o zajmu i u podršci sporazumima o bezbednosti.

Ključne reči: UNCITRAL model zakona, sprovođenje interesa bezbednosti, hipoteka, asimetrični sporazum o rešavanju sporova, jednostrana parnična klauzula.

1. Moldova – a Model Law Country

Since 2008, Moldova has introduced two arbitration laws: one (Moldovan Law on Arbitration) governing local arbitration proceedings, and the other (Moldovan Law on International Commercial Arbitration), as its name suggests, dealing with international commercial arbitration. In our opinion, this policy choice was unfortunate, as the two laws largely overlap, with the distinction that the Law on International Commercial Arbitration is more permissive. This concern is shared by other commentators (EBRD & IDLO, 2021, p. 11). The advantage of these two laws is that they largely follow the 2006 UNCITRAL Model Law on International Commercial Arbitration (Model Law).

The repeated justice sector reforms have attempted with modest success to promote arbitration to decongest the judiciary system and keep litigants farther away from certain courts that were perceived as lacking in integrity or specialised expertise. Nonetheless, most local companies remain hesitant to include arbitration agreements in their commercial contracts (Gutu, 2012, p. 13). The reasons for this hesitancy include unfamiliarity with arbitration as opposed to the clarity and accessibility of judicial proceedings, and a perception of high costs (especially due to media reports about investment arbitration costs incurred by the government). Another disincentive is the requirement for a court of law to issue a writ of execution before an award may be enforced by a bailiff (Article 11(e), Moldovan

Enforcement Code). This protracts the contract enforcement process, raising the risk of enforcement denied by the local court. An important exception to that is that consent awards are writs of execution without any further formalities (*ex legem*).

Recently, some local courts have claimed, based on a doubtful interpretation of the new Moldovan Stamp Duty Law, that an *ad valorem* stamp duty is applicable to a request for recognition and enforcement of a foreign arbitral award (*S. C. Pa & Co International SRL v. IS Administrația de Stat a Drumurilor*, Case 2-5/24; 2-24026129-02-2-06032024-1, 2024). This interpretation leads to a "double taxation" of arbitration claimants (firstly, as part of arbitration proceedings and, secondly, as part of the writ of execution proceedings) and can, of course, dampen the appetite for arbitration. We hope and expect the upper standing courts to establish a pro-arbitration interpretation, excluding this double taxation.

This complex legislative landscape and the sometimes unsatisfactory application of the arbitration laws are the reasons why the local arbitration community in partnership with the Moldovan Ministry of Justice are developing a new draft arbitration law (Ministry of Justice, 2024). From a design perspective, it is supposed to merge the two existing laws into a single new law, transpose the provisions of the Model Law to the letter (as opposed to the paraphrasing, which is sometimes used in the two current laws), but also take over some modern policy choices from select jurisdictions, such as Germany, Switzerland and the United Kingdom. From a practical perspective, the drafters are taking into account the flawed manner in which the local courts understand the principles of the Model Law and ways to limit the discretion of the local courts to come up with surprising applications of these principles. For example, in one case, an arbitrator declined their jurisdiction because the arbitration agreement provided for a sole arbitrator tribunal to be appointed by the claimant alone, and the arbitrator felt that this violated the underlying principle of party equality in the formation of the tribunal. Nevertheless, the court of appeals, relying on the freedom of contract, overturned this award on jurisdiction and ordered that such type of tribunal be formed (*Rikipal SRL v. Fruktdimcov SRL*, Case 2-14869/20, 2019).

In another example, the Moldovan Supreme Court of Justice had to deal with the recognition and enforcement of an arbitral award rendered in London under the LCIA between two airlines, for rent and damages under a lease contract containing the arbitration agreement (*Just-Us AIR SRL and EFS European Financial Services AG vs CA AIR Moldova SRL*, Case 2r-398/2022; 2-21156372-01-2r-28072022, 2022). The court denied recognition of the award based on Article 476(1)(a) of the Moldovan Code of Civil Procedure implementing Article V(1)(a) of the New York Convention (see Art. V(1)(a), Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958). The court denied the submission of the claimant that the matter of whether the respondent had the power to enter into the lease contract was governed by

their substantive law, i.e., Romanian law, and not Moldovan law, as the law governing the capacity to contract of the respondent. The court relied on the special rule applicable to state enterprises (respondent was, at the time of the contract, a state enterprise), which required contracts above a certain threshold to be approved by the founder of the enterprise. Such an approval was absent in respect of the lease contract although the threshold was met. Therefore, the court held that the lease contract was invalid and, consequently, the arbitration agreement was invalid as well.

Such an approach, of course, violates the separability principle contained in Art. 16(1) of the Model Law,[1] Art. 16(1) of the Moldovan Law on International Commercial Arbitration, as confirmed by the Supreme Court in its explanatory decision on arbitration (Explanatory Decision of the Moldovan Supreme Court on Arbitration Matters, 2015), i.e., even if the lease contract were invalid due to incapacity of the respondent, there is no special capacity requirement for arbitration agreements for state enterprises or companies in general under Moldovan law.

In addition, we express doubt if the underlying issue was really one of capacity, or if it was, in fact, a matter relating to the respondent's powers to be bound to a lease contract and to an arbitration agreement. In any event, it is arguable whether the respondent was even allowed to invoke its own incapacity. As it was observed in commentary to Article V(1)(a) of the New York Convention, "[i]n practice, it has often occurred that a State or a state-controlled entity or organization has claimed that pursuant to its own law it lacked capacity to enter into the arbitration agreement. Such a defence is hardly ever accepted and often is regarded as a demonstration of contradictory behaviour contrary to good faith by first accepting an arbitration agreement and then attempting to avoid it by reference to one's own law. Contrary to what may be the case for natural persons lacking capacity (such as minors or mentally infirm persons), a State or state-controlled entity comprehends the nature and consequences of its transactions and it would be abusive if it could rely on its own law to subsequently assert that it is not responsible for such transactions." (Wolff, 2012, pp. 284-285, para. 103).

These examples should not be taken as a criticism of the overall case law of the Moldovan courts. In *OOO BelgorhimpromEnergo vs SATI Moldavskaia GRES*, the Supreme Court held that the underlying New York Convention principles include the principle of the presumption of validity of the award and of the arbitration

[1] It reads: "(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause." (Art. 16(1), UNCITRAL Model Law on International Commercial Arbitration).

agreement, and the principle of interpretation of the New York Convention in favour of the legal effectiveness of foreign arbitral awards (*OOO BelgorhimpromEnergo vs SATI Moldavskaia GRES*, Case r. 2r-570/23; 2-23058026-01-2r-13122023, 2024). The court thus granted the request for recognition and enforcement of the Russian arbitral award in Moldova.

As a reaction to this state of affairs, the drafters intend to propose that the new law should specify that those of its provisions that adopt the Model Law should be interpreted and applied in light of the established interpretation of the Model Law, especially the UNCITRAL Secretariat Commentary.

2. Arbitration as International Finance Facilitator

The legal recognition of arbitration agreements plays an important role of facilitating the provision of finance by international lenders to the Moldovan government or Moldovan companies. This is especially the author's experience, as transaction counsel with multilateral development banks, such as the European Bank for Reconstruction and Development (EBRD), or the Black Sea Trade and Development Bank (BSTDB), or international organizations such as the International Finance Corporation (IFC), a member of the World Bank Group. Following their lead, international commercial banks provide finance to Moldovan projects in a similar fashion.

The loan agreements and other transaction documentation are, from our experience of over 20 years as transaction local counsel, in a majority of cases governed by English law. This documentation typically contains asymmetrical dispute resolution clauses or agreements (further referred to as "asymmetrical agreements"). Based on the taxonomy developed by Papadima (2021, p. 545), asymmetrical dispute resolution clauses can be divided into two major categories: (i) bilateral arbitration clause with a unilateral option to litigate (also called "unilateral litigation clause") and (ii) bilateral litigation clause with a unilateral option to arbitrate (also called "unilateral arbitration clause").

The version that is mostly encountered in international transactions in Moldova is the bilateral arbitration clause with a unilateral option to litigate. Its default dispute resolution mechanism is arbitration under the UNCITRAL, LCIA or ICC Arbitration Rules, but the lender reserves the right to enforce its rights in the Moldovan courts or any other courts of competent jurisdiction (further referred to as the "optional limb")[2].

[2] A typical wording would be: "*(a) Any dispute, controversy or claim arising out of or relating to (1) this Agreement, (2) the breach, termination or invalidity hereof or (3) any non-contractual obligations*

Consequently, as opposed to the lender's full rights, the borrower may initiate a legal claim in arbitration only, and is restricted from initiating a court proceeding. It is this optional limb that renders the dispute resolution agreement asymmetrical, or the litigation limb is unilateral.

This diverse range of legal avenues to enforce rights is an important consideration for lenders that loan money to borrowers of foreign jurisdictions. It allows the lender to choose the best legal path for enforcement not at the early, contracting stage, but at the latest – contract enforcement stage. Years can pass between these stages, and while at the date of the loan agreement, litigation in the borrower's jurisdiction appeared to be the faster enforcement option, at the time when the lender decides to enforce, it will receive a legal advice that litigation in that jurisdiction would be unfavourable (e.g. doubtful integrity of the local judicial system; higher stamp duties; duration of judicial proceedings). Or, while at the date of the loan agreement, litigating in lender's jurisdiction seemed to be most cost-effective and predictable, there are signs that the borrower's jurisdiction will not necessarily recognize a foreign judgement, but the enforcement of a foreign arbitral award would be more predictably secured by the fact that the New York Convention applies in the borrower's jurisdiction.

This rationale has been summarized in English law in the Mauritius Commercial Bank case where the High Court quoted Professor Fentiman in his article in the Cambridge Law Journal entitled "Universal jurisdiction agreements in Europe":

"Such unilaterally non-exclusive clauses are ubiquitous in the financial markets. They ensure that creditors can always litigate in a debtor's home court, or where its assets are located. They also contribute to the readiness of banks to provide finance, and reduce the cost of such finance to debtors, by minimizing the risk that a debtor's obligations will be unenforceable. Such agreements are valid in English law... Indeed, despite their asymmetric, optional character, it is difficult to conceive how their validity could be impugned or what policy might justify doing so..." (*Mauritius Commercial Bank Ltd. v. Hestia Holdings Ltd. & Sujana Universal Industries Ltd*., Case EWHC 1328 (Comm), 2013, para. 42).

---

arising out of or in connection with this Agreement shall be settled by arbitration in accordance with the UNCITRAL Rules. There shall be one arbitrator and the appointing authority shall be the LCIA (London Court of International Arbitration). The seat and place of arbitration shall be London, England, and the English language shall be used throughout the arbitral proceedings.

(b) Notwithstanding paragraph (a) above, this Agreement and the other agreements contemplated hereby may, at the option of the Lender, be enforced by the Lender in any courts having jurisdiction. For the benefit of the Lender, the Borrower hereby irrevocably submits to the non-exclusive jurisdiction of the courts of England with respect to any dispute, controversy or claim arising out of or relating to this Agreement or any other Financing Agreement, or the breach, termination or invalidity hereof or thereof. Nothing herein shall affect the right of the Lender to commence legal actions or proceedings against the Borrower in any manner authorised by the laws of any relevant jurisdiction."

The approach is slightly different in respect to the instruments securing these loans in the Moldovan market. Local security agreements include (i) mortgage agreements[3] providing for proprietary (*jus in rem*) security over real estate, movable property or intangible assets, and (ii) guarantee agreements providing for personal security (*jus in personam*) by third party guarantors. These are usually governed by local law as they need to satisfy various local law formalities applicable to the establishment of such security rights, such as registration of the mortgage in the land registry book. However, the same asymmetrical agreement is contained in all these security agreements. Disputes in connection with personal or proprietary security interests and agreements giving rise to them are arbitrable under Moldovan law, as the law does not specifically exclude their arbitrability.

3. Treatment of Asymmetrical Agreements

As reported by Papadima (2019, pp. 37-72; 2021, pp. 552-619), asymmetrical agreements are not welcome and recognized as valid in all researched jurisdictions: Australia, Hong Kong, Italy, Portugal, Singapore, Spain, and United Kingdom are comfortable with asymmetry; Bulgaria, China, India, Poland, Romania, Russia, and Turkey are uncomfortable with asymmetry, while in France, Germany (Bälz & Stompfe, 2017, p. 157), and the United Stated of America the jury is still out. In France, Racine (2016, p. 216) has expressed a favourable view for the validity of asymmetric agreements in French law: "Their validity must not be doubted. Freedom of contract allows the parties to shape their agreement as they wish. They are therefore entitled to create options, including the judges called upon to resolve their disputes. […] Their efficacy depends however on their drafting. Clarity must exist in respect of the option, its branches, and its beneficiaries."

In this paper, we submit that asymmetrical agreements are valid under Moldovan law. To support this conclusion, we will rely on Moldovan case-law and we will also verify the extent to which the core legal arguments of the "uncomfortable with asymmetry" jurisdictions have a basis in Moldovan law. In addition, Moldovan arbitration scholars do not include asymmetrical agreements in the cases of pathological arbitration agreements; while they mention them as problematic, in light of international case law, they appear to approve of such agreements (Băieșu, 2023, pp. 34-35).

Since Moldovan arbitration law is based on the Model Law, it lacks a specific provision dealing with the validity of asymmetric agreements. Moldova prides itself

[3] "Mortgage" is taken here not only as a security over immovable property, but a registered security over either immovable property or movable property. The latter is called "pledge" (*gaj*, in Romanian language) in the Moldovan Civil Code.

on freedom of contract.[4] So, our starting point is that Moldovan law contains no specific prohibition of an asymmetrical agreement.

The cases available for research show that the Moldovan courts are open to asymmetrical agreements contained in security agreements either when the courts are asked to enforce the security in lieu of resort to arbitration or when a third party challenges the enforcement made in the courts in lieu of resort to arbitration. There are no known cases where an arbitral award would be denied recognition and enforcement because it was based on an asymmetrical agreement.

The Moldovan practice shows that the optional litigation limb of the asymmetrical agreement (resorting, at the option of the Lender, to a court) is interpreted broadly so as to allow enforcement of the mortgage not only via a court action, but also by its direct submission to a bailiff for out-of-court enforcement. This out-of-court enforcement option is available under Moldovan law because mortgage agreements are allowed to contain a writ of execution clause,[5] while mortgage agreements establishing a security over movable property (tangible or intangible) are by operation of law (*ex legem*) writs of execution (Article 11, Moldovan Enforcement Code). An issue could arise if, in the optional litigation limb, the submission to a court also implied the submission to the out-of-court authorities competent to conduct enforcement of such writs of execution. The broad interpretation currently adopted, which we support, recognizes the jurisdiction of out-of-court authorities. This is first explained by the parties' intent to allow the lender the broadest array possible of remedies to realize the security and collect the debt. Secondly, bailiffs are subject to the supervision by the courts (e.g. their orders can be annulled by the courts upon a challenge by an interested party), and consequently a reference to the local courts should be taken as an implied reference to the authorities that carry out justice-related functions.

For the sake of clarity, mortgage agreements specify that the lender may resort to in-court or out-of-court enforcement to the extent allowed by the law governing the enforcement procedure.

Among other decisions, we rely here on *Case 25-10/2021* resolved by the Straseni District Court (Case 25-10/2021, 2021). The court had to consider whether a mortgagee holding a mortgage over shares in a company has properly enforced the mortgage by means of an out-of-court procedure via a bailiff, notwithstanding that the mortgage agreements contained an asymmetrical agreement: the default dispute resolution mechanism was arbitration, and the mortgagee alone could resort

[4] Article 993 of the Moldovan Civil Code introduces strong rules and presumptions that the Books of the Civil Code and other private law acts contain merely default rules, which the contracting parties may derogate from.

[5] "Formula executorie" in Romanian.

to the local courts to enforce its rights. In spite of several arguments about illegality of the enforcement raised by the plaintiff (a third party to the mortgage agreement), the court upheld the lawfulness of such an enforcement and did not raise any *ex officio* concerns about the jurisdiction of the bailiff or of the court.

The above considerations relate to what Papadima classifies as a bilateral arbitration clause with a unilateral option to litigate. However, Moldovan case law indicates that the second type of asymmetrical agreements, i.e., bilateral litigation clause with a unilateral option to arbitrate, are also not invalid merely because of the asymmetry feature.

In 2020-2021, the Moldovan courts had to deal with a wave of requests for enforcement of domestic arbitral awards obtained by a non-banking credit organization that lent money to consumers. These awards were based on a bilateral litigation clause with a unilateral option to arbitrate: any disputes under the loan agreement were to be resolved by the Moldovan courts; but, upon the request of the claimant (and not necessarily the lender), any dispute under the loan agreement was to be resolved by arbitration under the rules of the Association of Liquidators and Administrators (or ALARM). The Chisinau Court of Appeals, as the court of final instance in such matters, denied enforcement of such awards on two grounds. In some judgments, the court looked at the merits of the case and found that the sole arbitrator had failed to act *ex officio* and restrict certain claims of the claimant insofar as they violated the rights of the respondent who was a consumer, e.g. the sole arbitrator awarded to the claimant both penalties and default interest. Thus, the award was denied jurisdiction because it violated the fundamental consumer protection principle under Moldovan law (*Super Credit SRL vs IS*, Case 2-20114155-02-2r-09032021, 2021; *Super Credit SRL vs MM*, Case 2r-2991/20; 2-20140886-02-2r-24122020, 2021). This is indeed in line with the directives given by the Moldovan Supreme Court of Justice in their Advisory Opinion No. 106. It states: "[t]he determination that an arbitral award concerning a consumer which gave effect to contractual obligations arising from unfair terms will represent a legal ground for the court, as provided in paragraph (2) of Article 485 of the Civil Procedure Code, to refuse the issue of an enforcement order for the arbitral award, as the arbitral award violates the fundamental principles of the legislation of the Republic of Moldova." (Advisory Opinion of the Moldovan Supreme Court on Enforcement Matters, 2019).

In the above cases, while the Chisinau Court of Appeals acknowledged the asymmetrical nature of the dispute resolution clause, it did not invalidate the arbitration agreement because it was asymmetrical; it employed none of the frequent objections it relied on in other jurisdictions (see *infra* section 4), although it had full legal authority to do so under procedural law. Some other judgments of the same court

went further and invalidated the arbitration limb contained in the asymmetrical agreement. They did so by relying on the law of unfair terms in consumer contracts, and specifically Article 1077(1)(16) of the Moldovan Civil Code (*Super Credit SRL vs IG*, Case 2r-2884/20; 2-20132150-02-2r-15122020, 2021): a term imposing arbitration as the exclusive method of dispute resolution in a consumer contract is unfair if the term has not been individually negotiated. We appreciate, however, that the court has not taken time to reason why the asymmetrical agreement provides for arbitration as the exclusive method when in fact arbitration is only the optional limb of this agreement. Nonetheless, it is not the asymmetric feature of the agreement that served as a reason to invalidate it, but the fact that it is unfair for these other reasons. In other words, in the eyes of the court, even a symmetric arbitration agreement is unfair when it is not individually negotiated with a consumer.

4. Frequent Objections Used in Other Jurisdictions to Cast a Shadow over Asymmetric Agreements

Reports of case law from various jurisdictions unfavourable to asymmetrical agreements allow us to identify the following frequent objections that lead to their invalidity or inadmissibility: ambiguity; lack of mutuality; potestativity; and procedural inequality. Since Moldovan law does not require consideration for a contract to be valid, we will not analyse the objection of lack of mutuality.

4.1. Ambiguity

In a puritan view of arbitration, if the parties wish to submit to arbitration, they should do so clearly, unequivocally and waive the court jurisdiction over the merits of the dispute. The failure to satisfy this requirement usually classifies the arbitration agreement as pathological (Florescu, 2020, p. 47; Born, 2021, § 5[D][1] and [D][5]; Blackaby *et al*., 2023, § 2.220-2.222; Băieșu, 2023, p. 34) and has been used by some courts in Romania and Turkey. In France, El Ahdab & Mainguy (2021, p. 808) have expressed the view that asymmetric agreements should not pose validity questions as long as the choice afforded to one of the parties is objectively determinable, and not discretionary.

We note that a consequence of asymmetric agreements is that both arbitration and litigation is available to a party. This alternance does not affect the clear consent to arbitrate that both parties have given. This applies *a fortiori* to a bilateral arbitration clause with a unilateral option to litigate, because arbitration was set by the parties as the default dispute resolution mechanism. One private law

development trend is the creation of multiple routes or procedures to enforce the same rights. Even in the absence of an arbitration agreement, in a mortgage agreement, the mortgagee would have, under Moldovan law, three routes: out-of-court enforcement via a bailiff if the mortgage agreement amounts to a writ of execution; expedited ordinance procedure; and the general civil procedure. In addition, when considering debt collection, a mortgagee has the option to file an action for collection of the secured debt (a personal action) or an action for enforcement of the mortgage (a proprietary action; *actio hypothecaria*) (Cazac, 2023, p. 175). In the meanwhile, the borrower or the mortgagor have only the general civil procedure available, for instance in an action to annul the mortgage agreement or to seek damages for the wrongful realization of the security. This is because they do not hold a mortgage and because their principal interest is not debt collection, as opposed to the lender or the mortgagee. We thus conclude that asymmetry of procedural routes is normal in modern private law. Asymmetrical agreements encompass the idea that the different nature of the parties' interest justifies a different level of protection of that interest. They also take account of the different risks the parties are exposed to.

4.2. Potestativity

The objection that asymmetrical agreements are potestative, and hence invalid, has been used in French and Bulgarian case law. "The term 'potestative' refers to the fact that the fulfilment of the agreement is dependent upon an event which one of the parties has the power to make happen or prevent from happening, or, in other words, the event is entirely within the power of only one party to the contract" (Papadima, 2021, p. 549). As of 1 March 2019, the prohibition of potestative conditions has been excluded from the Moldovan Civil Code.[6] This was part of the policy choice to render Moldovan contract law more predictable and strengthen the validity of contracts and party autonomy. To the contrary, Moldovan law is open to discretions that shape a contractual relationship, such as unilateral options to create or prolong a contractual relationship, unilateral rights to amend or terminate a contractual relationship for cause or at will. It matters little if the discretion is exercised by the creditor or the debtor of a specific legal relationship. Discretionary rights are a foundation stone of the new Moldovan law of trusts contained in the Civil Code. The most important legal restriction to observe when shaping the terms of a contract with discretionary rights is contained in the law of unfair terms (Cazac, 2020, pp. 91-110).

[6] Former Article 235(2) of the Civil Code was in force between 12 June 2002 and 28 February 2019 and stated: "A condition whose occurrence or non-occurrence depends on the will of the parties to the juridical act is null and void. A juridical act concluded under such a condition is void."

4.3. Procedural equality

Asymmetrical agreements have been denied recognition in Russian case law (Draguiev, 2014, p. 30; Papadima, 2021, p. 581) based on the idea that a bilateral arbitration clause with a unilateral option to litigate violated the equality of arms principle stated in Article 18 of Russian Federation Law on International Commercial Arbitration, a verbatim adoption of Article 18 of the Model Law. We see no basis for applying that logic in Moldovan law. To the contrary, we join the opinion of Papadima (2021, p. 624) that Article 18 of the Model Law, "which gives effect to the principle of equality in arbitration, should be interpreted to apply only to treatment and conduct during arbitral proceedings, as indicated by the title of the chapter within which it is placed: 'Conduct of Arbitral Proceedings'".

A further objection raised by the Russian court was violation of Article 6 ECHR (right to a fair trial and access to justice). This reasoning appears to misconstrue the idea behind Article 6. In a better view, the English High Court upheld the validity of the asymmetrical agreement, providing a rebuttal to such a reasoning:

"Moreover I would not have acceded to Mr Forbes Smith's argument that the clause is invalid even if it bore the construction for which he contends. If, improbably, the true intention of the parties expressed in the clause is that MCB should be entitled to insist on suing or being sued anywhere in the world, that is the contractual bargain to which the court should give effect. The public policy to which that was said to be inimical was "equal access to justice" as reflected in Article 6 of the ECHR (Art. 6, European Convention on Human Rights, 1950). But Article 6 is directed to access to justice within the forum chosen by the parties, not to choice of forum. No forum was identified in which the Defendants' access to justice would be unequal to that of MCB merely because MCB had the option of choosing the forum." (*Mauritius Commercial Bank Ltd. v. Hestia Holdings Ltd. & Sujana Universal Industries Ltd.*, Case EWHC 1328 (Comm), 2013, para. 43).

Further, the ECHR case law shows a compatibility between arbitration and Art. 6 (*Transado - Transportes Fluviais Do Sado, S.A. v. Portugal*, Application No. 35943/02, 2003). The European Court held that, in jurisdictions where this human rights convention applies, a waiver of a person's right to have his or her case heard by a court or tribunal is frequently encountered in civil matters, notably in the shape of arbitration clauses in contracts. The waiver, which has undeniable advantages for the individual concerned, as well as for the administration of justice, does not in principle offend against the ECHR (*Deweer v. Belgium*, Application No. 6903/75, 1980, § 49; *Pastore v. Italy*, Application No. 46483/99, 1999). The parties to a case are free to decide that the ordinary courts are not required to deal with certain disputes potentially arising from the performance of a contract. In accepting an arbitration

clause, the parties voluntarily waive certain rights enshrined in the ECHR (*Eiffage S.A. and Others v. Switzerland*, Application No. 1742/05, 2009; *Tabbane v. Switzerland*, Application No. 41069/12, 2016, § 27).

We conclude that asymmetry in the choice of forum should not be taken as inequality of arms in an ongoing legal proceeding (be it litigation or arbitration). What matters is that, whatever valid choice binds the parties to the dispute, the procedure abides by the ECHR standards.

5. Extension of the Arbitration Agreement in the Loan Agreement to the Security Provider

An issue that has been dealt with in international arbitration practice but has yet to be raised in the Moldovan courts is whether an arbitration agreement contained in the loan agreement between the lender and the borrower may be extended to non-signatories, i.e., the third-party security providers. The usual practice in Moldova is that third-party providers of personal or proprietary security enter into a separate security agreement with the lender. Of course, the best practice is to include in the security agreement the same arbitration agreement as that contained in the loan agreement. The fact that this best practice is so closely followed explains the absence of any case law on the matter.

We submit that, as held in French law (El Ahdab & Mainguy, 2021, p. 431), under Moldovan law an arbitration agreement contained in the loan agreement should not be extended to non-signatory security providers, even if a suretyship is an accessory personal security interest and its validity is dependent on the validity of the loan agreement. Here, the fundamental requirement of consent to arbitrate excludes such an extension. This extension can be accepted, however, when it is proven that the parties to the security agreement intended for the arbitration agreement contained in the loan agreement to act as an umbrella clause for all security documents, usually by way of some term that incorporates it into the security agreement or otherwise shows that the loan agreement is a framework agreement in relation to the security document.

Still, the fact that an extension is excluded does not deprive the award obtained by the lender against the borrower of its opposability against the security provider in terms of confirming the amount of debt owed to the lender. And, vice versa, if the security provider is allowed to raise defences against the lender based on the lender-borrower relationship, such defences should remain available even if that relationship is subject to arbitration, while the lender-security provider relationship is not.

6. Conclusion

Moldova is a Model Law jurisdiction in statute, but it still has work to do to become a fully Model Law compliant jurisdiction in practice. We trust that the efforts of the arbitration community and the local authorities in improving and clarifying the existing law will serve as an impetus to improve the application of the Model Law and its spirit by local courts.

The availability of and friendliness to arbitration ensures a legal framework favourable to international trade, and especially to international lending to the Moldovan economy. A key factor is the recognition of asymmetric dispute resolution agreements in loan agreements and in supporting security agreements. All the signs exist in case law, practice and academic writings that such asymmetric agreements must be given effect to in the Moldovan jurisdiction.

References

Băieșu, A. 2023. Clauzele arbitrale patologice: probleme și soluții. *Studia Universitatis Moldaviae*, 3(163), pp. 30-38. Available at: http://doi.org/10.59295/sum3(163)2023_04, 12. 9. 2024.

Bälz, K. & Stompfe, Ph. 2017. Asymmetrische Streitbeilegungsklauseln in internationalen Wirtschaftsverträgen: Zulässigkeit, Grenzen, Gestaltungsmöglichkeiten. *Zeitschrift für Schiedsverfahren - German Arbitration Journal*, 15(4), pp. 157-164.

Blackaby, N., Partasides, C., Redfern, A. & Hunter, M. 2023. *Redfern and Hunter on International Arbitration*. 7th ed. Oxford: OUP. https://doi.org/10.1093/law/9780192869906.001.0001

Born, G. B. 2021. *International Commercial Arbitration*. 3rd ed. Alphen aan den Rijn: Kluwer Law International.

Cazac, O. 2020. Unfair Terms under the Moldovan Civil Code. *Analele Universității din București (AUB), Seria Drept*, Anul XVIII, pp. 91-110. https://www.doi.org/10.31178/AUBD.2020.07

Cazac, O. 2023. Aspecte de drept material și procedural privind valorificarea bunului grevat de garanție reală: prețul comercial rezonabil și opoziția la vânzare. *Revista Română de Drept Privat*, 3, pp. 172-201.

Draguiev, D. 2014. Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability. *Journal of International Arbitration*, 31(1), pp. 19-45. https://doi.org/10.54648/JOIA2014002

El Ahdab, J. & Mainguy, D. 2021. *Droit de l'arbitrage: Théorie et pratique*. Paris: LexisNexis.

Florescu, C. I. 2020. Perspective practice privind clauzele arbitrale unilaterale. In: Radulescu, A. (ed.), *Rolul Curții Constituționale și al Înaltei Curți de Casație și Justiție în configurarea dreptului românesc după intrarea în vigoare a noilor coduri*, Universul Juridic, pp. 39-49.

Papadima R. 2019. Asymmetrical Arbitration Clauses: Global Overview. *Revista Română de Arbitraj*, 4, pp. 37-72.

Papadima R. 2021. The Uncertain Fate of Asymmetrical Dispute Resolution Clauses in Arbitration Around the Globe: To Be or Not To Be (Symmetrical), *Mississippi Law Journal*, 40 (3), pp. 541-631. Available at: https://mississippilawjournal.org/wp-content/uploads/2022/02/Papadima_Macro_Final_Update.pdf, 12. 9. 2024.

Racine, J.-B. 2016. *Droit de l'arbitrage*. Paris: Presses Universitaires de France (P.U.F.)

Wolff, R. (ed.). 2012. *New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958: Article-by-Article Commentary*. Munich: C.H. Beck/Hart Publishing/Nomos.

Internet Sources

EBRD & IDLO. 2021. *Assessment of Arbitration Law and Practice in Moldova. 20 October 2021*. EBRD Technical Cooperation Project: Moldova - Commercial Mediation and Arbitration (Phase IV). Available at: https://justice.gov.md/sites/default/files/document/attachments/eng_ebrd_idlo_assessment_report_clean.pdf, 12. 9. 2024.

Gutu Z. 2012. *Study II. Consolidation of the Legal Framework on Arbitration in the Republic of Moldova (Studiul II. Consolidarea cadrului legal privind arbitrajul în Republica Moldova)*, Ministry of Justice of the Republic of Moldova. Available at: https://www.undp.org/ro/moldova/publications/studii-privind-functionarea-institutiei-arbitrajului-republica-moldova, 12. 9. 2024.

Ministry of Justice. 2024. *Ministry of Justice has Kicked-Off Efforts to Improve the Legal Framework for Arbitration (Ministerul Justiției a dat start activității de îmbunătățire a cadrului normativ în materie de arbitraj*). Available at: https://www.justice.gov.md/ro/content/ministerul-justitiei-dat-start-activitatii-de-imbunatatire-cadrului-normativ-materie-de, 12. 9. 2024.

Legal Sources and Case Law

Advisory Opinion of the Moldovan Supreme Court on Enforcement Matters, 2019. The Advisory Opinion No. 106 of the Supreme Court of Justice of the Republic of Moldova regarding the grounds for refusing to issue an enforcement order for an arbitral award under paragraph (2) of Article 485 of the Civil Procedure Code of 28 June 2019 (*Opinie consultativă nr. 106 cu privire la temeiul refuzului de a elibera titlul de executare silită a hotărârii arbitrale, prevăzut de alineatul (2) din articolul 485 Cod de procedură civilă*). Available at: http://jurisprudenta.csj.md/search_rec_csj.php?id=163, 12. 9. 2024.

Case 25-10/2021. 2021. Order of the Straseni District Court, Calarasi Office of 9 December 2021 (Case 25-10/2021; 2-21045746-48-25-29032021), upheld by the Decision of the Civil, Commercial and Administrative Chamber of the Chisinau Court of Appeals of 11 July 2022 (Case 2r-315/22; 2-21045746-02-25r-24012022), 12. 9. 2024.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) of 10 June 1958. United Nations Treaty Series, vol. 330, p. 3. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22, 12. 9. 2024.

Deweer v. Belgium. 1980. Judgment of the European Court of Human Rights of 27 February 1980 (Application No. 6903/75).

Eiffage S. A. and Others v. Switzerland. 2009. Decision of the European Court of Human Rights of 15 September 2009 (Application No. 1742/05).

Explanatory Decision of the Moldovan Supreme Court on Arbitration Matters, 2015. The Decision No. 2 of the Plenum of the Supreme Court of Justice of the Republic of Moldova regarding the application by the courts of legal provisions in resolving certain issues in the examination of disputes where the parties have concluded an arbitration agreement of 30 March 2015. (*Hotărârea Plenului Curții Supreme de Justiție a Republicii Moldova cu privire la aplicarea de către instanțele de judecată a prevederilor legale la soluționarea unor chestiuni în cadrul examinării litigiilor în care părțile au încheiat convenția de arbitraj*). Buletinul Curții Supreme de Justiție a Republicii Moldova, 6, p. 4 – Available at: https://jurisprudenta.csj.md/search_hot_expl.php?id=287, 12. 9. 2024.

European Convention on Human Rights of 4 November 1950 (ECHR). European Treaty Series, No. 5. Available at: https://www.echr.coe.int/documents/convention_eng.pdf, 12. 9. 2024.

Just-Us AIR SRL and EFS European Financial Services AG vs CA AIR Moldova SRL. 2022. Decision of the Civil, Commercial and Administrative Chamber of the Moldovan Supreme Court of Justice of 28 September 2022. (Case 2r-398/2022; 2-21156372-01-2r-28072022). Available at: https://jurisprudenta.csj.md/search_col_civil.php?id=68627, 12. 9. 2024.

Mauritius Commercial Bank Ltd. v. Hestia Holdings Ltd. & Sujana Universal Industries Ltd., 2013. Judgment of the High Court of Justice, Queen's Bench Division, Commercial Court of 14 May 2013. (Case EWHC 1328 (Comm)).

Moldovan Civil Code (*Codul civil*), 2002-06-06, No. 1107 – Available at: https://www.legis.md/cautare/getResults?doc_id=112573&lang=ro, (12 September 2024).

Moldovan Law on International Commercial Arbitration (*Legea cu privire la arbitrajul comercial international*), 2008-02-22, Nr. 24 – Available at: https://www.legis.md/cautare/getResults?doc_id=110184&lang=ro, 12. 9. 2024.

Moldovan Enforcement Code (*Codul de executare al Republicii Moldova*), 2004-12-12, No. 443 - Available at: https://www.legis.md/cautare/getResults?doc_id=144723&lang=ro#, 12. 9. 2024.

OOO BelgorhimpromEnergo vs SATI Moldavskaia GRES. 2024. Decision of the Civil, Commercial and Administrative Chamber of the Moldovan Supreme Court of Justice of 23 July 2024. (Case r. 2r-570/23; 2-23058026-01-2r-13122023). Available at: https://jurisprudenta.csj.md/search_col_civil.php?id=75573, 12. 9. 2024.

Pastore v. Italy, 1999. Decision of the European Court of Human Rights of 15 December 1999 (Application No. 46483/99).

Rikipal SRL v Fruktdimcov SRL. 2019. Order to Set Aside the Arbitral Award of the Chisinau District Court, Centre Office of 27 November 2019 (Case 2-14869/20). Available at: https://jc.instante.justice.md/ro/pigd_integration/pdf/a0e7d533-27b8-45fd-8074-e74333b49fb5, 12. 9. 2024.

S. C. Pa & Co International SRL v. IS Administrația de Stat a Drumurilor. 2024. Order of the Civil, Commercial and Administrative Chamber of the Chisinau Court of Appeals of 30 April 2024. (Case 2-5/24; 2-24026129-02-2-06032024-1). Available at: https://cac.instante.justice.md/ro/pigd_integration/pdf/51e75ce7-565d-410c-b691-6d875bf31c9e, 12. 9. 2024.

Super Credit SRL vs IG. 2021. Decision of the Civil, Commercial, and Administrative Chamber of the Chisinau Court of Appeals of 16 January 2021 (Case 2r-2884/20; 2-20132150-02-2r-15122020). Available at: https://cac.instante.justice.md/ro/pigd_integration/pdf/cb907b22-dd50-4cd6-8d3e-9ad6d666334b, 12. 9. 2024.

Super Credit SRL vs IS. 2021. Decision of the Civil, Commercial, and Administrative Chamber of the Chisinau Court of Appeals of 22 April 2021 (Case 2-20114155-02-2r-09032021). Available at: https://cac.instante.justice.md/ro/pigd_integration/pdf/73580159-c57d-4dd3-ab71-35430d01bf30, 12. 9. 2024.

Super Credit SRL vs MM. 2021. Decision of the Civil, Commercial, and Administrative Chamber of the Chisinau Court of Appeals of 16 February 2021 (Case 2r-2991/20; 2-20140886-02-2r-24122020). Available at: https://cac.instante.justice.md/ro/pigd_integration/pdf/9d9adf13-86fc-47d9-a42e-5f69cc8c3478, 12. 9. 2024.

Tabbane v. Switzerland, 2016. Decision of the European Court of Human Rights of 1 March 2016 (Application No. 41069/12).

Transado - Transportes Fluviais Do Sado, S.A. v. Portugal, 2003. Decision of the European Court of Human Rights of 16 December 2003 (Application No. 35943/02).

UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006 (Model Law). United Nations General Assembly Resolution 40/72 of 11 December 1985. Available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration, 12. 9. 2024.

Nastja Merlak*
Nejc Humar**

Review Scientific Paper
UDC: 341.6(497.4)
doi: https://doi.org/10.56461/SPZ_24403KJ
Received: 4. 10. 2024.
Accepted: 13. 1. 2025.

ARBITRABILITY OF CONCESSION DISPUTES IN SLOVENIA

Summary

A fundamental question at the beginning of any arbitration is whether any public policy rules prohibit the dispute to be decided by arbitration. As arbitration became a widely accepted alternative to litigation in national courts, the scope of arbitrable disputes was expanded to allow for a wide range of disputes to be resolved through arbitration. The authority to restrict arbitrability lies with the legislator, which generally does so only in cases where it is warranted by serious public policy concerns. The Slovenian Arbitration Act is a modern act that provides for a wide concept of arbitrability. When the Slovenian legislator unexpectedly tried to restrict the arbitrability of concession disputes by adopting an authentic interpretation of law restricting arbitrability for concession disputes, it created significant uncertainty for the parties who have included an arbitration clause in their concession contracts or who were considering doing so. The Slovenian Constitutional Court confirmed that the authentic interpretation of law cannot be used to give binding interpretations on how to rule in specific cases because it would undermine the core principle of the separation of powers and independence of judges. While it has now been settled that the authentic interpretation should not be applied, it nevertheless remains a skeleton in the legislator's closet since the legislator had not expressly invalidated or retracted the authentic interpretation.

Keywords: arbitrability, concession contracts, authentic interpretation, arbitration.

* LL.M, Partner at Jadek & Pensa Law Office, Ljubljana Slovenia.
E-mail: *nastja.merlak@jadek-pensa.si*
ORCID: *https://orcid.org/0009-0006-1076-7848*

** Master of Laws (LL.M.), Associate at Jadek & Pensa Law Office, Ljubljana Slovenia.
E-mail: *nejc.humar@jadek-pensa.si*
ORCID: *https://orcid.org/0009-0002-8381-0836*

ARBITRABILNOST KONCESIONIH SPOROVA U SLOVENIJI

Sažetak

Osnovno pitanje na početku svakog arbitražnog postupka je to da li pravila javne politike onemogućavaju rešavanje spora putem arbitraže. Budući da je arbitraža postala široko prihvaćena alternativa parnicama u nacionalnim sudovima, krug arbitražnih je sporova proširen, što je omogućilo širok dijapazon sporova koji se rešavaju putem arbitraže. Ovlašćenje ograničavanje arbitrabilnosti leži na zakonodavcu, koji obično to čini samo u slučajevima kada je to opravdano razlozima javne politike. Slovenački Zakon o arbitraži predstavlja moderan propis koji predviđa široko definisan koncept arbitrabilnosti. Kada je slovenački zakonodavac, usvajanjem autentičnog tumačenja zakona, neočekivano pokušao da ograniči arbitrabilnost koncesionih sporova, javila se neizvesnost za stranke koje su prethodno u ugovorima o koncesiji ugovarale arbitražne klauzule. Slovenački Ustavni sud potvrdio je da autentično tumačenje zakona ne može da se primenjuje kao obavezujuće u presuđivanju u konkretnim slučajevima, jer bi to potkopalo osnovni princip podele vlasti i sudske nezavisnosti. Premda se stalo na stanovište da autentično tumačenje ne treba primenjivati, ono ipak još uvek postoji, imajući u vidu da ga zakonodavac nije izričito poništio ili povukao.

Ključne reči: arbitrabilnost, ugovori o koncesiji, autentično tumačenje, arbitraža.

1. Introduction

Arbitration has emerged as a widely accepted alternative to traditional court litigation, offering parties a more flexible, efficient, and private means of resolving disputes. Over the years, the scope of arbitrable disputes has expanded significantly, encompassing even complex matters with strong public policy implications. One such area of growing importance is the arbitrability of concession disputes. These disputes, by their very nature, straddle the realms of both private and public law, raising intricate legal and policy questions about whether they should be subject to arbitration or remain within the exclusive domain of national courts.

Concessions, as a key tool for achieving public interest objectives such as the provision of public services and infrastructure, are inherently complex legal arrangements. Given the interplay of public and private law elements in concession

agreements, the regulation of these relationships is stringent. However, such regulation does not necessarily justify an exclusion of arbitration as a dispute resolution mechanism. In fact, arbitration is often well-suited for concession disputes, particularly when international parties are involved, as it offers a perceived neutrality that national courts may lack.

In Slovenia, this issue came to the forefront when the legislator unexpectedly sought to restrict the arbitrability of concession disputes through the Authentic Interpretation of the Services of General Economic Interest Act. This move has introduced significant uncertainty for the parties who had included arbitration clauses in their concession contracts, and for those considering arbitration as a dispute resolution mechanism. At the heart of this debate is a tension between promoting arbitration's benefits – such as expertise, expediency, and neutrality – and safeguarding public policy concerns, particularly in relation to the efficient and transparent use of public resources.

This paper explores the legal landscape surrounding the arbitrability of concession disputes, examining both the domestic legislative framework in Slovenia and comparative approaches from other jurisdictions. It also delves into the ramifications of the Slovenian legislator's actions, in particular the controversial adoption of an authentic interpretation, and how the Slovenian courts, including the Supreme Court and the Constitutional Court, have responded. Ultimately, the paper aims to clarify the current state of the arbitrability of concession disputes in Slovenia and suggest pathways for greater legal certainty in this area.

2. Introduction to Arbitration in Slovenia

The dispute resolution landscape in Slovenia, whether domestic or international, remains largely dominated by litigation and court-annexed mediation. Most domestic parties tend to favour litigation, possibly due to greater familiarity or confidence in it, or a lack of experience with arbitration. However, arbitration is becoming more popular, driven by an increase in foreign investment and Slovenia's growing involvement in international trade. This trend indicates a shift towards arbitral resolution as domestic entities become more integrated into global markets.

In Slovenia, international arbitration cases are predominantly referred to the Ljubljana Arbitration Centre (LAC). Modern arbitration rules, flexibility, the efficient resolution of disputes, and an ambition to be a regional leader (Djinović & Galič, 2017, p. 5) make the Ljubljana Arbitration Centre an attractive place to turn to. It is not uncommon, however, that international disputes involving one or more parties from Slovenia are also referred to chambers outside Slovenia, particularly

the Vienna International Arbitral Centre (VIAC) or the International Chamber of Commerce (ICC).

If the seat of arbitration is in Slovenia, the arbitration proceedings will be governed by the Slovenian Arbitration Act, which is largely based on the UNCITRAL Model Law on International Commercial Arbitration, while also incorporating elements of its 2006 version (Djinović & Galič, 2017, p. 4). In addition to transposing the Model Law into Slovenian legislation with only a few minor deviations, the Slovenian Arbitration Act prescribes specific rules on consumer and employment arbitration disputes (Arts. 44-49, Slovenian Arbitration Act).

The Slovenian Arbitration Act is generally considered a modern law and it has not undergone any revisions since its adoption in 2008 (National Assembly of the Republic of Slovenia, 2024a). There is no pending legislation that would impact the arbitration landscape in Slovenia (National Assembly of the Republic of Slovenia, 2024b), as the consensus appears to be that any new developments in international arbitration practice should be reflected in the rules of the local arbitral institutions rather than in the amendment of the law, reinforcing Slovenia as an arbitration-friendly jurisdiction (Stalna arbitraža pri GZS, 2015, p. 91).

Despite the evolving landscape, arbitration in Slovenia still faces challenges, including the attempt to limit the arbitrability of concession disputes by the Slovenian legislator, strict formal requirements for the validity of arbitration agreements, and a lack of transparency, particularly since the LAC stopped publishing anonymised awards in November 2017. In taking one step at a time, this paper focuses on the first, examining the legal framework that determines which disputes can be arbitrated. Understanding this is key for understanding how arbitration can further develop in Slovenia, and for addressing the ongoing legal and policy challenges.

3. Limits to Arbitrability

Arbitrability is the capacity to settle a dispute by arbitration in respect of which the parties may conclude an arbitration agreement (Ude, 2004, p. 65). Arbitrability involves broader considerations of whether the matter is sensitive in the context of public policy and mandatory rules, making private adjudication not permissible (Gélinas & Bahmany, 2023, pp. 6-7).

The legal doctrine typically distinguishes between subjective arbitrability (*ratione personae*, *i.e.,* a party's ability to be bound by an arbitration agreement), objective arbitrability (*ratione materiae*, *i.e.,* matters that can be settled by arbitration) and jurisdictional arbitrability (*ratione iurisdictionis*, *i.e.,* the (non-)exclusive

jurisdiction of the national courts) (Van Zelst & Masumy, 2024, p. 348; Ude, 2004, p. 73; Djinović & Rižnik, 2018, p. 60; Peralas Viscasillas, 2009, p. 273). This paper focuses on objective and jurisdictional arbitrability as they are relevant in the Slovenian case law landscape.

While arbitrability is referenced in the New York Convention[1] and the UNCITRAL Model Law,[2] the scope of arbitrability is not set out at the international level (Mistelis, 2009, p. 3), and it is ultimately determined under each national law (see, e.g., Art. 4, Slovenian Arbitration Act; Article 1030(1), German Code of Civil Procedure; Article 2059, French Code Civil).

As regards objective arbitrability, a dispute is only arbitrable if no public policy rules bar arbitration of its subject matter (Gélinas & Bahmany, 2023, p. 5). Restrictions on arbitrability are often motivated by the concept that submitting certain disputes to non-state-controlled dispute resolution systems undermines sovereignty (Mistelis, 2009, p. 6). These restrictions vary by state, depending on their political, social, and economic priorities and their general attitude towards arbitration (Mistelis, 2009, p. 10). For example, criminal offences are typically non-arbitrable due to their sensitive public policy implications, and are reserved exclusively for the judicial authority of state courts (Mistelis, 2009, p. 4).

In Slovenia, arbitrability is broadly defined, covering claims with economic interest (pecuniary claims) and other claims where parties can validly conclude a settlement (Ude, 2004, p. 67). Consequently, only a limited number of disputes are non-arbitrable, namely disputes that fall under the competence of administrative authorities (e.g. competition law matters governed by the Competition Protection Agency), family law matters (e.g. matrimonial disputes, challenges regarding paternity, and child support), personal status, housing disputes, and decisions with *erga omnes* effect (e.g. the validity of patents, trademarks and other registered intellectual property rights, insolvency, and court register matters) (Ude, 2004, pp. 67-69; Ude & Damjan, 2015, pp. 265-284).

Conversely, consumer disputes and employment disputes, specifically if they are foreseen in the collective bargaining agreement, are arbitrable, with certain specifics[3] on the validity of the arbitration agreement (Ude, 2004, p. 70). Likewise, claims arising from insolvency (e.g. the right to separate satisfaction and right to exclusion), stock exchange disputes, and corporate disputes are arbitrable (Ude, 2004, pp. 70-71; Ude & Damjan, 2015, pp. 265-284).

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

[2] UNCITRAL Model Law on International Commercial Arbitration with amendments, as adopted in 2006.

[3] Art. 45(1) of the Slovenian Arbitration Act: "An arbitration agreement between a company and a consumer can only be concluded in respect of disputes that have already arisen."

As regards jurisdictional arbitrability, states may limit arbitrability by setting the exclusive jurisdiction of courts for specific disputes (Ude, 2004, p. 73). This used to be applicable in Slovenia with the previous iteration of Slovenian Civil Procedure Act of 1977, which explicitly limited arbitrability of matters in the exclusive jurisdiction of courts (Djinović & Rižnik, 2018, p. 67; Ude & Damjan, 2015, p. 279). However, this changed with the adoption of Slovenian Civil Procedure Act in 1999, which did not adopt a similar provision.

4. Arbitrability in the Context of Concession Contracts

Concessions are the state's primary source for the financing of public interest objectives, e.g. the provision of public services, the construction and maintenance of public infrastructure, or the use and management of public goods (Mužina, 2004, p. 39). A concession relationship combines the elements of private and public law (Mužina, 2004, p. 31). The concession is awarded by the grantor, acting in its capacity as a public authority, and the concessionaire accepts the concession with the objective of pursuing its own commercial interests (Mužina, 2004, p. 31).

Given that the concession relationship includes elements of a public law relationship, it is subject to stricter regulation compared to purely private law relationships (Štemberger, 2023, p. 200). This is justified primarily to ensure that public funds invested by the grantor in the performance of the concession contract are utilised efficiently, transparently, and in accordance with public interest (Štemberger, 2023, p. 199).

The stricter regulation of concession relations, however, does not justify the exclusion of the possibility of arbitration for concession disputes (provided that the relationship is *iure gestionis*) (Štemberger, 2023, p. 352). Arbitration is well-suited for concession disputes due to several factors, primarily the high level of expertise of the arbitral tribunal and the expediency of arbitral decisions (Štemberger, 2023, p. 350). The concessionaire is obliged to carry out the activities in a continuous and uninterrupted manner, meaning that a protracted dispute could impose a significant burden on both the grantor and the concessionaire (Lahne, 2014, pp. 37-38). Arbitration in concession disputes will be even more appropriate in cases where the concessionaire is a foreign party, as arbitration gives the concessionaire a greater sense of neutrality, compared to proceedings before domestic courts in the grantor's home country (Štemberger, 2023, p. 350).

In analogous relationships to concession contracts, namely concession partnerships, the Slovenian legislator has expressly provided the option for settlement by arbitration maintaining that parties should have autonomy regarding the question

of jurisdiction, and that for *iure gestionis* relationships, settlement by arbitration may even be more advisable (Government of the Republic of Slovenia, 2006).

In light of the aforementioned, it is difficult to justify non-arbitrability of concession disputes arising from *iure gestionis* concession relationships.

5. Arbitrability of Concession Disputes in Other Jurisdictions

It is important to consider how other jurisdictions approach the non-arbitrability of concession disputes. The jurisdictions that the Slovenian legislator relied on for comparison purposes when adopting the Slovenian Arbitration Act[4] and certain public procurement legislation (e.g. Government of the Republic of Slovenia, 2008), namely Austria and Germany, do not exhibit a distinct aversion to the arbitrability of concession disputes (Heider & Fremuth-Wolf, 2016, p. 27; Gélinas & Bahmany, 2023, Chapter 4).

In Bulgaria, the legislator has introduced limitations on arbitrability to protect public interests (Dozhdev, 2020, pp. 309-311). Initially, Article 154(2) of the Bulgarian Concession Act required that disputes related to concession contracts be decided by the courts, which can lead to ambiguities (Baykushev & Zahariev, 2019, p. 123). The law was later amended to clarify that disputes without cross-border interests must be decided by the courts, while disputes with cross-border interests[5] could be resolved by arbitration (Baykushev & Zahariev, 2019, p. 123).

This distinction seems unjustified by public policy arguments or enhanced control over the allocation of public resources, as non-arbitrability would logically apply more to cross-border interests and not vice versa (Baykushev & Zahariev, 2019, p. 124). Instead, the motive appears to have been granting contractors assurance that their potential disputes with the state would be resolved by an independent tribunal, outside the influence of the Bulgarian state (Baykushev & Zahariev, 2019, pp. 124-125).

Another perspective can be found in Russia, with a traditional background of a wide scope of non-arbitrability, particularly for disputes involving public interest (Samoylov, 2016). According to Article 17 of the Russian Federal Law on Concession Agreements, disputes arising out of concession contracts may be settled by arbitration tribunals of the Russian Federation (Samoylov, 2016).

---

[4] Official Gazette of the Republic of Slovenia, no. 45/08, as amended.

[5] According to Article 11(1) of the Bulgarian Concession Act, these are construction works concessions and service concessions value of which is higher than the value determined in regulation of the European Commission adopted pursuant to Article 9 of the Directive 2014/23/EU.

In *Nevskaya v St. Petersburg*, Nevskaya Concession Company Ltd., as the concessionaire, and the Government of St. Petersburg, as the grantor, concluded a concession contract for the construction of the Orlovsky tunnel (Russian Court of Cassation, case no. A56-9227/2015, 2016). The concession contract contained an arbitration clause providing for an *ad hoc* arbitration under the UNCITRAL Arbitration Rules, with the place of arbitration set in Moscow, and the ICC as the appointing authority (Boulatov, 2020, p. 788). When a dispute arose, it was resolved by an arbitration award (Boulatov, 2020, p. 788). However, during the enforcement, the grantor argued that the arbitral proceedings did not meet the narrow definition of "Russian arbitration tribunals" (Boulatov, 2020, p. 788). The Arbitrazh Court of St Petersburg ruled that the arbitral tribunal did not qualify as a Russian arbitration tribunal since ICC was agreed as the appointing authority (Russian Court of Cassation, case no. A56-9227/2015, 2016). Consequently, the arbitration agreement was deemed null and void, and enforcement of the award was denied (Russian Court of Cassation, case no. A56-9227/2015, 2016).

In a subsequent decision by the Federal Commercial Court of the Moscow District,[6] it was ruled that a dispute arising from a concession agreement is a dispute between private parties and does not affect public interests (Dozhdev, 2020, pp. 309-311).

Finally, attention should be given to Chinese legislation, where concession contracts can be classified as administrative contracts, and thus, non-arbitrable (Yifei, 2018, pp. 222-223).[7] In *Banwan Highway Company v Bazhong Government*, the Beijing Second Intermediate People's Court addressed whether a concession contract was an administrative contract or a civil and commercial contract (Yifei, 2018, pp. 222-223). The court held that since the concession contract contained provisions indicating that the parties entered the contract on an equal basis, the contract was of a commercial nature, and thus that the arbitration clause was valid (Yifei, 2018, pp. 222-223).

In comparison, the non-arbitrability of concession disputes appears largely unjustified from a public policy standpoint, and is rarely encountered without a clear, consistent rationale or unified approach across jurisdictions.

6. Arbitrability of Concession Disputes in Slovenia

Article 40 of the Services of General Economic Interest Act states that:

"If a dispute arises between a grantor and a concessionaire during the execution of a concession contract, the regular court shall decide on the dispute."[8]

[6] Federal Commercial Court of the Moscow District, case no. A40-93716/2017, dated 3 May 2018.

[7] According to Article 3(2) of the Chinese Arbitration Law, administrative agreements are not arbitrable. See: Yifei, 2018, pp. 222-223.

[8] Author's translation.

The wording only relates to court jurisdiction in matters concerning concession contracts but is not expressly concerned with the arbitrability of concession disputes.

On 13 July 2011, the Slovenian legislator[9] adopted the Authentic Interpretation of Article 40 of the Services of General Economic Interest Act, which states that: "Article 40 of the Services of General Economic Interest Act is to be interpreted so that the dispute resolution between a grantor and a concessionaire in connection with the execution of a concession contract fall under the exclusive jurisdiction of the courts." (Authentic Interpretation of Services of General Economic Interest Act).[10]

The Slovenian legislator chose one of the possible interpretations of Article 40 of the Services of General Economic Interest Act by using the authentic interpretation of an existing law. While several circumstances led the Slovenian legislator to settle on this interpretation, which will be explored in this paper, it is widely accepted in both legal doctrine and judicature that the Authentic Interpretation of the Services of General Economic Interest Act is both misguided and inherently inappropriate.

6.1. Authentic Interpretation

The authentic interpretation of the law is a mandatory source of law to be followed by the legislator and other public authorities, with the purpose of ascertaining the true meaning or purpose or to clarify an ambiguous statutory provision (Zagorc, 2012, pp. 273-274). It has remained in force in Slovenia as authoritative interpretation primarily for historic reasons (Slovenian Constitutional Court, case no. U-I-462/18-45, 2021, para. 26; Zagorc, 2012, p. 273).

An authentic interpretation enters into force on the date of its adoption, but is applicable from the date of entry into force of the underlying provision of law (Nerad, 2011). This means that the authentic interpretation has retroactive effect (*ex tunc*),[11] except for adjudicated cases that are already final and binding (Galič, 2011, p. 11).

Problems arise when an authentic interpretation of a law does not merely clarify the law but instead changes, amends or supplements it. In such cases, the constitutionality of the procedure for adopting what is effectively an amendment to an existing law comes into question (Nerad, 2011). The Slovenian Constitutional

[9] I.e., the National Assembly of the Republic of Slovenia.

[10] Translation by the author.

[11] Slovenian Constitutional Court, case no. U-I-192/16, decision dated 7 February 2018, para. 14; Slovenian Constitutional Court, case no. U-I-51/06, decision dated 15 June 2006; Slovenian Constitutional Court, case no. I-I-103/11, decision dated 8 December 2011; see also Pavčnik, 2011, pp. 207-208.

Court has often addressed the distinction between interpreting an existing law and introducing a new meaning or supplement through authentic interpretation, frequently annulling the latter.[12]

More importantly for the purposes of this paper, the constitutional validity of authentic interpretation is also in question, as the legislator, by interpreting the law, assumes powers that inherently belong to the courts and the judicial branch under the principle of separation of powers (Nerad, 2011).

6.2. Reasons for the Adoption of the Authentic Interpretation

The purpose of the Authentic Interpretation of the Services of General Economic Interest Act was to clarify the non-arbitrability of disputes arising from concession contracts (Note General Editor Slovenia, 2019, pp. i-ii; Galič, 2011, p. 11). In the discussion leading to its adoption, the sponsor[13] of the authentic interpretation, the parliament's working group,[14] and the Slovenian legislator (together referred to as the drafters of the authentic interpretation) concluded that arbitration offers a lower level of legal certainty for public entities for the following reasons: (i) arbitrators are chosen privately; (ii) there is no appellate procedure; (iii) corruption is more prevalent, whereas resolving disputes before regular courts offers an additional judicial overview of public spending; and (iv) arbitration offers a less diligent evidentiary procedure.[15]

Although the drafters of the authentic interpretation acknowledged that the prevailing legal doctrine supported the interpretation of Article 40 of the Services of General Economic Interest Act considering concession disputes arbitrable (Bogovič,

[12] Slovenian Constitutional Court, case no. U-I-51/06 decision dated 15 June 2006; Slovenian Constitutional Court, case no. U-I-64/08, decision dated 6 November 2008; Slovenian Constitutional Court, case no. U-I-103/11, decision dated 8 December 2011.

[13] The sponsor of the authentic interpretation consisted of three members of the Slovenian People's Party, Mr. Bogovič, Mr. Žerjav and Mr. Kres (see: Bogovič, Žerjav & Kres, 2011).

[14] The Committee on Environment and Spatial Planning of the National Assembly of the Republic of Slovenia acted as the working group for the Authentic Interpretation of the Services of General Economic Interest Act during its 31st session on 23 June 2011 (see: the Committee on Environment and Spatial Planning, 2011).

[15] There were also further uninformed opinions, such as (i) the claim that the LAC influences the legal doctrine due to its vested interest in ensuring arbitrability, allowing it to adjudicate such disputes; (ii) the belief that anyone, not necessarily a judge, can serve as an arbitrator, raising concerns about whether the arbitrator would possess the necessary expertise for the procedure; and (iii) the concern that the list of arbitrators might include individuals who were involved in signing the concession contract (see: National Assembly of the Republic of Slovenia, 2011; Bogovič, Žerjav & Kres, 2011; Plauštajner, 2011, p. 16).

Žerjav & Kres, 2011), they disregarded this perspective, and even misquoted the sole legal opinion that they relied on and cited[16] (Government of the Republic of Slovenia, 2011). Furthermore, the drafters of the authentic interpretation ignored the opinion of the Government of the Republic of Slovenia, which explained that during the drafting of Article 40 of the Services of General Economic Interest Act, two options were considered: either (i) disputes could be decided by administrative courts; or (ii) disputes could be decided by regular courts; with the latter option ultimately chosen (Government of the Republic of Slovenia, 2011). This choice indicated that exclusive jurisdiction (and by extension non-arbitrability) was not a consideration in the drafting of Article 40 of the Services of General Economic Interest Act.

However, the discussion by the drafters of the authentic interpretation also exposed their true motives for pursuing the authentic interpretation. Their decisions were driven by negative experiences with arbitration, particularly stemming from a case involving the Municipality of Laško when the dispute was resolved against the municipality and in favour of the concessionaire (National Council of the Republic of Slovenia, 2011; Galič, 2011, p. 11; Plauštajner, 2011, p. 16).

On 19 October 2001, the Municipality of Laško and two concessionaires signed a concession contract for the construction of a sewage system with treatment facilities, and for the operation of a public wastewater disposal and treatment utility service (Committee on Environment and Spatial Planning, 2011; Ljubljana Higher Court, case no. I Cpg 1748/2014, decision dated 11 March 2015). The concessionaires connected the town in question to the sewage treatment plant, but did not complete the sewage system (Ljubljana Higher Court, case no. I Cpg 1748/2014, decision dated 11 March 2015). Nevertheless, the concessionaires charged the Municipality of Laško for the entire project under the concession contract (Ljubljana Higher Court, case no. I Cpg 1748/2014, decision dated 11 March 2015). The contract included a dispute resolution clause for disputes to be settled by arbitration (Ljubljana Higher Court, case no. I Cpg 1748/2014, decision dated 11 March 2015). The dispute was decided by an arbitral tribunal under the auspices of the LAC in favour of the concessionaires (Committee on Environment and Spatial Planning, 2011). This decision appears to have swayed the Slovenian legislator to adopt the authentic interpretation despite the

[16] The drafters of the authentic interpretation relied on Dr. Konrad Plauštajner's quote "In view of the purpose and content of the Services of General Economic Interest Act, it could be argued that the provision of Article 40 of the Services of General Economic Interest Act is of mandatory nature," and that Dr. Plauštajner went on to write that such disputes should be decided by courts. However, this was a misquote because Dr. Plauštajner clarified that it is not in the public interest that disputes arising from concession contracts be decided only by regular courts, especially because of the complexities of such disputes, as they would carry on forever (see Plauštajner, 2003, p. 1619; Plauštajner, 2011, pp. 16-18).

prevailing opinion of the legal doctrine, a well-reasoned opinion of the Government of Slovenia against it, and even the opinion of the Legislative and Legal Service[17] (National Assembly of the Republic of Slovenia, 2011).

6.3. Development of the Question of the Arbitrability of Concession Disputes in Slovenian Case Law

Interestingly, the very arbitration award that persuaded the legislator to adopt the authentic interpretation later kickstarted the court saga, in which the Supreme Court confirmed that the courts were not bound by the legislator's interpretation of the law, thus rendering the authentic interpretation inapplicable.

The question of the arbitrability of concession disputes in Slovenia first arose before the Celje District Court (Celje Disctrict Court, case no. Pg 321/2008, decision dated 22 January 2009), where the court dismissed a claim and annulled an enforcement order against the Municipality of Laško following the municipality's objection based on the arbitration clause (LAC, case no. SA 5.6-X/2014, decision on jurisdiction dated 12 August 2014). In response, the claimants initiated arbitration under the auspices of the LAC (LAC, case no. SA 5.6-X/2014, decision on jurisdiction dated 12 August 2014*)*. The arbitral tribunal issued a decision on jurisdiction (LAC, case no. SA 5.6.-2/2009, decision dated 25 March 2010), finding that it has jurisdiction to decide in the matter, despite objections emanating from Article 40 of the Services of General Economic Interest Act (LAC, case no. SA 5.6-X/2014, decision on jurisdiction dated 12 August 2014), and subsequently issued an award (LAC, case no. SA 5.6.-2/2009, decision dated 11 March 2011).

Following arbitration, the Slovenian legislator, siding with the Municipality of Laško, adopted the Authentic Interpretation of the Services of General Economic Interest Act. The Municipality of Laško, however, did not voluntarily fulfill its obligations under the award, prompting the claimants to seek enforcement, which was granted. The Municipality of Laško appealed this decision.

The case reached the Slovenian Supreme Court twice. In the first instance, the question was whether both the parties had received a fair hearing.[18]

[17] The Legislative and Legal Service, a body that assists the Slovenian legislator in drafting and amending legislative acts, argued that the Authentic Interpretation of the Services of General Economic Interest Act was unnecessary. It maintained that the provision in question was clear, and that its content, as proposed in the authentic interpretation, could be adequately determined through linguistic and teleological interpretation (see: Legislative and Legal Service, 2011).

[18] The court of first instance served the respondent the claimant's written pleading (i.e., chronologically the second submission in the proceedings) together with its final decision in the matter. Consequently, the respondent did not have the opportunity to respond to the written pleading, and thus did not have the opportunity to be heard on the substantive submissions of the

In the second appeal, the key issue was the applicability of Article 40 of the Services of General Economic Interest Act (Slovenian Supreme Court, case no. Cpg 2/2014, decision dated 17 June 2014). The Slovenian Supreme Court ruled that the authentic interpretation, by its nature, is only an interpretative act of the Slovenian legislator, not a law, and therefore not binding on the courts, which are bound only by the constitution and laws (Slovenian Supreme Court, case no. Cpg 2/2014, decision dated 17 June 2014; Galič, 2011, p. 11). The Slovenian Supreme Court further affirmed that Article 40 of the Services of General Economic Interest Act did not exclude the possibility of arbitration for concession disputes because even at its inception, the provision in question did not indicate exclusive jurisdiction for regular courts, nor did it expressly exclude arbitration.[19] Additionally, the Slovenian Supreme Court rejected the argument that the award violated public policy (Slovenian Supreme Court, case no. Cpg 2/2014, decision dated 17 June 2014).

The saga with the Municipality of Laško continued before the Ljubljana District Court and the Ljubljana Higher Court, where the municipality sought to set aside the award. Both courts upheld the arbitration award, reaffirming that concession disputes are arbitrable in Slovenia (Ljubljana Higher Court, case no. I Cpg 1748/2014, decision dated 11 March 2015). The Ljubljana Higher Court also reviewed and confirmed the procedure and concluded that due process was respected, and the arbitral tribunal conducted an adequate evidentiary procedure (Ljubljana Higher Court, case no. I Cpg 1748/2014, decision dated 11 March 2015), addressing even the unsubstantiated concerns of the drafters of the Authentic Interpretation of the Services of General Economic Interest Act.

In each case, the courts emphasised that whilst the Authentic Interpretation of the Services of General Economic Interest Act exists, the courts are not bound by it, thus clearly establishing that concession disputes are arbitrable in Slovenia.

In a subsequent arbitration case under the auspices of the LAC concerning a dispute arising from a concession contract for payment for wastewater treatment services, the arbitral tribunal confirmed its jurisdiction stating that Article 40 of the Services of General Economic Interest Act did not impede the jurisdiction of arbitral tribunals, despite the Authentic interpretation of the Services of General Economic Interest Act (LAC, case no. SA 5.6-X/2014, decision dated 12 August 2014).

claimant. In such circumstances, the Slovenian Supreme Court granted the respondent's appeal, annulled the decision, and referred the case back to the court of first instance. See Slovenian Supreme Court, case no. Cpg 2/2012, decision dated 17 July 2012.

[19] With only the latter being determining due to the provision of the Slovenian Civil Procedure Act (*Official Gazette of the Republic of Slovenia*, no. 26/99, as amended), which did not adopt the same provisions of the Slovenian Civil Procedure Act of 1977, *Official Gazette of the Socialist Federal Republic of Yugoslavia*, no. 4/77, as amended, differentiating arbitrability of disputes with an international element and those without it, limiting arbitrability to subject-matters without exclusive jurisdiction of courts. See: Slovenian Supreme Court, case no. Cpg 2/2014, decision dated 17 June 2014; Galič, 2011, p. 12.

6.4. Recent Decision of the Slovenian Constitutional Court on Authentic Interpretations and its Effect on the Arbitrability of Concession Disputes

A significant constitutional development regarding the applicability of the authentic interpretation occurred in 2021. Historically, the Slovenian Constitutional Court had held that an authentic interpretation, regardless of its later adoption, is an integral part of regulations from the time it comes into force (Slovenian Constitutional Court, case no. U-I-361/96, decision dated 21 October 1999). This approach was applied mainly in cases involving authentic interpretations by local municipalities (Slovenian Constitutional Court, case no. U-I-201/02, decision dated 17 December 2003), and had been affirmed for authentic interpretations by the Slovenian legislator as well (Slovenian Constitutional Court, case no. U-I-361/96, decision dated 21 October 1999; Slovenian Constitutional Court, case no. U-I-192/16, decision dated 7 February 2018).

The matter before the Slovenian Constitutional Court concerned the constitutionality of certain provisions of the Criminal Procedure Act,[20] where the judges reviewed the reasoning in the above decision by the Slovenian Supreme Court (Slovenian Constitutional Court, case no. U-I-462/18-45, decision dated 3 June 2021, para. 24).

The Slovenian Constitutional Court noted that the Slovenian Supreme Court had not adhered to previous constitutional judicial review but nevertheless reaffirmed the conclusion that the courts were bound only by the constitution and the laws (Slovenian Constitutional Court, case no. U-I-462/18-45, decision dated 3 June 2021, para. 33). Any further authoritative involvement of the Slovenian legislator in specific cases would violate the principle of the independence of judges and the principle of separation of powers (Slovenian Constitutional Court, case no. U-I-462/18-45, decision dated 3 June 2021, paras. 34-39).

The result of the judgment was that the Slovenian Constitutional Court annulled the provisions of the Rules of Procedure of the Slovenian legislator[21] regulating the adoption of authentic interpretations of laws by the Slovenian legislator, and in the same breath, annulling the authentic interpretations of certain articles of the Criminal Procedure Act because they had been adopted through unconstitutional methods (Slovenian Constitutional Court, case no. U-I-462/18-45, decision dated 3 June 2021, para. 43). In the aftermath of this decision, the Slovenian legislator amended the Rules of Procedure of the Slovenian legislator removing the annulled provisions.[22]

[20] *Official Gazette of the Republic of Slovenia*, no. 63/94, as amended.

[21] *Official Gazette of the Republic of Slovenia*, no. 35/02 as amended.

[22] *Official Gazette of the Republic of Slovenia*, no. 58/2023.

While this ruling was the final nail in the coffin for authentic interpretations, the constitutional overview of the Slovenian Constitutional Court was limited only to specific provisions of the Criminal Procedure Act, and did not extend to the constitutionality of the Authentic Interpretation of the Services of General Economic Interest Act, despite addressing arguments by the Slovenian Supreme Court in a related matter. Thus, the Authentic Interpretation of the Services of General Economic Interest Act remains formally valid (Djinović & Galič, 2023).

Some scholars consider the mere existence of the Authentic Interpretation of the Services of General Economic Interest Act a danger to viability of arbitration in Slovenia (Djinović & Galič, 2023; Plauštajner, 2011, p. 16). In an otherwise arbitration-friendly jurisdiction,[23] the Authentic Interpretation of the Services of General Economic Interest Act is the only regulation providing the contrary (Lahne, 2014, p. 36). The importance of comfort and legal certainty in arbitration is instrumental for international investment, business and commerce (Blackaby, Partasides & Redfern, 2023, para. 1.12; Mills, 2014, p. 445; Humar, 2020, p. 10). Consequently, there are calls for the Slovenian legislator to issue a formal document indicating that the Authentic Interpretation of the Services of General Economic Interest Act is null (Djinović & Galič, 2023).

7. Conclusion – Next Steps

Regulations can become obsolete even without a formal repeal, when the circumstances or relationships they were meant to govern change significantly (Služba Vlade Republike Slovenije za zakonodajo, 2018, pp. 123-124). In this sense, the Authentic Interpretation of the Services of General Economic Interest Act, while not expressly repealed by the Slovenian legislator, may already be considered obsolete.

Exhibiting the country's legal system as arbitration friendly is a consideration that has far-reaching effects on international investment, business, and commerce. However, the impact of retaining an obsolete regulation can be significant, particularly in terms of Slovenia being perceived as an arbitration-friendly country. If such a regulation, even one that is on the path to obsolescence, affects this perception, it cannot be considered without substantive impact. In weighing the gradual decay of a regulation against the risks posed by a potentially harmful yet ineffective provision, it would be prudent for the Slovenian legislator to formally terminate the validity of the Authentic Interpretation of the Services of General Economic Interest Act.

[23] A country that has adopted the UNITRAL Model Law is generally considered an arbitration friendly country. See: Blackaby, Partasides, & Redfern, 2023, para. 1.12; To note, as early as 1976, the Slovenian legislator was not averse to arbitration as an expression of the principle of party autonomy, and this is all the truer after the socio-economic changes in 1993. See: Galič, 2011, p. 11.

References

Baykushev, M. & Zahariev, M. 2019. Arbitrability of Construction Contracts Entered into with Public Authorities: The Bulgarian Perspective. In: Baltag C. & Vasile C. (eds.), *Construction Arbitration in Central and Eastern Europe: Contemporary Issues*. Kluwer Law International, pp. 115-130.

Binder, P. 2019. *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions*. 4th edition. Kluwer Law International.

Blackaby, N., Partasides, C & Redfern, A. 2023. *Redfern and Hunter on International Arbitration (Seventh Edition).* Kluwer Law International, Oxford University Press. https://doi.org/10.1093/law/9780192869906.001.0001

Boulatov, P. 2020. Russian Federation. In: Liebscher, C. & Fremuth-Wolf, A. A. *Arbitration Law and Practice in Central and Eastern Europe (Second Edition).* Juris Arbitration Law Library, pp. 685-982.

Djinović, M. & Rižnik, P. 2018. Arbitrability of Concession Disputes – Digest of the case law of the Ljubljana Arbitration Centre and the Slovenian Courts. *Javna uprava*. 54(1-2), pp. 55-78.

Djinović, M. & Galič, A. 2017. 90 let institucionalne arbitraže na Slovenskem Ubere preterito pro presenti. *Slovenska arbitražna praksa*, Year VI, Vol. 2-3, Gospodarska Zbornica Slovenije, Stalna Arbitraža pri Gospodsarski zbornici Slovenije, pp. 3-5.

Dozhdev, D. 2020. Judicial Control of Arbitral Awards in Russia. In: DiMatteo, L.A., Infantino, M. & Potin, N. M. P. (eds.), *The Cambridge Handbook of Judicial Control of Arbitral Awards*. Cambridge: Cambridge University Press. Cambridge Law Handbooks, pp. 306-319. https://doi.org/10.1017/9781316998250.024

Galič, A. 2011. Arbitrabilnost sporov iz koncesijske pogodbe. *Pravna praksa,* 41-42, pp. 11-13.

Gélinas, F. & Bahmany, L. 2023. *Arbitrability: Fundamentals and Major Approaches*. Kluwer Law International.

Hanotiau, B. 1999. The Law Applicable to Arbitrability. In: van den Berg, A. (ed.). *ICCA Series No. 9 (Paris 1998): Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, ICCA Congress Series*, Vol. 9. Kluwer Law International; ICCA & Kluwer Law International, pp. 146-167.

Heider, M. & Fremuth-Wolf A. A. 2016. Austria. In: Tirado, J. (ed.), *International Arbitration (Second edition).* London: Global Legal Insight, pp. 26-36.

Humar, N. 2020. *Analysis of the international law issues of third-party funding of investors in international investment arbitration*. Master's Thesis. Ljubljana: Pravna fakulteta, Univerza v Ljubljani. Available at: https://repozitorij.uni-lj.si/IzpisGradiva.php?lang=eng&id=122027, 18. 8. 2024.

Lahne, N. 2014. Razblinjen mit o 40. členu Zakona o gospodarskih javnih službah. *Slovenska arbitražna praksa,* 4, pp. 36-50.

Mills, A. 2014. The Balancing (and Unbalancing?) of Interests in International Investment Law and Arbitration. In Douglas, Z., Pauwelyn, J. & Viñuales, J. E. (eds.),

The Foundations of International Investment Law: Bringing Theory Into Practice, Oxford University Press, Oxford, pp. 436–465. https://doi.org/10.1093/acprof:oso/9780199685387.003.0015

Mistelis, L. A. 2009. Part I, Fundamental Observations and Applicable Law, Chapter 1 – Arbitrability – International and Comparative Perspectives. In: Mistelis, L. A. & Brekoulakis S. (eds.). *Arbitrability: International and Comparative Perspectives*, International Arbitration Law Library, vol. 19. Kluwer Law International, pp. 1-18.

Mužina, A. 2004. *Koncesije: Pravna ureditev koncesijskih razmerij v Sloveniji*. Primath: Ljubljana.

Note General Editor Slovenia. 2019. In: Bosman, L. (ed.). *ICCA International Handbook on Commercial Arbitration*. Kluwer Law International, ICCA & Kluwer Law International 2023. Supplement No. 105. April 2019, pp. i-ii.

Pavčnik, M. 2011. *Teorija prava, Prispevek k razumevanju prava,* 4th edition. GV Založba.

Perales Viscasillas, M. P. 2009. Part II Substantive Rules on Arbitrability, Chapter 14 - Arbitrability of (Intra-) Corporate Disputes. In: Mistelis, L. A. & Brekoulakis, S. (eds.), *Arbitrability: International and Comparative Perspectives*. International Arbitration Law Library, Vol. 19. Kluwer Law International, pp. 273-292.

Plaštajner, K. 2003. Praktični aspekti koncesijskih razmerij na področju gospodarskih javnih služb. *Podjetje in delo*, . 6, pp. 1619-1629.

Plaštajner, K. 2011. Spornost avtentične razlage zakonske določbe. *Odvetnik,* 54, pp. 16-18.

Služba Vlade Republike Slovenije za zakonodajo. 2018. *Nomotehnične smernice*. 3rd edition. Ljubljana. Available at: http://www.svz.gov.si/fileadmin/svz.gov.si/pageuploads/Dokumenti/Nomotehnicne_smer.pdf, 23. 8. 2024.

Štemberger, K. 2023. *Upravne pogodbe v slovenskem pravu*. Doctoral dissertation. Ljubljana: Pravna fakulteta, Univerza v Ljubljani. Available from: https://repozitorij.uni-lj.si/IzpisGradiva.php?lang=slv&id=144520, 8. 9. 2024.

Stalna arbitraža pri GZS. 2015. *Prenašamo dobre prakse v Skopje*, Slovenska arbitražna praksa. Vol. 2, p. 91.

Ude, L. 2004. *Arbitražno pravo*. Ljubljana: GV Založba.

Ude, L. & Damjan M. 2015. Arbitrabilnost sporov. In: Grilc, P (ed.), *Izbrani vidiki razvoja slovenskega gospodarskega in civilnega prava od srede 20. Stoletja do danes (liber amicorum Bojan Zabel)*. Ljubljana: Pravna fakulteta, Univerza v Ljubljani, pp. 265-284.

Van Zelst, B. & Masumy, N. 2024. The Concept of Arbitrability under the New York Convention: The Quest for Comprehensive Reform. *Journal of International Arbitration*. Kluwer Law International. 41(3), pp. 345-370. https://doi.org/10.54648/JOIA2024016

Yifei, L. 2018. Chapter 8: Arbitrability and Arbitral Scope. In: Yifei, L. (ed.), *Judicial Review of Arbitration: Law and Practice in China*. Kluwer Law International, pp. 197-224.

Zagorc, S. 2012. Avetntična razlaga zakona. *Zbornik znanstvenih razprav*. Ljubljana: GV Založba, pp. 273-298.

Internet Sources

Bogovič, F., Žerjav, R. & Kres, G. 2011. *Predlog za sprejem avtentične razlage*. 20 May. Parliamentary Group of the Slovenian People's Party. Available at: https://shorturl.at/HVzqP, 16. 8. 2024.

Committee on Environment and Spatial Planning of the National Assembly of the Republic of Slovenia. 2011. 31st Session. 23 June. Available at: https://shorturl.at/Idfa4, 18. 8. 2024.

Djinović, M. & Galič, A. 2023. Odprta pobuda, 29 March. Ljubljana Arbitration Centre. Available at: https://www.sloarbitration.eu/Portals/0/Prispevki/Pobuda-LAC.pdf, 16. 8. 2024.

Government of Republic of Slovenia. 2006. Proposal for Public-Private Partnership Act – first reading - EPA 1025-IV [online]. Available at: https://shorturl.at/xgL4v, 9. 9. 2024.

Government of the Republic of Slovenia. 2008. *Proposal for the adoption of Public Procurement Act* EVA 2008-2011-0002, no. 00720-2/2008/8. 14 February. Available at: https://shorturl.at/1EpLs, 10. 9. 2024.

Government of the Republic of Slovenia. 2011. Opinion no. 00741-7/2011/6. 9 June. Available at: https://shorturl.at/IWs24, 10. 9. 2024.

Legislative and Legal Service. 2011. Opinion no. 300-02/11-1/. 9 June. Available at: https://tinyurl.com/3w7dmdsp, 10. 9. 2024.

National Assembly of the Republic of Slovenia. 2011. *30th regular session.* 13 July. Available at: https://tinyurl.com/3w7dmdsp, 10. 9. 2024.

National Assembly of the Republic of Slovenia. 2024a. Adopted legislation – Slovenian Arbitration Act (Sprejeti zakoni – Zakon o arbitraži). Accessible at: https://tinyurl.com/y3vhs847, 21. 9. 2024.

National Assembly of the Republic of Slovenia. 2024b. Draft laws. Available at: https://tinyurl.com/yj6na37p, 21. 9. 2024.

National Council of the Republic of Slovenia. 2011. Opinion no. 300-02/11-0001 EPA 1850-V. 16 June. Available at: https://tinyurl.com/3w7dmdsp, 10. 9. 2024.

Nerad, S. 2011. 160. člen: Presoja ustavnosti in zakonitosti predpisov. In: Šturm, L. *et a.l* (eds.) *Komentar ustave Republike Slovenije – dopolnitev A*. E-book format. Available at https://e-kurs.si/cleni/160-clen/, 16. 8. 2024.

Samoylov, M. 2016. *Arbitrability of Disputes Arising out of a Concession Contract: The Russian Perspective*. Kluwer Arbitration Blog. Available at: https://arbitrationblog.kluwerarbitration.com/2016/08/30/arbitrability-disputes-arising-concession-contract-russian-perspective/, 24. 8. 2024.

Legal Sources

Bulgarian Concession Act. Available at: https://www.me.government.bg/en/library/concessions-act-556-c25-m258-2.html, 12. 9. 2024.

Chinese Arbitration Law. Available at: http://np.china-embassy.gov.cn/eng/78085/zchfl/200410/t20041027_1998190.html, 12. 9. 2024.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 38. Available at: https://www.newyorkconvention.org/english, 12. 9. 2024.

Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28.3.2014, p. 1–64. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32014L0023, 12. 9. 2024.

French Code Civil. Available at: https://www.legifrance.gouv.fr/, 12. 9. 2024.

German Code of Civil Procedure. Available at: https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html, 12. 9. 2024.

Rules of Procedure of the National Assembly of the Republic of Slovenia, *Official Gazette of the Republic of Slovenia*, no. 35/02, 60/04, 64/07, 105/10, 80/13, 38/17, 46/20, 105/21, 111/21, 58/23, 35/24.

Slovenian Arbitration Act. *Official Gazette of the Republic of Slovenia*, no. 45/08.

Authentic interpretation of Article 40 of the Services of General Economic Interest Act, *Official Gazette of the Republic of Slovenia*, no. 57/11.

Amendments to the Rules of Procedure of the National Assembly of the Republic of Slovenia, *Official Gazette of the Republic of Slovenia*, no. 58/23.

Slovenian Criminal Procedure Act, *Official Gazette of the Republic of Slovenia*, no. 63/94, 25/96, 39/96, 5/98, 49/98, 72/98, 6/99, 66/00, 111/01, 32/02, 44/03, 56/03, 43/04, 68/04, 101/05, 14/07, 40/07, 102/07, 21/08, 23/08, 65/08, 68/08, 89/08, 77/09, 88/09, 29/10, 58/11, 91/11, 47/13, 87/14, 8/16, 64/16, 65/16, 16/17, 59/17, 66/17, 1/19, 22/19, 48/19, 66/19, 55/20, 89/20, 191/20, 200/20, 105/21, 35/22, 96/22, 2/23, 7/23, 89/23, 53/24.

Services of General Economic Interest Act, *Official Gazette of the Republic of Slovenia*, no. 32/93, 30/98, 127/06, 38/10 and 57/11.

Slovenian Civil Procedure Act of 1977, *Official Gazette of the Socialist Federal Republic of Yugoslavia*, no. 4/77, 36/77, 6/80, 36/80, 43/82, 69/82, 58/84, 74/87, 14/88, 57/89, 83/89, 20/90, 27/90, Official Gazette of the Republic of Slovenia no. 17/91-I, 4/92, 55/92, 19/94, 19/94, 26/99.

Slovenian Civil Procedure Act, *Official Gazette of the Republic of Slovenia*, no. 26/99, 96/02, 58/03, 2/04, 2/04, 69/05, 90/05, 43/06, 52/07, 45/08, 111/08, 57/09, 12/10, 50/10, 107/10, 75/12, 40/13, 92/13, 6/14, 10/14, 48/14, 48/15, 6/17, 10/17, 32/18, 16/19, 70/19, 1/22, 3/22, 126/23, 47/24.

UNCITRAL Model Law on International Commercial Arbitration, United Nations Commission on International Trade Law, 112th Mtg, UN Doc A/40/17, Annex I (1985) with amendments as adopted in 2006.

Case Law

Celje District Court, case no. Pg 321/2008, decision dated 22 January 2009.

Federal Commercial Court of the Moscow District, case no. A40-93716/2017 dated 3 May 2018.

LAC, case no. SA 5.6.-2/2009, decision dated 11 March 2011.

LAC, case no. SA 5.6.-2/2009, decision dated 25 March 2010.

LAC, case no. SA 5.6-X/2014, decision on jurisdiction dated 12 August 2014.
Ljubljana Higher Court, case no. I Cpg 1748/2014, decision dated 11 March 2015.
Russian Court of Cassation, case no. A56-9227/2015. dated 17 February 2016.
Slovenian Constitutional Court, case no. I-I-103/11, decision dated 8 December 2011.
Slovenian Constitutional Court, case no. U-I-192/16, decision dated 7 February 2018.
Slovenian Constitutional Court, case no. U-I-201/02, decision dated 17 December 2003.
Slovenian Constitutional Court, case no. U-I-361/96, decision dated 21 October 1999.
Slovenian Constitutional Court, case no. U-I-462/18-45, decision dated 3 June 2021.
Slovenian Constitutional Court, case no. U-I-51/06, decision dated 15 June 2006.
Slovenian Constitutional Court, case no. U-I-64/08, decision dated 6 November 2008.
Slovenian Supreme Court, case no. Cpg 2/2012, decision dated 17 July 2012.
Slovenian Supreme Court, case no. Cpg 2/2014, decision dated 17 June 2014.

Jola Gjuzi*

Review Scientific Paper
UDC: 336.765(496.5)
doi: https://doi.org/10.56461/SPZ_24404KJ
Received: 16. 10. 2024.
Accepted: 13. 1. 2025.

ARBITRATION LAW AND PRACTICE IN ALBANIA: FEATURES, CHALLENGES AND PERSPECTIVES

Summary

Arbitration, as an alternative dispute resolution mechanism, has gained significant traction worldwide. This is primarily due to its consensual nature, the involvement of non-governmental adjudicators, as well as its efficiency, flexibility and confidentiality. In Albania, international arbitration remains a promising avenue for resolving commercial and investor-state disputes, especially considering the country's efforts towards a consolidated market and deeper integration into the regional and global economy. However, the arbitration landscape, particularly the domestic one, is not without challenges as Albania pursues to attain an effective rule of law. This paper provides an overview of the rules of arbitration under the Albanian domestic law, as well as the applicable international law. It then explores the current state of arbitration practice in Albania, the various perceptions among the pertinent political, business and legal communities, the challenges this practice encounters, and perspectives for its progress.

Keywords: Albania, alternative dispute resolution, arbitration, judicial intervention, enforcement of foreign arbitral awards, foreign direct investment, international investment law.

* Lecturer, University of New York Tirana (UNYT), Albania.
E-mail: *jola.gjuzi@law-school.de*
ORCID: *https://orcid.org/0009-0005-6221-5378*

ZAKON O ARBITRAŽI I ARBITRAŽNA PRAKSA U ALBANIJI: KARAKTERISTIKE, IZAZOVI I PERSPEKTIVE

Sažetak

Arbitraža je, kao alternativni mehanizam rešavanja sporova, doživela značajnu ekspanziju širom sveta. Razlog za to je prvenstveno konsensualna priroda arbitraže, učešće "nevladinih" sudija, kao i efikasnost, fleksibilnost i poverljivost arbitraže kao takve. U Albaniji, međunarodna arbitraža je i dalje obećavajući put za rešavanje trgovinskih i sporova između države i investitora, posebno ako se imaju u vidu napori zemlje na konsolidovanju tržišta i postizanju dublje integracije u regionalnoj i globalnoj ekonomiji. Međutim, i u oblasti arbitražne, i to posebno domaće, postoje određeni izazovi, imajući u vidu nastojanja Albanije da osigura efikasnu vladavinu prava. U ovom radu dat je pregled pravnog okvira za arbitražu prema albanskom domaćem zakonu, kao i prema važećem međunarodnom pravu. Nakon toga biće analizirano trenutno stanje arbitražne prakse u Albaniji, različite percepcije te prakse i izazovi koji postoje u toj oblasti, kao i perspektive za unapređenje iste.

Ključne reči: Albanija, alternativno rešavanje sporova, arbitraža, sudska intervencija, izvršenje stranih arbitražnih odluka, direktne strane investicije, međunarodno investiciono pravo.

1. Introduction

Since the fall of communism in the early 1990s, Albania has adhered to a liberal political government system, and has adopted a free market economy. The promotion of cross-border trade and foreign direct investment (FDI) have since been long-standing priorities of every Albanian government. A rather broad range of policy and legal measures taken in compliance with the international commitments have ensured an attractive market to foreign investors. Simultaneously, local businesses have been increasingly developing projects and further stimulating the country's social and economic progress. Despite some domestic and global events,[1] which have affected in one way or another the Albanian economy as well, the general development trend is positive.

[1] For example, the 1997 civil unrest in Albania, as well as the Covid-19 pandemic and the Ukraine war.

All projects involve legal transactions, implying specific rights and obligations agreed upon by the parties. These reflect a balance reached between the parties' autonomy and the legal boundaries imposed by the state in each jurisdiction.

An important aspect of such parties' autonomy is their right to select arbitration as a dispute settlement mechanism (see, Ferreres Comella, 2021, pp. 9-30). This aspect becomes almost a necessity in a country where the rule of law and the judicial system are anything but flawless, either so perceived or proven (European Commission, 2024). As opposed to the option of resolving their disputes through the state courts, the parties' use of the right to submit their disputes to arbitration is deemed mutually satisfactory. This is to the extent that arbitration is praised for its flexibility and confidentiality, the specialization of the adjudicators and their neutrality *vis-à-vis* governmental decision-makers and overall, and for an efficient and effective resolution that is binding and capable of enforcement (see, Born, 2001).

Clearly this right of using arbitration as a mechanism for solving commercial disputes cannot be without limits, for the sake of the utilitarian considerations (Ferreres Comella, 2021, pp. 9-30) (e.g., 'public interest', 'public order') and functional rules that need to be as uniform as possible beyond the borders of a single state (e.g., for purposes of enforcement and execution of arbitral awards). While national laws play a significant role in delineating and imposing such limits, the corresponding international agreements often prevail, providing their addressees the necessary assurance about the application of such ideally uniform standards.

Albania's liberal approach regarding its government system and market economy is the main guarantee for the application of arbitration as a mechanism for settling commercial and investment disputes over the transaction parties' rights and interests. An adequate legal framework is key for such a right to become effective and flourish. Section 2 of this paper examines the legal framework for arbitration. Section 3 turns to the international and domestic arbitration practices focusing on the key features, challenges and the future prospects in Albania. Section 4 provides the conclusions reached.

2. Arbitration Legal Regime in Albania: Historical Overview and Current Situation

Arbitration rules in Albania can be tracked back over many decades. Still, only after 1990, one can speak of modern arbitration rules, which were not only introduced in the Albanian legislation, but also effectively used by the contracting parties in their transactions once the disputes arose, and even interpreted by arbitral tribunals and local courts.

The institute of arbitration has existed in the Albanian context even before the fall of communism in the early 1990s. As part of the Ottoman legislation applicable in the Albanian territories, it was recognized in the civil procedure legislation before the proclamation of independence in Albania (1912). This continued until the entry into force of the new arbitration rules under the Second Annex of the Civil Procedure Law in 1929, upon the Zog regime legal system reform (see: Tafaj & Çinari, 2015, pp. 92-100; Spahiu, 2015, pp. 80-88).

During the communist regime (1945-1990), the focus was more on the so-called 'state arbitration'. This was imposed by the state in certain circumstances of property-related disputes, though the rules also covered similar disputes between private parties.[2] Overall, the stipulated mechanism could not properly qualify as arbitration in its classical meaning, but rather as a special state adjudication system that was incorporated in the law in the context of a centralized economic system (Spahiu, 2015, pp. 83-88).

2.1. Early 1990s

The early years after the collapse of communism witnessed strategic and policy actions of the Albanian government to boost economic and social development by attracting foreign direct investment on top of encouraging domestic commercial exchanges. The state authorities took actions to introduce new domestic regulations and accede to key international conventions that could achieve such aims. The topic of arbitration was also part of the agenda.

2.1.1. 1993 Decree

Having repealed the 1990 Law on State Arbitration, the Decree no. 682 "On the dissolution of state arbitration", dated 4 November 1993, empowered the state courts with the exclusive role in resolving property related disputes among state enterprises and institutions. Exceptionally, it allowed voluntary arbitration for the disputes between a local and a foreign party to the extent that "the parties had so agreed in a contract or otherwise, as regulated by the Albanian legislation or the respective international conventions" (Art. 2).

It took a few more years for the Albanian state authorities to prepare and enact the Code of Civil Procedure of 1996 (Code of Civil Procedure approved by Law no. 8116, hereinafter: CCP), which would include a set of rules on domestic and international arbitration (discussed in Section 2.2. below). Meanwhile, as the following shows,

[2] The key rules on state arbitration include the Decree no. 1872; Decree no. 5009, as amended; Decree no. 4359; Law no. 7424; Council of Ministers' Decision (CMD), 1991.

the statement in Art. 2 of the 1993 Decree, "as agreed in a contract or otherwise, as regulated by the Albanian legislation or the respective international conventions," was a good indication of Albania's arbitration-friendly approach *vis-à-vis* foreign businesses.

2.1.2. International Investment and Commercial Arbitration Regulations

As a former socialist country aiming to open and strengthen its economy to foreign markets, and in line with the economic liberalism principles endorsed by the so-called Washington Consensus (see, Williamson, 2004), Albania has embraced the Euro-Atlantic integration processes and introduced several legislative initiatives to facilitate the transformation from a centrally planned economy to the market economy. This includes its membership, as early as in October 1991, in the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD), the International Finance Corporation (IFC), the International Development Association (IDA), the Multilateral Investment Guarantee Agency (MIGA) and the International Center for the Settlement of Investment Disputes (ICSID) (Law no. 7515). In this regard, Albania acceded to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention),[3] ensuring that foreign investors in Albania could use international arbitration under the ICSID Convention for investor-state dispute settlement with Albania.

By 1992, to encourage foreign investments and align with the international standards of protection for such investments, Albania had ratified numerous international investment agreements (IIAs), and most importantly bilateral investment treaties (BITs) with Türkiye, Russia, the Swiss Confederation, Belgium, China, Austria, Hungary, Croatia, Tunisia, Bulgaria, USA, Slovenia, Belgium-Luxembourg, the Organization of the Petroleum Exporting Countries (OPEC), Ukraine, (former) Yugoslavia, South Korea and Moldova, acting as home countries to potential foreign investors and investments in Albania (see, Gjuzi, 2008). Currently Albania is party to more than fifty IIAs,[4] including forty-five BITs concluded also with France, Germany, Italy, Azerbaijan, the UK, the Netherlands, South Korea, Sweden, the United Arab Emirates, Malaysia, etc. (UNCTAD, 2024a).

Concurrently, an elaborate domestic legislation regarding investment arbitration was being put in place. This comprised the 1992 Foreign Investment Law (Law no. 7594), as subsequently abrogated by the 1993 Foreign Investment Law (Law on Foreign Investments) which is still in force.[5] As in other developing countries and

[3] Signed on 18 March 1965, adhered by Albania by means of Law no. 7515, dated 1 October 1991.

[4] E.g., the Energy Charter Treaty ratified by Law no. 8261, dated 11 December 1997.

[5] The 1992 Foreign Investment Law was not considered very liberal, hence it did not meet the needs of the government to stimulate further foreign investments. For example, Art. 3

transition economies, the 1993 Foreign Investment Law was enacted as a separate law dedicated to attracting and protecting foreign investments in Albania.[6]

In line with the 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment (World Bank Group, 1992, pp. 35-44), both the Albanian 1993 Foreign Investment Law and the IIAs to which Albania became a party provided more than just the substantive provisions protecting foreign investors and investments from the actions or inactions of state bodies (the standards of protection from unlawful expropriation, discrimination, and unfair treatment, but also the umbrella clauses, transfer of capital clauses, etc.) (see, Gjuzi & Nowrot, 2024). They contained specific clauses on international arbitration, making this dispute settlement mechanism available to foreign investors in case of disputes with Albanian state institutions or enterprises.[7] These clauses typically referred to the arbitral tribunals established and functioning according to the rules set out in the treaty itself, or otherwise as agreed between the parties, or established and functioning under the ICSID Convention, the United Nations Commission on International Trade Law (UNCITRAL) rules, the International Chamber of Commerce (ICC) rules, etc. Notably, the 1993 Foreign Investment Law allowed the parties to use arbitration also in the context of disputes between a foreign investor and a private Albanian party (Art. 8(1)).[8]

The Albanian government's openness to arbitration has also been reflected in the sector-specific legislation. The laws on mining, oil and gas, as well as concessions and private sector participation in public works and services, provided for the possibility of foreign - and sometimes local - companies to incorporate arbitration provisions in their contracts concluded with the Albanian state once they were

conditioned the entry of all FDIs on government authorization (see, Timmermans, 1993, pp. 553-567; Carlson, 1995, pp. 577-598); The 1993 Foreign Investment Law aimed at overcoming such matters of concern faced in the prior law and provided for a liberal legal regime (see, Gjuzi, 2008, pp. 33-34).

[6] Today most of the countries have an investment law dedicated to the protection of foreign investments. See, UNCTAD, 2016, p. 2 (referring to at least 108 countries worldwide).

[7] As opposed to the classical arbitration agreement in the context of a purely commercial transaction, in the context of such IIAs, the arbitration agreement is the result of meeting the so-called 'standing offer' to arbitrate made by the state party wishing to attract the foreign investor in the relevant agreement and the 'acceptance' of such an offer by the qualifying investor once a dispute between him and the host state has arisen under such an agreement (Blackaby *et al*., 2015, pp. 1-70).

[8] Note that this is a general analysis and does not delve into the details of each specific regulation under the above legal instruments. For example, Article 8 of the Albanian 1993 Foreign Investment Law, in the cases of disputes between a foreign investor and Albania, provides for the option of ICSID arbitration only where the dispute has arisen between a foreign investor and the public administration (as opposed to a state enterprise) and where such a dispute is related to expropriation, compensation from expropriation, discrimination, and transfers.

awarded projects in those sectors. For instance, under the 1993 Petroleum Law, foreign investors could be eligible to certain benefits, including the possibility of using international arbitration as a means for the settlement of disputes arising under the petroleum agreements concluded between the Albanian state authorities and the state-owned company Albpetrol SHA on the one hand, and foreign investors on the other (Law no. 7746, Art. 5, para. 3, lit. (f)). Similarly, the 1995 Concessions Law provided that disputes of the parties under the concession agreements could be resolved by the judicial authority in Albania or by "arbitration, if the parties had so agreed in the contract" (Law no. 7973, Art. 17; Law no. 9663, Art. 31; Law no. 125/2013, Art. 46, para. 3). The 1994 Mining Law went a step further by identifying the rules and arbitration institution that the dispute settlement provision of a mining contract could refer the dispute to, specifically the ICC (Law no. 7796, Art. 100, lit. (l)).

2.2. 1996 Code of Civil Procedure

The legal framework governing arbitration in Albania, which until that point had been useful mostly to the disputing parties from the perspective of international investment arbitration, was enriched by the enactment of the Code of Civil Procedure (Code or CCP) in 1996.

The Code provided for the general rules regarding the disputing parties' confrontation before the domestic courts on questions of jurisdiction (Art. 59), and the courts' role to decide whether the dispute under review belonged to "judicial or administrative jurisdiction". Notably, the Supreme Court has interpreted these phrases broadly to encompass also the "constitutional" and "arbitration" jurisdictions.[9]

Similarly, the Code addressed questions of conflict between the domestic courts' jurisdiction vs. other "foreign" jurisdictions (Art. 37) where the Supreme Court again

[9] See e.g., Supreme Court Judgment no. 356, dated 6 June 2013 (*Marko Tel & Hes Kablo Albania SHPK vs. ZTE Albania SHPK*), p. 6 ("The Civil College of the Supreme Court assesses that despite the fact that these provisions speak of the conflict between administrative and judicial jurisdictions, the same principle is respected in the case of a conflict that may exist between the judicial jurisdiction and the jurisdiction of arbitration courts, by the court of arbitration, or by ordinary judicial bodies. … the arbitration clause agreed between the parties means that the judiciary has no jurisdiction to review the dispute, except in the case where this agreement is invalid."); Supreme Court Judgment no. 284, dated 3 June 2015 (*Ital Trade SHPK vs. Trapani Charter SHPK*), paras. 18-19; Supreme Court Judgment no. 189, dated 1 June 2016 (*Ark I. Post Engineering vs. Sphinx SHPK*), pp. 7-8. In a similar vein, years later, the Albanian Parliament enacted a separate procedural law addressing administrative disputes (Law no. 49/2012). In the context of administrative disputes, its Art. 9 addressed the same confrontation between the categories of judicial and non-judicial jurisdictions, where the latter were deemed to cover also the arbitration jurisdiction. See, Supreme Court Judgment no. 142, dated 3 February 2022 (*Opsion-2010 SHPK et al., vs. Albanian Road Authority, Ministry of Infrastructure and Energy*), para. [10.]

confirmed that such foreign jurisdictions should include also foreign/international arbitration (Supreme Court Judgment no. 284, dated 3 June 2015 (*Ital Trade SHPK vs. Trapani Charter SHPK*), para. 35). Markedly, such foreign jurisdictions have been found to prevail over the domestic courts' jurisdiction in the event of the existence of foreign elements, or the application of a relevant international agreement ratified by Albania, such as the European Convention on International Commercial Arbitration (European Convention on International Commercial Arbitration, signed in Geneva on 21 April 1961, adhered by Albania by means of Law no. 8687, dated 9 November 2000, hereinafter: Geneva Convention) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958, adhered by Albania by means of Law no. 8688, dated 9 November 2000, hereinafter: New York Convention) as discussed shortly below.

Furthermore, the CCP introduced rules on the recognition and enforcement of arbitral awards (Arts. 393-399). Although they were shaped to address decisions of foreign courts, a reference provision within the Code made them applicable also to the arbitral awards rendered in foreign states (Art. 399). Such rules provided for the conditions for the application of foreign awards, the formal requirements, as well as the grounds for the refusal of recognition of such awards.

In this context, an important CCP regulation provided for the interaction between the Code and other rules available on the subject-matter. Pursuant to Art. 393, foreign awards shall be recognized and enforced in Albania based on the provisions of the Code "or" other special laws. Moreover, in case of a special agreement with a foreign state, "its provisions shall apply."

As pointed out above, in 2000 Albania acceded to the Geneva Convention and the New York Convention, two key international agreements aiming to promote international commercial arbitration and the enforcement of foreign arbitral awards. Earlier, it had concluded several bilateral agreements on the mutual judicial assistance in civil matters, which comprised specific provisions on enforcement of arbitral awards (Agreement with Greece ratified by Law no. 7760; Agreement with Türkiye ratified by Law no. 8036).

From a broader Albanian constitutional law perspective, international agreements ratified by Albania and duly published in the Official Journal constitute a source of law that prevails over the laws enacted by the Parliament, including the CCP (Arts. 5, 116 and 122, Albanian Constitution). Thus, the Albanian domestic law guarantees the prevalence of the binding international agreements, such as the Geneva Convention and the New York Convention, over the purely domestic legislation. This has been confirmed also by the Albanian Supreme Court in a 2011 judgment that unified previous judicial practice on matters relating to the

enforcement of foreign arbitral awards, in response to some inconsistencies between the CCP and the New York Convention:

> "…according to Article 122 of the Constitution, being an international agreement to which the Republic of Albania is a party, the provisions of the New York Convention prevail over the regulations of the Code of Civil Procedure and are directly applicable by the courts of appeal that adjudicate requests for the recognition of a foreign arbitral award."[10]

Moving a step further, in the case of questions of interaction between the New York Convention and other (multilateral or bilateral) international agreements concluded by Albania or even domestic laws of Albania, the more-favorable-right provision of the former should be employed in justifying the application of the latter provisions, if they are indeed more favourable to the interested party.[11] As some commentators put it,

> "…the New York Convention recognises explicitly that, in any given country, there may be a local law that, whether by treaty or otherwise, is more favourable to the recognition and enforcement of arbitral awards than the Convention itself. The Convention gives its blessing, so to speak, to any party who wishes to take advantage of this more favourable local law." (Blackaby *et al.*, 2015, p. 622).

Most importantly, the CCP introduced detailed regulation on domestic arbitration (Articles 400-438) and a few provisions on international arbitration (Arts. 439-441).

Except for the above provisions on jurisdiction and recognition and enforcement of foreign awards, which are still in force today, the Code's dedicated chapters on domestic and international arbitration proved anything but stable in the years to follow.

In 2001, in addition to some amendments to the domestic arbitration rules of the Code, the few rules on international arbitration were repealed and substituted

[10] See, Supreme Court Unifying Judgment no. 6, dated 1 June 2011 (*I.C.M.A. s.r.l, AGRI. BEN S.A.S v. Ministry of Agriculture and Food, Republic of Albania*), para. 28.1 (emphasis added). See also, Supreme Court Judgment no. 181, dated 1 June 2016 (*2T SHPK vs. Iren Acqua e Gas (IAG) Dega Shqiperi*), paras. 14, 16, 16.1.

[11] Art. VII(1) New York Convention: "The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of the arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon." The Albanian courts so far do not seem to have considered the implications of this other important provision of the New York Convention. See, Section 3.1.3 below.

by a provision stating that international arbitration would be regulated by a separate law (Law no. 8812, dated 17 May 2001, Arts. 61-68), though no such law was in place at the time.

In 2013, upon the state authorities' projections that a separate law on arbitration would be in place soon, other amendments were introduced to the arbitration rules of the Code. They referred to what can be regarded as a 'conditional abrogation' of all the regulations regarding arbitration in the CCP (Arts. 400-441). The 'condition' for such abrogation was the entry into force of a new law on arbitration that was planned to be drafted in due course (Law no. 122/2013, Arts. 30 and 49). Due to some other changes made to the CCP within the same year (Law no. 160/2013, Art. 1), and what was likely a flawed omission of the 'condition' inserted in the previous amendment (see, Supreme Court Judgment no. 181, dated 1 June 2016 (*2T SHPK vs. Iren Acqua e Gas (IAG) Dega Shqiperi*), para. 13.1; Tafaj & Vokshi, 2016, p. 188), such rules on arbitration were formally abrogated as of that subsequent 2013 change, regardless of the fact that the draft law on arbitration was not yet in place. As a result, since 2001 (for the international arbitration rules) and since 2013 (for the domestic arbitration rules) Albania had formally faced a legal gap in terms of the regulation of arbitration in its Code of Civil Procedure until a separate law on arbitration was enacted.[12]

2.3. 2023 Law on Arbitration

The Law on Arbitration no. 52/2023 was enacted by the Albanian Parliament on 6 July 2023, and entered into force on 21 July 2023.

The Law on Arbitration governs the organization and development of the procedures of domestic and international arbitration having the seat in the Republic of Albania, as well as aspects of recognition and enforcement of foreign awards rendered by tribunals seated outside Albania. It addresses key elements such as the arbitration agreement, the appointment and challenge of arbitrators, the jurisdiction of the arbitral tribunal, the arbitral procedure including the possibility of holding virtual and hybrid hearings, as well as the awards, and recourse against the arbitral awards.

The Law on Arbitration brings a modern regulation of arbitration compared to the outdated rules that were present in the CCP before their abrogation. It is

[12] Occasionally, however, the Albanian courts appear to have still applied the 'abrogated' provisions, disregarding the omission that occurred after the second 2013 amendment to the CCP. See e.g., Supreme Court Judgment no. 00-2018-1229, dated 27 December 2018 (*Sekcuk Sencer Esenyel vs. Trade Minerals AL SHPK*), paras. 10-11; Supreme Court Judgment no. 580, dated 11 October 2023 (*Edil Quattro SHPK vs. HCE Costruzioni S.p.a. (former Todini Construzioni Generali S.p.a.)*), paras. 24-25.

generally modelled after the UNCITRAL Model Law, as stated in the explanatory report of the Law (see, Albanian Parliament, 2024) and confirmed by UNCITRAL (UNCITRAL, 2024).

The practice will reveal the strengths and weaknesses of this new Law. From an initial review, a few deviations from the UNCITRAL Model Law, the New York Convention and the Geneva Convention have been encountered. By way of example,[13] with respect to the arbitration agreement and claims before the Albanian courts, the Law on Arbitration provides *inter alia* that where a claim is brought before a court in a matter that is the subject of an arbitration agreement, the court, even *ex officio*, must decline jurisdiction unless the arbitration agreement is "manifestly void" (Art. 12(1)).

These two elements appear to echo a similar regulation in the CCP, respectively Art. 414, and Art. 59 as interpreted by the Supreme Court of Albania (see e.g., Supreme Court Judgment no. 284, dated 3 June 2015 (*Ital Trade SHPK vs. Trapani Charter SHPK*), paras. 18-20). Meanwhile, by inserting the *ex officio* requirement and the 'manifestly' qualifier, the Law on Arbitration departs from the thresholds of the UNCITRAL Model Law (Art. 8(1)),[14] the New York Convention (Art. II(3))[15] and the Geneva Convention (Art. 6(1)).[16] Contrary to the international standards under the above instruments, the Law on Arbitration grants to the Albanian courts a stronger role for intervention in matters that are deemed to belong predominantly to the arbitral tribunal. At the same time, the Law on Arbitration appears more favorable by specifying fewer grounds (only if the arbitration agreement is "void") as opposed to the broader scope under the UNCITRAL Model Law and New Work Convention referring to "null and void, inoperative or incapable of being performed") for courts to accept jurisdiction if a party to the dispute submits that there is an arbitration agreement (see, Halili & Turši,, 2023; Tafaj & Cinari, 2023a, pp. 83-104).

[13] This analysis illustrates some aspects of the new law and does not aim to offer a comprehensive review thereof.

[14] "A court before which an action is brought in a matter that is the subject of an arbitration agreement shall, *if a party so requests* not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed." (emphasis added).

[15] "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, *at the request of one of the parties*, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." (emphasis added).

[16] "A plea as to the jurisdiction of the court made before the court seized by either party to the arbitration agreement, on the basis of the fact that an arbitration agreement exists *shall… be presented by the respondent* before or at the same time as the presentation of his substantial defense, depending upon whether the law of the court seized regards this plea as one of procedure or of substance." (emphasis added).

While the Law on Arbitration has also introduced its own rules on the recognition and enforcement of foreign arbitral awards, that matter is still regulated to a considerable extent by the effective CCP provisions. The Law on Arbitration in its Art. 47 refers to the recognition and enforcement of awards that are subject to foreign/international arbitration proceedings with the seat of arbitration located outside Albania. In its first paragraph it provides that the recognition of such awards shall be made in accordance with the New York Convention "as well as" the CCP. On the one hand, by referring to the CCP, the Law on Arbitration makes a circular regulation since the CCP in its Art. 393 (applicable to foreign arbitral awards through its Art. 399) provides for the separate law to apply instead of the CCP.[17] On the other hand, Art. 47 puts at the same level two legal instruments of different weighs, ignoring somehow the already established regulation and case law on the prevalence of the New York Convention *vis-à-vis* domestic legislation, including the CCP.[18] Such a cumulative reference may cause unnecessary uncertainty possibly triggering divergent courses of evolution in the legal practice and jurisprudence.

The same could be argued for Art. 47(2), which introduces the grounds for refusing recognition of a foreign arbitral award, such grounds purporting to, but not fully mirroring those provided for in the CCP (Art. 394) and in the New York Convention (Art. 5).

Meanwhile, Art. 47 refers to the grounds for refusal of foreign arbitral awards but remains silent as to the remaining procedural provisions that are closely related to the former in the context of the recognition and enforcement of foreign arbitral awards. Provisions on the competent court for examining the request, the formal-procedural requirements for such a request, etc., are currently regulated by the CCP (Arts. 395-397 as per the reference provision of Art. 399).

From a legislative technique perspective, it could have been more appropriate for the legislator to take a holistic approach by introducing the Law on Arbitration as the *lex specialis* on all matters of recognition of foreign arbitral awards, while simultaneously repealing the respective provisions of the CCP on the same subject-matter (Art. 399 referring to Arts. 393-398).[19]

---

[17] Art. 393(1) in conjunction with Art. 399 CPP: "[Foreign arbitral awards] are recognized and enforced in the Republic of Albania, according to the conditions provided for in this Code *or in special laws*" (emphasis added).

[18] See the discussion in Section 2.2 about Art. 393 CCP, Art. 122 of the Constitution, and Art. VII (1) of the New York Convention, as well as the Supreme Court Unifying Judgment 6/2011.

[19] Such abrogation could occur only by a special law, other than the Law on Arbitration. This is due to the nature of the Codes, which under the Albanian Constitution (Art. 81) require a qualified majority approval by the Parliament as opposed to simple majority approved laws, such as the Law on Arbitration.

Looking forward, it can be reasonably expected that the Albanian constitutional and legal rules, the Supreme Court case-law on the hierarchy of legal instruments in Albania, as well as a better understanding of the implications of the more-favorable-right provision of the New York Convention, will help to unravel any contradictions between the Law on Arbitration, the CCP and the prevailing international treaties. This is so to the extent that the binding international instruments are invoked as applicable law, which in turn could raise questions about a potential double standard regarding the application of the Law on Arbitration on domestic vs. international arbitration matters (e.g., the subject-matter of Art. 12(1)).

3. Overview of the Arbitration Practice in Albania: Challenges and Prospects

3.1. International Arbitration

3.1.1. International Arbitration Involving Albanian State Institutions and Enterprises

Albania has significant experience in international arbitration. This is observed from the publicly available case law and the private practice of the author of this paper.

The availability of an adequate legal framework has created a favourable context in this regard. Reference is made to the wide regulation of foreign investment protection, as well as the express permission of international arbitration in the domestic legislation as of the early 1990s. Against this background, foreign companies have availed themselves of the possibility of incorporating international arbitration clauses in the respective contracts concluded with the Albanian institutions, agencies and state enterprises in the mining, oil and gas, and hydropower sectors, in the context of concession projects, etc.[20] Local companies, in turn, generally had to accept the state party's position that the use of international arbitration was somewhat exclusive to contracts involving foreign counterparties only.[21] The dispute

[20] See e.g., a mining concession contract concluded between the Ministry of Economy and Privatization and Ber-Oner Madencilik San.Ve.Tic.A.S. (Turkish company), approved by Law no. 8761; A petroleum production sharing agreement concluded between the state-owned company Albpetrol SHA and Sherwood International Petroleum Ltd (Canadian company), approved by CMD no. 686 (referring to UNCITRAL arbitration, Zurich); a concession contract concluded on 6 February 2015 between the Municipality of Vlore and the Joint Venture TIS Holding LLC (US) and On Track Innovations Ltd (Israel) referring to ICC arbitration, Paris.

[21] See exceptionally e.g., the production sharing agreements concluded between the Albanian

resolution clauses in the state contracts concluded with local businesses typically referred to Albanian courts.[22]

As early as in 1994, the first ICSID claim against Albania was filed by a Greek investor, based on the 1991 BIT with Greece and the 1993 Foreign Investment Law (*Tradex Hellas S.A. v. Republic of Albania, ICSID Case No. ARB/94/2*, Award, 29 April 1999). So far eleven cases have been already heard and concluded before ICSID tribunals, and one of them is still pending (ICSID, 2024).

Other disputes between foreign claimants and the Albanian state institutions and enterprises have been or are still being heard before other tribunals (see, UNCTAD. 2024b). They comprise *ad hoc* arbitral tribunals (where probably the first case of an international arbitration involving an Italian company and Albania was resolved in 1993) (see, *Iliria S.r.l. v. Republic of Albania*; *Sky Petroleum, Inc. v. Ministry of Economy, Trade, and Energy of Albania*; *ČEZ v. The Republic of Albania*) or arbitral tribunals under the auspices of permanent international arbitration institutions, such as the ICC and its International Court of Arbitration (see, *Ital Strade IS S.R.L. vs. Republic of Albania*), the Stockholm Chamber of Commerce (SCC) (see *Ivicom Holding GmbH v. Republic of Albania*), the Permanent Court of Arbitration (PCA) (*Valeria Italia Srl v. Republic of Albania*; *Mrs. Mimoza Ndroqi v. Republic of Albania*) the Vienna International Arbitral Center (VIAC) (see, *Fyber SHPK vs. Hidro Invest SHPK and Alb-Star SHPK*), the Court of Arbitration of the Serbian Chamber of Commerce (see, *Galenika a.d. v. Jona Farma SHPK*), etc.

A good deal of these arbitration cases are based on the alleged violations of the respective investment treaties and the 1993 Foreign Investment Law. Others refer to the alleged violations of the contracts concluded between foreign companies and the Albanian state institutions and/or enterprises in a variety of sectors including oil and gas (see, *GBC Oil Company Ltd. v. Albania and Albpetrol sh.a.*, ICC Case No. 22676/GR, Award, 6 July 2020; *Sky Petroleum, Inc. v. Albania and Albpetrol sh.a.*, UNCITRAL Rules, Final Award, 7 May 2013), infrastructure (see, *G.E. Transport s.p.a. and Athena s.a. v. Ministry of Public Works, Transport and Telecommunication*), electricity (see, *SC Energy Holding Srl vs. KESH SHA*), as well as concessions (see, *TIS Park SHPK vs Municipality of Vlore (Albania)*, ICC Case, 2018; *Hydro S.R.L. (Italy) v. Republic of Albania*, ICC Case No. 20654/EMT/GR, Award of 7 September 2018). Thus, the

state-owned company Albpetrol SHA and an Albanian private company (Phoenix Petroleum SHA) approved by CMD no. 699 (referring to UNCITRAL arbitration with a seat in Zurich).

[22] For an early example, see a hydropower concession contract concluded between the Ministry of Economy, Trade and Energy and the Albanian company Hasi Energji SHPK referring to the Tirana Judicial District Court (approved by CMD no. 543). For a recent example, see a production sharing agreement concluded between Albpetrol SHA and the Albanian company (EDG Natural Gas SHPK) referring to the Tirana Judicial District Court (approved by CMD no. 402).

friendly approach of the Albanian legal framework to the use of contract-based arbitration has yielded its fruits in the selection of international arbitration as a dispute resolution mechanism and its successful implementation where disputes have arisen.

Overall, Albania is a positive example of the contractual use and application of international arbitration. A decisive factor is the favourable legal framework. It reflects the government's stable policy of promoting and attracting foreign investors in the country by making available the necessary tools to that effect.

At this point, one should consider certain developments that could have an impact on the current status-quo of the Albanian legal framework. At the international level, there are ongoing discussions primarily led by UNCTAD (UNCTAD, 2017), and the European Union (EU) (European Commission, 2024) in a regional context, about the old-generation IIAs and the need to reform the system to make it compatible with the sustainable development considerations. Similarly, since 2017, the UNCITRAL Working Group III has been working on the possible reform of the investor–state dispute settlement model (UNCITRAL, 2024). Questions have been raised, *inter alia,* on the legitimacy of investor-state arbitration, amid concerns about the excessive costs and lengthy proceedings, inconsistent and incorrect decisions, lack of transparency, and arbitral diversity and independence (see, Roberts, 2017; Langford *et al*., 2020, pp. 167-187).

In the Albanian context, most of the IIAs in force belong to the old-generation category. It can be anticipated that they will undergo renegotiations, though so far there has been no official announcement about any government initiative with that respect. The same applies to the 1993 Foreign Investment Law. A couple of years ago, the Albanian government announced its plans to revise this law along with another piece of legislation that aims to promote strategic investments from the domestic and foreign investors (Law no. 55/2015). The intention is to align their rules and introduce an integrated law that would aim at attracting and protecting both foreign and domestic investments.[23] In 2019, the government circulated a draft law on investments for consultations with the business and legal communities (see, Albanian Electronic Register on Public Notifications and Consultations). So far there have been no public statements about any further developments regarding the drafting of the integrated law on investments. Recently, the European Commission has insisted that Albania should adopt such a law in the context of the Stabilization and Association Agreement (Chapter 20 Enterprise and Industrial Policy) concluded between the European Communities and their Member States, on the one part, and the Republic of Albania, on the other part (European Commission, 2023, pp. 102-103).

[23] For the latest communication about the Albanian government' plans to prepare and approve a draft law on investments, which would subsequently be sent to the Parliament for enactment, see, CMD no. 466; CMD no. 790, p. 49.

This perspective might cause some hesitance on the foreign investors' part about the future rules on investment arbitration that Albania may introduce and apply to their projects. Nevertheless, these rules should not affect the existing projects made under the law in force, to the extent they benefit from the sunset clauses of the relevant legal instruments. From a broader perspective, Albania's adherence to the EU integration processes and its commitments *vis-à-vis* the World Bank Group largely exclude any possibility that the country's legislative approach regarding investment arbitration would be in any way unaligned with the relevant standards enshrined in the EU and World Bank policies.

As to the arbitration cases heard before international tribunals, the fact that Albania has succeeded in a considerable number of disputes adds to an optimistic view by the state and the public opinion on the continued use of arbitration in the future.[24]

Undoubtedly, this picture is more mixed due to some infamous losses Albania had suffered before international tribunals. Recently, in the case of *Hydro S.r.l. et al. vs. Albania*, an ICISD tribunal awarded the Italian businessman Francesco Becchetti, his companies and associates around EUR 110 million in compensation (see, *Hydro S.r.l. et al. v. Republic of Albania*; *G.E. Transport s.p.a. and Athena s.a. v. Ministry of Public Works, Transport and Telecommunication*; *GBC Oil Company Ltd. v. Albania*, Albpetrol; *JV Copri Construction Enterprises et al. v. Albanian Road Authority*).

Such losses do not appear to have triggered questions about the legitimacy of international arbitration *per se* and its use by the Albanian state. Rather they have provoked concerns about the allegedly irresponsible government conduct with respect to the grounds that had led to such disputes and to the loss itself,[25] as well as the budgetary effects of the government defense.[26]

[24] Some of the cases won by Albania include *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009; *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Award, 29 May 2013; *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24), Award, 30 March 2015; *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, 7 February 2019; *Hydro S.r.l. et al. v. Republic of Albania*, ICSID Case No. ARB/15/28, Award, 24 April 2019; *Ivicom Holding GmbH v. Republic of Albania*, SCC Case No. 2021/155, Award, 26 June 2024; *Durres Kurum Shipping SH.P.K. et al. v. Republic of Albania*, ICSID Case No. ARB/20/37, Award, 26 July 2024.

[25] For example, in 2021, some members of the Albanian Parliament requested the establishment of an *ad hoc* investigative commission that would control the legality of the actions and omissions of the government institutions and public officials in relation to the cases initiated by the Italian businessman Becchetti, his companies and associates. The request was not approved by the Parliament, which was controlled by the same political party that established the government. See, Decision of the Parliament of Albania no. 80/2021.

[26] See e.g., Open Data Albania, 2023 (about an assessment of the budgetary costs associated with key arbitration cases involving the Albanian government).

In the aftermath of *Hydro S.r.l. et al. vs. Albania* case, the Albanian Prime Minister is reported to have reacted by stating that the government is "analyzing the possibility of getting out of [ICSID's] jurisdiction because what happened is scandalous" (BIRN, 2023; China-SEE Institute, 2023). It was rather clear to the legal and business communities within and outside Albania that this was more of a political and hasty statement void of any consequential effects. The dependency of the Albanian economy on the World Bank policies should *inter alia* sustain this rationale.

The obstacles and delays in relation to the enforcement and execution of foreign arbitral awards could also raise concerns among the foreign businesses with respect to the functionality and effectiveness of the system. From the perspective of enforcement and recognition of ICSID awards, which are deemed to succeed smoothly because of the special ICSID Convention rules (Arts. 53-55), the *Hydro S.r.l. et al. vs. Albania* shows the struggle that the award creditor may encounter as Becchetti *et al*. have been purporting to execute Albania's assets abroad over the last years (ICSID, 2024).

Another recently publicized case (*Iliria S.r.l. v. Albania*) relates to a dispute that was resolved by an arbitral award as early as in 1993 in favour of the Italian company only to make headlines in view of the landmark ruling by the European Court of Human Rights in July 2024. The Court found that Albania and its domestic courts had violated the European Convention of Human Rights (Art. 6, due process of law) by causing unreasonably prolonged and complicated legal processes over the recognition of the 1993 arbitral award against Albania (*Iliria S.r.l. v. Republic of Albania*).[27]

3.1.2. International Commercial Arbitration among Private Parties

With a view to private international commercial arbitration, the available case law from the Albanian judiciary and the information collected privately by the author show that Albanian and/or foreign parties have on many occasions opted for international arbitration instead of the domestic courts or domestic arbitration. The main sectors covered include construction, telecommunications, energy, and services, while the parties come from Albania, Germany, Türkiye, Austria, Italy, etc.[28]

[27] See also, Supreme Court Judgment no. 102, dated 28 September 2017 (*Kaptan Metal Dis Ticaret Ve Nakliyat AS vs. Scutari Construction SHPK*), where a foreign arbitral award of 1 July 2010 was recognized by the Tirana Appeal Court on 1 March 2011, but subsequently challenged before the Supreme Court which rendered its final judgment on 28 September 2017 (i.e., 6 years later).

[28] See e.g., Supreme Court Judgment no. 5, dated 8 January 2013 (*C.A.E. SHPK vs. Energji SHPK*) (two Albanian parties selecting ICC arbitration in a 2007 construction sector service agreement); Supreme Court Judgment no. 356, dated 6 June 2013 (*Marko Tel & Hes Kablo Albania SHPK vs. ZTE Albania SHPK*), p. 7 (two Albanian parties selecting LCIA arbitration, London, in a 2011 telecommunications sector service agreement); Supreme Court Judgment no. 175,

The legal gap on international arbitration in the Albanian CCP does not seem to have affected the parties' willingness and decision to select international arbitration, at least in the cases reviewed.

Generally, the inclusion of an international arbitration agreement in the specific contracts is owed to the foreign parties' special preference for international arbitration and their stronger bargaining power during the negotiations with local partners.

Most importantly, as discussed in Section 2.2 above, Albania has ratified the Geneva Convention and the New York Convention. This offers sufficient guarantees to the parties with respect to the direct, and where necessary the prevalent application of such international instruments *vis-à-vis* the domestic legislation before Albanian courts in cases of the latter's intervention.

This rule is reflected in the CCP itself (Art. 393) and is generally applied by the domestic courts. In a 2013 case, the Supreme Court of Albania held that

> "[i]n the absence of a specific law regulating international arbitration, any international agreement or convention ratified by our country will be applied in the case under judgment, as part of domestic law. … In such circumstances, being part of our legal system, [the New York Convention] will not only apply directly, but it will prevail over any legal provision of our domestic law." (see, *C.A.E. SHPK vs. Energji SHPK*, p. 5; *Marko Tel & Hes Kablo Albania SHPK vs. ZTE Albania SHPK*, p. 7).

The dispute had arisen out of a commercial agreement concluded between the parties in 2007, when the provisions on international arbitration contained in the CCP were abrogated and no separate law on international arbitration was in place.

3.1.3. Judicial Intervention in International Arbitration Cases

Judicial intervention in arbitration cases can cut both ways. It may support the success of an arbitration, which is a welcome endeavour that ultimately leads to its legitimacy and effectiveness (Lew, 2009, pp. 489-537). But it may also defeat the rationale behind arbitration, undermining the party autonomy and other benefits thereof (see, Gaillard, 2023, pp. 367-378). When considering international arbitration and its connections with the respective national legal systems, the contracting parties look for national laws and court practices that are inclined to assist them in solving their dispute based on their arbitration agreement rather than disrupting it.

dated 24 April 2014 (*S4E Group GmbH vs. KESH SHA*) (a German company and an Albanian state enterprise selecting ICC arbitration in a 2006 power sector service agreement); Supreme Court Judgment no. 102, dated 28 September 2017 (*Kaptan Metal Dis Ticaret Ve Nakliyat AS vs. Scutari Construction SHPK*) (a Turkish company and an Albanian company selecting arbitration under the Swiss Rules of International Arbitration, Geneva in several 2008 contracts).

In the Albanian setting, the judicial intervention in international arbitration cases has been usually encountered in the context of the jurisdictional 'competition' (judicial procedure vs. arbitration) with questions raised before the local courts about the validity of the arbitration agreement and the submission of substantive claims,[29] the granting of interim measures of protection,[30] and the recognition and enforcement of foreign arbitral awards (see, *I.C.M.A. s.r.l, AGRI. BEN S.A.S v. Ministry of Agriculture and Food, Republic of Albania*, para. 28.1; *2T SHPK vs. Iren Acqua e Gas (IAG) Dega Shqiperi*, paras. 14, 16, 16.1).

Without delving into details here, there have been instances of incorrect application of the law in relation to such matters, particularly with respect to the recognition and enforcement of foreign arbitral awards. This is due to a combination of factors: the formal application of the CCP rules for the recognition of foreign court decisions in the case of foreign arbitral awards, which is deemed to some extent inappropriate due to the differences between the two categories, as well as the discrepancies between the CCP and the New York Convention regarding the formal-procedural requirements and the grounds of refusal of recognition of foreign arbitral awards (Tafaj & Çinari, 2023b, pp. 677-691; Spahiu, 2017, pp. 52-63). One could also add the Albanian judges' limited experience with arbitration law matters and its proper interpretation and application where domestic law interacts with binding international law (see, ICC Albania, 2024, p. 18).[31]

[29] The Albanian courts have generally upheld the jurisdiction of arbitral tribunals where a valid arbitration agreement was in place. In the absence of domestic rules on international arbitration, they have based their reasoning on the direct effect of the international treaties ratified by Albania (New Work Convention and Geneva Convention) as inferred from Arts. 37 and 59 of the CCP (which are still in force). See e.g., Supreme Court Judgment no. 356, dated 6 June 2013 (*Marko Tel & Hes Kablo Albania SHPK vs. ZTE Albania SHPK*), p. 6 (where the Supreme Court upheld the previous position of the lower court on the same dispute and stated that "… the arbitration clause agreed between the parties means that the judiciary has no jurisdiction to review the dispute, except in the case where this agreement is null and void. … ").

[30] The Albanian courts have generally admitted that interim measures taken by the judiciary in the context of a valid arbitration clause are not incompatible with the arbitration agreement or an infringement of the arbitration jurisdiction that is responsible for the merits of the case. See e.g., Supreme Court Judgment no. 580, dated 11 October 2023 (*Edil Quattro SHPK vs. HCE Costruzioni S.p.a.*), para. 31 (where the Supreme Court upheld the previous position of the lowest court and quashed the opposite position of the appeals court by stating that "… a valid arbitration agreement does not prevent the parties from turning to the ordinary judicial jurisdiction with the request for obtaining an interim measure of securing the claim. The submission of such a request cannot be considered as incompatible with the arbitration agreement or as an infringement of the jurisdiction, which is responsible for examining the merits of the case." The key legal basis that the court used to reach this conclusion was the Geneva Convention Art. 6(4), which was again found to apply directly within the domestic legal order, and this was given particular emphasis in light of the missing regulation on the same matter in the CCP.

[31] In its survey on arbitration in Albania, it found that about 59 percent of the participants stated that they had not encountered any challenge concerning the recognition and enforcement

The Supreme Court has admitted the different positions of the Albanian courts in previous judgments on the matter of recognition and enforcement of foreign arbitral awards (*I.C.M.A. s.r.l, AGRI. BEN S.A.S v. Ministry of Agriculture and Food, Republic of Albania*, para. 9). Its judgment of 2011 served a good purpose in respect of unifying such practice, though there have been discussions that its reasoning could have been clearer on certain aspects (see, Tafaj & Çinari, 2023b, pp. 677-691). Building on such a judgment, the courts' reasoning over the last years increasingly shows a diligent approach towards the application of arbitration law in Albania, particularly in terms of giving the appropriate weight to the applicable international agreements (*S4E Group GmbH vs. KESH SHA*, paras. 32-36; *SC Energy Holding Srl vs. KESH SHA*, p. 5).

The relevance of the current court practice must be assessed on a case-by-case basis. This is even more pertinent considering the recently enacted 2023 Law on Arbitration and its special rules about court intervention in international arbitration matters. The existing practice will continue to have a say for the arbitration proceedings that have been initiated before the entry into force of that Law, subject to its provisional requirements (Art. 48). It can be also expected that the disputing parties and the courts could still invoke and rely upon this case law when addressing issues arising under the 2023 Law on Arbitration to the extent it interacts with the relevant provisions of the CCP that are still applicable (e.g., the matter of formal requirements for the enforcement and recognition of foreign arbitral awards).

Summing up, a proper understanding and application of the supremacy of the international conventions over the domestic rules where inconsistencies exist, or their direct application in the absence of such domestic rules, should enable Albanian courts to reach arbitration-friendly judgments when intervening in international arbitration cases. This alignment with the international standards accepted by Albania should increase the confidence of the business community in the supportive intervention of Albanian courts.

3.1.4. Selecting Arbitration outside Albania

In the Albanian context, a common aspect of the international arbitration disputes (among Albanian and foreign, as well as state and private entities) is the parties' selection of an arbitration seat outside Albania. The selected centres typically include Paris, Geneva, Zurich, London, Vienna, Stockholm, Milan, Rome, Istanbul, etc.

of arbitral awards by the courts during their practice. Meanwhile among those who faced challenges in recognition and enforcement proceedings, one of the most cited problems included the judges' misapplication or misreading of Albania's legal regime related to the recognition and enforcement of arbitral awards in Albania.

Tirana appears not able to rival those centres as far as one considers the advanced legal regimes and judicial practice in these locations, as well as their established experience and reputation on the topics of arbitration proceedings and court interventions.[32] Beyond the uncrystallized legal regime governing arbitration in Albania, another factor that supports this assumption is the generally limited knowledge and experience of arbitration law matters among the Albanian legal community, and particularly the judges. Moreover, one cannot disregard a defective justice system and significant delays due to the high case overload and the recent justice reform (introducing the vetting process as a transitional re-evaluation of all sitting judges as mandated by law), as well as the corruption concerns among the various branches of government (European Commission, 2023, p. 103; Transparency International, 2023; Freedom House, 2024).

3.2. Domestic Arbitration

The domestic arbitration practice in Albania is rather sparse. While there are no statistical data or sufficient public information, the lawyers involved report about a few cases that have been heard under the rules of the Albanian Mediation and Arbitration Center (MEDART), an Albanian arbitration institution established in 2002 (Tafaj & Çinari, 2015, pp. 99-100).[33] Similarly, a few contracts, usually concluded in the years immediately after the establishment of MEDART, have referred to this centre in their dispute resolution clause (see, *Elona Banda, Erkin Banda vs. Lani SHPK*; *Colliers International SHPK vs. City Park SHPK*).

The legal gap created in 2013 due to the omission of the domestic arbitration rules in the CCP and the limited experience of legal professionals in domestic arbitration matters have probably deterred the contracting parties from selecting domestic arbitration in the first place, or from using it as previously agreed upon, in case disputes would arise.[34]

[32] A recent survey of arbitration in Albania showed that most of the participants preferred foreign jurisdictions for the resolution of their disputes through arbitration. See, ICC Albania, 2024, p. 5.

[33] MEDART was registered in the Albanian Register of Non-governmental Organizations under the Tirana District Court Decision no. 73, dated 30 December 2002 (information taken from the Supreme Court Judgment no. 357, dated 5 July 2011 (*City Park SHPK vs. MEDART*)).

[34] As it was reported in the drafting documents for the Law on Arbitration, "the review of Albanian courts' case law on arbitration has shown that over the last years arbitration has been used in very few cases. This is the result of the lack of confidence of the parties in having a "private court" to resolve their disputes, but very likely also due to the lack of regulation on such an area of law." (Explanatory Report of the Law on Arbitration, 2023).

Very recently, two other arbitration institutions have been established in Albania.[35] The future will show whether and how these and other local institutions that may be incorporated in the upcoming years will develop a solid domestic arbitration experience.

By filling a legal vacuum, the 2023 Law on Arbitration provides a solid foundation for the advancement of the domestic arbitration culture in Albania. The same is true for the success of domestic arbitration institutions, since these are specifically, or perhaps exclusively,[36] promoted by the law.

The legal practice shows that when negotiating their dispute settlement agreement within the contractual transactions, the Albanian local businesses are generally open to new options and alternatives to the judiciary. They also appreciate the efficiency and confidentiality of the arbitral proceedings and the arbitrators' expertise. It can be expected that the local businesses operating in Albania will be encouraged to use domestic institutions, particularly where the contractual elements are domestic in nature and the values involved would not justify the potentially higher costs resulting from the engagement of an international arbitration institution. In fact, the parties to this category of transactions have been the most deprived in using arbitration as a dispute settlement mechanism as opposed to the larger domestic businesses that have typically opted for foreign/international arbitration with a seat outside Albania.

At the same time, there is a number of challenges that should be considered. Some local businesses still have a sense of insecurity about these "private courts."[37] Doubts arise also about the legal community's limited experience with domestic arbitration and the potential inadequate involvement of the Albanian judiciary where the seat of arbitration is in Albania and the Albanian arbitration law applies.[38] Other

[35] Based on the publicly available information from the Albanian Commercial Register, the following centers have been established as limited liability companies: Tirana Chamber of Arbitration (May, 2021) and Albanian Chamber of Arbitration (May, 2022).

[36] The Law on Arbitration appears to leave out of its scope international arbitration institutions that could be engaged in resolving arbitration disputes with the seat of arbitration in Albania. See, Art. 3(4) defining 'Permanent Institution of Arbitration' as "a legal entity, established by natural or legal persons, domestic or foreign, *according to Albanian law*, whose object of activity is the administration of arbitral proceedings" (emphasis added) in conjunction with Arts. 1, 4(1), 6(1), 24(4). In practice, international institutions have taken such a role in the past. See e.g., Supreme Court Judgment no. 00-2015-3802, dated 16 July 2015 (*R&T SHPK vs. General Customs Directorate*) (referring to an arbitration agreement in a 2008 administrative contract between Albanian parties referring to ICC arbitration with a seat in Tirana).

[37] Explanatory Report of the Law on Arbitration, 2023. For an earlier discussion of this perception in Albania, see Emmond, Tefta & Përparim, 2007, p. 183. For a discussion about this and other possible grounds of the so-called "cold" approach to arbitration in Albania, see Spahiu, 2015, pp. 82-83.

[38] One should consider here the general deficiencies of the judiciary as discussed above,

factors include a degree of distrust in the existing Albanian arbitration institutions, which are currently inoperative or still have to gain a reputation, concerns over the integrity and professionalism of local arbitrators, who operate within a small market and business community and have yet to be tested in a significant number of cases, etc. While perception of corruption in the justice system should serve as a strong incentive to promote domestic arbitration as an alternative, the opposite effect is also possible and some individuals in the private sector may continue to doubt the ability of private arbitrators within the Albanian community to deliver effective justice.

The existence of several arbitration institutions (currently three, with the potential for more to be established) within a small market with a limited pool of professionals that could act as arbitrators could also cause unnecessary fragmentation. This could represent a missed opportunity to consolidate efforts into a single or fewer centres, enabling the Albanian professionals to gain more intensive experience and develop a more robust practice and reputation. Combined with a strong competition from reputable foreign arbitration institutions, which are actively targeting the Albanian market and adjusting to its needs, these factors could make a compelling case – particularly for large companies in Albania – to continue opting for international arbitration with a foreign seat.[39]

Overall, this critical assessment does not aim to discourage expectations for the future of domestic arbitration in Albania. Rather, it seeks to provide a perspective that the effective implementation of the Law on Arbitration, from the standpoint of domestic arbitration, may require time.

Arguably, in the short term, there is a potential for small and medium-sized businesses in Albania to prefer domestic arbitration through local arbitration institutions rather than resorting to international arbitration institutions (associated with higher costs) or local courts. This expectation is likely to be fulfilled if there is a growing arbitration-friendly culture among professionals, a fair promotion of the new Law on Arbitration, and continued progress in strengthening the rule of law within the country.

especially regarding domestic arbitration cases where case law is limited and hardly accessible to the public (except for the Supreme Court judgments, which are available on its website).

[39] See e.g., ICC Albania, 2024, p. 5 (finding that most participants expressed their preference of arbitration over traditional litigation, confirming familiarity and perceived effectiveness as their primary reasons. Moreover, they prefer resolving their disputes in foreign jurisdictions).

4. Conclusions

Albania offers a rather robust legal framework for international investment and commercial arbitration, and the relevant jurisprudence so far is proof of its accomplishments. The intervention of the Albanian courts, although not flawless, has generally been supportive of the arbitration cases. The direct and prevalent application of the Geneva Convention and the New York Convention over the purely domestic law ensures adherence to the international standards on essential matters of international arbitration.

The development of domestic arbitration practice has been rather slow. Key contributing factors include the prolonged regulatory gap prior to the enactment of the Law on Arbitration in 2023, as well as Albania's overall legal and business environment, which is marked by a weak justice system and limited experience in arbitration law.

Looking ahead, the success of the arbitration practice in Albania hinges on several key factors. The diligent interpretation of the recently enacted Law on Arbitration by lawyers, arbitrators and judges, in conjunction with other relevant pieces of legislation, such as the Code of Civil Procedure and the binding international conventions, is of utmost importance. This should enable a consistent evolution of the arbitration case law in Albania, and thus a reliable jurisdiction for arbitration-related matters. Additionally, there is a need to promote further arbitration law courses and advanced studies in the academic curricula at Albanian universities. Developing capacity-building projects for judges, lawyers, and other professionals, as well as fostering partnerships between the Albanian professionals and institutions and their foreign counterparts are also sound foundations for mainstreaming the arbitration practice in the country.[40]

Strengthening the rule of law and improving the judiciary's performance in Albania should convey positive signals to businesses and legal professionals. This would raise the expectation of a satisfactory experience when disputes arise and the arbitration agreement is invoked, thereby promoting the use of arbitration as an alternative dispute resolution mechanism.

[40] For a list of recommendations that could promote the development of the arbitration practice in Albania, as drawn from a recent survey on arbitration in Albania, see, ICC Albania, 2024.

References

Blackaby, N., Partasides, C. & Redfern, A. Hunter, M. 2015. *Redfern and Hunter on International Arbitration*. 6th ed. Oxford: Oxford University Press. https://doi.org/10.1093/law/9780198714248.001.0001

Born, G. B. 2001. *International Commercial Arbitration: Commentary and Materials*. Transnational Publishers. https://doi.org/10.1163/9789004502222

Carlson, S. N. 1995. Foreign Investment Laws and FDI in Developing Countries: Albania's experiment. *The International Lawyer*, 29(3), pp. 577-598.

Emmond, P., Tefta, Z. & Përparim. K. 2007. *Arbitrazhi dhe Ndërmjetësimi*. Tiranë: Shkolla e Magjistraturës së Republikës së Shqipërisë.

Ferreres Comella, V. 2021. The Liberal Case for Arbitration. In: *The Constitution of Arbitration*. Cambridge: Cambridge University Press (Comparative Constitutional Law and Policy), pp. 9-30. https://doi.org/10.1017/9781108906395.002

Gaillard, E. 2023. Seven dirty tricks to disrupt an arbitration and the responses of international arbitration law. *Arbitration International*, 39(3), pp. 361-378. https://doi.org/10.1093/arbint/aiad037

Gjuzi, J. 2008. Selected Aspects of the International and Domestic Legal Regime Governing Foreign Investments in Albania: Present Structure and Future Challenges. Master of Law and Business thesis.Hamburg: Bucerius Law School/WHU – Otto Beisheim School of Management . Available at: www.gbv.de/dms/buls/631008780.pdf, 1. 12. 2024.

Gjuzi, J. & Nowrot, K. 2024. Admission and Establishment of Foreign Direct Investments in Albania: A Predominantly Liberal Approach with Certain Exceptions. *Zeitschrift für das Recht der Außenwirtschaft, Sanktionen und Auslandsinvestitionen (ZASA)*, 6, pp. 329-333 Available at: https://cdn-assetservice.ecom-api.beck-shop.de/productattachment/toc/15367765/35709766_2024_06_18_zasa_06_inhaltsverzeichnis.pdf, 1. 12. 2024.

Halili, E. & Turši, D. 2023. *New Era Begins in Albania: Parliament Passes Arbitration Law*. Kluwer Arbitration Blog. Available at: https://arbitrationblog.kluwerarbitration.com/2023/08/19/new-era-begins-in-albania-parliament-passes-arbitration-law/, 1. 12. 2024.

Langford, M., Potesta, M., Kaufmann-Kohler, G. & Behn, D. 2020. Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions: Introduction. *Journal of World Investment & Trade*, 21(2-3), pp. 167-187. https://doi.org/10.1163/22119000-12340171

Lew, J. D. M. 2009. Does National Court Involvement Undermine the International Arbitration Process? *American University International Law Review*, 24(3), pp. 489-537.

Roberts, A. 2017. The Shifting Landscape of Investor-State Arbitration: Loyalists, Reformists, Revolutionaries and Undecideds. *EJIL: Talk! Blog of the European Journal of International Law,* 15. Available at: https://www.ejiltalk.org/the-shifting-landscape-of-investor-state-arbitration-loyalists-reformists-revolutionaries-and-undecideds/, 1. 12. 2024.

Spahiu, A. 2015. *Konventa e Nju Jork-ut dhe instrumentet juridike të njohjes dhe ekzekutimit të vendimeve të arbitrazhit ndërkombëtar në Shqipëri*, PhD thesis (Alb).

Spahiu, A. 2017. Recognition and Enforcement of International Arbitral Awards in Albania. Current challenges to the Albanian Domestic Law. *European Journal of Multidisciplinary Studies*, 2(4), pp. 52-63. https://doi.org/10.26417/ejms.v4i4.p52-63

Tafaj, K. F. & Çinari, S. 2015. *Zgjidhjet Alternative të Mosmarrëveshjeve.* Tirana: Albas.

Tafaj, K. F. & Çinari, S. 2023b. Recognition and Enforcement of Foreign Arbitral Awards in Albania, *European Business Organization Law Review*, 24, pp. 677-691. https://doi.org/10.1007/s40804-023-00270-w

Tafaj, K. F. & Çinari, S. 2023a. Njohje me legjislacionin e ri. Parimi *kompetenz/kompetenz* në ligjin e ri shqiptar të arbitrazhit. *Jeta Juridike*, 1, pp. 83-104

Tafaj K. F. & Vokshi, A. 2016. *Procedurë Civile, Pjesa e Dytë*. Tirana: Albas.

Timmermans, W. A. 1993. The 1992 Albanian Foreign Investment Law. *Review of Central and East European Law*, 19(5), pp. 553-567.

Williamson, J. 2004. *The Washington Consensus as a Policy Prescription for Development*, A lecture in the series "Practitioners of Development", World Bank 13 January 2004. Peterson Institute for International Economics. Available at: https://www.piie.com/sites/default/files/publications/papers/williamson0204.pdf, 1. 12. 2024.

Legal Sources

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed in Washington DC on 18 March 1965: United Nations Treaty Series (1966), Vol. 575, p. 160, No. 8359, adhered by Albania by means of Law no. 7515, dated 1 October 1991, ratified on 15 October 1991, and entered into force on 14 November 1991.

Council of Ministers' Decision no. 26, dated 4 January 1991 "On the approval of the Regulation for the examination of cases by the state arbitration".

Council of Ministers' Decision no. 686, dated 19 October 2007 "On the approval of the production sharing agreement concluded between Albpetrol SHA and Sherwood International Petroleum Ltd for the development and production of hydrocarbons in the oilfield of Kucova."

Council of Ministers' Decision no. 543, dated 1 May 2008 "On the approval of the concession contract BOT between the Ministry of Economy, Trade and Energy and the Company Hasi Energji SHPK for the construction of the Lengarica 1 and Lengarica 2 hydropower plants."

Council of Ministers' Decision no. 699, dated 16 August 2013 "On the approval of the petroleum agreements between Albpetrol SHA and Phoenix Petroleum SHA for the development and production of hydrocarbons in the oil fields of Amonica, Drashovica, Pekisht-Murriz and gas fields of Panaja, Frakull, Povelçë, Divjakë, Ballaj-Kryevidh dhe Finiq-Krane.

Council of Ministers' Decision no. 466, dated 30 July 2021 "On the approval of the strategy for the development of business and investments 2021 – 2027 and of its action plan."

Council of Ministers' Decision no. 402, dated 9 June 2022 "On the approval of the production sharing contract for the development and production of hydrocarbons in

the natural gas field Frakull, Albania between Albpetrol SHA and EDG Natural Gas SHPK.

Council of Ministers' Decision no. 790, dated 28 December 2023 "On the approval of the general analytical program of draft-bills that shall be submitted for consideration to the Council of Ministers during the year 2024."

Decision of the Parliament of Albania no. 80/2021 "On the non-approval of the draft decision "For the establishment of the investigation committee of the Parliament "For the control of the legality of the actions and omissions of the state institutions and public officials in matters that have resulted in the arbitral award "*Becchetti and others vs. Albania*"."

Decree no. 682, dated 4 November 1993 "On the dissolution of state arbitration."

Decree no. 1872, dated 7 May 1954 "On the state arbitration."

Decree no. 4359, dated 16 January 1968 "On the arbitration of foreign commerce near the Chamber of Commerce of the Popular Socialist Republic of Albania."

Decree no. 5009, dated 10 November 1972 "On the state arbitration" as amended.

European Convention on International Commercial Arbitration, signed in Geneva on 21 April 1961: United Nations Treaty Series (1963–64), Vol. 484, p. 364, No. 7041, adhered by Albania by means of Law no. 8687, dated 9 November 2000.

Law no. 7424, dated 14 November 1990 "On state arbitration."

Law no. 7515, dated 1 October 1991 "On the membership of the Republic of Albania in the International Monetary Fund, the International Bank for Reconstruction and Development, the International Finance Corporation, the International Development Association the Multilateral Investment Guarantee Agency and the International Center for the Settlement of Investment Disputes."

Law no. 7594, dated 4 August 1992 "On foreign investments."

Law no. 7746 of 28 July 1993 "Petroleum Law (Exploration and Production)."

Law no. 7760, dated 14 October 1993 "On the ratification of the Convention between the Republic of Albania and Greece for the mutual judicial assistance in civil and criminal cases."

Law no. 7764, dated 2 November 1993 "On foreign investments."

Law no. 7796, dated 17 February 1994 "Mining Law of Albania."

Law no. 7973, dated 26 July1995 "On concessions and the participation of the private sector in public services and infrastructure."

Law no. 8036, dated 22 November 1995 "On the ratification of the Convention for the mutual judicial assistance in civil, commercial and criminal cases between the Republic of Albania and the Republic of Turkey."

Law no. 8116, dated 29 March 1996 "The Code of Civil Procedure of the Republic of Albania."

Law no. 8261, dated 11 December 1997 "On the ratification of the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects."

Law no. 8417, dated 21 October 1998 "The Constitution of the Republic of Albania."

Law no. 8761, dated 2 April 2001 "On the approval of the Concession Agreement of the type BOT between the Ministry of Public Economy and Privatization and the Turkish company Ber-Oner for certain objects of the copper and chrome industry as well as for the award of certain benefits and guarantees to the concessionaire of this agreement."
Law no. 9663, dated 18 December 2006 "On concessions."
Law no. 49/2012 "On administrative courts and the adjudication of administrative disputes."
Law no. 125/2013 "On concessions and public-private partnership."
Law no. 55/2015 "On strategic investments in the Republic of Albania."
The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958: United Nations Treaty Series (1959), Vol. 330, p. 38, No. 4739, adhered by Albania under Law no. 8688, dated 9 November 2000.

Case Law

Anglo-Adriatic Group Limited v. Republic of Albania, ICSID Case No. ARB/17/6, Award, 7 February 2019.
Award of the Court of Arbitration at the Serbian Chamber of Commerce, Belgrade, 27 January 2009 (*Galenika a.d. vs Jona Farma SHPK*), recognized by the Albanian Court of Appeal as per Judgment no. 30-2018-6338, dated 1 October 2009.
Bankers Petroleum Albania Ltd v. The Ministry of Energy and Industry of Albania and Albpetrol SHA, ICC Case No. 21349/EMT/GR, Final Award, 7 June 2024.
Burimi SRL and Eagle Games SH.A. v. Republic of Albania (ICSID Case No. ARB/11/18), Award, 29 May 2013.
ČEZ v. The Republic of Albania, UNCITRAL Rules, initiated on 16 May 2013, settled.
Durres Kurum Shipping SH.P.K., Durres Container Terminal SH.A, Metal Commodities Foreign Trade Corp. and Altberg Developments LP v. Republic of Albania (ICSID Case No. ARB/20/37), Award, 26 July 2024.
GBC Oil Company Ltd. v. Albania, Albpetrol, ICC Case No. 22676/GR, Award, 6 July 2020.
G.E. Transport s.p.a. and Athena s.a. v. Ministry of Public Works, Transport and Telecommunication, Republic of Albania, ICC Case 14403/FM, Final Award 28 July 2008 (ICC, Rome) (information taken from the enforcement decision of the United States District Court for the District of Columbia, Case 1:08-cv-02042-RMU, Doc. 16, 16 March 2010, and the subsequent CMD no. 386, dated 19 May 2010).
Hydro S.r.l., Costruzioni S.r.l., Francesco Becchetti, Mauro De Renzis, Stefania Grigolon, Liliana Condomitti v. Republic of Albania, ICSID Case No. ARB/15/28, Award, 24 April 2019, Decision on Annulment, 2 April 2021, Decision on rectification of the decision on annulment, 29 July 2021, Decision on the Claimants' preliminary objections pursuant to ICSID Arbitration Rule 41(5), 29 March 2023.
Hydro S.R.L. (Italy) v. Republic of Albania, ICC Case No. 20654/EMT/GR, Award of 7 September 2018.

Iliria S.r.l. v. Republic of Albania, Award, 3 September 1993.
Iliria S.r.l. v. Republic of Albania, ECHR, Judgment, 5 March 2024.
Ivicom Holding GmbH v. Republic of Albania, SCC Case No. 2021/155, Award, 26 June 2024.
Italstrade IS S.R.L. vs. Republic of Albania (Council of Ministers and the Ministry of Public Works, Transport and Telecommunications, General Directorate of Roads), ICC Case No. 13205 FM, Final Award 14 February 2006.
Kubota Corporation and Costruzioni Dondi S.p.A v. Albania, ICC case, Final Award 2023.
Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania (ICSID Case No. ARB/11/24), Award, 30 March 2015.
Mrs. Mimoza Ndroqi v. Republic of Albania, PCA Case No. 2023-64, initiated in August 2022, pending.
Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania, ICSID Case No. ARB/07/21, Award, 30 July 2009.
Sky Petroleum, Inc. v. Ministry of Economy, Trade, and Energy of Albania (Acting by and through the National Agency of Natural Resources), UNCITRAL Rules, Final Award, 7 May 2013.
Supreme Court Judgment no. 00-2015-3802, dated 16 July 2015 (*R&T SHPK vs. General Customs Directorate*).
Supreme Court Judgment no. 00-2018-1229, dated 27 December 2018 (*Sekcuk Sencer Esenyel vs. Trade Minerals AL SHPK*).
Supreme Court Judgment no. 5, dated 8 January 2013 (*C.A.E. SHPK vs. Energji SHPK*).
Supreme Court Judgment no. 92, dated 2 Mars 2010 (*Colliers International SHPK vs. City Park SHPK*).
Supreme Court Judgment no. 102, dated 28 September 2017 (*Kaptan Metal Dis Ticaret Ve Nakliyat AS vs. Scutari Construction SHPK*).
Supreme Court Judgment no. 142, dated 3 February 2022 (*Opsion-2010 SHPK et al., vs. Albanian Road Authority, Ministry of Infrastructure and Energy*).
Supreme Court Judgment no. 175, dated 24 April 2014 (*S4E Group GmbH vs. KESH SHA*).
Supreme Court Judgment no. 181, dated 1 June 2016 (*2T SHPK vs. Iren Acqua e Gas (IAG) Dega Shqiperi*).
Supreme Court Judgment no. 189, dated 1 June 2016 (*Ark I. Post Engineering vs. Sphinx SHPK*).
Supreme Court Judgment no. 284, dated 3 June 2015 (*Ital Trade SHPK vs. Trapani Charter SHPK*).
Supreme Court Judgment no. 356, dated 6 June 2013 (*Marko Tel & Hes Kablo Albania SHPK vs. ZTE Albania SHPK*).
Supreme Court Judgment no. 357, dated 5 July 2011 (*City Park SHPK vs. MEDART*).
Supreme Court Judgment no. 362, dated 6 June 2014 (*SC Energy Holding Srl vs. KESH SHA*).
Supreme Court Judgment no. 467, dated 18 September 2014 (*Elona Banda, Erkin Banda vs. Lani SHPK*).

Supreme Court Judgment no. 362, dated 22 July 2015 (*Fyber SHPK vs. Hidro Invest SHPK and Alb-Star SHPK*).
Supreme Court Judgment no. 580, dated 11 October 2023 (*Edil Quattro SHPK vs. HCE Costruzioni S.p.a. (former Todini Construzioni Generali S.p.a.*).
Supreme Court Unifying Judgment no. 6, dated 1 June 2011 (*I.C.M.A. s.r.l, AGRI. BEN S.A.S v. Ministry of Agriculture and Food, Republic of Albania*).
TIS Park SHPK vs Municipality of Vlore (Albania), ICC arbitration, Paris (information taken from the Municipality of Vlore webpage, 2018. Available at: https://bashkiavlore.org/wp-content/uploads/2018/07/2-KRITERET-PROCEDURES-MONITORING-COMMISSION.pdf, 1. 12. 2024.
The Joint Venture "JV Copri Construction Enterprises W.L.L. & Aktor Technical Societe Anonyme" 2. Copri Construction Enterprises W.L.L. 3. Aktor S.A. v. Albanian Road Authority under the Authority of the Ministry of Public Works and Transport, ICC Case No. 23998/MHM/HBH (C-24011/MHM/HBH), Final Award, 1 September 2020.
Tradex Hellas S.A. v. Republic of Albania, ICSID Case No. ARB/94/2, Award, 29 April 1999.
Valeria Italia Srl v. Republic of Albania, PCA Case No. 2018-49, Award on Jurisdiction, 17 August 2021.

Internet Sources

Albanian Commercial Register available at: https://qkb.gov.al/, 30 September 2024.
Albanian Electronic Register on Public Notifications and Consultations, Available at: https://konsultimipublik.gov.al, 30. 9. 2024.
Albanian Parliament. 2024. Available at: https://www.parlament.al/, 30. 9. 2024.
BIRN, 2023. *Albanian PM Threatens to Quit International Arbitration Body*, 7 April 2023, Available at: https://balkaninsight.com/2023/04/07/albanian-pm-threatens-to-quit-international-arbitration-body/, 1. 12. 2024.
China-SEE Institute, 2023. *It is time for Albania to pay! The costs of an international legal battle*, Weekly Briefing, no. 61(2) (AI), April 2023, Available at: https://china-cee.eu/2023/04/25/albania-economy-briefing-it-is-time-for-albania-to-pay-the-costs-of-an-international-legal-battle/#_ftn9, 1. 12. 2024.
European Commission. 2023. *Commission Staff Working Document, Albania 2023 Report accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2023 Communication on EU Enlargement policy*, 8 November 2023 Available at: https://neighbourhood-enlargement.ec.europa.eu/albania-report-2023_en, 1 December 2024.
European Commission. 2024. Available at: https://commission.europa.eu/, 1. 12. 2024.
Freedom House. 2024. *Nations Transit, Albania*, Available at: https://freedomhouse.org/country/albania/nations-transit/2024, 1. 12. 2024.
ICC Albania. 2024. *Survey Report: Arbitration in Albania 2024: Perceptions, Preferences and Expectations*, Available at: https://icc-albania.org.al/survey-report-arbitration-in-albania-2024-perceptions-preferences-and-expectations/, 1. 12. 2024.

ICSID. 2024. *Compliance with and enforcement of ICSID Awards, Background Paper* Available at: https://icsid.worldbank.org/resources/publications/compliance-and-enforcement-icsid-awards, 1. 12. 2024.

Open Data Albania. 2023. Cases Lost in Arbitration: Issues and Liabilities of the Albanian State. May 2022, Available at: https://ndiqparate.al/?p=19599&lang=en, 30. 9. 2024.

Transparency International. 2023. *Corruption Perceptions Index, Albania*, Available at: https://www.transparency.org/en/cpi/2023/index/alb, 1. 12. 2024.

UNCITRAL. 2024. Available at: https://uncitral.un.org/en/working_groups/3/investor-state, 30. 9. 2024.

UNCTAD. 2016. *Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment*, Investment Policy Monitor, Special Issue, November 2016.

UNCTAD. 2017. *Phase 2 of IIA reform: Modernizing the existing stock of old-generation treaties*. IIA Issues Note, 2, Available at: http://unctad.org/en/PublicationsLibrary/diaepcb2017d3_en.pdf, 1. 12. 2024.

UNCTAD. 2024b. *Investment Dispute Settlement Navigator, Albania*, Available at: https://investmentpolicy.unctad.org/investment-dispute-settlement/country/2/albania/investor, 30. 9. 2024.

UNCTAD. 2024a. *International Investment Agreements Navigator*, Albania, Available at: https://investmentpolicy.unctad.org/international-investment-agreements, 30. 9. 2024.

World Bank Group. 1992. *Guidelines on the Treatment of Foreign Direct Investment, Legal Framework for the Treatment of Foreign Investment: Volume II: Guidelines*. Washington, D.C.: The International Bank for Reconstruction and Development/The World Bank), Available at: https://documents1.worldbank.org/curated/en/955221468766167766/pdf/Guidelines.pdf, 1. 12. 2024.

Jelena R. Vukadinović Marković*

Review Scientific Paper
UDC: 336.765(497.11)
doi: https://doi.org/10.56461/SPZ_24405KJ
Received: 18. 9. 2024.
Accepted: 13. 1. 2025.

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.

* PhD, Assistant Professor, Senior Research Associate, Institute of Comparative Law, Belgrade, Serbia.
E-mail: *jelena_vuk83@yahoo.com*
ORCID: *https://orcid.org/0000-0002-3949-4672*

** This paper is a result of the research conducted at the Institute of Comparative Law financed by the Ministry of Science, Technological Development and Innovation of the Republic of Serbia under the Contract on realization and financing of scientific research of SRO in 2024 registered under no. 451-03-66/2024-03/200049.

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.

References

Besarović, V. 2011. *Intelektualna svojina: industrijska svojina I autorsko pravo*. 5. neizmenjeno izdanje. Beograd: Pravni fakultet Univerziteta u Beogradu.

Bordaš, B., Varadi, T. & Knežević, G. 2001. *Međunarodno privatno pravo*. Beograd: Pravni fakultet Univerziteta u Beogradu.

Cukavac, M. 2000 Arbitrabilnost spora, *Arbitraža,* br. 1, pp. 25-54.

Đorđević, M. 2010. The Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce (Serbia FTCA), In: Mistelis, L. & Brekoulakis, S. (eds.), *World Arbitration Reporter*, 2nd edition, National Arbitration Institutions, Jurisnet, LLC, New York 2, pp. 1-74.

Jankovec, I. 1999. *Privredno pravo*. Beograd.

Janjić M. 1982. *Industrijska svojina i autorsko pravo*. Beograd: Službeni list SFRJ.

Jovičić, K. 2020. Pravna priroda odnosa između arbitara i stranaka: *receptum arbitri*. *Strani pravni život*, 64(1), pp. 17-28. https://doi.org/10.5937/spz64-24773

Knežević, G. 1999. *Međunarodna trgovačka arbitraža*. Beograd.

Knežević, M. 2008. O pojmu i značaju arbitrabilnosti. *Zbornik radova Pravnog fakulteta u Novom Sadu*, 42(1-2), pp. 873-892.

Marković Bajalović, D. 2017. Arbitrabilnost sporova iz prava konkurencije *ratione materiae*. *Pravni život,* 11, pp. 363-380.

Marković, S. 1979. *Autorsko pravo i srodna prava*. Beograd.
Marković, S. 1997. *Patentno pravo*. Beograd.
Marković, S. 2007. *Pravo intelektualne svojine*. Istočno Sarajevo.
Milutinović, Lj. & Đorđević, M. 2016. Medijacija i arbitraža. *Bilten Vrhovnog kasacionog suda*, 2, pp. 271-296.
Mitrović, D. 2006. Zakon o arbitraži Republike Srbije. *Arbitraža*, 4, pp. 79-85.
Pavić, V. & Đorđević, M. 2016. Resolution of International Commercial Disputes before Serbian Arbitral Institutions – Certain Salient Features of the New Institutional Rules. In: Varadi T. *et al.*(eds.), *Liber amicorum Gašo Knežević.* Beograd, pp. 304-346.
Pavić, V. & Đorđević, M. 2014. Novine u pravnom okviru za ADR u Srbiji. *Harmonious Journal of Legal and Social Studies in South East Europe*, 3(1), pp. 244-271.
Pavić, V. 2019. Osvrt na praksu Vrhovnog kasacionog suda u arbitražnoj materiji. In: Radović, V. (ed.), *Usklađivanje poslovnog prava Srbije sa pravom EU,* Beograd, pp. 370-397.
Pavić, V. 2010. National Reports: Serbia. In: Mistelis, L, Shore, H. & Smit, H. (eds.), *World Arbitration Reporter (WAR)*, 2nd Edition, pp. 1- 47. Available at : https://ssrn.com/abstract=1729841
Perović, J. 2002. *Ugovor o međunarodnoj trgovinskoj arbitraži*. Beograd: Službeni list SRJ.
Perović, J. 2008. Autonomija ugovora o arbitraži. *Pravo i privreda*, 45(5-8), pp. 535-544.
Perović, J. 2012. *Standardne klauzule u međunarodnim poslovnim ugovorima*. Beograd: Centar za izdavačku delatnost Ekonomskog fakulteta.
Perović Vujačić, J. 2017. Sumnja u nezavisnost ili nepristrasnost arbitra kao osnov zahteva za njegovo izuzeće. *Pravni život*, 66(11), pp. 63-78.
Perović Vujačić, J. 2019. Obligations of Arbitrators in International Commercial Arbitration, *Revija Kopaoničke škole prirodnog prav*a, 1(1), pp. 131-166. https://doi.org/10.5937/RKSPP1901131P
Perović Vujačić, J. & Vukadinović Marković, J. 2024. Autonomija volja u postupku imenovanja arbitara -međunarodna trgovinska arbitraža. In: Vujisić, D. (ed.), *Izazovi i otvorena pitanja uslužnog prava*. Kragujevac, pp. 475-490.
Petrović, M. 2013. Punovažnost arbitražnog sporazuma. In: Marković Bajalović, D. (ed.), *Harmonizacija građanskog prava u regionu*. Pale : Pravni fakultet Univerziteta u Istočnom Sarajevu, pp. 479-497.
Popović, D. 2013. *Isključiva prava intelektualne svojine i sloboda konkurencije*. Beograd: Pravni fakultet Univerziteta u Beogradu.
Popović, D. 2017. Arbitrability of intellectual property disputes: revisiting the public order arguments. *Reshaping the boundaries of Arbitrability: Are we heading forward?* : *International Conference*, Belgrade, pp. 166-179.
Radomirović, I. & Vukadinović Marković, J. 2023. Forma arbitražnog sporazuma. *Revija za evropsko pravo*, 25(1), pp. 91-107. https://doi.org/10.56461/rep250123.05.R
Stanivuković, M. 2013. *Međunarodna arbitraža*. Službeni glasnik.
Stanivuković, M. 2014. Zakon o stečaju i arbitraža. *Zbornik Pravnog fakulteta u Novom Sadu*, 48(1), pp. 119-135.

Stanivuković, M. & Pavić, V. 2021. Predlog za izmene i dopune Zakona koji uređuje arbitražu i pitanja od značaja za arbitražu radi celovitog uređenja materije, *Branič*, 1, pp. 11-22.

Stanivuković, M. 2024. National Report for Serbia (2020 through 2023), In: Bosman, L. (ed.), *International Handbook on Commercial Arbitration*, Supplement 104. The Hague: Kluwer Law International, pp. 1-45.

Stanković, G., Starović, B., Keča, R. & Petrušić, N. 2002. *Arbitražno procesno pravo*, Niš: Udruženje za građansko procesno i arbitražno pravo.

Uzelac, A. 2010. Arbitrabilnost - aktuelno uređenje i neka sporna otvorena pitanja u hrvatskom pravu. *Pravo u gospodarstvu*, 4, pp. 1016-1046.

Vasiljević, M. 1997. Pedeset godina Spoljnotrgovinske arbitraže pri Privrednoj komori Jugoslavije u Beogradu. *Međunarodna privredna arbitraža - stanje i perspektive*. Beograd, pp. 3-12.

Vasiljević, M. 2000. Priroda i karakteristike Spoljnotrgovinske arbitraže pri Privrednoj komori Jugoslavije u Beogradu. *Arbitraža*, 1, pp. 3-13.

Vasiljević, M. 2013. *Kompanijsko pravo*. Beograd: Pravni fakultet Univerziteta u Beogradu.

Velimirović, M. 2000. *Poslovno pravo*. Podgorica.

Vukadinović, J. 2013. Uticaj prekograničnog stečaja na arbitražni postupak. *Pravni život*, 11, pp. 350-360.

Vukadinović, J. 2016. Arbitražna klauzula u opštim uslovima poslovanja – pitanje forme ili saglasnosti ugovornih strana. *Pravni život*, 11, pp. 287-299.

Vukadinović Marković, J. 2017a. Impact of EU Insolvency Regulation on Process of Resolving Disputes before International Commercial Arbitration. In: Patrašević, T. & Dujić, D. (eds.), *Procedural aspects of EU Law*. Osijek : Faculty of Law Osijek, pp. 127-143. https://doi.org/10.25234/eclic/6525

Vukadinović Marković, J. 2017b. Arbitraža i /ili medijacija kao način rešavanja sporova iz prava intelektualne svojine. *Pravna riječ*, 52, pp. 133-145.

Vukadinović Marković, J. 2022. *Postupak rešavanja sporova pred međunarodnim trgovinskim arbitražama*. Beograd: Institut za uporedno pravo. https://doi.org/10.56461/M183_22JVM

Vukadinović Marković, J. & Popović, V. 2022. (Ne)ugovornice arbitražnog sporazuma kao stranke arbitražnog postupka, *Strani pravni život*, 66(2), pp. 187-204. https://doi.org/10.56461/SPZ_22201KJ

Vukadinović Marković, J. 2023. Od arbitražnog ugovora u pismenoj formi do arbitraže bez ugovora. In: Ćeranić Perišić, J. & Čolović, V. (eds.) *Sećanje na dr Jovana Ćirića- putevi prava*. Beograd : Institut za uporedno pravo, pp. 279-293. https://doi.org/10.56461/ZR_23.IMJC.13

Vukadinović Marković, J. 2024. Is There a Place for Arbitration in Disputes Arising from Administrative Contracts. In: Devjak, S. & Dimitrijević, P. (eds.), *Law on General Administrative Procedure: Contemporary Tendencies and Challenges*. Eurosfera & Partners, Institute of Comparative Law, Faculty of Management and Law, pp. 165-179.

Vukadinović, V. 2019. *Naknada štete kao građanskopravna sankcija u pravu konkurencije Evropske unije*. Doktorska disertacija: Pravni fakultet Univerziteta u Novom Sadu.
Živković, P. 2012. *Effects of Bankruptcy on Arbitration Proceedings*. Budapest: Central European University.
Živković, U. 2013. Arbitration: Country Report for Serbia, *Civil Law Forum for South East Europe: Collection of Studies and Analyses,* 3. Tirana, pp. 263-273.

Legal Sources

Law on Arbitration, *Official Gazette of the Republic of Serbia*, No. 46/2006. Law on Resolving Conflicts of Laws with Regulations of Other Countries, *Official Gazette of the Socialist Federal Republic of Yugoslavia, Nos. 43/82 and 72/82 - corrigendum, Official Gazette of the Federal Republic of Yugoslavia, No. 46/96, and Official Gazette of the Republic of Serbia, No. 46/2006 - separate law.*
Law on Public-Private Partnership and Concessions, *Official Gazette of the Republic of Serbia, Nos. 88/2011, 15/2016, and 104/2016*.
Law on Bankruptcy, *Official Gazette of the Republic of Serbia, Nos. 104/2009, 99/2011 - separate law, 71/2012 - Constitutional Court decision, 83/2014, 113/2017, 44/2018, and 95/2018*.
Rules of the Permanent Arbitration at the Chamber of Commerce and Industry of Serbia, *Official Gazette of the Republic of Serbia, No. 101/2016*.
Rules of the Belgrade Arbitration Centre, available at: Rules-of-the-Belgrade-Arbitration-Center.pdf (arbitrationassociation.org)

Case Law

Decision of Supreme Court of Cassation, RŽ 146/2014, REV2 653/2014 dated September 10, 2015
Decision of Supreme Court of Cassation, PREV. 113/2015
Decision of the Supreme Court of Cassation, No. 58/2016, October 6, 2016.
Higher Commercial Court, Decision Pž. 9058/2006 dated March 22, 2007, extracts published in "Case Law of Commercial Courts - Bulletin No. 2/2007" and the electronic database Paragraf Lex
Permanent Arbitration in Belgrade, Case T-9/17

Nikolina Tomović*

Review Scientific Paper
UDC: 341.6(497.16)
doi: https://doi.org/10.56461/SPZ_24406KJ
Received: 13. 9. 2024.
Accepted: 13. 1. 2025.

MONTENEGRO RECAP: THE STANDARD OF FAIR AND EQUITABLE TREATMENT (FET) AS A CATALYST FOR INVESTMENT DISPUTES

Summary

The fair and equitable treatment (FET) standard stands for one of the most significant yet debated principles in safeguarding foreign investments. While its wording is often broad and vague, its definition often emerges through arbitral awards based on the particulars of each case. This paper analyses the FET clauses in Montenegro's Bilateral Investment Treaties (BITs) within the context of its EU accession and modern approaches to FET regulation. By examining Montenegrin BITs and reviewing past disputes, the paper explores key aspects of FET application in Montenegro's Investor State Dispute Settlement (ISDS) practice so far. Given that the FET standard has been a central issue in nearly all disputes against Montenegro, the analysis underscores the need to review and refine FET regulation in Montenegrin BITs, in order to ensure better protection for foreign investments and clarify which state actions violate FET. Furthermore, the paper compares Montenegro's FET clauses with those in EU practice, offering recommendations for aligning it with more robust frameworks.

Keywords: fair and equitable treatment, investments, EU, FET standard, Montenegro.

* LL.M., Teaching Assistant at the Faculty of Law, University of Montenegro, Podgorica, Montenegro; PhD Candidate at the Faculty of Law, University of Zagreb, Zagreb, Croatia.
E-mail: *nikolinat@ucg.ac.me*
ORCID: *https://orcid.org/0009-0004-6316-9281*

CRNA GORA: STANDARD FER I PRAVIČNOG POSTUPANJA KAO INICIJATOR INVESTICIONIH SPOROVA

Sažetak

Standard fer i pravičnog tretmana (FET) je jedan od najznačajnijih, ali i najviše diskutovanih standarda u oblasti zaštite stranih investicija. Iako je njegova formulacija često široka i nejasna, definicija ovog standarda se uglavnom nalazi u arbitražnim odlukama koje su zasnovane na činjenicama svakog pojedinog slučaja. Ovaj rad analizira odredbe fer i pravičnog tretmana u bilateralnim investicionim sporazumima Crne Gore, a u kontekstu njenog pristupanja Evropskoj uniji i savremenih pristupa regulisanju standarda fer i pravičnog tretmana stranih investicija. Analizom crnogorskih bilateralnih investicionih sporazuma i pregledom dosadašnjih sporova Crne Gore, ovaj rad istražuje ključne aspekte primjene standarda fer i pravičnog tretmana u dosadašnjoj praksi rješavanja sporova između Crne Gore i stranih investitora. S obzirom na to da se ovaj standard javlja kao jedno od glavnih pitanja u skoro svim sporovima pokrenutim protiv Crne Gore, analiza podvlači potrebu da se preispita i precizira njegovo regulisanje u crnogorskim bilateralnim investicionim sporazumima, kako bi se osigurala bolja zaštita stranih investicija i razjasnilo koje radnje države podrazumijevaju kršenje ovog standarda. U radu se dalje porede crnogorske odredbe o fer i pravičnom tretmanu stranih investicija sa takvim odredbama usvojenim na nivou EU, uz preporuke za usklađivanje regulisanja ovog standarda po ugledu na snažnije regulatorne okvire.

Ključne riječi: fer i pravičan tretman, investicije, EU, FET standard, Crna Gora.

1. Introduction

Arbitration regulation in Montenegro has its roots in the period when the country was part of the Socialist Federal Republic of Yugoslavia. Yugoslavia established the Foreign Trade Arbitration in Belgrade in 1947 (Jovanović, 2022, p. 161), mostly dealing with disputes regarding foreign trade and foreign partner relations. Yugoslavia also established Main State Arbitration in 1954, focused on regulating domestic commercial disputes. After it became an independent state, Montenegro

turned to finding its own way to include arbitration as a dispute resolution mechanism by adopting the Law on Arbitration (Montenegrin Law on Arbitration, Official Gazette of Montenegro, No. 047/15, 2015).[1] Montenegrin Law on Arbitration is based primarily on the United Nations Commission on International Trade Law (UNCITRAL) Model Law, including its provisions on establishing the arbitral tribunal, conduct of arbitration proceedings, recognition and enforcement of foreign arbitral awards, etc. The principal arbitration body is the Arbitration Court established within the Chamber of Commerce of Montenegro. Proceedings before the Court are conducted according to the Arbitration Rules before the Arbitration Court at the Chamber of Commerce of Montenegro, which were recently updated in 2023 to ensure they reflect current practices and standards in international and domestic arbitration. However, the parties may also agree to apply the UNCITRAL Arbitration Rules to proceedings before the Arbitration Court of the Chamber of Commerce of Montenegro. Although Montenegro's legal framework for arbitration aligns well with the standards of leading arbitration centres, arbitration itself has yet to gain significant popularity. It is primarily utilized by foreign-owned companies or those based outside of Montenegro (MINA BUSINESS, 2024). While Montenegro's legislation is on par with other prominent arbitration institutions, the challenge remains to raise awareness among domestic businesses and highlight the advantages arbitration offers for resolving disputes efficiently. Promoting its benefits to local entities could help make arbitration a more common choice in the business environment.

Since regaining independence in 2006, Montenegro has turned to attracting foreign direct investments, most of which today are in the tourism, real estate, energy, telecommunications, banking and construction sectors. According to the Central Bank of Montenegro data, the total amount of foreign direct investment flowing into Montenegro from the time of independence in 2006 until the end of 2023 amounted to 13.8 billion euros, while for the period 2019 to 2023, that number was 4.38 billion euros (Central Bank of Montenegro, 2024). As an official candidate to become the next member state of the European Union, Montenegro is continuously taking significant reform steps towards harmonizing its legal framework with EU standards, including the one related to investment climate and foreign investment protection. However, the implementation often lags far behind the legal structure, and Montenegro faces various challenges in dealing with foreign investors, through the unfinished investment projects or handling the previously undertaken obligations as the host state.

[1] There has been discussion about drafting a new arbitration law in Montenegro, however, at the time of writing, it is unclear what stage the drafting process has reached or what specific changes the new law will introduce.

Truth be told, Montenegro has mostly been successful in solving investment disputes so far, however, there is a number of significant disputes yet to come, as some of them are only in the initial phase, and some have only been announced. As a leading common catalyst of earlier investment disputes against Montenegro, we can identify the well-known and well-argued fair and equitable treatment standard (hereinafter: FET), which has appeared in almost all disputes. It is therefore reasonable to anticipate that the FET will also find its way into future disputes, along with its expansiveness and blurry meaning. This empowers us to examine and discuss the role of the FET standard in Montenegrin investment practices, including its Bilateral Investments Treaties (hereinafter: BITs) and investment dispute experience, which will further lead us to other possible dilemmas on Montenegro's path to the European Union and its approach to reforms in the world of investments. The following sections of the paper will provide a concise summary of the FET standard and the key dilemmas associated with its interpretation. The discussion will then shift to the investment policy challenges Montenegro is likely to encounter during its EU accession process. The central focus of the paper will analyse Montenegro's past investment disputes, particularly the contentious issues where the FET was a critical factor. Additionally, the paper will explore potential improvements to the regulation of the FET standards, drawing on practices adopted within the EU.

2. A Brief Insight Into the FET Standard and its Dilemmas

The fair and equitable treatment (FET) standard is without a doubt the most significant standard of treatment in Bilateral Investments Treaties (BITs), and it forms part of the majority of modern BITs. Besides, it is also the most commonly cited standard in investment disputes,[2] and its interpretation and applicability are at the centre of the fiercest debates and discussions in contemporary foreign investments law. As frequently occurs in the dynamic legal environment, these debates mostly arise from various ambiguities and the insufficiently specified content of the FET, as well as the threshold standards for its interpretation. Vague language and the absence of strict terms defining what is meant by "fair" and "equitable" in terms of a specific "investor" or "investment" are the very reasons why the FET standard invites interpretations, seeking its closer definition in investment tribunal awards reasoning.

[2] Nearly 83% of all the treaty-based investment arbitration cases (based on the available data) have involved claims based on the application of the FET standard clause (Sarmiento & Nikièma, 2022, p. 1; Shan, 2012, p. 23).

Most of the BITs simply refer to the FET standard without any further explanation of its content and actions that constitute possible violations.[3] This leaves room for investment tribunals to engage in a "quasi-legislative" activity (Živković, 2023, p. 20), setting the FET its much-needed contours. However, its broadness has led to it becoming a so-called *catch-all clause* used by investors (Mann, 1981, pp. 241-254; Sarmiento & Nikièma, 2022, p. 5; Reinisch & Schreuer, 2020, p. 252), allowing them to succeed in disputes where their other claims were more likely to fail. This consequently caused various efforts to limit the scope of the FET clause, some of which indicated that the treatment under the FET standard is nothing more than the treatment of aliens under the customary international law minimum standard of treatment for aliens (hereinafter: MST), below which the host state may not go.[4] However, the authors suggest that the modern concept of the FET standard should be understood in light of the legitimate expectations of investors,[5] which means that it has expanded beyond what is known as the minimum standard of treatment under customary international law (Rubins, Papanastasiou & Kinsella, 2020, p. 244).

Some authors, and even tribunals, have further argued and adopted the view that the FET itself has become a rule of custom because it is found in so many BITs (Tudor, 2008, p. 43; Kirkman, 2002, p. 343). Conversely, other researchers believe that it is premature to consider the FET as a rule of custom, and it is still primarily a treaty-based standard of protection, which foreign investors cannot claim in cases where the FET is not expressly guaranteed by the treaty text (Dumberry, 2020, p. 318). Although most FET clauses sound alike, there is much more to it than meets the eye. Despite the fact that a number of BITs combine different wording to include "fair and equitable", "just and equitable", or just "equitable" treatment, such differences do not alter the content of what constitutes the FET standard of treatment (Rubins, Papanastasiou & Kinsella, 2020, p. 240). However, when coupled with other possible standards of treatment or criteria established under reference to international law, customary international law, minimum standard of treatment under customary international law and the like, the FET clause can become something

[3] New generation Model BITs feature a novel type of the FET clause that includes a comprehensive list of measures deemed to breach the FET standard, e.g. the CETA agreement between the EU and Canada, or the EU-Singapore Investment Protection Agreement.

[4] This approach was taken by NAFTA parties in the binding interpretation issued through the NAFTA Free Trade Commission.

[5] According to some arbitral tribunals, investor's legitimate expectations are the dominant element of the FET standard (*Saluka Investments*, 2006, para. 302). The reasoning behind the investor's legitimate expectations is that it is commonly viewed as unjust for the host state to implement actions and changes that alter the expectations that the state made in its laws and regulations before the investment, specifically the circumstances that led the investor to invest (Dumberry, 2020, p. 324).

of a headache for investment tribunals. Over the years, states have adopted various approaches to the formulation of the FET standard in their concluded BITs. Existing practice lists the following approaches as the most common:

1) BITs with no reference to the FET standard or with reference to the FET solely in a BIT preamble, therefore, not imposing any binding obligations to the host State; 2) BITs that include the FET standard, but without any reference to international law or any other criteria, the so-called "stand-alone", autonomous or unqualified clauses; 3) BITs that include the FET standard linked to international law; 4) BITs that include the FET standard linked to the minimum standard of treatment (MST) of aliens under customary international law, or combined with the most-favoured-nation clause (MFN); and 5) BITs that include the FET standard with further guidance on how to apply the standard, or a list of possible violation actions, etc. (UNCTAD, 2012, p. 18; Dumberry, 2020, p. 316).

Once established, the standard by which we will determine whether a violation of the FET has occurred will serve to examine the elements of the FET standard and their alleged violation in a given case. The FET standard is unequivocally recognized to cover and protect the following principles:

1) principle of legality; 2) administrative due process and the denial of justice; 3) the protection of legitimate expectations; 4) the requirement of stability, predictability and consistency regarding the legal framework; 5) non-discrimination; 6) transparency; and 7) the principles of reasonableness and proportionality (Jacob & Schill, 2015, pp. 749-812).

These principles can be recognised as inseparable elements of the application of the rule of law in many legal systems, and therefore serve to protect foreign investors from such state's conducts that violate basic rule of law principles (Živković, 2023). A wide spectrum of measures can give rise to a potential breach of the FET principle, usually defined under a denial of justice, breach of due process, frustration of investor's reasonable and legitimate expectations, instability in the host state's legal framework, lack of transparency, arbitrary decision - making, acting in bad faith, coercion and harassment of the investor (Sarmiento & Nikièma, 2022, p. 4). On the other hand, the state's right to regulate is a significant element of the FET standard interpretation, and needs to be taken into account when approaching its possible violations by the host states.[6]

[6] The right to regulate can be perceived as the legal right of the host state to enact laws or other measures contrary to the substantive obligations it has undertaken in its international investment treaties, without having to compensate injured investors (Titi, 2022, p. 17). The state's right to regulate is in the opposite direction of the application of the FET standard, meaning that it is in the hands of arbitral tribunals to balance the public interests of the host state and the interests of investors when interpreting and applying the FET standard (Levashova, 2019, p. 54).

It is evident that a deeper interpretation of the FET raises questions both on the very nature of this standard and its application in individual cases. However, as its text became universally adopted over time, tribunals tended to look to the facts of the case rather than the FET wording in the BIT when approaching the standard. Usually, the interpretation involves two stages. Tribunals first determine the legal standard against which they will judge the violation of the FET, followed by an analysis of the specificity and scope of the FET clause and the facts of the current case.

3. Montenegro on its Icy Road to the (New) EU Investment Policy

When discussing the origin of foreign investments in Montenegro, the Central Bank of Montenegro statistics reveals that in 2023, the largest share of investments came from Serbia, followed by Russia and Turkey, with Germany and Switzerland trailing behind. Among others are investments from the USA, United Arab Emirates, Cyprus, Austria and Ukraine.[7] It catches the eye that investments from non-EU countries are leading the way, as the countries with the highest representation of investments. At least for now, until Montenegro becomes a full EU member. Recently, Montenegro has received a positive Interim Benchmark Assessment Report (hereinafter: IBAR),[8] directly signalling that Montenegro has made significant steps in important areas and can continue to align with EU laws and standards in order to prepare for full membership. It is now clear that Montenegro is on a safe track to become the 28th EU member state, opening the door for new insights into investment policy and possible challenges. It is no secret that the world of investments in the EU has been shaken by major changes after the *Achmea* award (Case C-284/16; see: Ankersmit, 2018; Fouchard & Krestin, 2018) in the practice of Court of Justice of the European Union (hereinafter: CJEU). In the *Achmea* case, the CJEU established the incompatibility of arbitration clauses contained in the so-called intra-EU BITs with EU law, opening a discussion

[7] According to these data, investments from Serbia amounted to 125.2 million euros, investments from Russia 112.5 million, investments from Turkey 85.2 million, investments from Germany 72.8 million, and investments Switzerland 64.8 million (Forbes SRB, 2024).

[8] The Montenegro EU accession negotiations have been going on for over 12 years, and at the present moment, Montenegro has opened 33 and closed 3 chapters. In February 2020, Montenegro accepted a new negotiation methodology, according to which no chapter can be temporarily closed until the IBAR (Interim Benchmark Assessment Report) is received. Positive IBAR is an indicator that the country has progressed in the area of the rule of law and the judiciary, and that it is ready for the next phase of alignment with EU standards. After a positive IBAR, the country receives the European Commission's final benchmarks, whereby chapters 23 and 24 close last, also with the fulfilment of the final benchmarks (CDM, 2024).

on the future of the investor-state dispute settlement mechanism (hereinafter: ISDS) in Europe, and particularly, in the EU (Beaumont *et al*., 2024). It not only opened discussions, but also resulted in a Termination Agreement[9] signed by 23 EU member states,[10] used to repeal some 196 intra-EU BITs (Spaić, 2023, p. 65), meaning that the ISDS mechanism through international arbitration, as we knew it, will no longer be possible in the EU.[11]

The CJEU later reaffirmed and expanded its stance on investor-state disputes arising under the Energy Charter Treaty (hereinafter: ECT), by ruling in the *Republic of Moldova v. Komstroy*[12] *case. In this case, the CJEU ruled that intra-EU arbitration based on the ECT is contrary to EU law, sparking an even more intense debate, as it seemed that the CJEU had snuck this decision in through the backdoor tactic.*[13] *Nevertheless, the CJEU stepped in and defended its position as the sole supreme supervisor and interpreter of EU law, ruling that investment arbitration tribunals were not adequately subject to judicial review, which would ensure the complete effectiveness of EU law. In this regard, the EU has proposed to launch a Multilateral Investment Court (hereinafter: MIC) that will serve to replace ad hoc* arbitration tribunals and judge claims initiated under investment treaties that member states have decided to transfer to its jurisdiction (Spaić, 2023, p. 65; Brodlija, 2024, p. 4; Croisant, 2024).

Resuming the discussion on Montenegro, the establishment of the MIC will significantly impact its future investor-state relations. Not only will Montenegro

[9] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, OJ L 169/1, 29 May 2020.

[10] Austria, Sweden, Finland and the Republic of Ireland did not sign this Agreement.

[11] However, the authors are vocal in that *Achmea* does not mean the complete abolition of investment arbitration in the EU area. Moreover, they note that some arbitral tribunals seated outside the EU, such as those in London, do not consider themselves bound by the *Achmea* decision, which allows them to continue accepting and processing intra-EU investment arbitration cases. In addition, many BITs include sunset clauses that allow existing protections and arbitration mechanisms to remain in effect for a certain period even after the treaties are terminated (Reuter, 2021, pp. 33-45; Hindelang, 2018).

[12] In the Komstroy case, the dispute was between a Ukrainian investor and Moldova, so it was not an intra-EU dispute. However, the seat of the arbitration was in Paris, France, whose Court of Appeal decided to stay the annulment proceedings and ask the CJEU for a preliminary ruling on several issues, mainly concerned with the definition of investment under the ECT. However, the CJEU relied on the EU's interest in having the ECT provisions uniformly interpreted and on the fact that the seat of arbitration in the present case was in an EU country, justifying the jurisdiction of the CJEU (Brodlija, 2024, p. 6).

[13] Authors share the opinion that this case was not the best opportunity to extend the *Achmea* findings to ECT arbitration, mainly because this particular issue was not submitted to the CJEU, the case itself was not an intra-EU dispute and EU law was not directly enforceable (Fouchard & Thieffry, 2021).

have to align its investment policy with the restrictive EU standards,[14] but its current experience in the ISDS world will also be subordinated to a completely new practice that would be established under the MIC. Once it becomes an EU member state, Montenegro will be unable to rely on its previous (although modest) experience in the ISDS mechanism, mostly acquired within the context of the International Centre for Settlement of Investment Disputes (further: ICSID). This is especially in disputes that will arise with investors from EU member states. Conversely, as a country primarily dealing with investors from outside the EU, it will remain possible for it to maintain various forums for investor-state dispute settlement through extra-EU BITs (between EU member states and non-member countries), at least for the time being.[15] In any case, Montenegro may still be capable of meeting its obligations under BITs established prior to its EU membership, in accordance with the conditions prescribed by Article 351 of the Treaty on the Functioning of the EU (Ankersmit, 2018).

3.1. A Closer Look at FET Clauses in Montenegrin BITs in the Light of New EU Models

Considering its upcoming EU membership, it is reasonable that Montenegro should follow the EU practice and regulations when it comes to defining and contracting the FET clause in its BITs. However, it is not difficult to see the discrepancy between the FET clauses in the current Montenegrin BITs and those present, for example, in the CETA Agreement [16] or in the model BIT provisions between EU member states and third countries.[17] While the FET clauses contained

[14] With the Lisbon Treaty, the EU gained exclusive competence over direct foreign investments, as part of its common commercial policy under Article 207 of the Treaty on the Functioning of the EU. This essentially limits member states' independent treaty-making powers regarding direct foreign investments after joining the EU, as member states are not allowed to negotiate and conclude new BITs or other international agreements independently. Instead, the EU must negotiate such agreements on behalf of all its member states.

[15] Nonetheless, the future of extra-EU BITs remains open, as tribunals established under such treaties can potentially exclude disputes related to EU law from the jurisdiction of EU member state courts. This leads to each EU member state being required to terminate such extra-EU BITs, opening the door to a new field of legal uncertainty – the enforceability of decisions in such cases before EU member state courts (Ankersmit, 2018).

[16] The Comprehensive and Economic Trade Agreement - CETA (OJ L 11/24, 14.1.2017. pp. 23-1079.) is the trade agreement between the EU and Canada designed to enhance trade and stimulate economic growth and job creation.

[17] The European Commission released a Non-Paper containing annotation to model clauses for the negotiation or renegotiation of bilateral investment treaties (BITs) between member states and third countries. Although it is an informal document, the Non-Paper reflects the Commission's approach to investment protections, as well as best practices to be adopted among EU

in the current Montenegrin BITs are mostly those of the old generation, meaning that they are broadly worded and open for interpretation, those contained in the CETA include list of specific actions deemed violations of the FET standard, as well as further instructions on how to implement the FET standard. The following analysis will examine the FET clauses in Montenegro's existing BITs, highlighting particular features that have generated challenges and ambiguities in their application, as evidenced by arbitral practice. Emphasis will be placed on the differences between the current approaches and those applied in EU practice, with suggestions for improving the regulation of the FET standards in future BITs.

Examining the BIT with the country from which Montenegro receives the highest investments, Serbia, we can find a somewhat simple and regular FET standard clause. Under Art. 2 titled "Encouraging and protecting investments", it has been established in paragraph 2 that:

> "[Investments of investors of each Contracting Party shall, at all times, in the territory of the other Contracting Party, enjoy fair and equitable treatment and full protection and security. None of the Contracting Parties shall use unreasonable or discriminatory measures to hinder the investor of the other Contracting Party in managing, maintaining, using, enjoying or disposing of their investments in its territory.]"[18]

It can be noted that this clause encompasses not only the FET standard, but also the full protection and security principle. However, this formulation does not change the interpretation of the FET, it rather merely enumerates both standards of treatment within the same clause (UNCTAD, 2012, p. 21). While the FET standard addresses mostly the administrative and judicial decision-making processes, it is worth noting that full protection and security principle is interpreted primarily as the obligation of the host state to take all reasonable measures to physically safeguard assets and property from threats and attacks by public officials or third parties (UNCTAD, 2012, p. 36).[19] However, some tribunals have questioned whether the clause on full protection and security principle encompasses also the legal protection of investments, and not only physical protection (*Siemens A.G. v. Republic of Argentina*, 2007, para. 303; Rubins, Papanastasiou & Kinsella, 2020, p. 247). In any

member states (Nacimiento, Scharaw & Lui, 2024).

[18] Agreement between Montenegro and the Republic of Serbia on Mutual Encouragement and Protection of Investments (2009).

[19] As noted in the *Saluka Investments BV v. The Czech Republic* (2006, para. 483), "the 'full protection and security' standard applies essentially when the foreign investment has been affected by civil strife and physical violence." However, some cases raised the issue of whether full protection and security standard covers legal security of investments as well, i.e., *Siemens A.G. v. Republic of Argentina* (2007, para. 303).

case, only a few BITs contain special wordings that provide "full *legal* protection and security," strangely enough, one of them is the BIT concluded between Montenegro and Poland.[20] Meanwhile, some EU legal texts contain clarifications that "full protection and security" pertains to the obligations concerning the physical security of investors and protected investments.[21] Be that as it may, the state's duty to provide full protection and security is enshrined in almost all BITs, making it a very common standard in investment protection practice, and when combined with the FET principle, it should be interpreted as a complement standard (Rubins, Papanastasiou & Kinsella, 2020, p. 245-246).

This regular, or unqualified, FET clause from Serbia-Montenegro BIT is common in other BITs concluded by Montenegro with other countries, i.e., with Germany, Cyprus, Moldova, Qatar, Slovakia, Lithuania, Czech Republic, etc.[22] The clause usually provides that investments [shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other contracting party]. As is the case with the BIT concluded with Serbia, some other BITs also further impose that [neither Contracting Party shall, in any way, impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, disposal and, eventually, liquidation of such investments in its territory of nationals or companies of the other Contracting Party...].[23] However, such an additional provision does not constrain the scope of the FET to unreasonable or discriminatory measures only, but merely seeks to enhance the substance of the FET clause (UNCTAD, 2012, p. 31).

A more questionable issue is a reference point to international law, such as the one made in Montenegro-Spain BIT,[24] providing that a party [shall in no case

[20] Agreement Between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Republic of Poland on Reciprocal Promotion and Protection of Investments (1997); e.g. This particular phrase is included in Croatia-San Marino BIT as well; A similar provision establishing continuous protection and security is included in the Montenegro's BIT with the Belgium-Luxembourg Economic Union, explaining that this standard excludes an unjustified or discriminatory action that could impede, *whether legally or practically*, the management, maintenance, use, possession, or liquidation of the investment.

[21] E.g. the CETA agreement between the EU and Canada, as well as the EU-Singapore Investment Protection Agreement.

[22] Germany-Montenegro BIT (1989), Cyprus-Montenegro BIT (2005), The Republic of Moldova-Montenegro BIT (2014), Montenegro-Qatar BIT (2009), Montenegro-Slovakia BIT (1996), Lithuania-Montenegro BIT (2005), Czech Republic-Montenegro BIT (1997).

[23] For example, Malta-Montenegro BIT (2010), Montenegro-Netherlands BIT (2002), Montenegro-Turkey BIT (2012), Montenegro-Switzerland BIT (2005), Greece-Montenegro BIT (1997), Bosnia and Herzegovina-Montenegro BIT (2001);

[24] Agreement between the Federal Republic of Yugoslavia and the Kingdom of Spain on

accord to such investments treatment less favourable than that provided for by international law]. Despite the obvious connection with international law, the above wording is viewed as granting arbitrators greater flexibility in interpretation than the wording that provides that investments will receive fair and equitable treatment [in accordance with international law] (UNCTAD, 2012, p. 22).[25] A tribunal that is explicitly mandated to interpret the FET in line with international law cannot exceed the boundaries set by the sources of international law regarding the scope and meaning of the FET. On the other hand, a tribunal dealing with treatment *no less favourable than that provided for under international law* may interpret the FET more freely as an additional requirement to those established under international law. Therefore, the "no less favourable" wording is generally considered essentially closer to an unqualified FET clause, setting only a threshold for treatment below which the state may not go and leaving arbitrators with greater autonomy to determine the content of the FET in the specific case (UNCTAD, 2012, p. 23).

Determination of the applicable standard in the FET clause aims to answer a crucial threshold question - what is the criterion by which a state's conduct should be evaluated? Seen through the eyes of practice, it is easier to prove a breach of the FET as an "autonomous" standard, than under a provision referencing the international law or the MST. It was generally agreed that under the *Neer* standard (*United States v. Mexico,* 1926), when in conjunction with the MST, the FET provision gives rise to a higher threshold of liability to be applied, covering only very serious acts as violations of the BIT.[26] However, this threshold has been changed by later cases, which highlight the evolution of international investment protection from *Neer* to the present. Modern tribunals often recognize that the MST has evolved beyond the "egregious" or "outrageous" conduct standard established by *Neer*, to be aligned more closely with the contemporary FET expectations (*Mondev International Ltd. v. United States of America*, 2002, para. 116; Bi*lcon of Delaware Inc. and others v. Government of Canada,* 2015, para. 440; *Lone Pine Resources Inc. v. Government of Canada*, 2022, para. 602-604).

Alternatively, the autonomous or unqualified FET clause leaves that specific extent of the standard to be determined at the tribunals' discretion (Dumberry,

Promotion and Reciprocal Protection of Investments (2002); A similar reference is made in Finland-Montenegro BIT (2008) as well.

[25] For example, such wording is present in Croatia-Oman BIT (2004).

[26] State's conduct in such a case needs to be "egregious" or "outrageous" to determine a FET clause violation. This standard is specified in the *Neer* case (*United States v. Mexico, 1926*), where the tribunal stated that [the treatment of alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency] (UNCTAD, 2012, p. 45-46).

2023, p. 6), allowing tribunals to determine the range of principles required to fulfil the objectives of each BIT in a particular dispute (*Biwater Gauff v. Tanzania* case, 2008, para. 593-59), which presumably leaves investors with a better level of protection (Dumberry, 2023, p. 10). This holds particular importance given that the FET standard is highly fact-dependent and its potential violation must be established based on all circumstances in the specific case (*Biwater Gauff v. Tanzania*, 2008, para. 593-595; *Mondev v. USA*, 2002, para. 118).

None of the BITs concluded by Montenegro to date contains any guidelines for the implementation of the standard regarding its content and the actions that may constitute a potential FET standard violation. The use of such simple and unqualified FET clauses has almost ceased in the new practice of BITs concluded after 2018 (OECD, 2023, p. 9). Recently concluded BITs generally limit the scope of FET-related obligations or provide an exhaustive list of actions that represent a FET violation, while some of them contain no obligation to provide FET standard of treatment at all.[27]

Taking the EU practice as an example, e.g. the CETA Agreement, which shows a significantly detailed approach to the FET standard and its regulation, not only does CETA establish the requirement to provide fair and equitable treatment and full protection and security for investment, but it also gives a closed and comprehensive list of the FET standard violations. It is stipulated that a party violates the FET obligation if a measure or set of measures constitutes [denial of justice in criminal, civil or administrative proceedings; fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; manifest arbitrariness; targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; abusive treatment of investors, such as coercion, duress and harassment; or some other element of the FET that is established between the parties to the agreement] (Art. 8.10, CETA Agreement.)[28] It was further established that the signatories will regularly, or at the party's request, examine the elements of the FET obligation, which may lead to new recommendations in this regard. Some other guidance o the FET standard relate to the approach to the frustration of legitimate investor expectations,[29] as well as the question of

[27] E.g., India-Singapore Comprehensive Economic Cooperation Agreement.

[28] A somewhat similar provision is contained in Art. 2.4 of the EU-Singapore Investment Protection Agreement (2018), OJ L 294/3, 14.11.2019.

[29] Frustration of investor's legitimate expectations generally implies some "change" in the regulations affecting the investment. Claims derived from the frustration of legitimate expectations of investors are generally considered to develop in situations where the investor suffers losses due to changes made by the State (UNCTAD, 2012, p. 64). However, one of the questions is to what degree the FET standard encompasses the protection of these expectations. Arbitral tribunals

what would not constitute a FET standard breach.[30] It can be presumed that this approach grants a more profound way to the application of the FET standard in investor-state dealings. One thing is certain, an unqualified FET clause provides a very limited protection for host states against the possibility that a tribunal adopts a wide-ranging interpretation and concludes that a FET violation has been committed (Dumberry, 2023, p. 21).

3.2. Approach to the FET in Montenegro's ISDS Experience so Far

Several concluded disputes against Montenegro have addressed compliance with the FET standard requirements,[31] while some of them are currently ongoing,[32] and some have been announced, but have yet to be officially launched. Although potential FET clause violations have been a particular focus by tribunals in some cases, in other disputes there was no chance to discuss the FET because the tribunal declined jurisdiction.[33] Nevertheless, it can be noted that the FET clause revealed itself as a potential catalyst for investment disputes against Montenegro.

In some cases, tribunals had to deal with broader issues than determining whether there had been a FET standard violation. For example, in the case *Addiko*

have adopted different approaches to this issue, from establishing the obligation of host states to maintain a stable legal and business framework (*Techmed v. Mexico*, 2003; *CMS Gas Transmission Company v. Argentina*, 2005) to clarifying the specific requirements for a FET claim grounded in frustration of legitimate expectations to succeed (Dumberry, 2020, p. 325).

[30] For example, a violation of some other CETA clause, or an independent international treaty clause, does not constitute a FET clause violation, nor does a measure in breach of domestic law.

[31] For example: *Addiko Bank AG v. Montenegro*, (ICSID Case No. ARB/17/35); *Oleg Vladimirovich Deripaska v. the State of Montenegro* (PCA Case No. 2017-07); *CEAC Holdings Limited v. Montenegro* (ICSID Case No. ARB/14/8); *MNSS B.V. and Recupero Credito Acciaio N.V v. Montenegro* (ICSID Case No. ARB(AF)/12/8); *Medusa (Montenegro) Limited v. Montenegro* (PCA Case No. 2015-39).

[32] For example, *Atlas Group and Duško Knežević v. Montenegro* (Further details still not available) (Global Arbitration Review, 2020).

[33] In *Medusa (Montenegro) Limited v. Montenegro* (2015), the tribunal raised the issue of whether or not Medusa was a protected investor under the relevant BIT. In this case, Medusa relied on three different BITs, in particular on Austria-Montenegro BIT (2001), Finland-Montenegro BIT (2008) and Serbia-United Kingdom BIT (2002), in order to enhance its position against Montenegro. However, the tribunal stated that Medusa had been unable to prove that it qualified as an investor protected by any of the BITs and declined its jurisdiction. On the contrary, in the case of *CEAC Holdings Limited v. Montenegro* (2016), the tribunal faced doubts about qualifying CEAC as an investor under Cyprus-Montenegro BIT (2005). The tribunal decided that the CEAC did not hold a seat in Cyprus as required by the relevant BIT and, therefore, that the tribunal was unable to exercise jurisdiction over the matter.

Bank AG v. Montenegro (2021),[34] the tribunal examined whether the Article 2(2) of the relevant Austria-Montenegro BIT,[35] stipulating the FET standard, referred to the MST under customary international law (MST) or whether it referred to a separate autonomous standard. Tribunal was specifically concerned with the interpretation of the phrase:

> "[investments admitted … shall at all times be accorded fair and equitable treatment…]" in Article 2(2) of the Austria-Montenegro BIT.

Tribunal concluded that the clause set in Austria-Montenegro BIT created an autonomous standard, and not the MST under the customary international law. Tribunal interpreted the BITs text in accordance with the treaty interpretation standards set out in the Vienna Convention on the Law of Treaties (VCLT, 1969),[36] finding that the reference "fair and equitable treatment" in Art. 2(2) of the Austria - Montenegro BIT was not a reference to the MST under customary international law. Tribunal explained that the MST was a "well-established concept in international law" and that "the parties to the treaty could have specifically referred to it, if they wished the customary international law standard to apply" (*Addiko* award, 2021, p. 152). This view is supported by recognized scholars, who argue for the FET standard to be commonly viewed as an independent standard in treaties, seeking also an autonomous interpretation from the MST, especially in cases where BIT includes only a simple, unqualified FET clause, without any reference to international law (Dumberry, 2020, p. 314).

Tribunal relied on the reasoning from *Biwater Gauff v. Tanzania*, which established that "actual content of the FET standard is not materially different from the content of the MST in customary international law." However, tribunal noticed that

[34] The dispute involved Montenegro's enactment of the "Law on Conversion of Swiss Franc Denominated Loans into Euro Denominated Loans," following the Swiss central bank's decision from the previous year to eliminate an exchange rate control mechanism. This move caused the Swiss franc to surge in value against the euro, resulting in borrowers having to repay their loans at significantly higher rates. Addiko was obligated to refund the borrowers without applying interest on the converted loans and reportedly incurred costs of 10 million euros for converting loans that had already been repaid. Addiko argued that this Law violated Austria-Montenegro BIT by causing significant financial harm to its investment in Montenegro, as well as that the Law constituted unfair and inequitable treatment and amounted to an indirect expropriation of its assets.

[35] Dispute was submitted to arbitration under ICSID on the basis of Austria-Montenegro BIT (2002).

[36] Vienna Convention on the Law of Treaties (VCLT, 1969), known as the "treaty on treaties," serves as an international agreement that regulates treaties among states, establishing rules, guidelines and procedures on how the treaties are to be drafted, defined, amended and interpreted.

FET was not precisely defined in the BIT, but seemed to grant each arbitral tribunal "much latitude", therefore leaving tribunal to determine its content based on the interpretation of specific facts.[37]

In defining the relevant threshold, the tribunal followed the reasoning from *David Minnotte v. Poland* (2014, para. 198), that it is insufficient that a claimant finds itself in an unfortunate position as a result of all of its interactions with a respondent. Instead, the claimant must demonstrate that the state's conduct involved some level of impropriety (*Addiko* award, 2021, p. 155). *Addiko* claimed that there had been several breaches of Austria-Montenegro BIT and that the tribunal had to decide whether there had been a violation of due process and good faith, whether the investor's legitimate expectations had been frustrated, whether the measures taken by Montenegro had been discriminatory and proportionate, and whether these measures were unreasonable or arbitrary. However, the Tribunal rejected all claims and determined that Montenegro had not violated the FET standard under the Austria-Montenegro BIT, therefore it had not violated the BIT itself.

Further, in the *MNSS v. Montenegro* (2018)[38] case established under Montenegro-Netherlands BIT (2002), the parties argued whether a breach of contract may have been a breach of the FET standard or not. Yet, the tribunal only briefly addressed this matter, citing the *Noble Ventures* (2005, para. 53) and the stance that, under normal circumstances, a breach of a contract *per se* did not automatically result in direct international responsibility for the state. While FET is not usually used as a tool to assess the adequacy of a contractual arrangement between foreign investors and host states (*Bivac BV v. Paraguay*, 2012, para. 211-213), there are diverse perspectives on this issue. Some tribunals have found violations of the FET clause when there has been a breach of contract in situations where the host state's actions were arbitrary, discriminatory or conducted in bad faith (*CMS Gas*

[37] Further accessing the relevant threshold in the *Addiko* case, tribunal stated that the simple integration of the FET standard in the treaty language did not shield an investor from any state conduct or intervention, but that it was upon investor to show that there was "some degree of impropriety in the state's conduct". Tribunal referred to *David Minnotte v. Poland* award, which stated that it was insufficient for an investor to be in an unfortunate situation due to its interactions with the host state, and that it had to demonstrate also that the host state had acted improperly in some manner to be found in violation of the standard (*Addiko* Award, 2021, p. 155).

[38] Dutch companies MNSS B.V. and Recupero Credito Acciaio N.V. invested in the steel plant Željezara Nikšić in Montenegro through the privatization process. However, the investor claimed that Montenegro had misinterpreted the financial health and operational status of the plant, and that the plant was in a far worse condition than had been shown. Later financial difficulties led to bankruptcy proceedings and the investor claimed that Montenegro's misrepresentation, improper interference and mismanagement of bankruptcy proceedings were actions that were detrimental to its investment and led to an infringement of the FET established under Montenegro-Netherlands BIT.

Transmission Company v. Argentina, 2005; *AES Summit v. Hungary*, 2010; Schreuer, 2005, pp. 357-386). Therefore, it is widely accepted that a mere breach of contract is not by default a breach of the FET standard, but that there must be additional elements such as serious acts of mistreatment, rather than simply a matter of compliance with the contract.[39] BITs generally do not explicitly state whether a breach of contract constitutes a breach of the FET clause, but the phrasing of the clause itself may provide arbitrators with broader or narrower interpretations to include/exclude a particular breach of contract as an act violating the FET.

4. Is There a Preferred Conclusion for Montenegro?

Given all that has been discussed, one should not be surprised with an overhead question that remains - what should Montenegro do to prevent future disputes arising from the FET clause? Furthermore, what should Montenegro do to prepare its investment policy regime for the upcoming challenge of harmonizing its investment policy with the EU policy, especially the one dealing with the ISDS mechanism? Both these questions are quite difficult to address, as disputes will arise as long as there is investment, while the EU appears to be continuing its search for its best response to foreign investment regulation. Regardless of that, Montenegro should aim to enhance its position as an attractive host state for foreign investments, known for its good reputation in dealing with foreign investors, and recognized as a country where the law prevails. To achieve this, Montenegro should review its already concluded BITs, many of which it inherited as the successor state from its time as part of the Socialist Federal Republic of Yugoslavia and later the Federal Republic of Yugoslavia. The predominant form of the FET clauses in the current Montenegrin BITs is a simple, unqualified FET clause, without any

[39] Similar discussion follows the umbrella clauses incorporated in many BITs, in particular whether the umbrella clause applies to obligations arising under the investment contract between the host state and investor, and not only to obligations arising under the specific BIT. Umbrella clauses indicate that the host state "shall observe obligations," "shall respect any obligation," "shall constantly guarantee the observance of the commitments," or "shall comply with obligations" entered into with investors from the other contracting state. However, arbitral practice soon questioned the exact scope of the umbrella clause, and whether the arbitral tribunal established under the BIT holds jurisdiction over claims for breach of investment contract (Wong, 2006, p. 139). While in some cases like *SGS v. Pakistan* (2003) the conclusion was that the BIT tribunal lacked jurisdiction regarding contractual claims, tribunals in cases such as *SGS v. Philippines* decided otherwise (2004). Some tribunals attempted to find a middle ground, evaluating the unique circumstances of each case, e.g. in *El Paso v. Argentina* (2011) where the tribunal argued that only contractual obligations related to the state's sovereign authority could be raised under the umbrella clause, but not purely commercial breach of contract.

guidance on what constitutes coverage under the FET standard or what the possible violations thereof are. As noted in the earlier discussion, the FET is considered the embodiment of the rule of law in investment protection, and therefore, it ought to be regulated and implemented with care. For this reason, competent Montenegrin authorities should prepare an analysis of what should be revised in the Montenegrin BITs, with an emphasis on the FET standard and its formulation. Considering Montenegro's upcoming membership in the European Union, it would be most logical for Montenegro to align actions with the viewpoints of the EU and its member states, thus facilitating the future harmonization and adaptation process. Additionally, it is important to protect its relations with the non-EU countries, as a significant number of them are among the largest Montenegrin investors, and matters of interpretation of EU law can become quite sensitive when dealing with the non-EU forums. Fortunately, Montenegro still has a fair amount of time to refine its investment policy to guarantee a smooth shift to the new EU ISDS system and catch up on best practices in regulating foreign investment protection.

References

Beaumont, B., Brodlija, F., Ashdown, R. & Terrien, A., 2024. *The Future of Investor-State Dispute Settlement: Reforming Law, Practice and Perspectives for a Fast-Changing World* . Alphen aan den Rijn, Netherlands: Wolters Kluwer.

Brodlija, F. 2024. The Multilateral Investment Court: Necessary ISDS Reform or Self-Fulfilling Prophecy? *Arbitration Law Review*, 15(1), pp. 1-18.

Dumberry, P. 2020. *A Guide to General Principles of Law in International Investment Arbitration*. Oxford International Arbitration Series. Oxford: Oxford University Press. https://doi.org/10.1093/law/9780198857075.001.0001

Dumberry, P. 2023. *The cost of inaction: arbitral practice in respect of earlier generation FET clauses and current approaches to FET clauses*. Paris : OECD. Available at: http://dx.doi.org/10.2139/ssrn.4872672 (10. 7. 2024). https://doi.org/10.2139/ssrn.4872672

Jacob, M. & Schill, S. W. 2015. Fair and Equitable Treatment: Content, Practice, Method. In: Bungenberg, M., Griebel, J., Hobe, S. & Reinsch, A. (eds.). *International Investment Law: A Handbook*. Baden-Baden : Nomos, pp. 749-812. https://doi.org/10.5771/9783845258997-749

Jovanović, M. 2022. Doprinos Mihaila Konstantinovića modernizaciji jugoslovenske privrede - stvaranje Spoljnotrgovinske arbitraže. *Anali Pravnog fakulteta Univerziteta u Beogradu*, 70(5), pp. 159-182. https://doi.org/10.51204/Anali_PFBU_22MK07A

Kirkman, C. 2002. Fair and Equitable Treatment: Methanex v. United Stated and the Narrowing Scope of NAFTA Article 1105. *Law and Policy in International Business Journal*, 34, p. 343.

Levashova, Y. 2019. *The Right of States to Regulate in International Investment Law: The Search for Balance between Public Interest and Fair and Equitable Treatment*. International Arbitration Law Library. Alphen aan den Rijn: Wolters Kluwer.

Mann, A. F. 1981. British Treaties for the Formation and Protection of Investment. *British Yearbook of International. Law*, 52(1), pp. 241-254. https://doi.org/10.1093/bybil/52.1.241

Reuter, A. 2021. Taking Investors' Rights Seriously: The Achmea and CETA Rulings of the European Court of Justice do not Bar Intra-EU Investment Arbitration. *ICSID Review - Foreign Investment Law Journal*, 36(1), pp. 33-45. https://doi.org/10.1093/icsidreview/siaa044

Reinisch, A. & Schreuer C. 2020. Fair and Equitable Treatment. In: Reinisch A. & Schreuer C. (eds.), *International Protection of Investments - The Substantive Standards*. Cambridge: Cambridge University Press, pp. 251-535. https://doi.org/10.1017/9781139004978.004

Rubins, N., Papanastasiou, T. & Kinsella, N. S. 2020. *International Investment, Political Risk, and Dispute Resolution: A Practitioner's Guide*. Oxford International Arbitration Series. Oxford: Oxford University Press. https://doi.org/10.1093/law/9780198808053.001.0001

Sarmiento, F. & Nikièma, S. 2022. Fair and Equitable Treatment: Why it matters and what can be done. Winnipeg, Canada. International Institute for Sustainable Development (IISD). Available at: https://www.iisd.org/system/files/2022-11/fair-equitable-treatment-en.pdf (12 July 2024).

Schreuer, C. 2005. Fair and Equitable Treatment in Arbitral Practice. *Journal of World Investment & Trade*, 6(3), pp. 357-386. https://doi.org/10.1163/221190005X00118

Shan, W. 2012. General Standards of Treatment. In: Shan, W. *et al.* (eds.), *The Legal Protection of Foreign Investment a Comparative Study*. Oxford: Hart Publishing.

Spaić, A. 2023. Achmea Ripple Effect and its Reverberations in the Investment Worlds. *University of Montenegro Law Journal*, 46(23), pp. 65-81.

Titi, C. 2022. *The Right to Regulate in International Investment Law (Revisited).* Moscow, Russia. International and Comparative Law Research Center. Available at: https://ssrn.com/abstract=4058447, 12. 7. 2024.

Tudor, I. 2008. *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*. Oxford Monographs in International Law. Oxford: Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199235063.001.0001

UNCTAD. 2012. *Fair and Equitable Treatment*. UNCTAD Series on Issues in International Investment Agreements II. Available at: https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf (12 July 2024).

Wong, J. 2006. Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes. *George Mason Law Review*, 14, pp. 137–176.

Živković, V. 2023. *Fair and Equitable treatment and the Rule of Law*. Elgar International Investment Law series. Cheltenham, UK: Edward Elgar Publishing. https://doi.org/10.4337/9781789904369

Internet Sources

Ankersmit, L. 2018. *Achmea: The Beginning of the End for ISDS in and with Europe?* Investment Treaty News. Available at: https://www.iisd.org/itn/en/2018/04/24/achmea-the-beginning-of-the-end-for-isds-in-and-with-europe-laurens-ankersmit/, 10. 7. 2024.

CDM. 2024. *Šta je IBAR i zbog čega je važan za Crnu Goru*? Available at: https://www.cdm.me/politika/sta-je-ibar-i-zbog-cega-je-vazan-za-crnu-goru/, 10. 7. 2024.

Central Bank of Montenegro. 2024. Available at: https://www.cbcg.me/, 13. 10. 2024.

Croisant, G. 2024. *Multilateral Investment Court*. Jus Mundi. Available at: https://jusmundi.com/en/document/publication/en-multilateral-investment-court, 10. 7. 2024.

Forbes SRB. 2024. *Srbija najveći investitor u Crnoj Gori u 2023. uprkos velikom padu ulaganja u tu zemlju*. Available at: https://forbes.n1info.rs/novac/srbija-najveci-investitor-u-crnoj-gori-u-2023/, 10. 7. 2024.

Fouchard, C. & Krestin, M. 2018. *The Judgment of the CJEU in Slovak Republic v. Achmea – A Loud Clap of Thunder on the Intra-EU BIT Sky*. Kluwer Arbitration Blog. Available at: https://arbitrationblog.kluwerarbitration.com/2018/03/07/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea/, 10. 7. 2024.

Fouchard, C. & Thieffry, V. 2021. CJEU Ruling in Moldova v. Komstroy: the End of Intra-EU Investment Arbitration under the Energy Charter Treaty (and a Restrictive Interpretation of the Notion of Protected Investment). Kluwer Arbitration Blog. Available at: https://arbitrationblog.kluwerarbitration.com/2021/09/07/cjeu-ruling-in-moldova-v-komstroy-the-end-of-intra-eu-investment-arbitration-under-the-energy-charter-treaty-and-a-restrictive-interpretation-of-the-notion-of-protected-investment/, 10. 7. 2024.

Hindelang, S. 2018. *The Limited Immediate Effects of CJEU's Achmea Judgement*. Verfassungsblog. Available at: https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement/, 10. 7. 2024.

MINA BUSINESS. 2024. *Arbitražni postupci još nijesu zaživjeli u Crnoj Gori.* Available at: https://mina.news/mina-business-ekonomske-vijesti-iz-crne-gore/arbitrazni-postupci-jos-nijesu-zazivjeli-u-crnoj-, 13. 10. 2024.

Nacimiento, P., Scharaw, B. & Lui, J. 2024. European Commission Publishes Non-Paper of Model Clauses for Member States' Bilateral Investment Agreements with Third Countries. Kluwer Arbitration Blog. Available at: https://arbitrationblog.kluwerarbitration.com/2024/02/19/european-commission-publishes-non-paper-of-model-clauses-for-member-states-bilateral-investment-agreements-with-third-countries/, 5. 9. 2024.

Case Law

Addiko Bank AG v. Montenegro (ICSID Case No. ARB/17/35).

AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary (ICSID Case No. ARB/07/22).

Bilcon of Delaware Inc. and others v. Government of Canada (PCA Case No. 2009-04, 2015).

Bivac BV v. Paraguay (ICSID Case No. ARB/07/9).

Biwater Gauff v. Tanzania (ICSID Case No. ARB/05/22).
CEAC Holdings Limited v. Montenegro (ICSID Case No. ARB/14/8).
CMS Gas Transmission Company v. Argentina (ICSID Case No. ARB/01/8).
David Minnotte v. Poland (ICSID Case No. ARB(AF)/10/1).
L.*F.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States* (United States-Mexican General Claims Commission, 1926).
Lone Pine Resources Inc. v. Government of Canada (ICSID Case No. UNCT/15/2, Award, 2022).
Medusa (Montenegro) Limited v. Montenegro (PCA Case No. 2015-39).
MNSS B.V. and Recupero Credito Acciaio N.V v. Montenegro (ICSID Case No. ARB(AF)/12/8).
Mondev International Ltd. v. United States of America (ICSID Case No. ARB(AF)/99/2, 2002).
Mondev v. USA (ICSID Case No. ARB(AF)/99/2).
Noble Ventures, Inc. v. Romania (ICSID Case No. ARB/01/11).
Oleg Vladimirovich Deripaska v. the State of Montenegro (PCA Case No. 2017-07).
Republic of Moldova v. Komstroy (CJEU, C-741/19).
Saluka Investments BV v. The Czech Republic (UNCITRAL, Final Award, 2006).
SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/13).
SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID Case No. ARB/02/6).
Siemens A.G. v. Republic of Argentina (ICSID Case ARB/02/8).
Slovak Republic v. Achmea B.V. (CJEU, Case C-284/16).

Legal Sources

Agreement between Montenegro and the Republic of Serbia on Mutual Encouragement and Protection of Investments (2009).
Agreement between Serbia and Montenegro and The Republic of Cyprus on Reciprocal Promotion and Protection of Investments (2005).
Agreement between the Council of Ministers of Serbia and Montenegro and the Government of the Republic of Lithuania on the Reciprocal Promotion and Protection of Investments (2005).
Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of The Republic of Poland on Reciprocal Promotion and Protection of Investments (1997).
Agreement between the Federal Republic of Yugoslavia and The Kingdom of Spain on Promotion and Reciprocal Protection of Investments (2002).
Agreement between the Federal Republic of Yugoslavia and the Kingdom of Spain on Promotion and Reciprocal Protection of Investments (2002).
Agreement between the Federal Republic of Yugoslavia and the Kingdom of Spain on Promotion and Reciprocal Protection of Investments (2002).

Agreement between the Government of Montenegro and the Government of the Republic of Moldova on Promotion and Reciprocal Protection of Investments (2014).
Agreement between the Government of Montenegro and the Government of Malta for the Reciprocal Promotion and Protection of Investments (2010).
Agreement between the Government of Montenegro and the State of Qatar for the Reciprocal Promotion and Protection of Investments (2009).
Agreement between the Government of the Czech Republic and the Federal Government of the Federal Republic of Yugoslavia for the Reciprocal Promotion and Protection of Investments (1997).
Agreement between the Government of the Hellenic Republic and the Federal Government of the Federal Republic of Yugoslavia on the Reciprocal Promotion and Protection of Investments (1997).
Agreement between the Government of the Republic of Turkey and the Government of Montenegro Concerning the Reciprocal Promotion and Protection of Investments (2012).
Agreement between the Government of the Slovak Republic and the Federal Government of the Federal Republic of Yugoslavia on the Promotion and Reciprocal Protection of Investments (1996).
Agreement between the Republic of Finland and Montenegro on the Promotion and Protection of Investments (2008).
Agreement between the Socialist Federative Republic of Yugoslavia and the Federal Republic of Germany on Reciprocal Protection and Promotion of Investments (1989).
Agreement between the Swiss Confederation and Serbia and Montenegro on the Promotion and Reciprocal Protection of Investments (2005).
Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, OJ L 169/1, 29 May 2020.
Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Federal Republic of Yugoslavia (2002).
Agreement on the Promotion and Protection of Investment between Bosnia and Herzegovina and the Federal Republic of Yugoslavia (2001).
EU-Singapore Investment Protection Agreement (2018), OJ L 294/3, 14 November 2019.
Montenegrin Law on Arbitration, *Official Gazette of Montenegro*, No. 047/15 of 18 August 2015.
The Comprehensive and Economic Trade Agreement - CETA (OJ L 11/24, 14 January 2017. pp. 23-1079).
Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331.

Özge Varis*

Review Scientific Paper
UDC: 336.765(560)
doi: https://doi.org/10.56461/SPZ_24407KJ
Received: 21. 10. 2024.
Accepted: 13. 1. 2025.

ARBITRATION UNDER TURKISH LAW: PRACTICE, ENFORCEMENT & BEYOND

Summary

Arbitration is not a new concept under Turkish law; in fact, arbitration has been regulated in detail and it has been interpreted in various cases before Turkish courts. However, the Turkish arbitration regime has a multidimensional and fragmented structure under the Turkish legal system. Along with a general criticism of arbitration as a dispute settlement system, arbitration in Turkish law has been subject of fundamental criticisms including involvement and position of domestic courts, enforcement of awards, and conditions of arbitration and arbitrators.

Therefore, the main aim of this paper is to provide a general view of arbitration under the Turkish legal system. In order to provide this perspective, this paper will discuss the pros and cons of arbitration in Turkish law in various aspects, particularly in terms of the structure of arbitration and enforcement of arbitral awards.

Keywords: Türkiye, arbitration, enforcement of arbitral awards, procedural law.

* Assistant Professor, Kirklareli University, Faculty of Law, Turkiye.
E-mail: *ozgevaris@klu.edu.tr* • *ozgevaris@gmail.com*
ORCID: *https://orcid.org/0000-0001-9699-7412*

ARBITRAŽA U TURSKOJ: PRAKSA, IZVRŠENJE ODLUKA & POZADINA

Sažetak

U turskom pravu, arbitraža ne predstavlja novi koncept. Zapravo, arbitraža je detaljno regulisana, a arbitražna pravila tumačena su u različitim slučajevima pred turskim sudovima. Međutim, turski arbitražni režim ima višedimenzionalnu i fragmentiranu strukturu. Stoga je pravni režim arbitraže u Turskoj predmet fundamentalnih kritika uključujući ulogu i položaj domaćih sudova, izvršenje arbitražnih odluka, uslove arbitraže i kriterijume za izbor arbitara. Prema tome, osnovni cilj ovog članka je da obezbedi opšti pogled na arbitražu u turskom pravnom sistemu. U članku će biti reči o prednostima i manama arbitraže u turskom pravu sa različitih aspekata, posebno u pogledu strukture arbitraže i izvršenja arbitražnih odluka.

Ključne reči: Turska, arbitraža, izvršenje arbitražnih odluka, procesno pravo.

1. Introduction

Arbitration, a private and consensual method of resolving disputes outside the traditional court system, has become an essential component of international commerce and trade. Its growth in prominence can be attributed to its flexibility, efficiency, and the binding nature of arbitral awards, which are recognized and enforceable in many jurisdictions around the world. Unlike litigation, arbitration allows parties to choose arbitrators with specialized expertise, craft procedural rules suited to the specific dispute, and maintain a degree of confidentiality that public court proceedings lack.

In Türkiye, the significance of arbitration has expanded over the last few decades, particularly in the context of increasing foreign investment and international trade. As a country that straddles both Europe and Asia, Türkiye has positioned itself as a key player in international commercial arbitration, with an eye on becoming a regional arbitration hub. This is particularly relevant given its unique geographic location, cultural diversity, and its expanding role in the global economy.

The Turkish legal system, influenced by both continental European legal traditions and Islamic law, has gradually integrated arbitration into its domestic legal

structure. This transition has been marked by several legal reforms, notably the adoption of international arbitration principles and the establishment of specialized institutions like the Istanbul Arbitration Center (ISTAC). Despite these advancements, the arbitration landscape in Türkiye continues to face challenges, including inconsistent judicial intervention, lack of awareness among smaller businesses, and concerns over the costs associated with arbitration.

This paper provides a comprehensive examination of arbitration in Türkiye, tracing its historical development, analysing the current legal framework, reviewing the institutional landscape, and addressing the challenges and opportunities that lie ahead in descriptive structure to provide a general overview.

2. Historical Development of Arbitration in Türkiye

2.1. Arbitration in the Ottoman Empire

The history of arbitration in Türkiye dates back to the period of the Ottoman Empire (1299–1922), when informal dispute resolution mechanisms were commonly used. The vast empire encompassed diverse religious and ethnic communities governed by their own legal traditions. In this context, arbitration played a crucial role, particularly in commercial and trade disputes. Islamic law (Sharia), which formed the foundation of legal practice for Muslims within the empire, recognized arbitration as a legitimate form of dispute resolution. Merchants and traders, particularly in the empire's major commercial hubs, would often rely on trusted community leaders or elders to act as arbitrators, resolving conflicts quickly and efficiently without the need for formal court proceedings.

While arbitration during the Ottoman period was predominantly informal, it served an important function in resolving disputes that might otherwise have burdened the state's legal infrastructure. However, the absence of a formal legal framework governing arbitration meant that proceedings varied depending on the region, the community involved, and the nature of the dispute. Nevertheless, this early practice of arbitration laid the groundwork for the acceptance of arbitration in the Turkish legal tradition (Öncel, 2006).

2.2. Early Republican Period and the Introduction of Modern Arbitration Concepts

Following the fall of the Ottoman Empire and the establishment of the Republic of Türkiye in 1923, the country underwent a process of legal modernization,

mirroring the broader efforts to westernize its institutions. The new republic sought to create a legal system based on European models, particularly Swiss and German law, as part of a broader initiative to secularize and modernize the country. This included the introduction of modern arbitration concepts into the legal framework (Soylu, 2016).

In 1926, Türkiye adopted the Turkish Civil Code, which was based on the Swiss Civil Code, and in 1927, it introduced the Turkish Code of Civil Procedure (TCCP). The TCCP contained provisions on arbitration, providing a rudimentary framework for the use of arbitration in domestic disputes. However, arbitration during this period was not widely utilized, particularly in comparison to litigation, which remained the preferred method of resolving disputes. Arbitration was largely seen as an exceptional process, suitable only for specific types of commercial disputes where both parties agreed to it (Çelikel & Erdem, 2016, p. 457).

The early republican period saw limited development of institutional arbitration. Most arbitration proceedings were *ad hoc*, and there were few dedicated arbitration institutions. This lack of formal infrastructure, combined with the unfamiliarity of arbitration among domestic businesses, meant that arbitration remained underdeveloped as a dispute resolution method (T. C. Cumhurbaşkanlığı, 2021).

2.3. Türkiye's Ratification of the New York Convention (1991)

A significant turning point in Türkiye's arbitration history came with its ratification of the New York Convention in 1991. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which came into effect in 1958, is one of the most important international treaties in arbitration. It obliges signatory states to recognize and enforce foreign arbitral awards, subject to limited exceptions. By ratifying this convention, Türkiye committed to ensuring that foreign arbitral awards could be enforced within its jurisdiction, thereby significantly enhancing the attractiveness of arbitration for international businesses operating in or engaging with Turkish entities.

The ratification of the New York Convention was a crucial step in integrating Türkiye into the global arbitration community. It marked Türkiye's formal recognition of international arbitration as a legitimate and necessary method for resolving cross-border disputes, aligning the country's arbitration framework with international standards. Foreign businesses and investors became more confident in choosing arbitration as a dispute resolution method when dealing with Turkish counterparts, knowing that arbitral awards would be enforceable in Turkish courts (Soylu, 2016).

However, despite this important legal development, Türkiye still faced challenges in terms of judicial attitudes towards arbitration. While the country had

ratified the convention, Turkish courts were often hesitant to enforce foreign arbitral awards, particularly if they believed that the arbitration process had violated Turkish public policy in wide and complex way. For instance, recently, Turkish Court Cassation ruled that parties to commercial transactions and their merchant/trader status must be recognized by authorized institutions, and also that any relevance of criminal investigations of the arbitration disputes or parties can make arbitral awards set side on grounds of public policy (Keser & Ozden, 2024). This tension between the international obligations under the New York Convention and domestic judicial practices would continue to shape the arbitration landscape in Türkiye for years to come.

2.4. Adoption of the Turkish International Arbitration Law (2001)

The next major development in the evolution of arbitration in Türkiye came with the adoption of the Turkish International Arbitration Law (IAL) in 2001. The IAL was modelled on the UNCITRAL Model Law on International Commercial Arbitration, which is widely regarded as the gold standard for arbitration laws worldwide. The IAL applies to disputes with an international element and represents a significant modernization of Türkiye's arbitration laws, bringing them in line with international best practices (Ekşi, 2009, pp. 54-74).

The IAL has introduced several key principles, including:

- Party Autonomy (Arts. 7-14, IAL): The law emphasizes the autonomy of the parties in arbitration, allowing them to choose the rules governing the arbitration, the arbitrators, and the procedures. This flexibility is one of the key attractions of arbitration compared to litigation.
- Limited Judicial Intervention (Arts. 3, 6, IAL): The IAL adopts the principle of minimal court intervention in arbitration proceedings. Turkish courts are only allowed to intervene in specific circumstances, such as the appointment of arbitrators, or the recognition and enforcement of arbitral awards.
- Enforcement of Awards (Art. 6, IAL): The grounds for the annulment of arbitral awards are limited under the IAL, in line with the New York Convention. This ensures that courts cannot overturn arbitral awards except in cases where the process was fundamentally flawed or in violation of public policy.

The adoption of the IAL marked a significant step forward in the development of arbitration in Türkiye. By aligning with the UNCITRAL Model Law, Türkiye has demonstrated its commitment to promoting arbitration as a viable alternative to litigation, particularly in international disputes. The IAL has also provided greater certainty and predictability for businesses choosing arbitration, having established clear rules and procedures for the conduct of arbitral proceedings.

2.5. Establishment of the Istanbul Arbitration Centre (2015)

One of the most significant recent developments in the Turkish arbitration landscape was the establishment of the Istanbul Arbitration Centre (ISTAC) in 2015. ISTAC was created as part of Türkiye's broader strategy to promote Istanbul as a global financial and legal hub. The institution was designed to provide both domestic and international arbitration services, offering a modern and efficient framework for resolving commercial disputes.

ISTAC has played a critical role in promoting arbitration within Türkiye and beyond. It provides a range of arbitration services, including (ISTAC, 2024):

- Expedited Arbitration: ISTAC provides expedited procedures for smaller disputes, allowing parties to resolve conflicts quickly and cost-effectively.
- International Standards: ISTAC arbitration rules are modelled on international best practices, ensuring that the institution can handle both domestic and international disputes effectively.
- Mediation Services: In addition to arbitration, ISTAC also provides mediation services as an alternative dispute resolution method, reflecting the growing popularity of mediation in commercial disputes globally (Akıncı, 2011).
- Med-Arb Services: ISTAC provides Med-Arb services as an alternative method (see: Istanbul Arbitration Center Mediation – Arbitration Rules).

The establishment of ISTAC marked a new era in the development of arbitration in Türkiye. By creating a dedicated arbitration institution, Türkiye has positioned itself as a serious player in the international arbitration arena, with the potential to attract disputes from across Europe, Asia, and the Middle East (Akıncı, 2011).

3. Legal Framework Governing Arbitration in Türkiye

The legal framework for arbitration in Türkiye is shaped by both domestic and international laws, reflecting the country's efforts to align its arbitration practices with global standards while addressing the specific needs of domestic disputes. This framework is largely governed by two key pieces of legislation: the Turkish International Arbitration Law (IAL), which applies to international disputes, and the Turkish Code of Civil Procedure (TCCP) (see: Turkish Code of Civil Procedure), which governs domestic arbitration. In addition, Türkiye's ratification of international conventions, most notably the New York Convention, has further solidified the legal foundation for arbitration within the country (TC. Cumhurbaşkanlığı, 2021; Karkın, 2015, pp. 49-57).

3.1. The International Arbitration Law (IAL)

As previously mentioned, the International Arbitration Law (IAL), adopted in 2001, is the cornerstone of Türkiye's legal framework for international arbitration. Modelled on the UNCITRAL Model Law, the IAL is designed to facilitate the resolution of disputes with an international element, providing clear rules and procedures that are consistent with international norms (Karademir, 2012, pp. 73-104).

Key provisions of the IAL include:

- Scope of Application (Arts. 1-2, IAL): The IAL applies to disputes where at least one party is foreign, or where the legal relationship involves a foreign element, such as cross-border contracts or transactions involving international businesses. This distinction is crucial, as it separates international arbitration from purely domestic arbitration, which is governed by different rules under the TCCP.
- Party Autonomy (Arts. 7-14, IAL): The IAL places a strong emphasis on party autonomy, allowing the parties involved to choose the rules that will govern their arbitration. This includes the ability to select the seat of arbitration, the language of the proceedings, and the procedures for appointing arbitrators. Party autonomy is a key principle in international arbitration, ensuring flexibility and adaptability to the specific needs of the dispute.
- Judicial Intervention (Art. 3, IAL): One of the most important features of the IAL is its strict limitation on judicial intervention in arbitration proceedings. Courts are only permitted to intervene in exceptional circumstances, such as in the appointment of arbitrators when the parties cannot agree or in the enforcement of arbitral awards. This principle of limited judicial interference is crucial to ensuring the integrity and efficiency of the arbitration process.
- Recognition and Enforcement of Awards (Art. 15, IAL): The IAL sets out clear rules for the recognition and enforcement of arbitral awards, both domestic and foreign. In line with the New York Convention, Turkish courts are generally required to recognize and enforce foreign arbitral awards, provided that they meet certain criteria, such as not violating Turkish public policy.
- Grounds for Annulment (Art. 15, IAL): The IAL also provides specific grounds on which arbitral awards can be annulled. These grounds are narrowly defined, and include situations where the arbitration agreement is invalid, where the award deals with matters outside the scope of the arbitration agreement, or where the arbitral procedure was not in accordance with the parties' agreement or Turkish law (Akıncı, 2011).

3.2. Domestic Arbitration under the Turkish Code of Civil Procedure (TCCP)

While the IAL governs international disputes, domestic arbitration in Türkiye is regulated by the Turkish Code of Civil Procedure (TCCP). The TCCP, which was updated in 2011, provides a modern legal framework for domestic arbitration, ensuring that arbitration is a viable alternative to litigation for domestic disputes (Nomer, 2018).

Key features of domestic arbitration under the TCCP include:

- Arbitration Agreement (Art. 412, TCCP): As with international arbitration, the arbitration agreement is the foundation of domestic arbitration. The TCCP requires that arbitration agreements be in writing and clearly express the parties' intention to resolve their disputes through arbitration rather than through the courts. This formal requirement ensures clarity and certainty in the use of arbitration.
- Appointment of Arbitrators (Arts. 415-417, TCCP): The TCCP sets out detailed rules for the appointment of arbitrators in domestic arbitration. If the parties cannot agree on the arbitrator(s), the TCCP provides for court intervention to appoint the arbitrator(s), ensuring that the arbitration process can proceed without undue delay.
- Procedural Rules (Arts. 426-430, TCCP): The TCCP allows for flexibility in the conduct of arbitration proceedings, with the parties given significant control over the rules and procedures to be followed. However, if the parties do not specify particular procedural rules, the arbitrators are empowered to determine the appropriate procedures, subject to the general principles of Turkish law (Akıncı, 2011).
- Judicial Review (Arts. 436-437, TCCP): While the TCCP, like the IAL, seeks to limit judicial intervention in arbitration, it does provide for judicial review in certain circumstances. For example, Turkish courts can annul arbitral awards if they find that the award violates Turkish public policy or if there were serious procedural irregularities in the arbitration process.
- Enforcement of Arbitral Awards (Arts. 436, 437, 439, 443, TCCP): Domestic arbitral awards are enforceable through the Turkish courts, provided that they meet the requirements set out in the TCCP. Once the courts has confirmed an award, it has the same legal effect as a court judgment, making it binding and enforceable against the parties.

3.3. Judicial Intervention and Its Limitations

One of the key challenges in any arbitration system is finding the right balance between judicial oversight and judicial restraint. In Türkiye, both the IAL and the TCCP emphasize the principle of limited judicial intervention, recognizing that excessive court involvement can undermine the efficiency and autonomy of the arbitration process. However, in practice, Turkish courts have sometimes been more interventionist than the law would suggest, particularly when it comes to reviewing arbitral awards.

Grounds for judicial intervention in arbitration include (Akıncı, 2011):

- Appointment of Arbitrators: If the parties cannot agree on the appointment of arbitrators, the courts can step in to ensure that the arbitration can proceed.
- Interim Measures: In some cases, parties may seek interim measures from the courts to protect their interests during the arbitration process. This can include measures to prevent the dissipation of assets or to preserve evidence.
- Recognition and Enforcement of Awards: Courts have the power to review arbitral awards before they are enforced, particularly when public policy issues are raised.
- Annulment of Awards: Turkish courts can annul arbitral awards if they find that the award violates public policy, or if there were serious procedural irregularities in the arbitration process (Nomer, 2018).

While judicial intervention is generally limited under Turkish law, concerns remain about the inconsistency of court decisions in arbitration matters (TC. Cumhurbaşkanlığı, 2021). Some courts have been more willing to intervene in arbitration than others, particularly in cases involving sensitive public policy issues, such as criminal law-related issues relevant to arbitral procedures or disputes that are directly binding to other public institutions (Ekşi, 2020b). This inconsistency creates uncertainty for parties seeking to use arbitration in Türkiye, and may undermine confidence in the arbitration process.

4. Institutional Arbitration in Türkiye

Institutional arbitration plays a critical role in ensuring the effectiveness and credibility of arbitration as a dispute resolution method. Türkiye has several key arbitration institutions that provide the infrastructure and expertise necessary for the conduct of arbitration proceedings. The most prominent of these is the Istanbul Arbitration Centre (ISTAC), but there are also other significant arbitration bodies that contribute to the development of arbitration in Türkiye (Ekşi, 2020b).

4.1. Istanbul Arbitration Centre (ISTAC)

Established in 2015, the Istanbul Arbitration Centre (ISTAC) is the flagship arbitration institution in Türkiye. ISTAC was created as part of a broader effort by the Turkish government to promote Istanbul as a global business and financial centre, with a specific focus on making it an international arbitration hub (Çıplak, 2017).

ISTAC provides a wide range of arbitration services, including:

- Arbitration and Mediation: ISTAC provides both arbitration and mediation services for domestic and international disputes. Its rules are based on international best practices, ensuring that it can handle a wide variety of commercial disputes with efficiency and professionalism.
- Expedited Arbitration: Recognizing the need for quicker resolution of certain disputes, ISTAC offers expedited arbitration procedures, particularly for smaller or less complex cases. This allows parties to resolve their disputes more swiftly and at a lower cost than traditional arbitration.
- Flexible Arbitration Rules: The ISTAC arbitration rules are designed to be flexible and adaptable to the needs of the parties. Parties have significant control over the procedures to be followed, including the ability to choose the arbitrators, the seat of arbitration, and the language of the proceedings, as well as online or in-person arbitration procedures.

ISTAC's goal is to establish itself as a leading arbitration institution not only in Türkiye but also in the broader region, including Europe, Asia, and the Middle East. By offering a high standard of arbitration services and promoting arbitration as the preferred dispute resolution method, ISTAC aims to attract more international arbitration cases to Istanbul (Aklinci, 2013).

4.2. The Union of Chambers and Commodity Exchanges of Turkey (TOBB) Arbitration Court

Another important arbitration institution in Türkiye is the Arbitration Court of the Union of Chambers and Commodity Exchanges of Turkey (TOBB). Established to provide arbitration services in business-to-business disputes, particularly in the commercial and industrial sectors, the TOBB Arbitration Court plays a significant role in domestic commercial dispute resolution.

Key features of the TOBB Arbitration Court include:

- Commercial Focus: The TOBB Arbitration Court specializes in resolving commercial disputes, particularly those arising from business-to-business

contracts. It is widely used by Turkish companies, and has a strong reputation for handling complex commercial cases.

- Institutional Expertise: The TOBB Arbitration Court benefits from the institutional support and expertise of the Union of Chambers and Commodity Exchanges of Turkey, one of the most important business organizations in the country.
- Enforcement of Awards: Arbitral awards rendered by the TOBB Arbitration Court are enforceable under Turkish law, ensuring that parties can rely on the arbitration process to obtain a binding and enforceable resolution to their disputes (Ekşi, 2020b).

4.3. Other Arbitration Institutions

In addition to ISTAC and the TOBB Arbitration Court, several other institutions provide arbitration services in Türkiye. These include:

- The Turkish Maritime Arbitration Commission: Specializes in disputes related to maritime law and shipping, a key sector for Türkiye due to its strategic geographic location (Ekşi, 2020b).
- The Energy Disputes Arbitration Centre (EDAC): Focuses on the energy sector disputes, including disputes arising from oil, gas, and renewable energy projects (Ekşi, 2020b).

5. Procedural Issues in Arbitration under Turkish Law

Arbitration procedures in Türkiye are largely shaped by party autonomy, with significant flexibility given to the parties to tailor the process according to their preferences. However, both the Turkish International Arbitration Law (IAL) and the Turkish Code of Civil Procedure (TCCP) provide default rules for situations where the parties have not specified procedures in their arbitration agreements. In addition, Turkish arbitration institutions, such as the Istanbul Arbitration Centre (ISTAC), have their own procedural rules that align with international standards (Lokmanoğlı, 2020, pp. 347-368).

5.1. Initiation of Arbitration

The arbitration process in Türkiye typically begins when one party submits a request for arbitration. The specifics of this request will depend on whether the arbitration is *ad hoc* or institutional:

- *Ad Hoc* Arbitration: In *ad hoc* arbitration, where the parties do not rely on an institutional framework, the arbitration agreement usually specifies the process for initiating arbitration. This could include notifying the other party in writing of the intent to arbitrate, and providing details such as the nature of the dispute, the relief sought, and the proposed arbitrators.
- Institutional Arbitration: For institutional arbitration, such as under ISTAC or the TOBB Arbitration Court, the initiating party submits a request for arbitration to the institution. The institution's rules, such as ISTAC Arbitration Rules, provide detailed procedures for filing the request, including the necessary documentation and fees. The institution will then forward the request to the other party, which has a set period (usually 30 days) to submit their response.

In either case, the request for arbitration must contain key information, including the arbitration agreement, a description of the dispute, and the relief sought. In international arbitration, the request may also specify the seat of arbitration, the applicable law, and the proposed language of the proceedings (Akıncı, 2011).

5.2. Appointment of Arbitrators

The appointment of arbitrators is a crucial step in the arbitration process. Arbitration in Türkiye follows the principle of party autonomy, meaning that the parties have the freedom to agree on the number of arbitrators and the method of their appointment. If the parties fail to agree, Turkish law provides default mechanisms to ensure the arbitration proceeds without undue delay according to IAL Article 3, and TCCP Articles 415 and 416.

- Number of Arbitrators: In most cases, the parties are free to choose the number of arbitrators. Typically, commercial disputes are resolved by a sole arbitrator or a panel of three arbitrators. If the parties do not specify the number of arbitrators, Turkish law defaults to a sole arbitrator, unless the circumstances of the case justify the appointment of three arbitrators.
- Appointment Process: The process for appointing arbitrators is flexible. In cases involving a sole arbitrator, the parties usually agree on the appointment. In three-member tribunals, each party typically appoints one arbitrator, with the two party-appointed arbitrators selecting the third (presiding) arbitrator. If the parties or the appointed arbitrators fail to agree, the courts or the arbitration institution (such as ISTAC) can intervene to appoint the arbitrators.

Turkish courts and judges have a tendency to respect the parties' autonomy in the appointment process, intervening only when necessary to prevent a deadlock or delays in the arbitration proceedings. This judicial support ensures that arbitration remains efficient and that disputes do not stagnate due to procedural disagreements (Nomer, 2018).

5.3. Procedural Rules

Once the tribunal is formed, it has significant discretion in managing the arbitration proceedings, subject to any agreements made by the parties. The parties can agree on specific procedural rules, or they may rely on the rules provided by the arbitration institution or the default rules in Turkish law. Key procedural aspects include:

- Language of the Proceedings: The parties are free to choose the language in which the arbitration will be conducted. In international arbitration, English is commonly selected, especially in disputes involving foreign parties. If no agreement is reached, the tribunal has the authority to determine the appropriate language.
- Seat of Arbitration: The seat (or legal place) of arbitration determines the procedural law governing the arbitration. In international arbitration, parties often select a neutral seat, such as Istanbul, which has been promoted as a favourable arbitration hub. If the parties do not specify a seat, the tribunal may determine it based on the circumstances of the case.
- Applicable Law: The parties can choose the substantive law that will govern their dispute. For international disputes, this could be Turkish law, the law of another country, or even principles of international law. In the absence of an agreement, the tribunal will apply the law it deems most appropriate, considering factors such as the nature of the contract and the place of performance (Nomer, 2018).
- Hearings and Evidence: Arbitration in Türkiye allows for flexibility in how hearings are conducted. The tribunal can decide to hold oral hearings or to resolve the dispute based solely on written submissions, depending on the complexity of the case and the preferences of the parties. The tribunal also has discretion over the admissibility of evidence, and Turkish arbitration law does not impose strict rules of evidence, unlike those for litigation in state courts (Bayata, 2022, pp. 395-421).

5.4. Confidentiality of Proceedings

One of the key advantages of arbitration, particularly in commercial disputes, is the confidentiality of the proceedings. While Turkish law does not explicitly mandate confidentiality in arbitration, it is generally understood that arbitration proceedings and the resulting awards are private, especially in *ad hoc* arbitration or under institutional rules like those of ISTAC. This confidentiality is particularly appealing to businesses that wish to resolve their disputes without public scrutiny (Bulut, 2011, pp. 33-44).

5.5. Interim Measures and Preliminary Relief

Arbitral tribunals in Türkiye have the authority to issue interim measures to protect the interests of the parties during the arbitration process. These measures may include orders to preserve assets, maintain the *status quo*, or prevent one party from taking actions that could prejudice the arbitration outcome.

In addition, parties can also seek interim measures from Turkish courts, particularly when the tribunal has not yet been constituted or when court enforcement is necessary. Turkish courts are generally supportive of arbitration and will grant interim measures if they believe the applicant has a strong case and that urgent action is necessary (Bulut, 2011, pp. 33-44).

5.6. Issuance of the Arbitral Award

The final step in the arbitration process is the issuance of the arbitral award. The tribunal is required to render its award within the specified timeframe, as agreed upon by the parties or as provided in Turkish law. Under the IAL Article 15, the tribunal must issue its award within one year of the commencement of arbitration, though this period can be extended by agreement of the parties or by a court decision.

The arbitral award must be in writing and must be signed by the arbitrators. It must also state the reasons for the decision unless the parties have agreed otherwise. Once the award is rendered, it becomes binding on the parties, and they are obligated to comply with its terms (Bayata, 2022, pp. 395-421).

6. Recognition and Enforcement of Arbitral Awards in Türkiye

One of the key strengths of arbitration is the enforceability of arbitral awards, both domestically and internationally. In Türkiye, the recognition and enforcement of arbitral awards are governed by both the Turkish International Arbitration Law (IAL) and the Turkish Code of Civil Procedure (TCCP), as well as by Türkiye's international treaty obligations, most notably the New York Convention (Nomer, 2018).

6.1. Domestic Arbitral Awards

Domestic arbitral awards are enforceable in Türkiye through the provisions of the TCCP. Once an arbitral award is rendered, the winning party can apply to the Turkish courts for its enforcement. The court will review the award to ensure that it meets the necessary legal requirements, such as that is was rendered in accordance with the

arbitration agreement and that it does not violate Turkish public policy under Articles 408 and 412 of the TCCP (Atakan, 2007, pp. 59-136).

Grounds for refusing enforcement of a domestic arbitral award are limited and include:

- The arbitration agreement was invalid.
- The party against whom the award is invoked was not given proper notice or was otherwise unable to present its case.
- The arbitral tribunal exceeded its authority or decided on matters not covered by the arbitration agreement.
- The composition of the arbitral tribunal or the arbitration procedure was not in accordance with the parties' agreement or Turkish law.
- The award is contrary to Turkish public policy (Ekşi, 2020a).

Once the court confirms the enforceability of an arbitral award, it becomes enforceable in the same manner as a court judgment, meaning that the winning party can take enforcement actions such as seizing assets or garnishing wages to satisfy the award (Nomer, 2018).

6.2. Foreign Arbitral Awards and the New York Convention

Türkiye's ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1991 marked a turning point in its arbitration landscape. Under the New York Convention, Turkish courts are generally required to recognize and enforce foreign arbitral awards, subject to limited exceptions. This has made Türkiye an attractive jurisdiction for parties seeking to enforce foreign arbitral awards (Börü, 2023).

To enforce a foreign arbitral award in Türkiye, the winning party must apply to the Turkish courts and provide the necessary documentation, including a certified copy of the award and the arbitration agreement. The courts will review the award to ensure that it meets the requirements of the New York Convention, but their grounds for refusing enforcement are narrowly defined and include:

- The arbitration agreement was invalid under the applicable law.
- The losing party was not given proper notice of the arbitration or was otherwise unable to present its case.
- The award deals with matters outside the scope of the arbitration agreement.
- The composition of the arbitral tribunal or the arbitration procedure was not in accordance with the parties' agreement.
- The award has not yet become binding on the parties or has been set aside by a competent authority in the country where it was issued.
- The award is contrary to the public policy of Türkiye (Ekşi, 2020a).

The public policy exception is one of the most commonly invoked grounds for refusing enforcement, though Turkish courts have generally interpreted this exception narrowly. As a result, foreign arbitral awards are usually recognized and enforced in Türkiye unless there are compelling reasons not to do so (Ekşi, 2020b).

7. Challenges and Reforms in Turkish Arbitration

Despite significant progress in developing a robust legal framework for arbitration, several challenges still persist in the Turkish arbitration landscape. Addressing these challenges is crucial to improving efficiency, predictability, and attractiveness of arbitration as an alternative dispute resolution method. These challenges can be grouped into several categories, including judicial intervention, arbitrator selection, cost and duration of arbitration, and awareness of and trust in arbitration (TC. Cumhurbaşkanlığı, 2021).

7.1. Judicial Intervention

One of the key challenges in Turkish arbitration is the scope of judicial intervention in arbitration proceedings. Although Turkish law emphasizes limited judicial intervention, in practice, Turkish courts have sometimes been more interventionist, particularly in cases involving the annulment of arbitral awards or interim measures. This is partly due to inconsistencies in how different courts interpret public policy and procedural fairness.

- Inconsistent Court Decisions: Some Turkish courts have been willing to review the merits of arbitral awards under the guise of public policy, leading to unpredictability in arbitration outcomes. This undermines the finality of arbitration and discourages parties from choosing arbitration over litigation (Önay, 2024, pp. 843-870).
- Public Policy Concerns: The concept of public policy, while meant to protect fundamental legal principles, can be interpreted broadly by courts, leading to increased judicial scrutiny of arbitral awards. This can result in annulments or refusals to enforce awards, particularly in sensitive cases involving government contracts or issues of national interest (Ekşi, 2020a).

Efforts to streamline judicial involvement are needed to ensure consistency and predictability. Training for judges on arbitration-related matters and clearer legislative guidelines could help reduce unwarranted court intervention.

7.2. Arbitrator Selection and Qualifications

Another challenge in Turkish arbitration is the selection and qualifications of arbitrators. While the parties have significant freedom to choose their arbitrators, there have been concerns about the availability of qualified arbitrators, particularly for specialized disputes, such as those in the energy, maritime, or construction sectors (Karkın, 2015, pp. 49-57).

- Lack of Specialized Arbitrators: In certain industries, the pool of qualified arbitrators with the necessary technical expertise is limited. This can lead to delays in appointing arbitrators or in the resolution of disputes, as parties may struggle to find arbitrators who understand the specific issues involved (T. C. Cumhurbaşkanlığı, 2021).
- Impartiality and Independence: Ensuring the impartiality and independence of arbitrators is a fundamental principle in arbitration. However, there have been instances where parties have raised concerns about potential bias or conflicts of interest among arbitrators, particularly in cases where arbitrators have close ties to one of the parties or have served as arbitrators in related disputes.

Reforms aimed at improving transparency in the arbitrator selection process and enhancing arbitrator training, particularly in specialized fields, could help address these concerns.

7.3. Cost and Duration of Arbitration

While arbitration is often promoted as a faster and more cost-effective alternative to litigation, costs and delays remain significant challenges in Turkish arbitration. In some cases, arbitration proceedings can become lengthy and expensive, particularly when multiple rounds of submissions, complex expert testimony, or procedural challenges arise.

- Expensive Arbitration Fees: The costs associated with arbitration, including arbitrators' fees, institutional fees, and legal costs, can be prohibitive for some parties, particularly in smaller disputes. Although institutions like ISTAC offer expedited arbitration procedures, these are not always suitable for more complex cases.
- Delays in Proceedings: While Turkish law imposes time limits on the issuance of arbitral awards, parties can extend these time limits by mutual agreement or by court intervention. This can result in prolonged proceedings, undermining the key advantage of arbitration – swift resolution (T. C. Cumhurbaşkanlığı, 2021).

Efforts to address these challenges could include promoting the use of expedited arbitration for smaller disputes, adopting procedural innovations such as online dispute resolution (ODR), and encouraging parties to agree on stricter time limits for arbitration proceedings (T. C. Cumhurbaşkanlığı, 2021).

7.4. Awareness and Trust in Arbitration

Despite the significant strides made in developing Türkiye's arbitration framework, awareness and trust in arbitration remain relatively low compared to litigation. Many businesses, particularly small and medium-sized enterprises (SMEs), are more accustomed to resolving disputes through the Turkish courts, and may be unfamiliar with the benefits of arbitration.

- Lack of Awareness: Some parties, particularly domestic businesses, may be reluctant to use arbitration due to a lack of understanding of the process or concerns about its perceived complexity or cost. This is especially true for parties outside of major commercial hubs like Istanbul (T. C. Cumhurbaşkanlığı, 2021).
- Preference for Litigation: In some sectors, there is still a strong preference for litigation over arbitration, particularly where the parties believe that the courts will offer more predictable outcomes or better protection of their rights. This preference can be attributed to cultural and historical factors, as well as a perception that courts may be more neutral or less costly than arbitration (T. C. Cumhurbaşkanlığı, 2021).

Awareness campaigns and providing resources to educate businesses about arbitration, especially in regions outside major cities, could help improve trust and reliance on arbitration as a viable dispute resolution method.

7.5. Ongoing Reforms

In response to these challenges, Türkiye has undertaken several reforms aimed at improving its arbitration framework and making it more attractive to both domestic and international parties. Key initiatives include:

- Promoting ISTAC: The Turkish government has actively promoted the Istanbul Arbitration Centre (ISTAC) as a world-class arbitration institution. Efforts to increase ISTAC's visibility and improve its procedural offerings, such as expedited arbitration and mediation services, are designed to position Istanbul as a regional arbitration hub (T. C. Cumhurbaşkanlığı, 2021).
- Judicial Training: Ongoing efforts to train Turkish judges on arbitration-related issues, including the limits of judicial intervention and the enforcement

of arbitral awards, are critical to reducing inconsistencies in court decisions and improving the overall efficiency of the arbitration process (T. C. Cumhurbaşkanlığı, 2021).

- Arbitrator Training and Certification: There are also initiatives to improve the training and certification of arbitrators in Türkiye, particularly in specialized fields. These efforts are intended to expand the pool of qualified arbitrators and ensure that arbitrators are equipped to handle complex disputes (T. C. Cumhurbaşkanlığı, 2021).

The continued implementation of these reforms, coupled with increased use of arbitration by businesses, will likely enhance the role of arbitration in Türkiye's dispute resolution landscape.

8. Conclusion

The development of arbitration in the Turkish legal system reflects the country's broader efforts to align its dispute resolution mechanisms with international standards while addressing domestic needs. With the adoption of the Turkish International Arbitration Law (IAL) and significant reforms to the Turkish Code of Civil Procedure (TCCP), Türkiye has established a solid legal framework for both domestic and international arbitration.

The Istanbul Arbitration Centre (ISTAC), along with other institutional arbitration bodies like the TOBB Arbitration Court, provides the necessary infrastructure to support arbitration, particularly in commercial disputes. These institutions offer flexible and efficient procedures, making arbitration an attractive alternative to litigation in the Turkish courts.

However, challenges remain. Judicial intervention, costs, delays, and awareness issues continue to affect the widespread adoption and effectiveness of arbitration in Türkiye. Judicial inconsistency, particularly in the annulment of awards and the application of public policy, undermines confidence in arbitration's finality. Meanwhile, the cost and duration of proceedings, as well as the need for more qualified arbitrators, particularly in specialized sectors, are ongoing concerns.

Efforts to promote arbitration through institutions like ISTAC, combined with judicial training and legislative reforms, are critical to addressing these challenges. By continuing to enhance the arbitration framework and promoting Istanbul as a global arbitration hub, Türkiye has the potential to become a leading arbitration jurisdiction in the region.

Ultimately, arbitration offers significant advantages over traditional litigation, including greater flexibility, confidentiality, and the ability to resolve disputes swiftly and efficiently. For Türkiye to fully realize the potential of arbitration, ongoing reforms and increased awareness are essential. With the right measures in place, arbitration could become the preferred method of dispute resolution for both domestic and international parties, reinforcing Türkiye's position as an attractive destination for investment and commerce.

References

Akıncı, Z. 2013. Viyana Konvansiyonu'nun Tahkimde Uygulanması. *Galatasaray ÜniversitesiHukuk Fakültesi Dergisi Özel Sayısı*, 1, pp. 73-86.

Akıncı, Z. 2011. *Arbitration Law of Turkey: Practice and Procedure.* JurisNet: LLC.

Atakan, A. 2007. Kamu Düzeni Kavramı. *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi,* 13, pp. 59-136. Available at: https://avesis.marmara.edu.tr/yayin/3280416f-b4ff-4c63-b917-853fb3a9eac0/kamu-duzeni-kavrami, 25. 11. 2024.

Bayata, A. 2022. Milletlerarası Tahkim Kanunu Uyarınca Tahkim Yargılamasının Sona Ermesi. *Ankara Barosu Dergisi,* 80(3), pp. 395-421. Available at: https://dergipark.org.tr/en/pub/abd/article/1122925, 25. 11. 2024. https://doi.org/10.30915/abd.1122925

Börü, L. 2023. Yargı Kararları Işığında New York Sözleşmesi'ne Göre Yabancı Hakem Kararlarının Türkiye'de Tenfizi Engeli Olarak Hukuki Dinlenilme Hakkı Üzerine Bazı Değerlendirmeler. *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 72(2), pp. 811-844. Available at: https://dergipark.org.tr/en/pub/auhfd/article/1295689#article_cite, 25. 11. 2024. https://doi.org/10.33629/auhfd.1295689

Bulut, B. 2011. The Role of the Place of Arbitration in International Commercial Arbitration Proceeding; Turkey as a Place of Arbitration. *Ankara Bar Review,* 4(1), pp. 33-44. Available at: https://dergipark.org.tr/en/pub/abr/issue/47972/606929, 25. 11. 2024.

Çelikel, A. & Erdem, B. 2016. *Milletlerarası Özel Hukuk*. 14th Edition. İstanbul.

Çıplak, D. 2017. *Milletlerarası tahkim kavramı ve İstanbul Tahkim Merkezi kuralları çerçevesinde Türkiye'de tahkim uygulaması.* Çağ Üniversitesi Sosyal Bilimler Enstitüsü. Available at: https://tez.yok.gov.tr/UlusalTezMerkezi/tezDetay.jsp?id=A3vWgVWRsIEFDOnnvfDhyg&no=n6NT2LjqrNWMg7Y8XPwB3w, 25. 11. 2024.

Ekşi, N. 2009. Yargıtay Kararları Işığında ICC Hakem Kararlarının Türkiye'de Tanınması ve Tenfizi. *Ankara Barosu Dergisi*, 67(1), pp. 54-74. Available at: https://dergipark.org.tr/en/download/article-file/397544, 25. 11. 2024.

Ekşi, N. 2020a. Yargıtay Kararları Işığında Yabancı Hakem Kararlarının Tenfizinde Kamu Düzeni. *Public and Private International Law Bulletin*, 40(1). pp. 143-201. Available at: https://dergipark.org.tr/en/pub/ppil/issue/52638/734340#article_cite, 25. 11. 2024.

Ekşi, N. 2020b. *Türkiyede Kurumsal Tahkim*. Istanbul: Beta Yayinlari.

Karademir, Y. D. D. E. 2012. Milletlerarası Kurumsal Tahkim Merkezlerinin Bir Karşılaştırması. *Public and Private International Law Bulletin*, 32, pp. 73-104. Available at: https://dergipark.org.tr/tr/download/article-file/411068, 25. 11. 2024.

Karkın, M. 2015. Appointment of and Challenge to Arbitrators. In: Yeşilırmak, A. & Esin, İ. G. (eds.), *Arbitration in Turkey.* Wolters Kluwer, pp. 49-72.

Keser, A. A. & Ozden, K. 2024. *Yargıtay'ın Yabancı Tahkim Kararlarına İlişkin Tenfiz ve İptal Davalarında Kamu Düzeni Kavramına Güncel Yaklaşımı.* Available at: https://gun.av.tr/tr/goruslerimiz/makaleler/yargitay-in-yabanci-tahkim-kararlarina-iliskin-tenfiz-ve-iptal-davalarinda-kamu-duzeni-kavramina-guncel-yaklasimi#top, 25. 11. 2024.

Lokmanoğlı, S. Y. 2020. Türk Hukukunda Tahkim Sözleşmesinin Kurucu Unsurları ve Geçerlilik Şartları. *Türkiye Adalet Akademisi Dergisi,* 1, pp. 347-368. Available at: https://dergipark.org.tr/tr/pub/taad/issue/58516/857816, 25. 11. 2024.

Nomer, E. 2018. *Milletlerarasi Usul Hukuku.* Istanbul: Beta Yayinlari.

Önay, I. 2024. Interpretation of the Scope of International Commercial Arbitration Agreements: A Comparison of Swiss and Turkish Case Law. *European Business Organization Law Review*, 25, pp. 843-870. Available at: https://link.springer.com/content/pdf/10.1007/s40804-024-00321-w.pdf, 25. 11. 2024. https://doi.org/10.1007/s40804-024-00321-w

Öncel, S. 2006. *International Commercial Arbitration as an Alternative Dispute Solving Mechanism and Its Role in the Turkish Judiciary System.* M.A., Bilkent Universitesi (Turkey). Available at: https://www.proquest.com/docview/2652595869?fromopenview=true&pq-origsite=gscholar&sourcetype=Dissertations%20&%20Theses#, 25. 11. 2024.

Soylu, H. C. 2016. *International Commercial Arbitration in the European and Turkish Context.* AV Akademikerverlag.

TC. Cumhurbaşkanlığı, 2021. T. C. Cumhurbaşkanlığı. İdari İşler Başkanlığı, Hukuk ve Mevzuat Genel Müdürlüğü . 2021. *Tahkime İlişkin Temel Kavramlar, Düzenlemeler ve Güncel Gelişmeler Raporu.* Available at: https://www.mevzuat.gov.tr/MevzuatMetin/Publications/TAHKİM%20KİTABI/TAHKİME%20İLİŞKİN%20TEMEL%20KAVRAMLAR,%20DÜZENLEMELER%20VE%20GÜNCEL%20GELİŞMELER.pdf, 25. 11. 2024.

Legal Sources

Turkish International Arbitration Law. IAL. (Code Number: 4686). Available at: https://rm.coe.int/turkish-international-arbitration-law-ial-/1680a72d93, 25. 11. 2024.

Turkish Code of Civil Procedure. TCCP (Code Number: 6100). Available at: https://www.mevzuat.gov.tr/mevzuatmetin/1.5.6100.pdf , 25. 11. 2024.

Istanbul Arbitration Centre Mediation – Arbitration Rules.

Istanbul Arbitration Centre. ISTAC. 2024. Available at: https://istac.org.tr/en/, 25. 11. 2024.

The Union of Chamber and Commodity Exchanges Arbitration Council. Available at: https://www.tobb.org.tr/HukukMusavirligi/Sayfalar/Eng/Arbitration.php, 25. 11. 2024.

Filip Balcerzak*

Review Scientific Paper
UDC: 341.63:339.5(438)
doi: https://doi.org/10.56461/SPZ_24408KJ
Received: 1. 12. 2024.
Revised: 17. 12. 2024.
Accepted: 13. 1. 2025.

THE LAW AND PRACTICE OF COMMERCIAL AND TREATY-BASED ARBITRATION IN POLAND: RECENT DEVELOPMENTS AND CURRENT TRENDS

Summary

This paper analyses the recent developments and current trends in the landscape of Polish arbitration. It commences with a brief overview of the legal framework governing arbitration in Poland, followed by a review of the practice of the Polish state courts in post-arbitral cases. It then describes the most relevant Polish arbitral institutions. Next, it proceeds to examine the position of treaty-based arbitration in the Polish context. Each of these sections discusses the challenges and perspectives faced by arbitration in Poland.

Keywords: Arbitration, dispute resolution, Poland, Court of Arbitration at the Polish Chamber of Commerce, Lewiatan Court of Arbitration.

* Lecturer in law at Brunel University of London (United Kingdom), associate professor at Adam Mickiewicz University in Poznań (Poland), FCIArb, attorney-at-law (Poland, Spain), LL.M. (2011, Canada), Ph.D. (2016, Poland), Ph.D. (2024, Spain).
E-mail: *filip.balcerzak@brunel.ac.uk* • *filip.balcerzak@amu.edu.pl*
ORCID: *https://orcid.org/0000-0001-8579-9162*

ZAKON I PRAKSA TRGOVINSKE ARBITRAŽE I ARBITRAŽE NA OSNOVU SPORAZUMA U POLJSKOJ: NAJNOVIJI RAZVOJ DOGAĐAJA I AKTUELNI TRENDOVI

Sažetak

U ovom članku analiziraćemo nedavna dešavanja i aktuelne trendove u oblasti arbitraže u Poljskoj. Prvo ćemo dati kratak pregled pravnog okvira za arbitražu u Poljskoj, a zatim i pregled prakse poljskih državnih sudova u "post-arbitražnim" predmetima. Nakon toga ćemo posvetiti pažnju najrelevantnijim poljskim arbitražnim institucijama. Na kraju ćemo razmotriti položaj arbitraže na osnovu sporazuma. U svakom od delova biće reči i o izazovima i perspektivama sa kojima se suočava arbitraža u Poljskoj.

Ključne reči: Arbitraža, rešavanje sporova, Poljska, Arbitražni sud pri Poljskoj privrednoj komori, Arbitražni sud „Levijatan".

1. Introduction

Arbitration in Poland is deeply rooted in the legal framework, and Poland is perceived as an arbitration-friendly jurisdiction. Its legislation implements the UNCITRAL Model Law and, in approximately 90% of post-arbitral disputes, Polish courts uphold the effectiveness of arbitral awards, either by enforcing them or by refusing to set them aside.

This paper commences with a brief overview of the legal framework governing arbitration in Poland, followed by a review of the practice of the Polish state courts in post-arbitral cases. It then describes the most relevant Polish arbitral institutions. Next, it proceeds to examine the position of treaty-based arbitration in the Polish context. Each of these sections discusses the challenges and perspectives faced by arbitration in Poland.

2. Legal Framework

Arbitration plays an important role in the Polish legal system, and is deeply rooted in the Polish legal framework. It is regulated as part of Poland's Code of Civil Procedure (Law of 17 November 1964 Code of Civil Procedure – unified text Polish Journal of Laws of 2023, item 1550, as amended). Since it was amended in 2005, arbitration is

regulated in Part V of the Code. It implements the UNCITRAL Model Law (Asłanowicz, 2017), albeit with some diversions. For example, these provisions are not limited to international arbitration, but apply to both domestic and international arbitrations.

Poland is a monist state, meaning that international conventions ratified by Acts of Parliament are directly applicable and take precedence over national legislation in the hierarchy of legal norms (Article 91, The Constitution of the Republic of Poland). Consequently, several international conventions relevant to arbitration are directly applicable in Poland, including the 1958 New York Convention,[1] and the 1961 European Convention on International Commercial Arbitration.[2] Poland remains a party to the 1923 Geneva Protocol on Arbitration Clauses,[3] and is a party to several bilateral treaties on the recognition and enforcement of arbitral awards.[4] Notably, Poland has never signed or ratified the ICSID Convention (Convention on the settlement of investment disputes between States and nationals of other States).

In recent years, three important legislative amendments have influenced the regulatory framework governing arbitration in Poland.

In 2017, Poland introduced Art. 1164[1] to the Code of Civil Procedure. This implemented Art. 10 of the directive on alternative dispute resolution for consumer disputes (see, Art. 10, Directive 2013/11/EU).[5] Until then, consumer arbitration was governed by the same rules as commercial arbitration. From the moment the aforementioned amendment entered into force, an arbitration agreement to which a consumer is a party is only valid if it was concluded after the relevant dispute arose (*compromis).* Moreover, such an arbitration agreement must be concluded in writing, and must include information that the parties are aware of the consequences of having concluded an arbitration agreement, and in particular that an arbitral award (or a settlement concluded before an arbitral tribunal) has the same legal effects as a court judgment (or a settlement concluded before a domestic judge).[6]

In 2019, an amendment was made to Art. 1163 of the Code of Civil Procedure, regulating arbitration of corporate disputes – understood as disputes based on arbitration

[1] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards done in New York on 10 June 1958, published in Polish Journal of Laws from 1962, No 9, pos. 41.

[2] European Convention on International Commercial Arbitration done in Geneva on 21 April 1961, published in the Polish Journal of Laws from 1964, No 40, item 17.

[3] Protocol on Arbitration Clauses done in Geneva on 24 September 1923, published in the Polish Journal of Laws from 1931, No 84, item 648.

[4] With Algeria, Bosnia and Herzegovina, China, Croatia, Iraq, Montenegro, Morocco, North Macedonia, Serbia, Slovenia, Syria, and Turkey.

[5] This amendment of the Polish Code of Civil Procedure entered into force on 10 January 2017.

[6] Written form is interpreted in the light of the Polish Civil Code, Art. 78, which clarifies that a qualified electronic signature is equivalent to a wet-ink signature (see, Art 78, Polish Civil Code).

agreements included in companies' articles of associations, typically concerning claims for the annulment or invalidation of resolutions adopted by the general meeting of a limited liability company or a joint stock company. Whilst this type of disputes was capable of being resolved in arbitration prior to the aforementioned amendment, it was believed that the lack of more specific provisions dedicated to corporate disputes was the main reason why few, if any, corporate disputes had ever actually been resolved through arbitration. This legislative amendment was optimistically welcomed by the major Polish arbitral institutions, which adopted special rules of procedure to accommodate it. For example, the Court of Arbitration at the Polish Chamber of Commerce adopted separate rules regulating corporate disputes (Court of Arbitration at the Polish Chamber of Commerce in Warsaw, 2024c), whereas the Lewiatan Court of Arbitration adopted supplementary regulations in the form of an appendix to the general arbitration rules (Rules of the Lewiatan Court of Arbitration, 2023).

Despite all these efforts, corporate disputes remain non-existent in arbitration in Poland. It was publicly reported that, as of September 2024, there had not been a single arbitration based on these dedicated rules of procedure.

In 2023, Art. 1161^1 of the Code of Civil Procedure was introduced. This regulated the "*conversion*" of court litigation into arbitration. This new provision introduced an explicit legal basis allowing an arbitration agreement to be concluded during pending court proceedings. Whilst this was also possible prior to the introduction of the new provision, the consequences of such an arbitration agreement are now explicitly regulated. First, the state court should discontinue the pending court proceedings.[7] Second, the statute of limitations starts to run anew after the discontinuance decision becomes final and binding (Art. 1161^1 § 2, Code of Civil Procedure). Third, three quarters of the amount of court fees already paid are reimbursed to the claimant once the court litigation is discontinued (Art. 79(2)(aa), Law on the Court Fees in Civil Matters).

This development was warmly welcomed by the Polish arbitral community, particularly in the context of the increasing length of average times before Polish state courts for resolving business disputes (corresponding to the overall trend of an increasing number of cases brought before domestic courts). Despite such initial enthusiasm, it is believed that, as of the moment of writing this paper, there has not yet been a single conversion in practice.[8]

[7] Pursuant to Art. 1161^1 § 2 of the Code of Civil Procedure, following the newly concluded arbitration agreement, the parties shall file a joint motion for discontinuance of the court litigation.

[8] Both the Court of Arbitration at the Polish Chamber of Commerce and the Lewiatan Court of Arbitration confirmed to the author that they have not yet handled a single "*conversion*" case. However, it cannot be excluded that a "*conversion*" existed in favour of *ad hoc* arbitration, or in favour of an international arbitral institution.

3. State Courts' Attitude towards Arbitration

Poland is perceived as an arbitration-friendly jurisdiction. A recent study has confirmed the existence of a "*pattern*" of decisions issued by Polish state courts, proving the existence of "*arbitration friendliness*" within the Polish courts. An analysis of the decisions issued by Polish courts in post-arbitral cases in the period 2020-2022 has revealed that, in approximately 90% of all relevant decisions, "*Polish courts either enforced or refused to set aside arbitral awards, and thus upheld the effectiveness of arbitral awards*." (Durbas, Ziarko & Zbiegień, 2023).

Courts of Appeals, which are the highest instance in the Polish structure of state courts in civil matters, are competent to hear post-arbitral cases.[9] This, in principle, guarantees that post-arbitral proceedings are decided in an efficient manner. However, in cases concerning motions to enforce or recognize domestic arbitral awards, the unsuccessful party can challenge the court's decision by filing an interlocutory appeal (*zażalenie*), which is ruled upon by other judges of the same court (Art. 1214 § 4, Polish Code of Civil Procedure). In cases concerning motions to enforce or recognize foreign arbitral awards (Art. 1215 § 3, Polish Code of Civil Procedure), or motions to set aside arbitral awards issued in Poland (Art. 1208 § 3, Polish Code of Civil Procedure), the unsuccessful party may file a cassation appeal (*skarga kasacyjna*) to the Supreme Court. If the Supreme Court consents to hear a case on its merits, the proceedings can last several years if that court quashes the lower court's judgment and remits the case for reconsideration at first instance. This explains why post-arbitral proceedings in Poland can be lengthy if the parties utilize of all the available legal possibilities.

4. Leading Arbitral Institutions

There are several arbitral institutions active in Poland. However, as regards their caseloads, two institutions play the most important role in the Polish arbitral landscape: the Court of Arbitration at the Polish Chamber of Commerce in Warsaw and the Lewiatan Court of Arbitration in Warsaw.[10]

[9] Arts. 1208 and 1213[1] of the Polish Code of Civil Procedure, as amended by Art. 1 of the Law on amending certain acts in connection with supporting amicable dispute resolution methods, *Polish Journal of Laws* of 2015, item 1595.

[10] Polish arbitral practitioners often comment that the existence of these two competing institutions leads to some degree of discomfort when drafting arbitration agreements in favour of these arbitral institutions. Whereas some practitioners prefer one institution or the other, the discussion can sometimes result in a choice of *ad hoc* domestic arbitrations or arbitration agreements concluded in favour of international arbitral institutions, rather than domestic ones.

The Court of Arbitration at the Polish Chamber of Commerce in Warsaw was established in 1950.[11] It is the arbitral institution with the highest caseload in Poland. During its 70 years of activity, it has handled over 15,000 disputes, 1,365 of which were handled between 2010 and 2020.[12] In 2020, there were 169 new cases, in 2021 – 184, in 2022 – 144, in 2023 – 146, and in 2024 (as of September 2024) – 101 new cases. A growing number of these cases have an international character – 11 in 2020, 25 in 2021, 31 in 2022, 43 in 2023, and 17 in 2024 (as of September 2024). As regards the most common sectors of the economy, a significant number of those disputes concern: the sales of goods (including agency, commission, commercial trade),[13] services (including financial services),[14] construction (including construction works),[15] leases,[16] and corporate disputes (resulting from share purchase agreements, investment agreements and dissolutions of companies, and not falling within the scope of Art. 1163 of the Polish Code of Civil Procedure commented above).[17]

The Lewiatan Court of Arbitration in Warsaw (formally the Court of Arbitration at the Polish Confederation Lewiatan) was established in 2005 (Court of Arbitration Lewiatan, 2024). Between 1 January 2017 and 10 September 2024, 252 new cases were filed with the Lewiatan Court of Arbitration. In the same period, arbitral tribunals issued 193 awards and decisions concluding arbitral proceedings.[18] Six motions were issued for, and arbitral decisions issued by, emergency arbitrators. As regards the most common sectors of the economy, most disputes during this period

[11] It is the second oldest existing arbitral institution in Poland, the oldest being the Court of Arbitration at the Gdynia Cotton Association, which has been active since 1938 (Gdynia Cotton Association, 2024).

[12] Initially, during Soviet times, this operated as a separate, independent unit created to settle international trade disputes, under the name of the "Council of Arbitrators at the Polish Chamber of Foreign Trade" (Court of Arbitration at the Polish Chamber of Commerce in Warsaw, 2024b).

[13] 25 cases in 2020, 45 in 2021, 26 in 2022, 36 in 2023, 19 in 2024 (as of September 2024).

[14] 18 cases in 2020, 35 in 2021, 28 in 2022, 35 in 2023, 34 in 2024 (as of September 20204).

[15] 56 cases in 2020, 33 in 2021, 21 in 2022, 19 in 2023, 21 in 2024 (as of September 2024).

[16] 42 cases in 2020, 49 in 2021, 42 in 2022, 33 in 2023, 17 in 2024 (as of September 2024).

[17] 3 cases in 2020, 10 in 2021, 18 in 2022, 15 in 2023, 5 in 2024 (as of September 2024). The data referred to in footnotes 26-30 are based on information received by the author from the Court of Arbitration at the Polish Chamber of Commerce in Warsaw on 4 September 2024, on file with the author. On 14 October 2024, the author received clarification as to how this arbitral institution defines "*corporate disputes,*" and confirmation that there has been no dispute concerning annulment or invalidation of a resolution adopted by a general meeting of a company.

[18] 36 awards and 6 decisions in 2017, 25 awards and 5 decisions in 2018, 15 awards and 4 decisions in 2019, 22 awards and 7 decisions in 2020, 9 awards and 9 decisions in 2021, 12 awards and 15 decisions in 2022, 17 awards in 2023, 9 awards and 4 decisions in the period from 1 January to 10 September 2024. The author's calculations result in a total number of 195, rather than 193 awards and decisions, i.e., 2 more than in the official data shared by the Lewiatan Court of Arbitration.

concerned: construction works (49 cases), commercial agreements (32 cases), and lease agreements (25 cases).[19]

The Lewiatan Court of Arbitration has announced that the average time from the moment when an arbitral tribunal is constituted until it issues an award is between 4.5 and 5 months, and even as short as 1.5 to 2 months in the expedited procedure. The average time between the filing of a statement of claim until the constitution of an arbitral tribunal is between 1.5 and 2 months, and between 1 and 1.5 months in the expedited procedure.[20]

Even though the Lewiatan Court of Arbitration clearly has fewer cases than the Court of Arbitration at the Polish Chamber of Commerce, both the institutions form part of the Polish arbitral landscape, and provide high-quality services at competitive prices.

The prevailing view is that, in the Polish business reality, domestic arbitration must be competitive regarding its pricing in comparison with the state courts, or businesses would be less inclined to use arbitration. Indeed, arbitral fees in Poland are comparable to those of the Polish state courts, and within certain margins, they can be even lower than the court fees. A recent study shows that arbitral fees in Poland are lower than the court fees if the value of the dispute is between PLN 1,347,000 and PLN 19,133,000 (at the Court of Arbitration at the Polish Chamber of Commerce), and between PLN 1,120,000 and PLN 24,580,000 (at the Lewiatan Court of Arbitration) (Waszewski & Kocur, 2023, p. 16).[21]

Located between East and West, in the 21st largest economy worldwide by GDP (World Bank Group, 2024a), and the 20th by GDP PPP (World Bank Group, 2024b), Polish arbitral institutions have the potential to become an international dispute resolution hub in the Central and Eastern Europe region. To date, such potential has not converted into reality, as the above case numbers show.[22] However, both the institutions have undertaken efforts to achieve this goal. For example, in 2024, each published drafts of new arbitration rules, which are expected to be adopted and enter into force in the near future, with the target date set for 1 January 2025 (Court of Arbitration at the Polish Chamber of Commerce in Warsaw, 2024; Polish

[19] Information received by the author from the Lewiatan Court of Arbitration on 10 September 2024, on file with the author.

[20] Information received by the author from the Lewiatan Court of Arbitration on 10 September 2024, on file with the author.

[21] However, with the entry into force of new rules in 2025, the arbitral fees are expected to increase.

[22] However, these statistics demonstrate the strength of Polish arbitral institutions when compared to, for example, the Vienna International Arbitral Centre, which also seeks to be the arbitration hub for the region, despite having only 41 new cases filed throughout 2022. (see, Vienna International Arbitral Centre, hereinafter: VIAC, 2022).

Confederation Lewiatan, 2024). The new rules intend to reflect the most up-to-date current trends in international arbitration. Another example is the growing cooperation between arbitral institutions. For example, the Court of Arbitration at the Polish Chamber of Commerce cooperates with the Arbitration Institute of the Stockholm Chamber of Commerce (which has a similar profile of a neutral forum for disputes between East and West), with the aim being to expand the arbitration market, rather than to enter into direct competition with its Swedish counterpart (Court of Arbitration at the Polish Chamber of Commerce in Warsaw, 2023).

Polish arbitral institutions note that their caseload could be higher if not for the approach adopted several years ago by public authorities in practice, whereby they stopped concluding arbitral agreements and instead relied on jurisdictional clauses in favour of state courts. This has had a visible impact on the caseload of domestic arbitration tribunals, particularly in sectors such as construction, where public contracts (often concluded through public procurement) continue to be the flywheel of the economy. There are certainly many reasons that could explain this state of affairs, with one of the most relevant ones being the public authorities' better track record when litigating disputes before state courts than when engaging in arbitration. The General Counsel to the Republic of Poland, who represents the State Treasury and other state authorities in the most important cases,[23] has a success rate of 95.7% when the State Treasury or other public authority is named as the respondent in domestic litigation, and the success rate of 85.2% when the State Treasury or other public authority acts as the claimant in domestic litigation (General Prosecutor of the Republic of Poland, 2023, p. 15).

Other arbitral institutions also have a role in the landscape of Polish arbitration, including the Court of Arbitration of Greater Poland,[24] and the Court of Arbitration at the Chamber of Commerce and Industry in Katowice (Chamber of Commerce and Industry in Katowice, 2024). Additionally, there are several arbitral institutions focusing on particular industries, such as the Court of Arbitration for Internet Domain Names at the Polish Chamber of Information Technology and Telecommunication (The Polish Chamber of Information Technology and Telecommunications, 2024), the Court of Arbitration at the Gdynia Cotton Association

[23] The cases in which the General Counsel to the Republic of Poland represents the country are enumerated in the Act from 15 December 2016 on the General Council to the Republic of Poland (unified text Journal of Laws from 2024, item 1192, as amended). As a general rule, the General Counsel to the Republic of Poland Office represents the State Treasury in almost all court proceedings, and represents other public authorities if the value of the dispute exceeds PLN 5,000,000.

[24] Established in 2021, as a result of a consolidation of several arbitral institutions present in the region of Greater Poland (Wielkopolska) in Western Poland (Wielkopolska Court of Arbitration, 2021).

(Gdynia Cotton Association, 2024), the International Court of Arbitration at the Polish Chamber of Maritime Commerce (Polish Chamber of Maritime Commerce, 2019), the Court of Arbitration at the Polish Bank Association (Polish Bank Association, 2024), and the Court of Arbitration at the Polish Financial Supervision Authority (Polish Financial Supervision Authority, 2024). There is also an online arbitral institution named Ultima Ratio, which focuses on small-value claims that are resolved in a fully online procedure (Ultima Ratio, 2024; Rojek-Socha, 2019), and the Court of Arbitration at the General Counsel to the Republic of Poland (Service of the Republic of Poland, 2024), which focuses on disputes concerning public authorities.[25]

5. Resistance towards Treaty-Based Arbitrations

Since the birth of arbitrations based on international investment treaties, Poland has been and continues to be in the top 10 most sued states under investment treaties (UNCTAD, 2022, p. 3). This often escapes the general reports and has remained unnoticed, since Poland is not a signatory to the ICSID Convention, and therefore is not included in the ICSID statistics. Typically, even the mere fact that a case is ongoing is considered by the Polish authorities as confidential, and details are not publicly revealed. When summarising all publicly known cases (below), Poland has been the respondent state in at least 35 treaty-based arbitrations – which makes it the second most sued and most frequent respondent EU member state, after Spain (UNCTAD, 2022, p. 3).[26]

This emphasis on confidentiality has resulted in efforts to seek greater transparency through the Polish Freedom of Information Act (Act on access to public information, unified text Polish Journal of Laws of 2022, item 902, as amended). Initial attempts in this regard related to the *Servier v. Poland* case, where even *amicus curiae* were submitted in the course of judicial proceedings before the Polish administrative courts (Centre for International Environmental Law, 2013). A significant number of awards have been obtained under the Polish Freedom of Information Act since then, despite the fierce resistance of the Polish authorities

[25] However, as noted earlier, public authorities are hesitant to resolve disputes through arbitration even under the "*umbrella*" of state lawyers such as the General Counsel to the Republic of Poland. In 2023, there were only 4 arbitrations commenced at the Court of Arbitration at the General Counsel to the Republic of Poland (General Counsel to the Republic of Poland, 2023, p. 33).

[26] In the report, Poland is placed as the seventh most sued state in the ISDS worldwide during 2012-2021, with 20 reported cases. However, without limiting the analysis to any sub-period, Poland is not on the podium. Argentina (with 62 cases), Spain (55 cases), and Venezuela (55 cases) are the most frequent respondent States.

(Balcerzak & Hepburn, 2015, pp. 147-170). However, the Polish authorities remain unimpressed, and the same route through the Polish administrative courts is required to obtain copies of arbitral awards, unless an investor decides to make an award public or an undesired leak of such information occurs.[27]

Initially, Poland was represented in treaty-based arbitrations by external law firms. However, with the lapse of years, Poland has built its own capacities. Currently, Poland is represented by state lawyers from the Office of the General Counsel to the Republic of Poland.[28]

Poland's track record in arbitration proceedings is good. It has prevailed in the most of its reported treaty-based arbitrations: Saar Papier (II) (*Saar Papier Vertriebs GmbH v. Republic of Poland* (II)), Mercuria I (SCC Case No. 096/2008), East Cement (ICC Case No. 16509/JHN), Traco (*TRACO Deutsche Travertinwerke GmbH v. Republic of Poland*), Minnotte (ARB(AF)/10/1), Schooner (ARB(AF)/11/3), Enkev (PCA Case No. 2013-01), Seventhsun (SCC Case No. 138/2012), Almås (PCA Case No. 2013-15), Juvel (ICC Case No. 19459/MHM), Griffin (SCC Case No V 2014/168), Festorino (SCC Case No. 2018/098), and Ojeocan (SCC Arbitration V 2017/200). Even if Poland was formally found liable for having breached the relevant treaty, it still cannot be considered a 'lost' case if no compensation was awarded, which is what happened in the Crespo (*Crespo and others v. Republic of Poland*; see, Echeverri, 2020), and the Nordzucker (*Nordzucker AG v. Republic of Poland*) cases. This sums up to 15 investor-state arbitrations in which Poland has prevailed.

Poland has lost 11 cases: Cargill (*Cargill, Inc. v. Republic of Poland*), Servier (see, UNCTAD, 2009), Flemingo (PCA Case No. 2014-11), PL Holdings (SCC case No. V 2014/163),[29] Horthel (PCA Case No. 2014-31), Manchester Securities (PCA Case No. 2015-18),[30] Slot (PCA Case No. 2017-10),[31] Syrena Immobilien (ICSID Case No. ADHOC/15/1),[32] Lumina Copper (PCA Case No. 2015-27), Mercuria (II) (SCC

[27] For example, the author of this paper has a hearing scheduled at the Supreme Administrative Court on 5 December 2024, concerning access to the arbitral award issued in the Slot v. Poland case.

[28] Nevertheless, from time to time, the General Counsel to the Republic of Poland is assisted by an external law firm. The visible pattern indicates that this typically occurs in high-profile cases or when the value of the claim is considerably higher than usual.

[29] However, the award was set aside in Sweden – see, judgment of the Swedish Supreme Court of 14 December 2022, case no T 1569-19.

[30] However, the set aside proceedings remain pending (judgment of Brussels Court of First Instance of 18 February 2022, case no 19/3390/A, set aside the award, but the judgment was then quashed by the judgment of the Supreme Court of Belgium of 12 Aril 2024, case no C.22.0348.F).

[31] However, Poland was successful in its motion to set aside the award based on the intra-EU arguments. (see, Judgment of the Paris Court of Appeal (Department 5 - Chamber 16) 20/14581 of 19 Apr 2022).

[32] Whereas Poland lost on its objections to jurisdiction, it was successful in its motion to set

Case No. V 2019/126) and Prairie Mining (*Prairie Mining Limited v. Republic of Poland*). However, sometimes the awarded compensation represents merely a small fraction of the compensation sought by the claimant. In the *Servier* case, Poland was ordered to pay less than 2% of the claimed amount (UNCTAD, 2009), whilst in the *Lumina Copper* case this was less than 0.18% of the claimed amount.[33] Similarly, in the *Slot* case, Poland was obliged to pay only 5% of the claimed amount (General Prosecutor of the Republic of Poland, 2021, p. 28).[34]

Poland has settled at least 7 cases: Ameritech (*Ameritech v. Republic of Poland*), France Telecom (*France Telecom v. Republic of Poland*), Schaper (*Lutz Ingo Schaper v. Republic of Poland*), Eureko (*Eureko B.V. v. Republic of Poland*), Vivendi (*Vivendi v. Republic of Poland*), Darley (*Darley Energy Plc v. Republic of Poland*), Airbus (*Airbus Helicopters S.A.S. and Airbus S.E. v. Republic of Poland*), At least two cases remain pending: Invenergy (PCA Case No. 2018-40) and Honwood (ICC Case No. 22755/MHM).

Despite its relatively good track record in defending claims based on international investment treaties, in 2016, Poland took steps leading to the termination of various international investment treaties.[35] Poland mutually terminated the Denmark – Poland BIT,[36] the Latvia – Poland BIT,[37] the Estonia – Poland BIT,[38]

aside the award based on the intra-EU arguments: Judgment of the Paris Court of Appeal (Department 5 - Chamber 16) 20/13085 of 19 Apr 2022; One may note that the French court which issued the two judgments in the Slot and Syrena cases on the same day was composed of the same judges. It is not publicly known whether the arbitration was formally discontinued.

[33] See, for example, announcement that despite losing the case on its merits, the state considered the case as a win, since the awarded compensation amounted to 0.17% of the claimed amount (see, Website of the Republic of Poland, 2021; similarly: General Prosecutor of the Republic of Poland, 2022, p. 26).

[34] Whilst the report specifies neither the case number nor the name of the claimant, it refers to a Czech investor and an award issued in 2020. Therefore, it can be understood that it refers to the *Slot v. Poland* case.

[35] First declarations were made by state officials in early 2016, see for example, answers of Mikołaj Wild, undersecretary at the Polish Ministry of the State Treasury: "[…] it seems that it is necessary not only to terminate these agreements, but also to make them lose their legal force as soon as possible, i.e. to shorten the transitional period during which these agreements will remain in force after termination. Therefore, the management of the Ministry of State Treasury made a decision to – of course after conducting all analyses of the profits and losses related to this process – to make these agreements expire as soon as possible. […]" [unofficial translation] – Stenographic Report of the 12th Session of the Sejm of the Republic of Poland on 25 February 2016 (Sejm of the Republic of Poland VIII, 2016, p. 97).

[36] The proposal of 18 April 2017 sent by Denmark was accepted by Poland on 16 October 2017.

[37] The proposal of 17 October 2017 sent by Poland was accepted by Latvia on 28 October 2017.

[38] The proposal of 20 October 2017 sent by Poland was accepted by Estonia on 19 March 2018.

the Czech Republic – Poland BIT,[39] the Romania – Poland BIT,[40] and the Sweden – Poland BIT. It unilaterally terminated: the Austria – Poland BIT,[41] the Belgium and Luxembourg – Poland BIT,[42] the United Kingdom – Poland BIT,[43] the France – Poland BIT,[44] the Sweden – Poland BIT,[45] the Germany – Poland BIT,[46] the Cyprus – Poland BIT,[47] the Spain – Poland BIT,[48] the Netherlands – Poland BIT,[49] the Hungary – Poland BIT,[50] the Lithuania – Poland BIT,[51] the Greece – Poland BIT,[52] the Portugal – Poland BIT,[53] the Bulgaria – Poland BIT,[54] the Croatia – Poland BIT,[55]

[39] The proposal of 10 January 2018 sent by Poland was accepted by the Czech Republic on 11 April 2018.

[40] The proposal of 14 March 2018 sent by Romania was accepted by Poland on 18 June 2018.

[41] Poland withdrew in a document of 4 October 2018, notified to the other Contracting Party on 17 October 2018.

[42] Poland withdrew in a document of 29 June 2018, notified to the other Contracting Party on 19 July 2018.

[43] Poland withdrew in a document of 19 November 2018, notified to the other Contracting Party on 22 November 2018.

[44] Poland withdrew in a document of 29 June 2018, notified to the other Contracting Party on 19 June 2018.

[45] Poland withdrew in a document of 4 October 2018, notified to the other Contracting Party on 16 October 2018. However, on 18 June 2020, Sweden proposed to mutually terminate the BIT, which was accepted by Poland on 8 July 2021.

[46] Poland withdrew in a document of 4 October 2018, notified to the other Contracting Party on 18 October 2018.

[47] Poland withdrew in a document of 29 June 2018, notified to the other Contracting Party on 17 July 2018.

[48] Poland withdrew in a document of 4 October 2018, notified to the other Contracting Party on 16 October 2018.

[49] Poland withdrew in a document of 29 June 2018, notified to the other Contracting Party on 19 July 2018.

[50] Poland withdrew in a document of 4 October 2018, notified to the other Contracting Party on 16 October 2018.

[51] Poland withdrew in a document of 4 October 2018, notified to the other Contracting Party on 16 October 2018.

[52] Poland withdrew in a document of 4 October 2018, notified to the other Contracting Party on 7 November 2018.

[53] Poland withdrew in a document of 6 November 2017, notified to the other Contracting Party on 16 November 2017.

[54] Poland withdrew in a document of 4 October 2018, notified to the other Contracting Party on 16 October 2018.

[55] Poland withdrew in a document of 4 October 2018, notified to the other Contracting Party on 18 October 2018.

the Slovenia – Poland BIT,[56] and the Finland – Poland BIT.[57] Bearing in mind that the Italy – Poland BIT had been terminated earlier,[58] this encompassed all intra-EU BITs to which Poland was a party, except the BIT concluded with Slovakia. This latter BIT was terminated once Poland signed and ratified the 2020 Agreement for the termination of BITs between the EU Member States.[59]

Poland actively supported the European Commission's efforts to put an end to the intra-EU aspect of international investment arbitration. The General Counsel to the Republic of Poland reported its wide-range activities that contributed to such efforts and ultimately resulted in the famous *Achmea* (C-284/16, ECLI:EU:C:2018:158; General Prosecutor of the Republic of Poland, 2019, p. 22) and *Komstroy* judgments (C-741/19, ECLI:EU:C:2021:655; General Prosecutor of the Republic of Poland, 2022, p. 27), albeit these cases were not even remotely linked with Poland. Subsequently, the General Counsel to the Republic of Poland was the main actor whose actions led to the *PL Holdings* judgment (General Prosecutor of the Republic of Poland, 2022, p. 27). These activities represented a long-term strategy, and Poland successfully relied on the CJEU's judgments on intra-EU BITs to set aside several arbitral awards in lost cases. Poland was also one of the first EU member states to withdraw from the Energy Charter Treaty, having filed the official notification to the depositary on 28 December 2022 (see, Ministry of Foreign Affairs of Portugal, 2022).

Within this context, it may be surprising that Poland has not undertaken any steps to withdraw from the BITs in force between Poland and non-EU states, except those with the United Kingdom (Poland withdrew from the BIT with the United Kingdom once it became known that the United Kingdom was leaving the EU)[60] and Norway.[61] Thus, Poland continues to be bound by the BITs with: Albania (1993), Argentina (1992), Australia (1991), Azerbaijan (1997), Bangladesh (1997), Belarus (1992), Canada (1990), Chile (1995), China (1998), Egypt (1995), Indonesia

[56] Poland withdrew in a document of 7 March 2019, notified to the other Contracting Party on 12 March 2019.

[57] Poland withdrew in a document of 4 October 2018, notified to the other Contracting Party on 16 October 2018.

[58] Poland received notification from Italy about the withdrawal on 22 August 2007.

[59] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (OJ L 169, 29 May 2020, pp. 1–41). Four EU member states are not parties to this Agreement: Austria, Ireland, Finland and Sweden. The Agreement entered into force on 29 August 2020 (European Council & Council of the European Union, 2020).

[60] Therefore, after the intra-EU terminations of investment arbitration and after Brexit, there is no BIT in place between Poland and the United Kingdom.

[61] The proposal of 27 June 2023 sent by Poland was accepted by Norway on 18 July 2023.

(1992), Iran (1998), Israel (1991), Jordan (1997), Kazakhstan (1994), Kuwait (1990), Malaysia (1993), Moldova (1994), Mongolia (1995), Montenegro (1996), Morocco (*1994*), North Macedonia (1996), Serbia (1996), Singapore (1993), South Korea (1989), Switzerland (1989), Thailand (1992), Tunisia (1993), Turkey (1991), Ukraine (1993), United Arab Emirates (1993), the United States of America (1990), Uruguay (1991), Uzbekistan (1995), and Vietnam (1994). These are all "*old generation*" BITs, concluded in the late 1980s and throughout the 1990s.

In addition to the intra-EU BITs, the US-Poland BIT has played the most significant role in the historical record of arbitrations brought against Poland. Currently, the growing number and value of incoming investments from South Korea is expected to increase the relevance of the South Korea – Poland BIT, providing the basis of future investor-state arbitrations.

6. Conclusions

This paper describes Poland as an arbitration-friendly jurisdiction, which has implemented the UNCITRAL Model Law and whose domestic courts uphold the effectiveness of approximately 90% of arbitral awards, either by enforcing them or refusing to set them aside. The legislative amendments in recent years demonstrate that the legislative branch also upholds this pro-arbitration trend, striving to increase the relevance of arbitration in practice.

In 2024, the two major Polish arbitral institutions prepared new drafts of arbitration rules, reflecting modern trends in international arbitration. They provide high-quality services at competitive prices, comparable to the costs of domestic litigation, and cheaper than many international arbitral institutions. Located between East and West, in the 21st largest economy worldwide by GDP (World Bank Group, 2024a), and the 20th by GDP PPP (World Bank Group, 2024b), Polish arbitral institutions have the potential to become an international dispute resolution hub in the Central and Eastern Europe region.

Poland has acted as the respondent state in at least 35 treaty-based arbitrations, which may explain why it was one of the fist EU member states to escape the intra-EU BITs and the Energy Charter Treaty. Nevertheless, as for now, Poland has not declared any intention to withdraw from its non-EU BITs, and they will continue to play an important role in Poland's international legal landscape.

References

Asłanowicz, M. 2017. Art. 1154. In: Asłanowicz, M. *Sąd polubowny (arbitrażowy). Komentarz do części piątej Kodeksu postępowania cywilnego*. Legalis.

Balcerzak, F. & Hepburn, J. 2015. Publication of investment treaty awards: the qualified potential of domestic access to information laws. *Groningen Journal of International Law,* 3(1), pp. 147-170. https://doi.org/10.21827/5a86a8b976e29

Internet Sources

Centre for International Environmental Law. 2013. *Republic of Poland before the Regional Administrative Court in Warsaw.* Amicus Curiae brief submitted by Centre for International Environmental Law, case number: II SA/Wa 838/13. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw1563.pdf, 6. 12. 2024.

Chamber of Commerce and Industry in Katowice. 2024. Available at: https://rig.katowice.pl/sad-arbitrazowy/, 6. 12. 2024.

Court of Arbitration at the Polish Chamber of Commerce in Warsaw. 2023. *Cooperation agreement with SCC Arbitration Institute*. 2023. Available at: https://sakig.pl/en/list/cooperation-agreement-with-scc-arbitration-institute, 6. 12. 2024.

Court of Arbitration at the Polish Chamber of Commerce in Warsaw. 2024a. *Prace nad nowym regulaminem Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie*. 2024. Available at: https://sakig.pl/regulaminy-i-taryfa-oplat/arbitraz/prace-nad-nowym-regulaminem-sadu. 6. 12. 2024).

Court of Arbitration at the Polish Chamber of Commerce in Warsaw. 2024b. *General information*. Available at: https://sakig.pl/en/about-court/general-information, 6. 12. 2024.

Court of Arbitration at the Polish Chamber of Commerce in Warsaw. 2024a. *Regulamin Sądu Arbitrażowego przy KIG w sporach uchwałowych*. Available at: https://sakig.pl/wp-content/uploads/2021/12/Regulamin-w-Sporach-Uchwalowych_11_11_21.pdf, 5. 12. 2024.

Court of Arbitration Lewiatan. 2024. *History of the Court of Arbitration at the Polish Confederation Lewiatan*. Available at: https://sadarbitrazowy.org.pl/en/court-of-arbitration/history-of-the-court-of-arbitration/, 6. 12. 2024.

Durbas, M., Ziarko, A & Zbiegień, T. 2023. *2021-2022 Statistics of Polish Post-Award Case Law: Poland is (Still) Arbitration-Friendly*. Kluwer Arbitration Blog. Available at: https://arbitrationblog.kluwerarbitration.com/2023/07/20/2021-2022-statistics-of-polish-post-award-case-law-poland-is-still-arbitration-friendly/, 5. 12. 2024.

Echeverri, J. 2020. *Looking Back: In Julian Crespo v. Poland, ICC tribunal offered an early analysis of the arbitrators' power to order security for costs; on the merits, a majority found the state liable for a breach of the Poland-Spain BIT, but declined to award any damages*. IA Reporter. Available at: https://www.iareporter.com/articles/looking-back-in-julian-crespo-v-poland-icc-tribunal-offered-an-early-analysis-of-the-ar-

bitrators-power-to-order-security-for-costs-on-the-merits-a-majority-found-the-state-liable-for-a-b/, 6. 12. 2024.

Gdynia Cotton Association. 2024. *History of the Court of Arbitration at the Gdynia Cotton Association*. Available at: https://gca.org.pl/en/arbitration/, 6. 12. 2024.

General Prosecutor of the Republic of Poland. 2019. *Sprawozdanie z działalności Prokuratorii Generalnej Rzeczypospolitej Polskiej za 2018 rok*. Available at: https://www.gov.pl/attachment/98458a51-628b-403f-a24d-ad44c4cf0b99, 6. 12. 2024.

General Prosecutor of the Republic of Poland. 2021. *Sprawozdanie z działalności Prokuratorii Generalnej Rzeczypospolitej Polskiej za 2020 rok*. Available at: https://www.gov.pl/attachment/7142ee25-7240-46e7-8288-c6897a950433, 6. 12. 2024.

General Prosecutor of the Republic of Poland. 2022. *Sprawozdanie z działalności Prokuratorii Generalnej Rzeczypospolitej Polskiej za 2021 rok*. Available at: https://www.gov.pl/attachment/9e4bb54e-4a00-460d-99f1-b3b3b5eae6bb, 6. 12. 2024.

General Prosecutor of the Republic of Poland. 2023. *Sprawozdanie z działalności Prokuratorii Generalnej Rzeczypospolitej Polskiej za 2023 rok*. Available at: https://www.gov.pl/attachment/e758a913-256e-4944-9696-6dc6016bf9a6, 6. 12. 2024.

Kocur, M. & Waszewski, T. 2023. *Koszty arbitrażu w Polsce*. Warsaw: Kocur & Partners., pp. 1-33. Available at: https://kocurpartners.com/upload/2023/11/raport-www.pdf, 6. 12. 2024.

Ministry of Foreign Affairs of Portugal. 2022. *Notification of withdrawal from the Energy Charter Treaty by the Republic of Poland*. Available at: https://www.energycharter.org/fileadmin/DocumentsMedia/Withdrawal_notifications/2022.12.28_-_Withdrawal_notification_Poland.pdf, 8. 12. 2024.

Polish Chamber of Maritime Commerce. 2019. *Międzynarodowy Sąd Arbitrażowy – Krajowa Izba Gospodarki Morskiej*. Available at: http://www.kigm.pl/miedzynarodowy-sad-arbitrazowy, 6. 12. 2024.

Polish Bank Association. 2024. Available at: https://zbp.pl/dla-klientow/sad-polubowny, 6. 12. 2024.

Polish Confederation Lewiatan. 2024. *Nowy regulamin SAKL wejdzie w życie 1 stycznia – spotkanie Klubu Arbitra*. Available at: https://lewiatan.org/nowy-regulamin-sakl-wejdzie-w-zycie-1-stycznia-spotkanie-klubu-arbitra/, 6. 12. 2024.

Polish Financial Supervision Authority. 2024. Available at: https://www.knf.gov.pl/dla_rynku/sad_polubowny_przy_KNF, 6. 12. 2024.

Rojek-Socha, P. 2019. *Elektroniczny arbitraż Ultima Ratio wydał pierwsze wyroki*. Prawo.pl. Available at: https://www.prawo.pl/prawnicy-sady/pierwsze-wyroki-wydane-przez-e-sad,455560.html, 6. 12. 2024.

Rules of the Lewiatan Court of Arbitration as in force from 1 march 2012 with amendments in force since March 23, 2015 and May 8th 2017 and from May 13th, 2020, from June 8th 2020 and from June 1st 2023 - consolidated text. Available at: https://sadarbitrazowy.org.pl/en/wp-content/uploads/2023/09/aktualny-ang-nowe-formatowanie-Regulamin-SAL-zmiany-dot.-zdalnego-prowadzenia-postepowania-i-reg.-korporacyjny-final-zmiany-z-1-lipca-2023-tlumaczenie-1-1.pdf, 5. 12. 2024.

Sejm of the Republic of Poland VIII. 2016. *Stenographic Report of the 12th Session of the Sejm of the Republic of Poland on 25 February 2016 (second day of the session).* Available at: https://orka2.sejm.gov.pl/StenoInter8.nsf/0/A3B27EAFDE0323FAC1257F6400574FDE/%24File/12_b_ksiazka_bis.pdf, 6. 12. 2024.

Service of the Republic of Poland. 2024. *Sąd Polubowny przy Prokuratorii Generalnej Rzeczypospolitej Polskiej. Podstawowe informacje*. Available at: https://www.gov.pl/web/sp-prokuratoria/podstawowe-informacje, 6. 12. 2024.

The Polish Chamber of Information Technology and Telecommunications. 2024. *Arbitration Court for Internet Domains*. Available at: https://www.piit.org.pl/sad-polubowny, 6 December 2024.

Ultima Ratio. 2024. *Online arbitral institution*. Available at: https://ultimaratio.pl, 6. 12. 2024.

UNCTAD. 2022. *IIA Issues Note. Facts on investor–state arbitrations in 2021: with a special focus on tax-related ISDS case*s. Available at: https://unctad.org/system/files/official-document/diaepcbinf2022d4_en.pdf, 6. 12. 2024.

VIAC Statistics 2022 (as per 31 December 2022). Vienna International Arbitral Centre. Available at: https://www.viac.eu/en/statistics, 6. 12. 2024.

Website of the Republic of Poland. 2021. *Rozstrzygnięcie w postępowaniu arbitrażowym wytoczonym przez kanadyjskiego inwestora. Prokuratoria Generalna Rzeczypospolitej Polskiej*. Available at: https://www.gov.pl/web/prokuratoria/rozstrzygniecie-w-postepowaniu-arbitrazowym-wytoczonym-przez-kanadyjskiego-inwestora, 6. 12. 2024.

Wielkopolska Court of Arbitration. 2021. *Powołanie Wielkopolskiego Sądu Arbitrażowego*. Available at: https://arbitrazwielkopolski.pl/powolanie-wielkopolskiego-sadu-arbitrazowego/, 6. 12. 2024.

World Bank Group. 2024a. *GDP (current US$). World Bank database*. Available at: https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?end=2023&most_recent_value_desc=true, 6. 12. 2024.

World Bank Group. 2024b. *GDP PPP (current international $). World Bank database*. Available at: https://data.worldbank.org/indicator/NY.GDP.MKTP.PP.CD?most_recent_value_desc=true, 6. 12. 2024.

Legal Sources

Act from 15 December 2016 on the General Council to the Republic of Poland, unified text *Polish Journal of Laws* from 2024, item 1192, as amended.

Act on access to public information, 6 September 2001, unified text *Polish Journal of Laws* of 2022, item 902, as amended.

European Council & Council of the European Union. 2020. *Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union* (OJ L 169, 29. 5. 2020, pp. 1–41). Available at: https://www.consilium.europa.eu/en/

documents-publications/treaties-agreements/agreement/?id=2019049&DocLanguage=en, 7. 12. 2024.
Convention on the settlement of investment disputes between States and nationals of other States, done in Washington on 18 March 1965.
Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) (OJ L 15/63).
Law on amending certain acts in connection with supporting amicable dispute resolution methods, 10 September 2015, *Polish Journal of Laws* of 2015, item 159.
Law on the Court Fees in Civil Matters, 28 July 2005, unified text *Polish Journal of Laws* of 2024, item 959, as amended.
Polish Civil Procedure Code, 17 November 1964, unified text *Polish Journal of Laws* of 2023, item 1550, as amended.
Polish Civil Code, 23 April 1964, unified text *Polish Journal of Laws* of 2024, item 1061, as amended.
The Constitution of the Republic of Poland, 2 April 1997, *Polish Journal of Laws* No 78, item 483, as amended.

Case Law

Airbus Helicopters S.A.S. and Airbus S.E. v. Republic of Poland, Netherlands – Poland BIT.
Ameritech v. Republic of Poland, US – Poland BIT, UNCITRAL Arbitration Rules. Settlement of 1995/1997 not publicly available.
Cargill, Inc. v. Republic of Poland, US – Poland BIT, UNCITRAL Rules (initially ISCID Additional Facility Rules, then changed), award of 29 February 2009.
Crespo and others v. Republic of Poland, Spain – Poland BIT, ICC Arbitration Rules, interim award of 21 November 2004, final award of 22 September 2005.
Darley Energy Plc v. Republic of Poland, UK – Poland BIT, UNCITRAL Rules.
David Minnotte & Robert Lewis v. Republic of Poland, ARB(AF)/10/1, US – Poland BIT, ICSID Additional Facility Rules, award of 16 May 2014.
East Cement v. Republic of Poland, ICC Case No. 16509/JHN, Jordan – Poland BIT, ICC Rules, award of 21 August 2011.
Enkev Beheer B.V. v. Republic of Poland, PCA Case No. 2013-01, Poland – Netherlands BIT, UNCITRAL Rules, first partial award of 29 April 2014, final award on costs of 13 June 2014.
Eureko B.V. v. Republic of Poland, Netherlands – Poland BIT, UNCITRAL Rules, partial award of 19 August 2005, settlement signed on 1 October 2009.
Festorino Invest Limited and others v. Republic of Poland, SCC Case No. 2018/098, Energy Charter Treaty, SCC Rules, final award of 30 July 2021.
Flemingo DutyFree Shop Private Limited v. Republic of Poland, PCA Case No. 2014-11, India – Poland BIT, UNCITRAL Rules, award of 12 August 2016.
France Telecom v. Republic of Poland, France-Poland BIT, UNCITRAL Arbitration Rules. Settlement of 1996/1997 not publicly available.

GPF GP S.à.r.l v. Republic of Poland, SCC Case No. V 2014/168, Belgium/Luxembourg – Poland BIT, SCC Rules, award on jurisdiction of 15 February 2017, award of 29 April 2020.

GreenX Metals Limited (formerly Prairie Mining Limited) v. Republic of Poland, Australia – Poland BIT, Energy Charter Treaty, UNCITRAL Rules, two awards issued on or around 8 October 2024. Available at: https://wcsecure.weblink.com.au/pdf/GRX/02863980.pdf, 6. 12. 2024.

Honwood Services Ltd. v. Republic of Poland, ICC Case No. 22755/MHM, Cyprus - Poland BIT, ICC Rules.

Horthel Systems BV, Poland Gaming Holding BV and Tesa Beheer BV v. Republic of Poland, PCA Case No. 2014-31, Netherlands – Poland BIT, UNCITRAL Rules, final award of 16 February 2017.

Invenergy Renewables LLC and Others v. Republic of Poland, PCA Case No. 2018-40, US – Poland BIT, Energy Charter Treaty, UNCITRAL Rules.

Judgment of Brussels Court of First Instance of 18 February 2022, case No. 19/3390/A.

Judgment of the Court (Grand Chamber) of 2 September 2021, Komstroy, C-741/19, ECLI:EU:C:2021:655.

Judgment of the Court (Grand Chamber) of 6 March 2018, Achmea, C-284/16, ECLI:EU:C:2018:158.

Judgment of the Paris Court of Appeal (Department 5 - Chamber 16) of 19 April 2022, case No. 20/14581. Available at: https://jusmundi.com/en/document/decision/en-slot-group-a-s-v-republic-of-poland-judgment-of-the-paris-court-of-appeal-tuesday-19th-april-2022, 6 December 2024.

Judgment of the Paris Court of Appeal (Department 5 - Chamber 16) of 19 April 2022, case No. 20/13085.

Judgment of the Supreme Court of Belgium of 12 April 2024, case No. C.22.0348.F.

Judgment of the Swedish Supreme Court of 14 December 2022, case No. T 1569-19.

Juvel Ltd. and Bithell Holdings Ltd. v. Republic of Poland, ICC Case No. 19459/MHM, Cyprus – Poland BIT, ICC Rules, award of 26 February 2019.

LC Corp B.V. v. Republic of Poland, Netherlands – Poland BIT, UNCITRAL Rules. Available at: https://www.italaw.com/cases/10104 (6 December2024).

Lumina (Miedzi) Copper Corp. v. Republic of Poland, PCA Case No. 2015-27, Canada – Poland BIT, UNCITRAL Rules, final award of 27 December 2021.

Lutz Ingo Schaper v. Republic of Poland, Germany – Poland BIT, UNCITRAL Rules, final partial award of 22 August 2006, termination order of 23 February 2009.

Manchester Securities Corporation v. Republic of Poland, PCA Case No. 2015-18, US – Poland BIT, UNCITRAL Rules, award of 7 December 2018.

Mercuria Energy Group Limited v. Republic of Poland (II), SCC Case No. V 2019/126, Energy Charter Treaty, SCC Arbitration Rules, final award of 29 December 2022.

Mercuria Energy v. Republic of Poland, SCC Case No. 096/2008, Energy Charter Treaty, decision on jurisdiction of 2009, final award of 2011.

Mr. Kristian Almås and Mr. Geir Almås v. Republic of Poland, PCA Case No. 2013-15, Norway – Poland BIT, UNCITRAL Rules, award of 27 June 2016.

Nordzucker AG v. Republic of Poland, Germany – Poland BIT, UNCITRAL Rules, partial award of 10 December 2008, second partial award of 28 January 2009, third partial and final award of 23 November 2009.

Ojeocan Management Ltd v. Republic of Poland, SCC Arbitration V 2017/200, Energy Charter Treaty, SCC Rules, award of 28 September 2021.

PL Holdings S.a.r.l. v. Republic of Poland, SCC case No. V 2014/163, Luxembourg – Poland BIT, SCC Rules, partial award of 28 June 2017, final award of 28 September 2017.

Saar Papier Vertriebs v. Republic of Poland (II), Germany – Poland BIT, UNCITRAL Rules, award of 24 January 2000 and award of 19 June 2001.

Seventhsun Holding Ltd., Jevelinia Ltd, Aventon Ltd., Stanorode Ltd. and Wildoro Ltd. v. Republic of Poland, SCC Case No. 138/2012, Cyprus - Poland BIT, SCC Rules, partial award of 13 October 2015, final award on costs of 4 January 2016.

Slot Group a.s. v. Republic of Poland, PCA Case No. 2017-10, Czech Republic – Poland BIT, UNCITRAL Rules, award of 3 February 2020.

Strabag SE, Raiffeisen Centrobank AG, Syrena Immobilien Holding AG v. Republic of Poland, ICSID Case No. ADHOC/15/1, Austria – Poland BIT, Partial Award on Jurisdiction of 4 March 2020.

TRACO Deutsche Travertinwerke GmbH v. Republic of Poland, Germany – Poland BIT, UNCITRAL Rules, first partial award of 5 September 2012.

UNCTAD. 2009. *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland*, France – Poland BIT, UNCITRAL Rules, award of 14 February 2012. Available at: https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/339/servier-v-poland, 6 December 2024.

Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland, ARB(AF)/11/3, US – Poland BIT, ICSID Additional Facility Rules, award of 24 November 2015.

Vivendi v. Republic of Poland, France – Poland BIT, UNCITRAL Rules, settlement signed in December 2010.

Dániel Dózsa*
Lili Hanna Fehér**
Balázs Muraközy***

Review Scientific Paper
UDC: 336.765(439)
doi: https://doi.org/10.56461/SPZ_24409KJ
Received: 11. 11. 2024.
Accepted: 13. 10. 2025.

THE UNTAPPED POTENTIAL OF ARBITRATION IN HUNGARY

Summary

Arbitration in Hungary, despite its modern legal framework and strategic location in Central and Eastern Europe (CEE), remains underutilised compared to neighbouring countries such as Austria. This paper explores the reasons behind this trend, examining Hungary's arbitration landscape, strengths, and challenges. Key factors include legislative interferences, deviations from the UNCITRAL Model Law, and cost concerns. The authors argue that Hungary has a significant untapped potential in arbitration, which could be realised by addressing these challenges and leveraging its rich arbitration culture and favourable legal framework to attract more domestic and international arbitration cases.

Keywords*:* UNCITRAL Model Law, arbitration history, arbitrability, costs, business attitude towards arbitration.

* LL.M, partner at Queritius Dispute Resolution, Guest Lecturer at Leiden Law School.
E-mail: *daniel.dozsa@queritius.com*
ORCID: *https://orcid.org/0009-0009-5633-3684*

** LL.M., associate at Queritius Dispute Resolution.
E-mail: *lilihanna.feher@queritius.com*
ORCID: *https://orcid.org/0009-0001-8439-6318*

*** Intern at Queritius Dispute Resolution, student at Pazmany Peter Catholic University Faculty of Law.
E-mail: *balazs.murakozy@queritius.com*
ORCID: *https://orcid.org/0009-0004-5379-7655*

NEISKORIŠĆENI POTENCIJAL ARBITRAŽE U MAĐARSKOJ

Sažetak

Uprkos modernom pravnom okviru i strateškom položaju u centralnoj i istočnoj Evropi (CEE), u Mađarskoj arbitraža je još uvek nedovoljno iskorišćena u odnosu na susedne zemlje kao što je, na primer, Austrija. Stoga, u ovom radu autori istražuju razloge za taj trend i ispituju pravni okvir za arbitražu u Mađarskoj i prednosti i izazove istog. Ključni razlozi za neiskorišćeni potencijal arbitraže mogu se naći u zakonodavnim smetnjama, odstupanjima od UNCITRAL Model Zakona i problemima u vezi troškova. Autori stoje na stanovištu da Mađarska ima neiskorišćeni potencijal u arbitraži, koji bi mogao da se realizuje rešavanjem postojećih izazova, oslanjajući se na bogatu kulturu arbitraže u zemlji i povoljan pravni okvir za privlačenje većeg broja domaćih i međunarodnih slučajeva arbitraže.

Ključne reči: UNCITRAL Model zakon, istorija arbitraže, arbitrabilnost, troškovi, odnos poslovne zajednice prema arbitraži.

1. Introduction and Methodology

Arbitration has long been recognised as an effective alternative to traditional litigation in resolving commercial disputes, offering advantages such as speed, flexibility, and expertise. Whilst the arbitration market in Southeast and Central Europe[1] is rapidly expanding, Hungary's full potential remains untapped. Despite the country's modern arbitration laws and location in the heart of the CEE region, domestic businesses and legal practitioners have yet to fully embrace arbitration as the desired dispute resolution mechanism, and international parties often flock to the neighbouring hub of Austria, which boasts a higher international caseload (Vienna International Arbitral Centre – hereinafter: VIAC, 2022).

In this paper, the authors explore potential reasons for the underutilisation of arbitration in Hungary, examining first Hungary's position within the regional arbitration landscape and identifying the overarching trends; and proceeding to zone in on the appeals of the jurisdiction, and then flag potential challenges faced by the arbitration market in the country. Finally, the authors will propose areas for growth and development. It is ultimately the authors' observation that Hungary possesses an untapped potential, and that by becoming aware of the challenges

[1] Hereinafter referred to as the "CEE region" for ease of reference.

identified in this paper, practitioners could take steps to "put Hungary on the map" of arbitration hubs.

Over the past decades, commercial arbitration has increasingly become a preferred alternative to traditional litigation before national courts in business disputes, the main selling points being its speed and efficiency, the quality and fairness of adjudication (particularly in legal systems experiencing challenges in the rule of law), and arbitrators' specialist knowledge (Born, 2021).

On top of the baseline offerings of arbitration, there are also jurisdiction-specific factors that appeal to domestic and international parties and make some arbitration markets more successful than others (Redfern & Hunter., 2005; Bermann, 2018, pp. 341-353). These include a supporting legal framework; enforceability of awards; economic stability of the respective country; expertise and experience of the respective jurisdiction in settling high-profile disputes; and the costs of arbitration. These factors have informed our analysis of the strengths and weaknesses of the Hungarian jurisdiction, allowing us to evaluate the quality of arbitration in the country, and show that its current position in the CEE market does not reflect its true potentials.

2. Current Regional Landscape

To understand the perspectives and challenges of arbitration in Hungary, it is helpful to first take a bird's eye view at the countries considered to be part of the CEE region. Whilst doing so, we will identify the overarching trends and attitudes that might be typical for the entire CEE region. In the following chapters, we will evaluate the decreasing role of the Vienna International Arbitral Centre (VIAC) in the region, and in turn, examine the opportunities presented by other potentially competing arbitral centres.

2.1. Decreasing Utilisation of VIAC?

Austria takes the central position in the region, given its history and its leading institution, VIAC. Austria has been a significant player in the CEE arbitration market for decades, dating back to the so-called East-West disputes in the times of the Cold War (Sadowski, 2015, p. 409), which in turn ensured that VIAC enjoyed a head-start over the other regional arbitral centres, as they entered the scene after the fall of Communism.

VIAC's leading position was further reinforced by a huge influx of foreign direct investment that came with the market transition in the former Eastern Bloc countries. This advantage was coupled with the perceived underdevelopment of

the legal and judicial systems in the other CEE states, their vulnerability to various types of fraud and abuse, and the perceived risk of corruption in the eyes of the investors who sought to have their disputes resolved by a neutral forum skilled in commercial matters (Sadowski, 2015, p. 409; Korom, 2020, pp. 268-280).

In recent years, however, VIAC's popularity has been on a seemingly downward trend, as a steady drop may be observed in the new cases registered by the institution (VIAC, 2022).

Year	2011	2012	2013	2014	2015	...	2019	2020	2021	2022
Number of new cases	75	70	56	56	40	...	45	40	44	41
% of non-Austrian parties	70	48	78,6	78	75	…	67	68	75	61

The decreasing interest from parties originating in the CEE region is further underlined by the fact that parties from Germany are comfortably the second most frequent users of the VIAC services. Therefore, by now, local Austrian and German companies may be considered as the principal VIAC users (Sadowski, 2015, p. 420).

Year	2011	2012	2013	2014	2015	(…)	2019	2020	2021	2022
% of German and Austrian parties	44	83	35	35	39	…	37	35	29	53

This drop may be attributable to the general decreasing need for an *international* arbitration centre in the CEE region (Sadowski, 2015, p. 420). One reason behind this trend is that regional companies are generally cost-sensitive, and that improvements and modernisation of the arbitration laws in their respective countries could be making their "home-grown" institutions more attractive in certain cases.[2]

2.2. Regional Trends

Moving on to arbitral centres located in other CEE jurisdictions such as Poland, Czechia and Romania, it is difficult to compare them directly with Hungary, as there is scarce publicly available data on annual caseloads, amounts in dispute, and parties' nationality.

[2] In other cases, where the disputing parties prefer an international institution, they have been observed to gravitate away from VIAC and towards either the Arbitration Court of the International Chamber of Commerce (hereinafter ICC) or the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter SCC), rather than their CEE regional alternatives. For example, in 2023, 23 parties from Poland and Romania, and 20 from Czechia had a case at the ICC. Whilst there are no specific statistics available about cases administered by the VIAC for the same year, in 2022 VIAC handled only 4 Polish, 6 Romanian and 2 Czech cases, which confirms this trend (see: Sadowski, 2015, p. 420).

What is commonly observable is that the largest and oldest arbitral institutions are often the ones formerly attached to their respective country's chambers of commerce in the Communist era, mostly in the 1950s, and that their Rules of Procedures and the general legal framework have been subsequently modernised in line with the market transition by adopting the UNCITRAL Model Law on International Commercial Arbitration 1985 (hereinafter: Model Law) with slight modifications. The region is also characterised by specialist arbitration courts set up in industries including agriculture, sports, or stock and commodity markets. More recently, new arbitral centres have also emerged, such as the Court of Arbitration at the Polish Confederation Lewiatan in Poland ("Lewiatan"), the Belgrade Arbitration Centre, or the Bucharest International Arbitration Court in Romania, indicating a regional expansion of the arbitral market.

In Poland, most disputes are handled by the Court of Arbitration at the Polish Chamber of Commerce. In 2018, it opened 1365 cases in total (see: Court of Arbitration at the Polish Chamber of Commerce in Warsaw, 2024). Between 2010 and 2020, nearly 20% of the disputes it handled were international in nature (Court of Arbitration at the Polish Chamber of Commerce in Warsaw, 2024). The second largest arbitration court, Lewiatan, handles around 50 cases annually (Polish Arbitration Association, 2024), and is leading initiatives to popularise arbitration in Poland. Poland also boasts several specialist arbitration courts, such as the Court of Arbitration for Internet Domain Names, the Court of Arbitration at the Gdynia Cotton Association, and the International Court of Arbitration at the Polish Chamber of Maritime Commerce. The exact number of cases handled by these courts is not available.

The landscape in Czechia is similar. Its Arbitration Court attached to the Economic Chamber and Agricultural Chamber of the Czech Republic is the only permanent arbitration court having general jurisdiction. It was founded in 1949, but throughout the Soviet era, it could only adjudicate upon foreign trade disputes. Since the passing of a modernised Arbitration Act in 1994, both international and domestic disputes may be referred to it. There is no publicly available data on its annual caseloads.

In Romania, the most frequently used arbitration court is the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania ("CICA"), which has settled over 3000 arbitration disputes since Romania joined the European Union in 2007, including over 700 international disputes. Conversely, between 2020 and 2023, the Permanent Court of Arbitration attached to the Hungarian Chamber of Commerce (the "Hungarian Arbitration Court") administered only 305 cases in total, 15% of which included international parties (Hungarian Chamber of Commerce and Industry, 2024).

Notwithstanding the above, this overview should be read with caution due to the lack of transparent information on caseloads and disputing parties in several of the surveyed jurisdictions. Nevertheless, two conclusions may be drawn concerning the tendencies in the region.

First, whilst VIAC remains a dominant (and potentially the top-performing) arbitral institution, its significance seems to be decreasing, opening opportunities for growth for other regional centres. Second, whilst it is difficult to rank Hungary in terms of overall caseloads, in terms of the percentage of international cases taken on by national institutions (around 20% in Poland and Romania, and over 40% for VIAC), Hungary lags behind at around 15%.

3. Strengths of Arbitration in Hungary

This section explores the strengths of arbitration in Hungary, in an effort to highlight its potential. These include the exceptionally rich arbitral culture of Hungary predating the Communist regime; its now modernised *lex arbitri* (largely) in line with the UNCITRAL Model Law; the courts' pro-arbitration approach to enforcement; and the potential upside of the neutrality inherent in arbitration considering the country's democratic backsliding.

3.1. Longstanding Arbitration Culture and Centralised Structure

Hungary is a country of rich arbitration history. Its first act containing modern provisions on arbitration was passed as early as in 1911 (Act I of 1911 on Civil Procedure), and, several arbitration courts, attached to regional Chambers of Commerce, and specialist courts, colloquially referred to as "arbitral centres", were established over the following decades (László, 2020, pp. 1-33). Whilst the number of cases referred to arbitration was severely reduced in the state-controlled economy of the Communist regime, the arbitration court attached to the centralised Hungarian Chamber of Commerce commenced its operation during that era, in 1953 (Horváth, 1993, pp. 17-24). At that time, its mandate was limited exclusively to foreign trade disputes. Whilst the scope of its jurisdiction had been expanded gradually (Horváth, 1993, pp. 17-24), it was only in 1993 that arbitration was made generally permissible between businesses.

After its transition to a market economy, Hungary was quick to adopt international standards and revive its former arbitration culture. With Act LXII of 1994 on Arbitration ("the old Arbitration Act"), Hungary adopted the UNCITRAL Model Law of 1985, thus becoming the first jurisdiction that made it applicable not only to

international, but also to domestic disputes (Horváth, 1993, pp. 17-24). The adoption of the old Arbitration Act proved to be a solid foundation, reflected by the statistics of the Hungarian Arbitration Court, showing that the median number of cases had doubled on average between the mid-1990s to the mid-2000s.

Year[1]	**1994**	**1995**	**1996**	**1997**	**1998**	**1999**
New cases	168	137	161	175	181	204
International cases	85	52	71	50	67	71
Domestic cases	83	85	90	125	114	133
Year	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**
New cases	202	255	394	590	381	1417
International cases	75	49	30	137	41	62
Domestic cases	127	206	364	453	340	1355
Year	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**
New cases	411	264	291	288	269	335
International cases	42	30	37	30	27	30
Domestic cases	369	234	254	258	242	305

Although the Hungarian Arbitration Court is the only arbitral institution with general jurisdiction, there are two specialist arbitration courts as well, which were established under separate legislative acts (Sec. 47, Act I of 2004 on Sport; Sec. 32, Act CXXXVI of 2012 on the Hungarian Chamber of Agriculture, Food Economy and Regional Development). These arbitration courts administer only a limited number of cases annually, largely due to their limited jurisdiction. Thus, the Permanent Court of Arbitration for Sports handled only 11 cases between 2018 and 2021. In the same period, the Arbitration Court attached to the National Agricultural Chamber handled 18 cases (Lukács, 2022).

3.2. Favourable Lex Arbitri

Recognising the advantages of arbitration, Hungary has established a robust, practical legal framework (Burger, 2011, pp. 15-29), the cornerstone of which is Act LX of 2017 on Arbitration (the Arbitration Act). The Arbitration Act was enacted to further align the country's legal infrastructure with international standards, and more importantly, to restore public faith in the Hungarian commercial arbitration system, which had been eroded during the socialist era (Bodzási, 2018, pp. 11-19). The main features of the Arbitration Act will be examined in this section.

The Arbitration Act applies to all arbitrations (both institutional and *ad hoc*) seated in Hungary (Sec. 1, Arbitration Act). One of the fundamental principles underlying the Arbitration Act is party autonomy. The Act allows parties significant

[3] Kecskés, 2020, p. 13.

freedom to shape the arbitration process according to their needs. For instance, parties are free to choose the applicable law (Sec. 41, Arbitration Act), the language of the arbitration (Sec. 33, Arbitration Act), and the place of arbitration (Sec. 31, Arbitration Act). This flexibility is crucial in international arbitrations, where parties from different jurisdictions may have varying preferences and requirements.

The Arbitration Act governs also the issue of arbitrability. Under Hungarian law, most disputes are arbitrable, and even where there had once been statutory obstacles,[4] those have gradually been removed (one notable remaining exception being consumer disputes).

Another key feature of the Arbitration Act is the principle of minimal court intervention. The Arbitration Act sets out, as a general rule, that state courts may only intervene in the conduct of arbitration proceedings when the Act expressly allows them to do so (Sec. 6, Arbitration Act), and therefore Hungarian courts are required to respect the autonomy of the arbitration process and are only permitted to intervene in limited instances. State courts may only intervene in:

- The appointment of arbitrators (Sec. 12, Arbitration Act),
- The removal of arbitrators (Sec. 14, Arbitration Act),
- Declaring the arbitrator's mandate has ceased (Sec. 15, Arbitration Act),
- Ruling on a jurisdictional objection, if the tribunal ruled on it as a preliminary matter and one of the parties applied for such ruling (Sec. 17, Arbitration Act),
- Setting aside proceedings (Sec. 47, Arbitration Act),
- Enforcement proceedings (Sec. 53-54, Arbitration Act).

This limited intervention is in line with international norms (Art. 5, UNCITRAL Model Law) and ensures that arbitration remains a swift and efficient alternative to litigation, extending also a robust court-based system to support arbitral proceedings if needed.

The Arbitration Act exclusively governs also the grounds for setting aside (Sec. 47, Arbitration Act), which is *largely* in line with the UNCITRAL Model Law, and includes cases where:

- A party's consent to the arbitration agreement was invalid under applicable national law,
- The arbitration agreement is invalid under the law it is subject to,
- The party who applies for setting aside was not properly notified of the appointment of arbitrators or the proceedings of the tribunal or was otherwise unable to present their case,

[4] The previous obstacles, which are capable of undermining the utilisation of arbitration, are going to be examined in the following chapter.

- The award extends to issues beyond the scope of the arbitration (e.g. not contemplated in the arbitration agreement),
- The constitution of the tribunal or the proceedings were not in accordance with the parties' agreement or the provisions of the Arbitration Act,
- The dispute is not arbitrable under Hungarian Law,
- The award is at odds with Hungarian public order,
- The arbitral tribunal has not assessed the substance of the Performance Certification Body's expert opinion submitted by either party in its award, including by giving reasons for assessing or excluding the report as evidence.[5]

In judicial practice, courts have refused to set aside awards where the only objection was that the award was unfounded on the merits, since the exhaustive list of the grounds for annulment cannot be supplemented through judicial practice (BH 1996.159). In another case, the Supreme Court further confirmed that annulment proceedings could not include the review of the merits of an award (EH 2008.1705). Thus, Hungarian courts have largely been able to lay the foundations of a pro-arbitration philosophy in practice, making Hungary an arbitration-friendly Model Law jurisdiction (Schmidt, 2020).

It is also important to note that the Arbitration Act incorporates a provision allowing the court where the application for annulment was submitted to suspend its proceedings and allow the arbitral tribunal to reopen its proceedings in order to eliminate the ground for annulment (Sec. 47(4), Arbitration Act).

3.3. Pro-Arbitration Judicial Practice Relating to the New York Convention

Hungary is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") since 1961, and the Arbitration Act incorporates the New York Convention principles (Secs. 53-54, Arbitration Act). The Act provides that the effect of an arbitral award shall be equal to a final and binding court judgment, and it must be enforced under the provisions of Act LIII of 1994 on Judicial Enforcement (Sec. 53(1), Arbitration Act). The Arbitration Act incorporates the provisions of Article 5(2) of the New York Convention as the grounds for refusal of recognition and enforcement, and therefore recognition of an award can only be refused if (i) the subject matter of the dispute is not arbitrable under Hungarian law (Sec. 54(a), Arbitration Act), or (ii) if it would be contrary to Hungarian public policy (Sec. 54(b), Arbitration Act). The case law regarding recognition and enforcement has constantly been evolving

[5] This provision was inserted into the Arbitration Act in 2023, and will be examined in more detail in Section IV.2. below.

as Hungarian ordinary courts have become increasingly exposed to arbitral proceedings following the above reforms of 1994. This evolution is the most visible in the public policy exception, which can now be considered as modern and pro-arbitration (Schmidt, 2019), in line with international standards.

Most notably, under the current well-established jurisprudence, the notion of public policy shall be construed narrowly. Therefore, a breach of a legal provision only amounts to a breach of public policy if that provision sought to protect directly the foundations of the economic and societal order (BH 2003.3.17).

Thus, the recognition and enforcement procedure cannot serve as a remedy on the merits against the arbitral award (BH 2015.209; BH 2013.31). In addition, other grounds not set out in Article V of the New York Convention cannot be referred to for a refusal of recognition, as that provides an exhaustive list of the grounds on which refusal can be sought (BH 2007.130).

3.4. Arbitration as a Neutral Forum in CEE Countries with Rule of Law Issues

The democratic backsliding in recent years in certain CEE countries, most notably Hungary, is well documented, leading to a troubled relationship with the EU (Kochenov, Magen & Pech, 2016, pp. 1043-1259). The democratic issues manifest themselves, *inter alia*, in relation to the independence of the judiciary (European Parliament, 2023). According to the European Commission's 2023 Rule of Law Report, the level of perceived judicial independence in Hungary has decreased among the general public and is low among companies (European Commission, 2023a). This is further reinforced by the fact that state-owned or state-affiliated entities continue to dominate certain sectors, especially banking services, the energy industry and transportation. In this vein, both international and domestic parties may find arbitration a safer and more predictable dispute resolution forum, instead of ordinary courts. The two main reasons given for such distrust are fear of interference or pressure from economic or other specific interests; and interference by the government or politicians (European Commission, 2023b). Such landscape could further promote the need for arbitration in Hungary, even more so as international actors investing in Hungary often prefer arbitration as a neutral dispute resolution mechanism (Boronkay &. Wellmann, 2015, pp. 1-31).

4. Challenges

Unfortunately, not all of the factors outlined in the Methodology chapter are present in Hungary, or at least not in a favourable way. This section will examine these factors individually, focusing particularly on the frequent interference with

arbitrability issues and the unnecessary deviations from the UNCITRAL Model Law, both of which, when combined, may undermine the perception of arbitration in Hungary. Additionally, the section will analyse in detail the cost factors associated with arbitration in Hungary.

4.1. Legislative Interferences with Arbitrability

As shown above, after the regime change and market transition, arbitration in Hungary hit the ground running: it was possible to build on the experiences of a strong institution, coupled with modernised arbitration law and increasingly more sophisticated and pro-arbitration judicial practice relating to arbitration. These factors resulted in a steady rise of cases until the early 2010s.

However, 2012 may be considered a turning point, after which there was a significant drop in cases administered by the Hungarian Arbitration Court.

This drop was largely attributed to two factors (László, 2015, pp. 152-160), the first being the Act CXCVI of 2011 on National Assets (hereinafter: National Assets Act), which provided for the exclusive jurisdiction of state courts in disputes relating to national assets, which in turn meant that it indirectly excluded arbitration in these matters. The Act also led to legal uncertainty prevailing at the enforcement stage: under Hungarian law, both domestic and international awards may be refused enforcement if the award was issued in a non-arbitrable dispute (Varga, 2014).

The second significant legislative change came with the amendment to the old Arbitration Act, which limited party autonomy in matters relating to rights *in rem*: in disputes regarding real estate assets located in Hungary, or in disputes relating to a lease agreement when the parties have their respective principal office in Hungary, provided that Hungarian law applied to the agreement,[6] only Hungarian institutional arbitration was available for the parties, with the language of arbitration also being mandatorily Hungarian (Cavalieros, 2014, pp. 317-328). Even though the provision on national assets was repealed mostly on the back of a large economic transaction for a new nuclear power plant financed by Russia in 2015, the case numbers did not recover to the previous levels, as shown above in Section III.1.

Although the obstacles relating to national assets are no longer present, and with the passing of the new Arbitration Act, the bar has been removed over rights *in rem*, arbitrability is still subject to statutory restrictions. As such, consumer disputes are still not arbitrable under Hungarian law (Sec. 1(3), Arbitration Act),

[6] And this was the case in almost every case, as Section 21 of the old legislative act on private international law (Legislative Decree No. 13 of 1979) provided that the law of the place where the property is situated shall apply to rights *in rem*.

except for disputes arising out of contracts setting up trusts. In our view, such outright exclusion is overprotective of the consumers, as the desired protection could also be achieved through other means, such as setting formal requirements for the arbitration agreement to be binding in B2C relations (Varga, 2018, pp. 1-24), thus recognising that in individual scenarios it might even be feasible to opt for arbitration in B2C relations as well (an option that is now excluded in its entirety). This solution can be traced back to a Guidance issued by the Supreme Court,[7] in which it was held that if the General Terms and Conditions applicable to a B2C relationship contain an arbitration agreement, that agreement must be qualified as an unfair term, and therefore null and void. However, this guidance in itself would not exclude consumer arbitration altogether, it only excludes this possibility *if* the arbitration agreement is included in GTCs.

4.2. Unnecessary Deviations from the UNCITRAL Model Law and Scepticism towards Arbitration

Even though Hungary can be considered a so-called Model Law country since the adoption of the old Arbitration Act (United Nations, 2024), it is not uncommon for the legislator to interfere with the Arbitration Act, and include provisions that might reflect a special need present in the country. However, these deviations are often counter-productive, as commercially sophisticated parties often have expectations which are in line with international standards, and these differences are capable of undermining these expectations, and in turn, the popularity of arbitration in Hungary.

First, as already mentioned, an additional ground for annulment of an award, inserted in an amendment to the Arbitration Act in 2023, has been subject to criticism as departing from the Model Law and being in disharmony with the international framework of arbitration. This ground gives rise to set aside proceedings, if the arbitral tribunal has not assessed the substance of the Performance Certification Body's expert opinion in its award submitted by either party, including giving reasons for assessing or excluding the report as evidence.

The Performance Certification Body was set up after the early 2010 financial crisis to fight against chain debts and delayed payments in the construction sector (Schmidt, 2023). It was given significant weight in commercial litigations at ordinary courts,[8] as the expert opinion issued by it had to be given more evidentiary value than opinions of party appointed experts, and the first instance judgment was

[7] 3/2013 Polgári Jogegységi Határozat.

[8] Based on Chapter 5/A of Act XXIV of 2013, which is applicable in disputes where the obtainment of such an expert opinion is mandatory, and supersedes the Rules on Civil Procedure.

enforceable regardless of any appeal, in case it upheld its opinion (Chapter 5/A, Act XXIV of 2013). However, arbitration was largely not impacted by the setup of this body, up until 2023. Arguments were made that the insertion of a new ground only helped to maintain an even playing field in construction disputes, as it was hard for ordinary courts to deviate from the expert opinion, whilst arbitral tribunals were free to do so without any consequences (Chapter 5/A, Act XXIV of 2013). This in turn could have led to more surprise awards in construction arbitrations according to some, which otherwise might be prone to deterring parties from using arbitration as a dispute resolution mechanism.

Another frequently debated provision of the Act allows for a retrial of the proceedings within one year after the receipt of the award, with an application for the arbitral tribunal based on a fresh circumstance or evidence, which was not asserted in the main proceedings outside of the asserting party's control (Sec. 48-52, Arbitration Act). The introduction of such provision was subject to scholarly debate, as according to some authors, it questioned the finality of the arbitral award and it could be at odds with the UNCITRAL Model Law, as a remedy on the merits of the decision of the tribunal, other than an application for setting aside at the state courts (Varga, 2018). According to some authors (Bodzási, 2018, pp. 11-19), this provision seeks to address the fact, that in Hungarian case law in set aside proceedings, circumstances and evidence arising after the arbitral award has been handed down cannot be examined, contrary to the rules of civil procedure applicable in regular court proceedings. They also claim that the perceived disadvantages are offset by the fact that retrial proceedings may be excluded by the parties in their arbitration agreement.[9] Indeed, it is advisable for parties stipulating Hungary as the seat of the arbitration to exclude the possibility of retrial in the arbitration clause itself.

These negative developments, coupled with the regional historic distrust of arbitration,[10] have seemingly served as hindrance to the wider adoption of arbitration as the preferred dispute resolution method, despite the country's robust legal framework for arbitration.

According to Kecskés (2020, pp. 18-20), the 2019 amendment to the Rules of Procedure of the Hungarian Arbitration Court had further detrimental effects. Before, it was clearly stipulated that any arbitrators appointed in an arbitration at the Hungarian Arbitration Court could not also act as a counsel at a different proceeding in another arbitration before the Court, until their mandate had ceased to exist. Now, with that provision repealed, the potential to interchange of arbitrator

[9] The Model Clause of the Arbitration Court attached to the Hungarian Chamber of Commerce does exactly that.

[10] As discussed above at II.1., scepticism towards arbitration may be observed in other CEE jurisdictions, attributable to longstanding historic rule of law issues (see: Sadowski, 2015, p. 422).

and counsel roles is capable of giving rise to moral reservations from the general public, which in turn may undermine the perceived integrity of arbitration.

It is also true that besides the overarching *pro arbitri* approach of state courts and even more so in Hungarian legal literature, there are certain judgments that are questionable from that standpoint. As it was pointed out by Boronkay & Wellmann (2015, pp. 8-10), the Supreme Court has shown that it is prone to interpretations that do not always recognise arbitration as equal to court litigation as a dispute resolution mechanism, which in turn may have detrimental effect on the business perception of arbitration as a viable alternative. This in turn may influence businesses to have the same views, given the authority of the highest judicial body in the country.

4.3. Cost-Related Challenges

The costs of commercial arbitration in Hungary can be broken down into two main components: the arbitration fee, and the registration fee. The cost of the entire procedure, consisting of these two types of fees, can be calculated by using the Hungarian Arbitration Court's calculator application (Hungarian Chamber of Commerce and Industry, 2024). The arbitration fee may be further broken down into sub-components: it consists of an administrative fee, the arbitrators' fee and the taxes it is subject to, a reserve fund, and the payable levies for the proceedings.

The arbitrators' fees, which often take up the largest share of the costs, are set by the Hungarian Chamber of Commerce (Magyar Kereskedelmi és Iparkamara, hereinafter MKIK) through a calculator, and are based on the disputed amount. Administrative fees generally range between 1-2% of the disputed amount. Pursuant to Section 55 of the Act XCIII of 1990 on levies, arbitrations are subject to levies. This sum is 1% of the amount in dispute, it being at least 5,000 and not more than 250,000 forints. Therefore, if the case is valued over 25,000,000 forints (roughly EUR 63,000), the payable levies are capped at that amount. Registration fee is a relatively low, non-refundable lump sum amount set at 40,000 forints (around EUR 100), payable at the beginning of the arbitration.

Some costs associated with arbitration, especially administrative and arbitrators' fees, may also hint at why this form of dispute resolution is underutilised at present, as litigation may seem, at first glance, to be a cheaper alternative. Court fees in Hungary are adjusted to the amount in dispute (typically 6%), however for first instance hearings, they are capped at around EUR 3,700 (for certain types of cases this figure is even lower) (§ 42, Act XCII. of 1990 on Duties and Taxes).

To take the example of an arbitration in which the disputed amount is 2 million euros (equivalent to 807,320,000 forints),[11] the costs relating to the proceeding are as follows.

[11] The exchange rate used is 403.66 HUF = 1 EUR, valid as of 25 October 2024.

	In HUF	In EUR
Amount in dispute	807,320,000	2,000,000
Administrative fee	4,794,280	11,877
Arbitrators' fees	14,872,968	36,845
Tax charged on arbitrators' fees	1,933,486	4,789
Reserve fund	297,459	737
Levies	250,000	619
Registration fee	40,000	99
The cost of the arbitration in total	**22,188,193**	**54,967**

5. Conclusion

Even though Hungary has a rich arbitration culture with its roots leading even back to the early 1900s, and a stable legal framework, which is largely in line with the newest international legal standards, the jurisdiction seems to lag behind its regional competitors.

This may be attributable to sporadically unfavourable Supreme Court attitudes and deviations from the UNCITRAL Model Law, and it may also be due to the perceived costs of arbitration. Whilst it is difficult to speculate over the precise causes, it is apparent from the statistics of the past three decades that the number of international arbitrations conducted in Hungary seems to stagnate, and that there is an observable relative drop in domestic arbitrations administered since the 2010s.

Whilst it is clear that there is still room for improvement in the Hungarian arbitration laws and recent judicial practice, there is nevertheless an untapped potential in the jurisdiction. Arbitration in Hungary has sound foundations, and – with the decreasing popularity of the region's largest hub, VIAC – a room for growth. Against the backdrop of general democratic backsliding and the perceived undue interferences to the judiciary both from political and economic actors, arbitration can find its footing as a neutral and efficient means to settle commercial disputes.

References

Bermann, G. A. 2018. What Does It Mean to Be 'Pro-Arbitration'?. *Arbitration International*, 34(3), pp. 341-353. https://doi.org/10.1093/arbint/aiy025

Bodzási, B. 2018. Az új választottbírósági törvény néhány újdonságáról. *Tanulmánykötet a kereskedelmi választottbíróságról - Collection of Essays of the Commercial Arbitral Court*, Magyar Közlöny Lap- és Könyvkiadó, pp. 11-19.

Born, G. B. 2021. Overview of International Commercial Arbitration. In: Born, G. B. (ed.) *International Commercial Arbitration*, 3rd edition, Kluwer Law International, 2021.

Boronkay, M. & Wellmann, G. 2015. A választottbíráskodás helyzete Magyarországon. *MTA Working Papers*, no. 2/12, pp. 1-31.

Burger, L. 2011. Chapter I: The Arbitration Agreement and Arbitrability – Barriers of International Arbitration in Hungary: New Challenges for Hungarian Commercial Arbitration. In: Pitkowitz, N. *et al.* (eds.), *Austrian Yearbook on International Arbitration*, vol. 2011, pp. 15-29.

Cavalieros, P. 2014. The Hungarian Arbitration Law: A Leap into the Past. *Journal of International Arbitration*, 31(2), pp. 317-328. https://doi.org/10.54648/JOIA2014013

Horváth, É. 1993. Arbitration in Hungary – The Problematics of the Moscow Convention. *Journal of International Arbitration*, 10(1), pp. 17-24. https://doi.org/10.54648/JOIA1993002

Kecskés, L. 2020. Választottbíráskodás - A 2020. február 11-én megtartott MTA rendes tagi székfoglaló előadás. *Európai Jog*, 3, pp. 1-33.

Kochenov, D., Magen, A. & Pech, L. (eds.). 2016. The Great Rule of Law Debate in the EU. *Journal of Common Market Studies*, 54(5), pp. 1043-1259. https://doi.org/10.1111/jcms.12399

Korom, V. 2020. Budapest as Venue of International Arbitration. In: Burai-Kovács, A. (ed.), *A Kereskedelmi Választottbíróság Évkönyve, 2019-2020*, HVG ORAC, pp. 268-280.

László, A. D. 2015. Választottbíráskodás nemzeti vagyonnal kapcsolatos ügyekben. *Magyar Jog*, 3, pp. 152-160.

László, K. 2020. Választottbíráskodás - A 2020. február 11-én megtartott MTA rendes tagi székfoglaló előadás. *Európai Jog*, 3. pp. 1-33. Available at: https://szakcikkadatbazis.hu/doc/3892785, 25. 11. 2024.

Lukács, J. 2022. A magyarországi állandó választottbíráskodás az új választottbírósági törvény alapján: számok, adatok, gyakorlati kérdések. In: Burai-Kovác, J. (ed.), *A kereskedelmi választottbíróság évkönyve 2021-22*, HVG ORAC, 2022.

Moses, M. L. 2017. *The Principles and Practice of International Commercial Arbitration*. Cambridge University Press. https://doi.org/10.1017/9781316585245

Redfern, A., & Hunter, M. 2005. *Law and Practice of International Commercial Arbitration*. Sweet & Maxwell.

Sadowski, W. 2015. The Future of International Arbitration in Central and Eastern Europe. *American University Business Law Review*, 5(3), pp. 407-427.

The European Commission. 2023a. *2023 Rule of Law Report: Country Chapter on the Rule of Law Situation in Hungary.*

Varga, I. 2018. A választottbírósági eljárásjog megújulása – Új törvény, új szabályzat. *Eljárásjogi Szemle*, 1, 2018, pp. 1-24.

Legal Sources

Act I of 1911 on Civil Procedure.
Act XCII. Of 1990 on Duties and Taxes
Act I of 2004 on Sport.
Act CXXXVI of 2012 on the Hungarian Chamber of Agriculture, Food Economy and Regional Development.
Act LX of 2017 on Arbitration.
BH 1996.159.
BH 2003.3.17.
BH 2007.130.
EH 2008.1705.
BH 2013.31.
BH 2015.209.
Model Law on International Commercial Arbitration. 1985. United Nations Commission on International Trade Law (UNCITRAL) UN Doc A/40/17.

Internet Sources

European Commission. 2023b. The 2023 EU Justice Scoreboard. Available at: https://commission.europa.eu/system/files/2023-06/Justice%20Scoreboard%202023_0.pdf, 25. 11 2024.
European Parliament. 2023. *The 2023 EU Justice Scoreboard*. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/741581/IPOL_BRI(2023)741581_EN.pdf, 25. 11 2024.
Hungarian Chamber of Commerce and Industry. 2024. Available at: https://mkik.hu/, 25. 11 2024.
Polish Arbitration Association. 2024. Arbitration in Poland. Available at: polisharbitration.pl, 25. 11 2024.
Schmidt, R. 2019. *The New York Convention in the Hungarian Court Practice in Two Decades – Formalistic Yet Pro-Arbitration Approach*. Kluwer Arbitration blog. Available at: https://arbitrationblog.kluwerarbitration.com/2019/09/11/the-new-york-convention-in-the-hungarian-court-practice-in-two-decades-formalistic-yet-pro-arbitration-approach/, 25. 11 2024.
Schmidt, R. 2020. *Hungary: Setting Aside Arbitral Awards in the Last 25 Years – A Pro-Arbitration Approach with Minor Derailments*. Kluwer Arbitration Blog. Available at: https://arbitrationblog.kluwerarbitration.com/2020/01/26/hungary-setting-aside-arbitral-awards-in-the-last-25-years-a-pro-arbitration-approach-with-minor-derailments/, 25. 11 2024.
Schmidt, R. 2023. *Storm in a Teacup: A New Ground for Annulling Hungarian Construction Arbitration Awards*. Kluwer Arbitration Blog. Available at: https://arbitrationblog.kluwerarbitration.com/2023/09/22/storm-in-a-teacup-a-new-ground-for-annulling-hungarian-construction-arbitration-awards/, 25. 11 2024.

United Nations. 2024. *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.* Available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status, 25. 11 2024.

Varga, István. *A választottbíráskodás elfogadottságának alakulása Magyarországon: Privatizált bíráskodás és állami érdekek.* 2014. Available at: https://edit.elte.hu/xmlui/bitstream/handle/10831/55332/vargai_publ_v%C3%A1lasztottb%C3%ADr%C3%B3s%C3%A1g_elfogadotts%C3%A1ga_20140610.pdf, 25. 11 2024.

Vienna International Arbitral Centre (VIAC) Statistics. Available at: https://www.viac.eu/en/about-us/statistics, 25. 11 2024.

Warsaw Arbitration Court General Information. Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej.

Petr Bříza*
René Cienciala**

Review Scientific Paper
UDC: 336.765(437.1/.2)
doi: https://doi.org/10.56461/SPZ_24410KJ
Received: 4. 10. 2024.
Accepted: 13. 1. 2025.

SELECTED CHALLENGES AND PARTICULARITIES OF ARBITRATION IN CZECHIA

Summary

Arbitration in Czechia has historical roots tracing back to the First Czechoslovak Republic. However, the article explores mainly the recent evolution of Czech arbitration law, addressing topics such as interim measures and significant developments in the conduct of arbitral proceedings, including the unusual role of the country's Code of Civil Procedure or arbitrators' duty to instruct the parties, separability of arbitration agreement, competence-competence matters, disclosures and disqualification of arbitrators, or the enforcement of arbitral awards. The authors argue that despite Czechia not being formally a fully UNCITRAL Model Law compliant jurisdiction, the country nowadays offers a globally competitive environment for arbitration, driven by recent pro-arbitration case law and experienced professionals, making it a viable seat of arbitration on the international stage.

Keywords: arbitral proceedings, disclosure, enforcement, interim measures, separability.

* UDr., LL.M. (NYU), Ph.D., Senior Lecturer at the Department of Business Law at the Charles University, Faculty of Law (Prague), co-founder and partner at Bříza & Trubač law firm, and arbitrator.
E-mail: *petr.briza@brizatrubac.cz*
ORCID: *https://orcid.org/0000-0002-9503-6406*

** JUDr, LL.M. (MIDS), partner at Urban & Hejduk law firm, former secretary at the Commission on International Arbitration of the ICC Czech Republic, and arbitrator.
E-mail: *rene.cienciala@urbanhejduk.cz*
ORCID: *https://orcid.org/0009-0002-6880-7866*

ODREĐENI IZAZOVI I SPECIFIČNOSTI ARBITRAŽE U ČEŠKOJ

Sažetak

Arbitraža u Češkoj ima istorijske korene koji sežu do Prve Čehoslovačke Republike. Međutim, autor analizira nedavnu evoluciju češkog arbitražnog zakona, i obrađuje teme kao što su privremene mere i značajni pomaci u vođenju arbitražnog postupka, uključujući neobičnu ulogu Zakona o parničnom postupku u zemlji ili dužnosti arbitara da uputi stranke, kao i razdvojivost sporazuma o arbitraži, pitanje 'nadležnost-nadležnost', otkrivanja identiteta i diskvalifikacije arbitara, te pitanje izvršenja arbitražnih odluka. Autori tvrde da, uprkos tome što nacionalno zakonodavstvo Češke nije formalno u potpunosti usaglašeno sa UNCITRAL model zakonom, zemlja danas nudi konkurentno okruženje za arbitražu, imajući u vidu skoriju pro-arbitražnu praksu i iskusne profesionalce, što je čini podobnim sedištem arbitraže na međunarodnoj sceni.

Ključne reči: arbitražni postupak, otkrivanje identiteta arbitara, izvršenje, privremene mere, razdvojivost.

1. Introduction

Arbitration has a long-standing tradition in Czechia. It has evolved since the First Czechoslovak Republic, rooted in the Austrian legal system.[1] Commercial arbitration was well established at the time. The state had become a party to instruments such as the *Protocol on Arbitration Clauses* (Geneva Protocol on Arbitration Clauses, 1923, No. 191/1931 Coll., effective since 7 November 1931) or the *Convention on the Execution of Foreign Arbitral Awards* (Geneva Convention on the Execution of Foreign Arbitral Awards, 1927, No. 192/1931 Coll., as amended, effective since 18 December 1931).

The country's institutional framework for arbitration dates back to the late 1940s. Despite the communist Czechoslovak coup d'état, the permanent Arbitration Court was founded in 1949, and it operated attached to the Czechoslovak Chamber of Commerce. During the communist period, it decided in foreign

[1] The crown lands of Bohemia, Moravia, and Silesia were a long-lasting part of the Austrian Empire, later the Austrian-Hungarian Realm.

trade disputes between the state trading organisations of the member states of the Council for Mutual Economic Assistance (COMECON).[2] This arbitral institution operates to this date and is currently attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic (the "Arbitration Court").[3]

The Arbitration Court handles steadily around 500 new cases every year, both domestic and international. Furthermore, it is one of the world's leading institutions deciding in domain name disputes.[4] In conjunction with other arbitral proceedings, such a case flow ensures a rather vivid evolution of the Czech arbitration practice and case law. In this regard, we have witnessed a stable popularity of arbitration in our country.

Notwithstanding, Czechia is hardly one of the world's leading seats (places) of arbitration (despite the above popularity of the Arbitration Court, although mainly for Czech parties). To illustrate this, in 2023, the International Court of Arbitration of the International Chamber of Commerce (the "ICC Court") had 890 newly registered cases (ICC Dispute Resolution Service, 2023). Out of these, 20 parties had Czech nationality, and Czech law applied in 5 cases, but only 1 arbitration was seated in Czechia (ICC Dispute Resolution Service, 2023, pp. 6, 12, 27). Moreover, the figures from the previous years and/or relating to other established foreign arbitral institutions do not differ fundamentally.

Why so? We find this global lack of choice of Czechia as a seat of arbitration as unfounded. Despite some historical challenges and particularities of arbitration in our country, it provides a competitive framework for arbitral proceedings, a recent revival of pro-arbitration case law, and experienced professionals.

In this paper, we have focused firstly on a basic overview of Czech arbitration (Part 2) followed by some selected issues, especially those that have recently seen notable developments (Szabó, 2023, p. 352). Namely, we have covered interim measures in (support of) arbitration (Part 3), the conduct of arbitral proceedings (Part 4), separability of arbitration agreement and the competence-competence principle (Part 5), disclosures along with disqualifications of arbitrators (Part 6), and last but not least enforcement of arbitral awards (Part 7). Our concluding remarks occupy their usual place.

---

2 Economic organisation under the leadership of the Soviet Union.

3 Available at: https://en.soud.cz/arbitration-court, 11. 11. 2024.

4 The Arbitration Court is the only institution authorised to arbitrate ".eu" domain disputes; moreover, it was the fourth institution in the world (the second in Europe) authorised to arbitrate generic domain names disputes (".com", ".org", ".net", etc.).

2. Basic Overview of Arbitration in Czechia

In Czechia, arbitration generally enjoys a status equivalent to court proceedings as a means of settlement of disputes. Despite some past controversies related to consumer cases (see below) or investor-state matters (which are outside the scope of this paper),[5] arbitration has more or less been recognised by business professionals as a time- and cost-effective, procedurally flexible, and private (closed to the public) alternative to court litigation.

2.1. Domestic Legal Framework

The current arbitration law was adopted in 1994 as the *Act on Arbitration and Enforcement of Arbitral Awards* (The Arbitration Act, No. 216/1994 Coll., as amended, effective since 1 January 1995).

Issues of conflict-of-laws rules and enforcement related to international arbitration are addressed by the Act on Private International Law (No. 91/2012 Coll., as amended).

At the time of its adoption, the Arbitration Act especially broadened the scope of its permissible application (the so-called "objective arbitrability") to include the resolution of all proprietary disputes except those arising in connection with the enforcement of judgments and principally those arising from the bankruptcy proceedings (Section 2, paragraph, Arbitration Act). Another major modification was to enable referring domestic disputes to arbitration (in addition to the already permitted arbitrating international disputes).

These legal framework changes combined with a rather pro-arbitration approach by Czech courts had led, in or around the late 1990s and the 2000s, to a wide expansion of arbitration from solely business matters to consumer-related ones. Unsurprisingly, various controversies connected with the said expansion of arbitration arose. It resulted in the shift to an anti-arbitration approach by Czech courts, and was followed by the express exclusion of all consumer-related disputes from objective arbitrability in late 2016 (Act No. 258/2016 Coll., as amended, effective since 1 December 2016).[6] Since then, we have seen a gradual revival of the initial pro-arbitration approach by Czech courts.

Going back to the Arbitration Act, it is commonly said that it is not based on the UNCITRAL Model Law on International Commercial Arbitration of 1985, as amended in 2006 (the "Model Law"). Indeed, the Arbitration Act is not an express (let alone full) transposition of the Model Law. Nevertheless, the majority of the latter's provisions and its fundamental principles are reflected in the Arbitration Act.

[5] Czechia as a host state is one of the world's most sued countries in investor treaty arbitrations.

[6] Amending, *inter alia*, the Arbitration Act accordingly.

The main differences involve, for example, some rules pertaining to arbitrators (e.g., unlike the Model Law, the Arbitration Act always requires an odd number of arbitrators) (Art. 10, para. 1, Model Law; Section 7, para. 1, Arbitration Act), the absence of the arbitral tribunal's power to order interim measures, or some particularities in terms of the conduct of arbitral proceedings (see below).

2.2. International Legal Framework

Czechia is bound by the main international arbitration-related instruments. First and foremost, by the well-known *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1957; the New York Convention, Decree No. 74/1959 Coll., effective since 10 October 1959).[7] The country requires complying with the principle of reciprocity for its application.

In addition, Czechia has likewise remained a party to the *European Convention on International Commercial Arbitration* (Geneva Convention, 1961, Decree No. 176/1964 Coll., effective since 11 February 1964).[8] In 1992, the country also became a party to the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Washington Convention, 1965, Notification No. 420/1992 Coll., effective since 8 April 1992)[9] and, in 1998, it acceded to the *Energy Charter Treaty* (The Hague, 1991, Notification No. 18/2023 Coll. replacing previous Notification No. 372/1999 Coll., effective since 16 April 1998).

2.3. Domestic and International Arbitration

The Arbitration Act does not distinguish between domestic arbitration and arbitration with an international element. Therefore, the same rules and principles apply to both domestic and international cases.

In practice, many Czech-related disputes are arbitrated in foreign arbitral seats and under foreign arbitration rules, especially those of the ICC Court, DIS,[10] LCIA,[11] SCC,[12] or VIAC[13] (the first and the last one being likely the most noteworthy). This

[7] Czechoslovakia acceded to the New York Convention in 1959, and Czechia adopted it by way of succession on 30 September 1993.

[8] Czechoslovakia acceded in 1964.

[9] Kown as the ICSID Convention.

[10] The German Arbitration Institute.

[11] The London Court of International Arbitration.

[12] The Arbitration Institute of the Stockholm Chamber of Commerce.

[13] The Vienna International Arbitral Centre is the permanent international arbitration institution of the Austrian Federal Economic Chamber.

has been encouraged by the Supreme Court's case law, which expressly permitted submitting a wholly domestic matter to a foreign-seated arbitration and/or before foreign arbitral institution under its arbitration rules (Supreme Court of the Czech Republic, Decision of 30 September 2013, case No. 23 Cdo 1034/2012 (R 24/2014 civ.)).

2.4. Institutional and Ad Hoc Arbitration

The Arbitration Act has a quite unusual understanding of institutional arbitration. Strictly speaking, proceedings are held either before the so-called "permanent" arbitration court, which has to be established by an Act of the Czech Parliament (Section 13, para. 1, Arbitration Act) or *ad hoc*.

The aforementioned Arbitration Court is the only permanent arbitral institution with general jurisdiction under Czech law. Therefore, in case of selection of a foreign arbitral institution, the parties are *stricto sensu* choosing *ad hoc* proceedings from the perspective of Czech arbitration law.

The above distinction creates very practical concerns when selecting foreign arbitral institutions: whether the arbitration rules agreed upon by the parties could simply be referred to (in case of choosing a permanent arbitration court) or should be attached to the arbitration agreement (in case of *ad hoc* arbitrations) (see: Olík & Karešová Kucharčuk, 2024; Arbitration Act, Section 13, para. 3 in conjunction with para. 2, and Section 19, para. 4)

In practice, the Supreme Court's case law overcomes this formalistic requirement (it historically aimed at protecting consumers against questionable "private" arbitral institutions; see above) when it comes to the established foreign arbitral institutions (Supreme Court of the Czech Republic, decision of 24 October 2013, case No. 23 Cdo 1166/2013; decision of 29 October 2020, case No. 23 Cdo 1258/2020; decision of 30 November 2020, case No. 23 Cdo 2093/2020, regarding arbitrations under the ICC Court' Arbitration Rules).

The Arbitration Court (given its general jurisdiction) will likely be the common choice for a Czech-seated arbitration, especially regarding domestic disputes. For the sake of completeness, the country has another two permanent arbitration courts – one attached to the Czech Commodity Exchange Kladno,[14] and the second one attached to the Prague Stock Exchange.[15] Nevertheless, these institutions have limited jurisdiction[16] and, in fact, a negligible number of newly registered cases (if any).

[14] The International Arbitration Court in Prague of the Czech Commodity Exchange Kladno (PRIAC).

[15] The Prague Stock Exchange Arbitration Court (PSEAC).

[16] Jurisdiction of these two permanent arbitration courts is limited to disputes arising from the commodity market and the stock exchange, respectively.

3. Interim Measures in (Support of) Arbitration

As outlined above, the power of arbitrators to order interim measures is among the main differences when comparing the Arbitration Act with the Model Law.

In this regard, the Model Law stipulates in its Article 17, paragraph 1: "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures." This rule was also included in the original Model Law, 1985, as follows: "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the tribunal may consider necessary in respect of the subject-matter of the dispute. […]." (UNCITRAL Model Law on International Arbitration, Art. 17, para. 1).

On the other hand, Section 22 of the Arbitration Act provides: "If it appears during the arbitral proceedings or also before its commencement, that the enforcement of an arbitral award could be jeopardised, the court may, on the application of any party, order an interim measure."

It obviously follows from the quoted provisions that arbitrators are principally empowered to grant interim measures under the Model Law, but the parties can agree on the exclusion or limitation of such power. On the other hand, regardless of any will of the parties, only courts can grant interim measures in (support of) arbitration under Czech law. In other words, the Arbitration Act does not empower arbitrators to grant interim measures under any circumstances.

It similarly applies to preserving evidence. The Model Law gives such power to the arbitral tribunal, whereas the Arbitration Act keeps it with the court, which may be approached by the arbitrators for assistance in taking evidence (Art. 17, para. 2(d), Model Law compared with Section 20, para. 2, Arbitration Act).[17]

It is likewise worth mentioning that the grounds for seeking an interim measure under the Arbitration Act are narrowed on the risks of unenforceability of an arbitral award, while the grounds for an interim measure under the Code of Civil Procedure (Act No. 99/1963 Coll., as amended, effective since 1 April 1964) cover the risks of unenforceability of the decision, as well as the "if the parties' circumstances should be provisionally adjusted" situations (Code of Civil Procedure, Section 74, para. 1, and Section 102, para. 1).

In any case, the proceedings before Czech courts regarding an application to grant interim measure are swift – as a matter of law, a decision must be rendered within 7 days of the filing of the application (Section 75c, para. 2, Code of Civil Procedure), cost-effective,[18] *ex parte* in the first instance, and appealable.

[17] However, the latter provision echoes Article 27 of the Model Law.

[18] Currently, the respective filing fee is CZK 1,000 (i.e., approx. EUR 40), and the applicant shall also pay a refundable deposit of CZK 50,000 (approx. EUR 2,000) in business-to-business

4. Conduct of Arbitral Proceedings

The Arbitration Act does not provide as much detail as the Model Law when it comes to the conduct of arbitration. Nevertheless, there are two issues that deserve our attention – firstly, the role of the Code of Civil Procedure therein, and secondly, the arbitrators' duty to instruct the parties.

4.1. Role of the Code of Civil Procedure

Possibly the most controversial and certainly unfortunate particularity of Czech arbitration law is its interplay with the Code of Civil Procedure, influencing the conduct of arbitral proceedings.

Article 19, paragraph 1 of the Model Law provides: "*Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings*." Its paragraph 2 adds: "*Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate*." These provisions have been principally reflected in the Arbitration Act (Article 19, paras. 1 and 2, Arbitration Act).

However, Section 30 of the Arbitration Act reads: "*Unless otherwise provided by law, the provisions of the Code of Civil Procedure shall apply* ['přiměřeně'] *to the proceedings before arbitrators*."

The Code of Civil Procedure's provisions should apply "*přiměřeně*" (in Czech) – in the given context it could mean (i) "*reasonably*" as in using good judgment, (ii) "*appropriately*" as in being suitable for arbitration, or (iii) "*moderately*" as in limited in scope. Yet, some arbitrators and courts interpret this term as "*mutatis mutandis*" (almost as its subsidiary use) and unduly apply the rules of the Code of Civil Procedure in arbitration to a greater extent.

The practice of extending the application of the Code of Civil Procedure to arbitration was mainly driven by a wish to protect weaker parties in rather frequent and often unfair consumer arbitrations (see above). However, since the prohibition thereof, we have seen a gradual revival of the initially pro-arbitration approach by Czech courts, including narrowing the application of the Code of Civil Procedure to reasonable, appropriate, and moderate levels.

The recent Supreme Court's case law aptly concluded: "*In its decision-making practice, the Supreme Court has already addressed the question of the relationship between the rules of the Code of Civil Procedure and the Arbitration Act, namely in its judgment of 25 April 2007, Case No. 32 Odo 1528/2005 (to which the appellant also referred), in which it concluded, concerning Section 30 of the Arbitration Act, that the*

disputes to cover a compensation for eventual damage.

use of the term ['přiměřeně'] *implies that arbitral procedures are not directly subject to the Code of Civil Procedure and that its provisions cannot be applied mechanically in arbitration. The term* ['přiměřeně'] *means, first of all, taking into account the general principles underlying Czech arbitral proceedings, i.e., the application of the rules of the Code of Civil Procedure under the general framework of the principles of Czech arbitration.*" (Supreme Court of the Czech Republic, decision of 21 June 2022, case No. 23 Cdo 1307/2022).

In light of the foregoing, Section 30 of the Arbitration Act allows room for the application of the Code of Civil Procedure on the conduct of arbitral proceedings. Its provisions, however, cannot be applied automatically nor extensively without proper consideration of both the general framework and the principles of arbitration.

4.2. Arbitrators' Duty to Instruct Parties

Another debatable particularity of Czech arbitration law is closely linked to the role of the Code of Civil Procedure in Czech-seated arbitral proceedings (see above).

Pursuant to Section 118a of the Code of Civil Procedure, judges have a specific procedural duty to instruct (i.e., inform) the parties on their insufficiently presented or unsubstantiated positions, or legal grounds of the claim assessed in a different way by the judge than pleaded by the party(-ies). In 2011, the Constitutional Court rendered a landmark decision whereby extended this duty to instruct also on arbitrators.

The Constitutional Court ruled as follows: "*The arbitrator cannot be merely a passive actor but must ensure that his decision is not surprising by the way he conducts the proceedings. In order to achieve this objective, the court's duty to instruct is applied in civil proceedings; there is no reason why the arbitrator, who acts as the decision-maker in arbitral proceedings instead of the court, should not have a duty to instruct. Act No. 216/1994 Coll., on Arbitration and Enforcement of Arbitral Awards, as amended, does not provide for the arbitrator's duty to instruct, and it is therefore appropriate to apply the Code of Civil Procedure (under Article 30 of the Act on Arbitration and Enforcement of Arbitral Awards).*" (Constitutional Court of the Czech Republic, decision of 8 March 2011, case No. I.US 3227/07 (37/2011 USn.)).

Since then, both the arbitrators and Czech courts have been trying to find a balance in applying the duty to instruct and the equality of arms.[19]

Recently, the Constitutional Court has reduced the impact of the foregoing case law stressing that "*a failure to provide an instruction under Section 118a of the*

[19] For practical implications of the arbitrators' duty to inform see, for example, a proactive role of the arbitral tribunal under Articles 2.2.b, 2.3, and 2.4 of the so-called Prague Rules, 2018.

Code of Civil Procedure, where both parties had an opportunity to be heard, were mutually informed of each other's positions and were able to respond adequately" should not be principally problematic in arbitration (Constitutional Court of the Czech Republic, decision of 23 February 2021, case No. I.ÚS 2296/20).

5. Separability of Arbitration Agreement and Competence-Competence Principle

It has long been established under the Czech law that, in line with international practice, the arbitration agreement is separable from the contract in which it is contained (Supreme Court of the Czech Republic, decision of 19 December 2007, case No. 29 Odo 1222/2005).[20] However, the case law has been divided on the issue of whether a partial defect of the arbitration agreement automatically makes the whole arbitration agreement invalid or whether it is possible to apply the partial invalidity theory upholding the part of the agreement not tainted by the defect.

This has been resolved by the recent Supreme Court's Grand Chamber decision (Supreme Court of the Czech Republic, decision of 12 February 2020, case No. 31 Cdo 3534/2019), where the Supreme Court opted for the latter and more favourable approach for the arbitration practice. Thus, the Court held that: "*[i]f the ground of invalidity concerns only a part of the arbitration clause that can be separated from the rest of the arbitration clause, only the (invalidated) part of the arbitration clause is invalid*." (Supreme Court of the Czech Republic, decision of 12 February 2020, case No. 31 Cdo 3534/2019, para. 38). In the given case, there was a primary nomination procedure and a subsidiary nomination procedure for the appointment of the arbitrators agreed in the arbitration agreement. While the primary procedure (agreement on three arbitrators, from which the claimant could choose) was valid, the subsidiary procedure (applicable in a situation where none of three arbitrators was available) was invalid, as it gave one party an unlimited and unilateral choice from all the lawyers registered with the Czech Bar Association.

The competence-competence principle is also enshrined in Czech law in a form favourable for arbitration practice. Under Section 15 of the Arbitration Act, arbitrators rule on their own jurisdiction, which is compliant with Article 16 of the Model Law. If the respondent objects to the arbitral tribunal's jurisdiction in a court after an arbitration has been initiated, the court will stay its proceedings until the arbitral tribunal decides on its jurisdiction. If, however, an objection to the arbitral tribunal's jurisdiction is filed with a court before the commencement of the arbitration, the court will decide if there is a valid arbitral agreement (Section 106,

[20] This reflects Article 16, paragraph 1 of the Model Law.

Code of Civil Procedure). The parties must raise any objection they may have to the arbitral tribunal's jurisdiction in their first action in the proceedings; otherwise, the objection is considered waived.[21]

6. Disclosures and Disqualifications of Arbitrators

The issue is governed by sections 8, 11 and 12 of the Arbitration Act. Section 8 para. 1 lays down the basic requirement of impartiality of the arbitrator, similar to those contained in arbitration laws around the world.[22] Paragraph 2 goes on to stipulate the duty of disclosure of the arbitrator.[23] An arbitrator already nominated or appointed shall be disqualified from hearing the case if the circumstances doubting his or her impartiality, referred to in Section 8, should subsequently come to light (Section 11, Arbitration Act). An arbitrator who does not meet the impartiality standards shall resign, and if he or she does not resign voluntarily, the parties may agree on a procedure for his or her removal, or either party may apply to the court for a ruling on the disqualification (Section 12, Arbitration Act).[24] Arbitration rules of arbitration institutions may lay down more detailed rules on the procedure of removal. Under Section 31, Item c) of the Arbitration Act, an arbitral award may be challenged on the ground that an arbitrator was not entitled to decide in the case based on the arbitration clause or otherwise did not have the capacity to act as arbitrator, but an application for challenge shall be rejected if the argument could have been raised during the arbitral proceedings but the party failed to do so (Section 33, Arbitration Act).

In recent years, the Supreme Court has had several opportunities to rule on these basic rules and provide more details on their practical application (Supreme Court of the Czech Republic, decision of 18 November 2020, case No. 23 Cdo 1337/2019; decision of 18 November 2020, case No. 23 Cdo 3972/2019; decision No.

[21] This solution is also compliant with Article 16, paragraph 2 of the Model Law, under which "[a] plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence."

[22] The provision reads as follows: "An arbitrator shall be disqualified from hearing and deciding a case if, having regard to his or her relationship to the case, the parties or their representatives, there is reason to doubt his or her impartiality."

[23] The provision reads as follows: "Whoever is to be or has been nominated or appointed arbitrator shall, without any delay, notify the parties or the court of any circumstances that might raise a reasonable doubt as to his or her impartiality and would disqualify him or her as an arbitrator."

[24] The parties may agree on a procedure replacing the court ordered removal, but such procedure always has to fully respect the equality of arms principle – the Supreme Court of the Czech Republic, decision of 16 December 2020, case No. 23 Cdo 4006/2019.

23 Cdo 4006/2019 (supra)). The Supreme Court has fully embraced this opportunity and, more importantly, it has done it mostly in a way that is in line with modern standards of international arbitration practice. First of all, the Supreme Court has provided more guidance on the exact content of the requirement of impartiality under Section 8 of the Arbitration Act. The Supreme Court has noted that an arbitrator has to be impartial and independent. Independence can be understood to mean objective absence of personal, professional or economic ties of the arbitrator to the parties to the dispute. Consequently, impartiality usually represents the absence of subjective favouritism of one of the parties to the dispute. Bias is an expression and manifestation of a lack of impartiality that has reached a certain degree and intensity, can be objectively examined, and is a procedural instrument [and reason] for disqualifying not only the judge but also the arbitrator (Supreme Court's decision No. 23 Cdo 1337/2019 (supra), para. 19). Typical examples of an arbitrator who is not independent or impartial include situations where the arbitrator is also a party to the proceedings or a witness, or where he or she may be prejudiced in his or her rights by the proceedings or the outcome; the same applies if he or she has a familial, friendly or manifestly hostile relationship with the parties to the proceedings, or a relationship of economic dependence (Supreme Court's decision No. 23 Cdo 1337/2019 (supra), para. 79).

What is important, the Supreme Court has held that when assessing an arbitrator's (lack of) impartiality (i.e., his or her potential bias) a court can take into account the *IBA Guidelines on Conflicts of Interest in International Arbitration* (the "Guidelines"),[25] which fully reflect the international standards in the field. The Supreme Court has clarified that these Guidelines are not binding *per se*, but that they might serve as a "source of inspiration" (Supreme Court's decision No. 23 Cdo 1337/2019 (supra), para. 22). The Court's explicit recognition of this important and widely accepted instrument has been welcomed by Czech arbitration practice (Hrodek & Marchand, 2021). However, when applying the impartiality standards, the Supreme Court seems to be more lenient than the Guidelines,[26] as it has held that the repeated nominations of the same arbitrator by one party does not mean a (presumption of) economic dependence without further proof (Supreme Court of the Czech Republic, decision of 23 January 2018, case No. 20 Cdo 4022/2017, confirmed in decision No. 23 Cdo 1337/2019 (supra), para. 21; or decision No. 23 Cdo 3972/2019 (supra), paras. 80-81).[27]

[25] The most recent is the 2024 version.

[26] According to Art. 3.1.3 of the Guidelines (Orange List), the disclosure is required already when the arbitrator has been appointed arbitrator by one of the parties, or an affiliate of one of the parties on two occasions over the past three years.

[27] On the other hand, the Constitutional Court of the Czech Republic admitted that repeated

The same standards of impartiality and independence pertaining to the arbitrators apply also to the so-called "appointing authority", i.e., the person appointing arbitrators (usually the presiding arbitrators) in the cases where the selection is done by the parties or a party has failed to make an appointment (nomination) (Supreme Court's decision No. 23 Cdo 3972/2019 (supra), paras. 75-79).

Regarding the duty of disclosure, the Supreme Court has held that the arbitrator is not obliged to disclose any slightest relationship with the parties or their representatives, but only those that reach a certain intensity and are capable of raising justified doubts about the arbitrator's impartiality or independence (Supreme Court's decision No. 23 Cdo 1337/2019 (supra), para. 24). The duty of disclosure in intended to inform the parties of the facts which, according to the arbitrator's own assessment, do not constitute grounds for his or her disqualification, but the arbitrator must also take into account that these circumstances need not be assessed in this way by the parties, who, on the contrary, may perceive them as a threat to an independent and impartial treatment. The notification obligation therefore does not concern facts that are objectionable from the arbitrator's point of view (these automatically lead to his or her disqualification), but facts that could be considered as such by a party (Supreme Court's decision No. 23 Cdo 1337/2019 (supra), para. 25). An arbitrator must not be satisfied that he or she does not subjectively feel biased, but must always consider whether, in the circumstances of the case known to him or her, legitimate doubts as to his or her impartiality are excluded (Supreme Court's decision No. 23 Cdo 1337/2019 (supra), para. 26). A breach of the duty of disclosure does not automatically lead to a disqualification (removal) of the arbitrator, it rather enables the party to raise this undisclosed information (which the party could not have been aware of prior to that) even later in the arbitration proceedings or even in the set-aside proceedings (Supreme Court's decision No. 23 Cdo 1337/2019 (supra), paras. 27-31).[28]

As suggested above, if an arbitrator who fails to meet the standards of impartiality hears the case, it is a ground for a successful challenge of the award in the set-aside proceedings under Section 31, Item c) of the Arbitration Act (Supreme Court's decision No. 23 Cdo 1337/2019 (supra), paras. 32–33; or decision No. 23 Cdo 4006/2019 (supra)).

nominations might be problematic and lead to an economic dependence, but this was in an extreme case of 13,000 (!) cases where the same person was nominated (Constitutional Court of the Czech Republic, decision of 16 August 2019, case No. II.ÚS 1851/19).

[28] The same applies also in case when the arbitrator's disclosure declaration has not been forwarded by the arbitration institution to the parties. (Supreme Court of the Czech Republic, decision of 30 August 2023, case No. 23 Cdo 2193/2022, para. 49).

7. Enforcement of Arbitral Awards

Denial of enforcement of an arbitral award is not commonplace in Czechia. That is mainly because the country is a signatory of most of the international treaties relating to arbitration, and thus applies pro-arbitration international practice. The Arbitration Act states that its provisions apply only if they do not contradict with an international treaty. Therefore, the New York Convention takes precedence over the Arbitration Act, and foreign arbitral awards issued in jurisdictions that are party to the New York Convention must be enforced in a similar manner as domestic arbitral awards (issued in Czechia). The Supreme Court has recently held that where both the European Convention on International Commercial Arbitration and the New York Convention are applicable, the New York Convention takes precedence (Supreme Court of the Czech Republic, decision of 16 May 2019, case No. 23 Cdo 3439/2018).[29] Provisions on recognition and enforcement of arbitral awards are also contained in a number of bilateral treaties on legal assistance concluded between the Czech Republic and many of the former socialist block countries.

However, between 2016–2021, there had been an issue with foreign arbitral awards enforcement, concerning the way in which it is possible to enforce a foreign arbitral award. In the Czech Republic, the creditors may choose between the court enforcement under the Code of Civil Procedure, or enforcement by private bailiffs pursuant to the Code of Enforcement Procedure (the "CEP"). In practice, the enforcement by private bailiffs is much more effective, and therefore predominantly preferred to the court enforcement. After the 2012 amendment to the CEP, the amended CEP Section 37, para. 2, Item b) stipulated that foreign decisions shall not be enforced by private bailiffs unless declared enforceable according to directly applicable EU law/international treaty or recognized in special court proceedings. In a quite surprising line of case law, the Supreme Court interpreted this provision in a way preventing private enforcement of foreign arbitration awards, including those governed by the New York Convention, except for those that had been recognized in special court proceedings (Supreme Court of the Czech Republic, decision of 3 November 2016, case No. 20 Cdo 1165/2016; decision of 16 August 2017, case No. 20 Cdo 5882/2016; decision of 12 June 2018, case No. 20 Cdo 1754/2018; decision of 11 August 2020, case No. 20 Cdo 2155/2020).[30] Given the wide criticism by both academia and the practitioners (Bříza, 2017, pp. 53-54; Rathouský & Skorkovská, 2017, pp. 100-101; Hoder, 2019, p. 62; Miklíková & Vacek, 2019; Pfeiffer, 2021 pp.

[29] The decision primarily dealt with the issue whether the arbitration agreement might be concluded in electronic form through email, to which the answer was affirmative, i.e., also in line with modern trends (see more details in Bříza, 2020, pp. 143-155).

[30] There is a detailed and critical account of these decisions (Pfeiffer, 2021, pp. 335-343).

335-343), and the fact that the Constitutional Court had refused to intervene (Constitutional Court of the Czech Republic, decision of 26 November 2019, case No. III. ÚS 170/18; decision of 30 November 2020, case No. II.ÚS 3141/20), the Czech legislature stepped in, and in 2021 amended the CEP (Act No. 286/2021 Coll., effective since 1 January 2022). Even though the legislature did not change the problematic requirement that foreign arbitral awards had to be recognized in court proceedings,[31] it enabled the award-creditors to file applications for recognition simultaneously with applications for enforcement by bailiffs (Section 35, para. 6, CEP), which was not possible under the previous legislation. This has in fact resolved all the practical problems, having enabled them to initiate the enforcement proceedings through private bailiffs with all the freezing effects on the debtor's property, while at the same time the court decides on the recognition of the award.[32]

8. Concluding Remarks

We believe there is no serious reason not to have a seat of arbitration in Prague or elsewhere in our country. As follows from this paper, Czechia has effectively dealt with some of the country's historical challenges and particularities of arbitration. In fact, the country nowadays provides a globally competitive framework for arbitral proceedings, which is supported by a revival of pro-arbitration case law and experienced professionals.

References

Bříza, P. 2020. Czech perspective on validity of international arbitration clauses contained in an exchange of emails under the New York Convention. *Auc Iuridica*, 66(4), pp. 143-155. Available at: https://karolinum.cz/casopis/auc-iuridica/rocnik-66/cislo-4/clanek-8620%20(26, 26. 9. 2024. https://doi.org/10.14712/23366478.2020.37

Hoder, L. 2019. *Judikatura Nejvyššího soudu znevýhodňuje cizí rozhodčí nálezy*. Soukromé právo, No. 7, p. 62.

Pfeiffer, M. 2021. The Cinderella treatment of foreign arbitral awards in the Czech enforcement procedure. In: Pfeiffer, M., Brodec, J., Bříza, P. & Zavadilová, M. (eds.), *Liber Amicorum Monika Pauknerová*. Praha: Wolters Kluwer ČR, pp. 335-343.

[31] One might argue that this is in violation of the New York Convention (Pfeiffer, 2021. pp. 341-343; or Zabloudilová, 2022, pp. 282-283).

[32] The authors have practical experience with this new regime, and the proceedings are usually quite quick, taking only a few weeks, at least at the first instance.

Szabó, J. 2023. Ovlivňování rozhodčího řízení judikaturou českých obecných soudů. *Praha: Soudní rozhledy*, 11-12/2023, p. 352.

Zabloudilová, K. 2022. *Uznání a výkon cizích rozhodčích nálezů v českém právním prostředí ve světle novelizované právní úpravy a recentní rozhodovací praxe*. Právník, No. 3, pp. 275-283.

Available at: https://www.ilaw.cas.cz/upload/web/files/pravnik/issues/2022/3/5_Zabloudilova_275-283_3_2022.pdf, 26. 9. 2024.

Internet Sources

Bříza, P. 2017. *Exekuce cizích rozhodčích nálezů ve světle problematického rozhodnutí Nejvyššího soudu*, EPRAVO.CZ, No. 2, p. 53-54, Available at: https://www.epravo.cz/_dataPublic/data/E-pravo_mag/2017_E2_web.pdf, 26. 9. 2024.

Hrodek, M. & Marchand, M. 2021. *Rozhodčí řízení ve světle nedávné judikatury Nejvyššího soudu*. Ekonom, Právní rádce. Available at: https://pravniradce.ekonom.cz/c1-66892530-rozhodci-rizeni-ve-svetle-nedavne-judikatury-nejvyssiho-soudu, 26. 9. 2024.

IBA Guidelines on Conflicts of Interest in International Arbitration, 2024. Available at: https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024, 26. 9. 2024.

Miklíková, E. & Vacek, L. 2019. *Praktická úskalí výkonu zahraničních rozhodčích nálezů*. EPRAVO.CZ. Available at: https://www.epravo.cz/top/clanky/prakticka-uskali-vykonu-zahranicnich-rozhodcich-nalezu-108630.html, 26. 9. 2024.

Olík, M. & Karešová Kucharčuk, M. 2024. *Je třeba přiložit ICC pravidla k rozhodčí doložce? Požadavky a praxe v českém právním prostředí*. EPRAVO.CZ. Available at: https://www.epravo.cz/top/clanky/je-treba-prilozit-icc-pravidla-k-rozhodci-dolozce-pozadavky-a-praxe-v-ceskem-pravnim-prostredi-117687.html, 26. 9. 2024.

Rathouský, O. & Skorkovská, T. 2017. *Exekuce na základě zahraničních rozhodčích nálezů*. EPRAVO.CZ, pp. 100-101. Available at: https://www.epravo.cz/_dataPublic/data/E-pravo_mag/2017_E4_web.pdf, 26. 9. 2024.

The International Arbitration Court in Prague of the Czech Commodity Exchange Kladno (PRIAC). Available at: https://www.priac.net/en/, 27. 9. 2024.

The Prague Stock Exchange Arbitration Court (PSEAC). Available at: https://www.pseac.org/en, 27. 9. 2024.

Legal Sources

Act No. 99/1963 Coll. (Code of Civil Procedure).

Act No. 216/1994 Coll. (Arbitration Act).

Act No. 91/2012 Coll. (Act on Private International Law).

Act No. 258/2016 Coll.

Act No. 286/2021 Coll.
Convention on the Execution of Foreign Arbitral Awards (Geneva, 1927) [No. 192/1931 Coll.].
Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1957) [Decree No. 176/1964 Coll.].
Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965) [Notification No. 420/1992 Coll.].
Energy Charter Treaty (The Hague, 1991) [Notification No. 18/2023 Coll. replacing Notification No. 372/1999 Coll.].
European Convention on International Commercial Arbitration (Geneva, 1961) [Decree No. 176/1964 Coll.].
Protocol on Arbitration Clauses (Geneva, 1923) [No. 191/1931 Coll.].
Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules). Prague, 2018. Available at: https://www.praguerules.com/ (29. 9. 2024).
UNCITRAL Model Law on International Commercial Arbitration, 1985, with amendments as adopted in 2006. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (26. 9. 2024).

Case Law

Constitutional Court of the Czech Republic, Decision of 8 March 2011, case No. I. US 3227/07 (37/2011 USn.).
Constitutional Court of the Czech Republic, Decision of 16 August 2019, case No. II.ÚS 1851/19.
Constitutional Court of the Czech Republic, Decision of 26 November 2019, case No. III. ÚS 170/18.
Constitutional Court of the Czech Republic, Decision of 30 November 2020, case No. II.ÚS 3141/20.
Constitutional Court of the Czech Republic, Decision of 23 February 2021, case No. I.ÚS 2296/20.
Supreme Court of the Czech Republic, Decision of 19 December 2007, case No. 29 Odo 1222/2005.
Supreme Court of the Czech Republic, Decision of 30 September 2013, case No. 23 Cdo 1034/2012 (R 24/2014 civ.).
Supreme Court of the Czech Republic, Decision of 24 October 2013, case No. 23 Cdo 1166/2013.
Supreme Court of the Czech Republic, Decision of 3 November 2016, case No. 20 Cdo 1165/2016.
Supreme Court of the Czech Republic, Decision of 16 August 2017, case No. 20 Cdo 5882/2016.
Supreme Court of the Czech Republic, Decision of 23 January 2018, case No. 20 Cdo 4022/2017.

Supreme Court of the Czech Republic, Decision of 12 June 2018, case No. 20 Cdo 1754/2018.
Supreme Court of the Czech Republic, Decision of 16 May 2019, case No. 23 Cdo 3439/2018.
Supreme Court of the Czech Republic, Decision of 12 February 2020, case No. 31 Cdo 3534/2019.
Supreme Court of the Czech Republic, Decision of 11 August 2020, case No. 20 Cdo 2155/2020.
Supreme Court of the Czech Republic, Decision of 29 October 2020, case No. 23 Cdo 1258/2020.
Supreme Court of the Czech Republic, Decision of 30 November 2020, case No. 23 Cdo 2093/2020.
Supreme Court of the Czech Republic, Decision of 18 November 2020, case No. 23 Cdo 1337/2019.
Supreme Court of the Czech Republic, Decision of 18 November 2020, case No. 23 Cdo 3972/2019.
Supreme Court of the Czech Republic, Decision of 16 December 2020, case No. 23 Cdo 4006/2019.
Supreme Court of the Czech Republic, Decision of 21 June 2022, case No. 23 Cdo 1307/2022.
Supreme Court of the Czech Republic, Decision of 30 August 2023, case No. 23 Cdo 2193/2022.

Toni Deskoski*
Vangel Dokovski**

Review Scientific Paper
UDC: 341.6(495.6)
doi: https://doi.org/10.56461/SPZ_24411KJ
Received: 16. 10. 2024.
Revised: 13. 11. 2024.
Accepted: 13. 1. 2025.

ARBITRATING DISPUTES IN THE REPUBLIC OF NORTH MACEDONIA

Summary

This paper deals with the arbitration framework in North Macedonia, presenting the dualistic approach to domestic and international arbitration as provided by the national Law on International Commercial Arbitration (hereafter: LICA) and the national Code of Civil Procedure (hereafter: CPA). The LICA is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration, which provides a legal framework for resolving disputes with an international element, allowing the parties the freedom to choose between *ad hoc* or institutional arbitration. Contrary to that, domestic disputes are exclusively reserved for institutional arbitration. Furthermore, this paper addresses subjective and objective arbitrability, and analyzes the arbitrability of corporate, employment and defamation disputes. The procedural aspects of arbitration, particularly the role of institutional arbitration in North Macedonia and the governing rules for arbitration procedures, are also exploited.

The issue of recognition and enforcement of foreign arbitral awards in North Macedonia is also analyzed in this paper. Recent judicial practices have demonstrated deviation from the Private International Law Act (hereafter: PIL Act), notably turning *ex parte* proceedings into contradictory ones, which undermines the PIL Act. A case involving the refusal to recognize a Partial ICC

* PhD, Full Professor, Ss. Cyril and Methodius University in Skopje, Iustinianus Primus Faculty of Law.
E-mail: *t.deskoski@pf.ukim.edu.mk*
ORCID: *https://orcid.org/0009-0000-3481-5951*

** PhD, Associate Professor, Ss. Cyril and Methodius University in Skopje, Iustinianus Primus Faculty of Law.
E-mail: *v.dokovski@pf.ukim.edu.mk*
ORCID: *https://orcid.org/0009-0007-6808-6532*

Award from Poland and later setting aside the award illustrates these issues, as the court failed to properly apply the LICA and the PIL Act. This deviation is also analyzed in the paper.

Keywords: arbitrability, arbitral award, institutional arbitration, *ad hoc* arbitration, 1958 NY Convention.

ARBITRAŽNI SPOROVI U REPUBLICI SEVERNOJ MAKEDONIJI

Sažetak

Predmet istraživanja u ovom radu tiče se arbitražnog okvira u Severnoj Makedoniji. U radu se analizira dualistički pristup domaće i međunarodne arbitraže predviđen nacionalnim Zakonom o međunarodnoj trgovinskoj arbitraži i nacionalnim Zakonom o parničnom postupku. Zakon o međunarodnoj trgovinskoj arbitraži zasniva se na UNCITRAL Model Zakonu o međunarodnoj trgovinskoj arbitraži iz 1985. godine. Ovaj zakon, sa jedne strane, pruža pravni okvir za rešavanje sporova s međunarodnim elementom tako što omogućava strankama slobodu izbora između *ad hoc* i institucionalne arbitraže, dok su, sa druge strane, domaći sporovi isključivo rezervisani za institucionalnu arbitražu. Takođe, ovaj rad bavi se i pitanjem subjektivne i objektivne arbitrabilnosti i analizira arbitrabilnost korporativnih sporova, sporova iz radnih odnosa, kao i sporova zbog klevete. Proceduralni aspekti arbitraže i posebno uloga institucionalne arbitraže u Severnoj Makedoniji i pravila koja se odnose na arbitražne postupke su takođe obrađeni u ovom radu.

Pored toga, u radu se analizira i pitanje priznavanja i izvršenja stranih arbitražnih odluka u Severnoj Makedoniji. Nedavna praksa sudova ukazala je na odstupanja od Zakona o međunarodnom privatnom pravu, posebno pretvaranje *ex parte* postupaka u kontradiktorne. Na kraju, autor analizira i slučaj odbijanja priznanja presude MKS od strane Poljske i kasnije poništavanje iste, u kojem sud nije pravilno primenio Zakona o međunarodnoj trgovinskoj arbitraži, kao i Zakon o međunarodnom privatnom pravu.

Ključne reči: arbitrabilnost, arbitražna odluka, institucionalna arbitraža, *ad hoc* arbitraža, Njujorška konvencija iz 1958. godine.

1. General Overview

Alternative dispute resolution (ADR) refers to any out-of-court dispute resolution method. These alternative methods are historically rooted back in ancient Greece. ADR gained significant popularity in the 1980s as a response to costly, lengthy, and often ineffective court procedures. The *ratio* of alternative dispute resolution (ADR) methods is to provide a more efficient and suitable dispute resolution forum. While ADR is used predominantly in commercial disputes, it has also been applied in other areas of law, such as labor law for example. In principle, ADR relies on the consent of the involved parties to allow a third, independent party to resolve a dispute (either current or future) rather than going through a national court.

Arbitration is the most formal and the most used alternative dispute resolution method. By selecting arbitration as a dispute resolution forum, the parties effectively exclude the option of resolving the same dispute through national courts. In particular, the parties are replacing traditional court protection with protection provided by arbitrators. While offering flexibility and respecting the party autonomy, still there are some restrictions to the party autonomy and the powers of the arbitral tribunals. Specific limitations are expressed through mandatory rules that the parties in the dispute and the arbitrators must adhere to. Such norms set the boundaries within which both the parties and the arbitrators must operate. For instance, the parties cannot waive their right to be heard. Arbitral tribunals on the other hand must observe the principle of due process.

In this paper, we will show that arbitration is not perfect when experiments with arbitrators' fees are made and when the courts disrespect the international obligations and deviate from such rules.

2. Legal Framework – Dualistic Approach

The legal theory of arbitration and the North Macedonian national legislation accept a dualistic approach to the nature of the arbitration, differentiating between domestic and international arbitration by applying different legal rules. For disputes involving an international element, the parties are free to choose *ad hoc* or institutional arbitration.[1] Contrary to that, for domestic disputes, the parties are limited to agreeing solely on institutional arbitration.[2] The

[1] The unofficial English version of the Law on International Commercial Arbitration is available at the following link: https://www.international-arbitration-attorney.com/wp-content/uploads/2013/07/Macedonia-Arbitration-Law.pdf, 14. 11. 2024.

[2] Under Article 441 (1) of the Code of Civil Procedure, in disputes without international

most significant change in the field of arbitration in North Macedonia occurred in 2006, when the Law on International Commercial Arbitration was enacted (hereafter in: LICA).[3] The LICA was drafted using the text of the 1985 UNCITRAL Model Law on International Commercial Arbitration, and applies only to disputes with an international element.

According to Article 3 of the Law on International Commercial Arbitration, arbitration is classified as arbitration with a foreign element if one of the following conditions applies at the time when the arbitration agreement is concluded: one of the parties is a natural person with domicile or habitual residence in a foreign country, a legal entity with its place of business in a foreign country, or the place where a substantial part of the commercial obligations is to be performed, or the location most closely connected to the subject matter of the dispute.

In other cases, where is no foreign element, arbitration is classified as domestic and, as such, it is regulated by the Code of Civil Procedure (hereinafter: CCP).[4] In particular, disputes without a foreign element that involve rights that are freely disposable by the parties can only be resolved before arbitral institutions established by chambers of commerce.

As for the multilateral conventions concerning the International Commercial and Investment Arbitration, North Macedonia has signed and ratified several multilateral conventions:

- Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (hereinafter: the 1958 New York Convention);
- The 1961 European Convention on International Commercial Arbitration (ECICA), and
- The 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

element, the parties may agree solely on institutional arbitration. The text of the Code of Civil Procedure is available on the following link: https://www.pravda.gov.mk/upload/Documents/ЗПП%20редакциски%20пречистен%20текст%202015(1).pdf, 14. 11. 2024.

[3] The unofficial English version of the Law on International Commercial Arbitration is available at the following link: https://www.international-arbitration-attorney.com/wp-content/uploads/2013/07/Macedonia-Arbitration-Law.pdf, 14. 11. 2024.

[4] The text of the Law on Litigation Procedure is available on the following link: https://www.pravda.gov.mk/upload/Documents/ЗПП%20редакциски%20пречистен%20текст%202015(1).pdf, 14 November 2024.

3. On the Question of Arbitrability

The arbitration agreement is the cornerstone of the parties' consent to resolve their dispute through arbitration, thereby excluding court jurisdiction. It serves as the foundation for their obligation to submit their dispute to arbitration. However, like any other contract, an arbitration agreement must meet specific legal requirements in order to be valid. *Firstly*, it must be concluded by parties who have the legal capacity to enter into such an agreement (*capacité de compromettre*). *Secondly*, the agreement must pertain to a dispute that is eligible for arbitration. These two requirements define the concept of "arbitrability" (from the Latin *arbitratio*, meaning arbitration, and *bilis*, meaning possibility or eligibility), which is established to safeguard the public interest. The notion of arbitrability gained significance and became a focus of analysis in the legal theory and practice with the adoption of the 1958 New York Convention. For example, Article V(2)(a) of the 1958 New York Convention provides for the possibility of refusing recognition and enforcement of an arbitral award if "*the subject of the dispute is not eligible for arbitration.*" While the Convention and its *travaux préparatoires* do not use the term "arbitrability," this clear language refers to it. This notion has since been incorporated into numerous international instruments and national legislation (See: Born, 2015, pp. 73-90).

3. 1. Subjective Arbitrability

Subjective arbitrability refers to the ability of persons (natural, legal or the states) to enter into a valid arbitration agreement, or more specifically, to be a party to an arbitration proceeding.

In North Macedonia, there has never been any dilemma whether the country can enter into arbitration agreements. In fact, North Macedonia is a member of the 1961 European Convention on International Commercial Arbitration, and adheres to Article II, paragraph 1 of the Convention. Therefore, the LICA also deals with "*subjective arbitrability*" in matters to refer to the possibility of the country and public legal entities to resolve international commercial disputes through arbitration. While this issue is not expressly addressed in the UNCITRAL Model Law on International Commercial Arbitration, it was deemed necessary by the national legislator to include it in the LICA to eliminate any uncertainty about the validity of arbitration agreements concluded by North Macedonia.

In short, the LICA adopts the doctrine of "*limited State immunity*." Pursuant to Article 1, paragraph 7 of the LICA, not only North Macedonia and its legal entities, but also local self-government units and their established entities, and the city of Skopje, have the right to enter into arbitration agreements. This broad scope of

subjective arbitrability is consistent with international practices and provides legal certainty for foreign investors entering into contracts with public legal entities in North Macedonia.

4. Objective Arbitrability – Point of View in North Macedonia

The term "objective arbitrability" refers to the possibility of disputes over a certain matter to be settled by arbitration. When considering objective arbitrability, it is essential to present some of the most important characteristics and specificities:

Firstly, although international instruments that focus on international arbitration address and incorporate the concept of arbitrability, this concept is ultimately defined and applied at the national level. The scope of what may be settled through arbitration depends solely on national legislation. Exercising their sovereignty, states determine which disputes can be resolved by arbitration and which must be addressed by national courts. In national legislations, the limits of arbitrability are set in two ways: *positive approach* – mostly in the laws on arbitration, where it is provided as a general rule on which disputes or which types of disputes can be submitted to arbitration; and *negative approach* – mostly in other laws that do not contain direct provisions relating to arbitration (for example: in private international law codes), but contain provisions stipulating that national courts have exclusive jurisdiction over certain disputes.

Secondly, arbitrability is a temporal concept. It is not time-fixed and changes over time. In modern times, the scope of arbitrable disputes has expanded, meaning that many matters previously classified as non-arbitrable are now capable of being settled by arbitration.

Thirdly, arbitrability is not an isolated concept; it interacts with a broader set of legal tools, such as public policy and mandatory rules, which can override party autonomy and consent. These tools allow national courts to uphold fundamental values of public policy (see: UNCITRAL, 2016).

In North Macedonia, the limits of objective arbitrability are established by the LICA and the Act of Private International Law (PIL Act). These laws set forth a two-part test to determine whether a dispute is arbitrable. Specifically, Article 1(2) (6) of the LICA states that "*international commercial arbitration resolves disputes concerning matters that the parties may settle,*" and that "*this Law shall not affect any other law of the Republic of North Macedonia under which certain disputes may be subject only to the jurisdiction of a court in the Republic of North Macedonia*."

The second condition derives from the PIL Act. This Act regulates the exclusive court jurisdiction. If the PIL Act designates exclusive jurisdiction of the courts

of North Macedonia over specific types of disputes, such disputes are considered non-arbitrable.

In recent years, the issue of objective arbitrability has often been raised regarding several types of disputes in North Macedonia, particularly in the context of corporate, employment and defamation cases.

5. Arbitrability of Corporate and Employment Disputes in North Macedonia

The determination of arbitrability of corporate and employment disputes has been a debatable question in some jurisdictions, considering the application of public policy considerations. As a general rule, corporate disputes are arbitrable. In corporate disputes, there is no need to protect individuals or to deprive them of the disposition of claims as a consequence of a state monopoly on judicial power. Shareholder resolutions in commercial companies involve an economic interest. Consequently, disputes arising from them are arbitrable. The actual, practical problem lies in the process of making the arbitration agreement. The submission of this kind of corporate dispute to arbitration requires a specifically drafted arbitration clause that is adapted to the characteristics of the situation at hand.

The substantive law of North Macedonia includes provisions that regulate arbitration in specific types of corporate and employment disputes. For instance, Article 41 of the Law on Trade Companies allows shareholders to agree to amicably settle disputes related to company contracts or statutes through methods such as mediation and negotiation (see: Art. 41, Law on Trade Companies). If an amicable resolution is not possible, the parties may agree to proceed with arbitration.

Regarding labor arbitration, the question of the arbitrability of employment disputes is addressed by a specific type of labor arbitration under the Law on Labor Relations (Art. 172, Law on Labor Relations). This pertains to a distinct form of arbitration without an international element. In the case of individual or collective labor disputes, the employer and employee may agree to resolve the matter through a designated body established by law.

The Law on Amicable Settlement of Employment Disputes (LASEM) establishes such bodies (Art. 1, Law on Amicable Settlement of Employment Disputes). Specifically, Article 29 of the LASEM states that an individual dispute may be resolved before an arbitrator, upon agreement of the parties, if the dispute involves: 1) termination of an employment contract, or 2) failure to pay wages (see: Art. 29, Law on Amicable Settlement of Employment Disputes).

For collective disputes, Article 183 of the Law on Labor Relations permits collective agreements to provide for arbitration to resolve collective labor disputes

(Art. 183, Law on Labor Relations). The collective agreement outlines the composition, procedure, and other relevant aspects of the arbitration process. If both the employer and employee agree to arbitrate a labor dispute, the resulting arbitration award is final and binding for both parties. However, the unsatisfied party may bring an action against the arbitral decision before national courts of first instance.

6. Arbitrating Defamation Disputes in North Macedonia

In 2012, North Macedonia implemented a legislative reform, decriminalizing insult and defamation. The Law on Civil Liability for Insult and Defamation was enacted, and the Criminal Act was amended accordingly to decriminalize defamation and insult. Hence, there has been a change in the type of responsibility for defamation and insult from criminal to civil law, and therefore to the type of court proceedings in which legal protection is provided to those who have been affected by these wrongs. After the entry into force of the new Law, instead of in criminal proceedings, the existence of defamation or insult is to be established in civil proceedings, in accordance with the new legal nature of the responsibility of the perpetrator of the insult or defamation. The compensation of damages for insult or defamation can only be effected in civil procedure. The provisions of the Law on Obligations, the Code of Civil Procedure, and the Law on Enforcement apply to the procedure for the determination of liability for insult or defamation and compensation for damages unless otherwise determined by the Law (Art. 4, para. 2, Law on Civil Liability for Insult and Defamation).

The Law on Civil Liability for Insult and Defamation regulates civil liability for damages inflicted on the honor and reputation of a natural person or a legal entity by an insult or defamation. Under Articles 6 and 8 of the Law on Civil Liability for Insult and Defamation, a person shall be held liable for insult if they, with the intent to humiliate, make a statement, engage in behavior, make a publication, or use any other means to express a demeaning opinion about another person that harms their honor and reputation. In addition, a person shall be held liable for defamation if they present or disseminate false facts that damage the honor and reputation of another person with an established or apparent identity before a third party, intending to harm that person's honor and reputation, having known, or having been obligated to know, that the facts are incorrect.

After the intervention of the legislator, the question of the boundaries of arbitrability under North Macedonian law arose. Once again, this question needs to be answered relying on the double test for arbitrability that has already been established: 1. Are defamation disputes considered disputes over rights that parties can

freely dispose of, and 2. Is there exclusive court jurisdiction provided by the PIL Act or any other procedural act for this type of dispute?

The 2012 decriminalization of insult and defamation transferred the existence of insult or defamation to civil law, where judicial protection is provided in civil (litigation) proceedings. The deadline for filling a formal letter of complaint is three months from the day the plaintiff becomes aware or should have become aware of the insulting or defamatory statement and of the identity of the person who has caused the damage, but not later than within one year from the day the statement has been communicated to a third person (Art. 20, Law on Civil Liability for Insult and Defamation). Consequently, it has been transformed into the right that can be freely disposed of by the parties, which in turn provided the first condition for its arbitrability based on the provision of Article 1 (2) of the LICA, and Article 441 (1) of Law on Civil Procedure. Before 2012, only the right of compensation was at the free disposal of the parties. The question of liability was part of the Criminal Code, and thus the parties were not in a position to freely dispose of their rights. Thus, the question of liability for insult and defamation was not arbitrable.

As for the second condition, the Law on Civil Law Liability for Insult and Defamation, as well as other laws of North Macedonia, do not provide for *forum exlusivum* of the national courts for disputes related to insult and defamation. Hence, the second requirement is also fulfilled concerning objective arbitrability - there are no provisions in favor of exclusive court jurisdiction.

7. Ad Hoc and Institutional Arbitration

The Permanent Court of Arbitration, attached to the Economic Chamber of North Macedonia (hereafter in: PCA), was established in 1993 as a permanent arbitral institution that resolves disputes with and without an international element. In 2021, new PCA arbitration rules were enacted (hereafter in: PCA Rules). PCA Rules deal with questions such as the PCA organization, the PCA jurisdiction, the arbitrators, and the proceedings before the arbitral tribunals (panel of arbitrators or sole arbitrator) in domestic and international cases. Arbitral proceedings administrated by the Arbitration Court commence with a statement of claim (Art. 10, para. 1, Arbitration Rules of the Permanent Court of Arbitration – attached to the Economic Chamber of North Macedonia – PCA Rules).

Article 10 (3) of the Rules stipulates the minimum requirements for a statement of claim under the Rules: (a) the complete names of the parties, including the company name and headquarters for each legal entity, as registered with the Central Registry of North Macedonia or any other relevant registry, along with

verification from the respective registry and details of an authorized representative or agent, if applicable; (b) the parties' contact details, including addresses, phone numbers, fax numbers, and an email address for receiving submissions or notices; (c) the remedy or relief being sought; (d) a statement outlining the facts supporting the claim; (e) supporting evidence; (f) the arbitration agreement, if one has been established; (g) a suggestion for the number of arbitrators, the language to be used, and the arbitration seat, if these have not been previously agreed upon the parties; (h) the nominated arbitrator; (i) the stated value of the claim; and (j) the claimant's signature or electronic signature.

The parties involved in a dispute can choose to have it resolved by either a sole arbitrator or a panel of three arbitrators. If the arbitration agreement specifies an even number of arbitrators, an additional arbitrator would be appointed by the President of the Arbitration Court to ensure an odd number of arbitrators. For disputes valued at 30,000 EUR or less, a sole arbitrator would generally be assigned, unless both parties agree within 15 days of receiving the statement of claim that a panel should hear the case. Conversely, disputes exceeding 30,000 EUR in value would be handled by a panel unless the parties agree within 15 days to proceed with a sole arbitrator. The Arbitration Court has two designated lists of arbitrators, from which sole arbitrators, arbitral tribunals, and presiding arbitrators are appointed in the vast majority of cases: one list for disputes with an international element, and another one for domestic disputes. These lists are compiled and approved by the Chamber's Managing Board, following a proposal from the Presidency of the Arbitration Court (Art. 18, PCA Rules).

Under Article 20 of the PCA Rules, an Arbitration Panel consists of three arbitrators. Unless the parties have agreed otherwise, the process of formation of the Arbitration Panel is as follows: the claimant first appoints one arbitrator within the statement of claim, while the respondent appoints one arbitrator in their reply to the claim. The Presiding Arbitrator is then appointed by the President of the Arbitration Court.

If either party fails to appoint an arbitrator in their initial submissions, the Secretary of the Arbitration Court would send them a reminder and invitation, allowing 15 days from receipt of the request for the party to make the appointment. Should the party fail to appoint an arbitrator within this period, the President of the Arbitration Court would appoint an arbitrator on their behalf. In cases involving multiple parties, the co-litigants are expected to appoint a single common arbitrator. If they fail to reach an agreement or if they each appoint different individuals, the responsibility of appointing an arbitrator is in the hands of the President of the Arbitration Court. This procedure ensures the timely formation of the Arbitration Panel even in complex multi-party disputes (Art. 21, PCA Rules).

The only restriction in *ad hoc* arbitration cases is outlined in the Code of Civil Procedure. According to Article 441, in domestic arbitration cases, the parties are not permitted to choose *ad hoc* arbitration. However, this restriction does not apply to disputes that have an international element, where the parties can freely opt for *ad hoc* arbitration if they wish. In case of *ad hoc* arbitration involving disputes with an international element, the Arbitration Court may undertake, upon agreement by the parties, specific functions as outlined in the applicable PCA Rules. These functions include serving as the appointing authority in both *ad hoc* arbitrations and those conducted under the auspices of other arbitration institutions as long as this is agreed upon by the parties involved. Additionally, the Arbitration Court can provide administrative support by organizing hearings, offering facilities, and supplying the necessary equipment to facilitate arbitration and conciliation proceedings, even when these are governed by rules other than those outlined in the Arbitration Court Rules.

One of the main features of the proceedings in front of the PCA is the structure of arbitrators' fees. According to the 2022 PCA Rules, the fee for a sole arbitrator in both domestic and international disputes is set at €500. In domestic and international cases involving a panel of arbitrators, the total fee amounts to €1.000. In practice, the value of the dispute does not influence the arbitrators' fees. Consequently, many arbitrators no longer wish to accept nominations to serve in arbitration proceedings.

8. Recognition and Enforcement of Foreign Arbitral Awards in North Macedonia

The relevant provisions concerning the recognition and enforcement of foreign arbitral awards are contained in the LICA and in the PIL Act. According to Article 37(3) of the LICA, the recognition and enforcement of foreign arbitral awards are governed by the provisions of the New York Convention, signed on 10 June 1958. An arbitral award is classified as foreign if it was rendered outside North Macedonia, thereby making it subject to recognition and enforcement proceedings.

The procedure for the recognition and enforcement of foreign court and arbitral awards is regulated by the PIL Act, specifically addressing non-litigious processes for the recognition and enforcement of foreign judgments (Arts. 165-172, PIL Act). This same procedure applies to foreign arbitral awards.

Upon receiving a proposal for the recognition and enforcement of a foreign arbitral award, the court of first instance begins by examining *ex officio* the grounds for refusal of recognition and enforcement as provided by the New York Convention

(public policy and non-arbitrability). If the court determines that no such obstacles exist, it will render a decision to recognize and enforce the foreign arbitral award. The court will then notify the opposing party informing them of their right to file an objection within 30 days from the receipt of the decision.

If an objection is filed, the court that initially issued the recognition decision will reconsider the matter in a panel of three judges. The court will decide on the objection after conducting a hearing, ensuring that the right to defense is respected throughout the process.

If the decision to reject the recognition request or the decision made by a panel of three judges following the objection is unfavorable for one of the parties, an appeal may be filed with the competent appellate court within 15 days from the receipt of the decision.

In practice, however, courts have deviated from the PIL Act provisions, often delivering the recognition request directly to the opposing party, and transforming *ex parte* proceedings into contradictory proceedings involving both parties. This shift can be seen in two recent decisions: Decision No. 3 PSO-58/16, refusing the recognition of a foreign arbitral award by the Civil Court of First Instance in Skopje, and Decision No. 3 PSO1 3/19, granting recognition of a foreign judgment by the same court. Judges have justified the need for a hearing at every stage of the proceedings and for serving the opposing party with the recognition and enforcement request by citing Article 6 of the European Convention on Human Rights. Unfortunately, this practice has been adopted by all first-instance courts in North Macedonia. However, neither Decision No. 3 PSO-58/16 nor Decision No. 3 PSO1 3/19 explains the reasoning behind the court's departure from the *ex parte* proceedings outlined in the PIL Act.

9. Refusing a Request for Recognition and Setting Aside Foreign Arbitral Award – the Polish Arbitral Award Saga

In North Macedonia, not so many cases have gone through the process of recognition and enforcement of foreign arbitral awards. Unfortunately, there is a precedent that goes directly in contradiction with the bases of the arbitration law, procedure, and internationally recognized standards. In particular, the court refused to recognize a Partial ICC Award (Poland) due to a violation of due process and public policy. In this case, the application for recognition was submitted to the Skopje First Instance Court (Skopje II) on 20 April 2016 on behalf of NDI S.A against GRANIT AD Skopje. The petitioner submitted the following documents: 1. The Partial Award, 2. The Arbitral Agreement, and 3. The Judgment of the Court

in Gdansk for recognition and enforcement of the Partial Award under Art. 1202 of Part V of the Polish Civil Procedure Code.

On 20 May 2016, a hearing was held and the Civil Court in Skopje, and the recognition and enforcement were refused due to a. Violation of the public policy (based on the Articles of the PIL Act as substantive conditions for recognition and enforcement of foreign judgments); b. Lack of impartial decision by the arbitration tribunal due to bias of one of the arbitrators (Claimant's nominee), and c. Lack of proof that the Partial Award is enforceable (based on the Articles of the PIL Act on foreign judgments). The Court also rejected the recognition of the judgment from the Court in Gdansk. This decision represents a clear violation of the provisions of the 1958 New York Convention, i.e., application of national law instead of the 1958 New York Convention. Instead of applying the conditions contained in the1958 New York Convention, the Court applied the conditions for recognition and enforcement of foreign arbitral awards from the PIL Act. As for the findings of the alleged lack of impartial decision by the arbitral tribunal due to the bias of one of the arbitrators, the Court neglected the fact that during the arbitral proceedings, this question was settled in favor of no bias of the arbitrator.

On 10 June 2016, an Appeal was filed to the Appellate Court in Skopje due to the violation of the procedure for recognition and enforcement and improper application of the substantive law. However, the Appellate Court in Skopje rejected the appeal on 15 July 2016.

After that, on 12 October 2016, a motion for an extraordinary legal remedy was filed: Repeating of the Proceedings (before the Appellate Court) due to the improper constitution of the Court, one of the judges in the panel which decided on the appeal had to be exempted: The Presiding Judge in the proceeding in the Appellate Court was/is a wife of an employee in Granit (Respondent), and he is a shareholder in Granit. And once again, on 16 February 2017, the motion was denied by the Appellate Court.

The culmination of this procedure occurred on 1 December 2016, when the motion for setting aside of the ICC Partial Award was submitted. The claimant was Granit (Respondent in the Arbitral Award), while the respondent was NDI S.A. (Claimant in the Arbitral Award). Surprisingly, on 8 May 2019, the Court delivered a Judgment for setting aside of the (foreign) ICC Partial Award! This was a clear violation of the LICA where it is clearly stated that annulment applies only to domestic arbitral awards. On 22 July 2019, an appeal to the Appellate Court was submitted by NDI S.A. In the meantime, on 13 January 2017, NDI S.A submitted an application to the European Court of Human Rights in which it substantiated the violation of Article 6 of the ECHR Convention, Article 13 in connection with Article 6 of the Convention, and Article 1 of the Convention Protocol No. 1. The

applicant submitted that the decisions of the state courts in Skopje were rendered with manifest violation of both international law and North Macedonia's national law, and the case is still pending.

This case shows how the court should not act in a procedure for recognition and enforcement of foreign arbitral awards. Instead of applying the 1958 New York Convention, the court has applied the domestic standards from the PIL Act. Furthermore, the Court has annulled a foreign arbitral award, which is a clear violation of Article 35 of the LICA, under which annulment is the only remedy for domestic arbitral awards. The only hope is that this case will be featured in textbooks, and that the students and practitioners will learn how not to act in the course of an international commercial arbitration.

10. Conclusion

North Macedonia's arbitration system is facing real challenges. Although there have been positive changes in the arbitration practice where most of the international commercial contracts embody arbitration clauses, recent events show that there is still a lot of work to be done to ensure that the Republic of North Macedonia is a country *in favorem arbitrandum*. The case regarding the Partial ICC Award is a clear example of how not to deal with recognition and enforcement. The issues surrounding the recognition and enforcement of foreign arbitral awards reveal possible abuse of law in favor of one of the parties. The decision to not recognize the Polish ICC Award raises concerns about fairness and could discourage the flow of international commercial transactions. In addition, the setting aside of foreign arbitral award demonstrates the failure of the courts to apply the LICA and their flawed understanding of the international arbitration law. Therefore, there is an urgent need for proper application of both the PIL Act and the LICA by the judges in North Macedonia, and rethinking the possible court specialization for recognition and enforcement of both foreign court and arbitral awards.

References

Born, G. 2015. *International Arbitration: Law and Practice*, 2nd edition. Kluwer Law International, pp. 73-90

Legal Sources

European Convention on International Commercial Arbitration, Geneva, 21 April 1961, *Official Gazette of SFRY*, International Agreements, No. 12/63.

Law on Amicable Settlement of Employment Disputes, *Official Gazette of the Republic of Macedonian*, No. 87/2007, 27/2014, 102/2014, 30/2016.

Law on Civil Liability for Insult and Defamation, *Official Gazette of Republic of Macedonia*, No. 143/2012.

Law on International Commercial Arbitration, *Official Gazette of the Republic of Macedonia*, No. 39/2006.

Law on Labor Relations, *Official Gazette of Republic of Macedonia*, No. 62/2005, 3/2006, 44/2006, 66/2006, 16/2007, 57/2007, 77/2007, 106/2008, 161/2008, 63/2009, 114/2009, 130/2009, 149/2009, 10/2010, 50/2010, 52/2010, 58/2010, 124/2010, 132/2010, 47/2011, 11/2012, 39/2012, 13/2013, 25/2013, 170/2013, 187/2013, 106/2014, 113/2014, 20/2015, 33/2015, 72/2015, 129/2015, 27/2016, 134/2016, 120/2018, 110/2019, 267/2020, 151/2021, 288/2021, and 111/2023).

Law on Trade Companies, *Official Gazette of the Republic of Macedonia*, No. 28/2004, 84/2005, 25/2007, 87/2008, 42/2010, 48/2010, 24/2011, 166/2012, 70/2013, 119/2013, 120/2013, 187/2013, 38/2014, 41/2014, 138/2014, 88/2015, 192/2015, 6/2016.

Code on Civil Procedure, *Official Gazette of the Republic of Macedonia*, No. 79/2005, 110/2008, 116/2010, 7/2011.

Private International Law Act, *Official Gazette of the Republic of North Macedonia*, No. 32/2020).

Paula Poretti*
Mirela Župan**

Review Scientific Paper
UDC: 341.63(497.5)
doi: https://doi.org/10.56461/SPZ_24412KJ
Received: 25. 10. 2024.
Accepted: 13. 1. 2025.

INTERNATIONAL INVESTMENT ARBITRATION – – AN OUTLOOK FROM CROATIA

Summary

Since Croatia's establishment as a sovereign country in the early 1990s, foreign investments have been identified as a strategic priority of its economic policy. Croatia seeks to provide a stable legal environment for foreign investors through its domestic rules, EU law or bilateral investment treaties. Providing legal protection in international investment disputes is a challenging task, and requires careful balancing between protecting private investor interests and the public interest in the State of investment. Entrusting this task to ad hoc arbitration tribunals, which adjudicate based on a specific body of investment law, and its open concepts, has been under increasing criticism, leading to a conclusion that the characteristics that distinguish arbitration from court proceedings are, at the same time, its greatest shortcomings. On the trail of this reflection, and following the Achmea case, there is increasing advocacy for establishing a special EU court for international investment disputes. This paper focuses, however, on the investment dispute resolution before ICSID involving Croatia either as the respondent or the home state in the last half decade.

Keywords: Croatia, EU law, foreign investments, ICSID, international investment disputes.

* Associate Professor at the Josip Juraj Strossmayer University of Osijek, Faculty of Law.
E-mail: *pporetti@pravos.hr*
ORCID: *https://orcid.org/0000-0001-6311-8274*

** Full Professor at the Josip Juraj Strossmayer University of Osijek, Faculty of Law.
E-mail: *mzupan@pravos.hr*
ORCID: *https://orcid.org/0000-0002-6673-1274*

MEĐUNARODNA INVESTICIONA ARBITRAŽA – – IZ PERSPEKTIVE REPUBLIKE HRVATSKE

Sažetak

Od uspostavljanja Hrvatske kao suverene zemlje početkom 90-ih, strane investicije su izdvojene kao strateški prioritet ekonomske politike zemlje. Hrvatska nastoji da obezbedi stabilno pravno okruženje za strane investitore, kako kroz svoja domaća pravila, tako i kroz pravo EU, te bilateralne investicione ugovore. Pružanje pravne zaštite u međunarodnim investicionim sporovima predstavlja jedan od izazovnijih zadataka, jer zahteva pažljivo balansiranje između zaštite interesa privatnog investitora i javnog interesa u državi ulaganja. Poveravanje ovog zadatka ad hoc arbitražnim sudovima predmet je sve većih kritika, što dovodi do zaključka da su karakteristike koje razlikuju arbitražu od sudskog postupka istovremeno i njeni najveći nedostaci. Na tragu tog razmišljanja i nakon slučaja Achmea, sve više se zagovara uspostavljanje posebnog suda EU za međunarodne investicione sporove. U ovom radu fokus je, međutim, na pitanju rešavanja investicionih sporova pred ICSID-om u kojima je Hrvatska uključena bilo kao tužena strana ili kao matična država u poslednjih pola decenije.

Ključne reči: Hrvatska, pravo EU, strane investicije, ICSID, međunarodni investicioni sporovi.

1. Introduction

1.1. General Policy and Treaty Landscape

1.1.1. Foreign Investment Policy

While direct investment in foreign markets had emerged globally after World War II (Sornarajah, 1999, p. 1), in transition countries, including Croatia, has become possible only after to the market economy was opened up in the early 1990s. Foreign investment drives the recipient country's competitiveness, economic growth, and higher productivity. In addition, for the recipients, it brings several social benefits, including new and modern technology transfers and expertise, and strengthening employment through workforce development and training. At the same time, indirect spillovers on other local businesses are indicative as well (Pečarić, Jakovac & Miličić, 2020, p. 135 ff).

Since Croatia's establishment as a sovereign country, foreign investment has been a focus of socio-economic and political discourse and has been identified as a strategic priority of the Croatian economic policy (Marošević & Romić, 2011, p. 156). According to the World Bank income classification, Croatia is an upper middle-income country (World Bank Group, 2024). Numerous advantages of the Croatian economy include its great geographical and strategic position, modern infrastructure, low inflation rate, and stable exchange rate. Membership in international associations, particularly accession to the World Trade Organization in 2000, and Croatia's full European Union membership in 2013, have accelerated foreign investment attraction.

According to the Croatian Ministry of Economy's data for 1993, when the foreign direct investment data first became available, until the first quarter of 2024, Croatia has attracted EUR 46.2 million in foreign investments. The majority of its European investors come from the Netherlands (15%), Austria (14%), Germany (11%), Luxembourg (10%), and other countries. The most attractive investment areas include financial services (23%), manufacturing (17%), real estate (16%), and trade (13%) (Croatian Ministry of Economy, 2024).

1.1.2. Legal Framework

Acknowledging that foreign direct investment is crucial for development, Croatia has provided a secure and stable legal environment for foreign investors. While there are no specific laws that relate to foreign investors, the same rules apply to foreign and domestic investors. Several provisions of the Croatian Constitution impact foreign investment policy. The Constitution firmly guarantees the right of ownership, which may be restricted or rescinded by law only if such restriction is in Croatia's high interest and is subject to indemnification equal to the market value of the pertinent property (Art. 48(1) and Art. 50, Constitution of Republic of Croatia). Foreigners are free to exercise the right of ownership. Pursuant to the Ownership and Other Property Rights Act, foreign natural or legal persons subject to reciprocity, which is no longer required for EU Member States, can, in principle, acquire real estate.

The Constitution provides for free enterprise and free market as the foundations of Croatia's economic system, entailing equal legal status for entrepreneurs in the market and the prohibition of monopoly. Furthermore, the Constitution guarantees that "all rights acquired through the investment of capital shall not be infringed by law or any other legal act," and that foreign investors may freely transfer and repatriate profits and invested capital. The Constitution specifies also the allowed limits and boundaries for free enterprise and property rights (Art. 50(2), Constitution of Republic of Croatia).

Other national legislation applies equally to foreign investors and Croatian companies as well. The Companies Act includes definitions of 'foreign company' and 'foreign sole proprietor',[1] which have equal rights as Croatian companies and sole proprietors when doing business in Croatia (Art. 612(1), Companies Act). In addition, foreign companies and sole proprietors can conduct business permanently if they establish their branch office in Croatia. Furthermore, the Companies Act defines a 'foreign investor' as any legal person with the registered seat of the company outside Croatia or any natural person who is a foreign citizen, a refugee, or a stateless person who is acquiring shares in companies or investing capital on a contractual basis. Under the condition of presumed reciprocity, any foreign investor who incorporates or participates in the incorporation of foreign companies in Croatia has the same rights and obligations as any domestic investor. No reciprocity applies if a foreign investor has their seat or permanent residence in a country that is member of the World Trade Organization (Arts. 619(1), 620, Companies Act). The relevant European Company law rules apply equally to all.

The Protection of Competition Act governs antitrust rules and competition policy. The Labour Act governs collective agreements, individual contracts, and labour relations. The recently adopted Investment Promotion Act fully aligns with EU legislation, particularly with Regulation No 651/2014, which declares specific categories of aid compatible with the internal market. The recent Croatian Private International Law Act has implemented contemporary global and European principles of cross-border civil justice. By adopting the Strategic Investment Projects Act, Croatia has set the rules for the election, evaluation, preparation, and implementation of strategic projects, granting concessions and issuing administrative acts. It is in full compliance with EU legislation. Double taxation is avoided among EU Member States through bilateral agreements with third countries (Ministry of Finance, 2024).

Arbitration proceedings are governed by the 2001 Arbitration Act. The Croatian legislator relied on the UNCITRAL Model Law on International Commercial Arbitration as a prototype (Uzelac & Nagy, 2011, pp. 165-278). To a certain extent, the legislator reverted also to the German Model Law, whilst keeping some elements of the previous Croatian (post-Yugoslavian) legal framework for arbitration (Dika, 2016).

Any prospective EU foreign investment policy reform will also shape the Croatian landscape. The current regime under Regulation 2019/452 establishing the framework for the screening of foreign direct investments (FDIs) is subject to

[1] A foreign company is "validly established under regulations outside the Croatia in which the seat of the company is registered." In contrast, a foreign sole proprietor is a "natural person who is considered as such in the country of the company's registered seat and where he/she carries out his/her business activity." (Art. 611, Companies Act.

revision, as the Proposal for a new Regulation of the European Parliament and of the Council on the screening of foreign investments in the Union and repealing Regulation 2019/452 was launched in January 2024.

1.1.3. International Treaties and International Investment Arbitration Proceedings

Croatia is a party to major international treaties relevant to investments, and most importantly the 1965 Washington Convention for the Settlement of Investment Disputes between States and Nationals of Other States. The multiplicity of legal sources may lead to overlapping international agreements at different levels. Hence, a multilateral agreement can become a secondary source if there is a bilateral agreement in force regarding the specific subject matter and states (Sajko, 2009, pp. 61-62). Croatia has contracted many bilateral investment treaties (hereinafter: BITs) and treaties with investment provisions (hereinafter: TIPs) to strengthen foreign investment. It has concluded 59 bilateral investment agreements, though those with EU Member States have since been terminated (UNCTAD, 2024). In 2018, the EU Court of Justice in C-284/16 *Slowakische Republik v. Achmea* found that investor-state arbitration under the Netherlands - Slovakia BIT is incompatible with EU law. Following this decision that intra-EU BITs overlap and conflict with the EU single market (Borovikov, Evtimov & Crevon-Tarassova, 2016, pp. 186-95; Meijer Dusman, 2012, pp. 167 ff), they were terminated where they related to the EU and in Croatian bilateral relations as well.

The Croatian BITs normally have standardised content, and contain a most favoured nation clause (MFN). As a principle, foreign investors have equal rights and obligations as domestic investors and, when conducting business activities, are considered domestic legal entities (Petrović & Ceronja, 2012, p. 294). These BITs provide for standards of protection including non-expropriation, fair and equitable treatment, full protection and security, free transfer of capital, umbrella clause, and national treatment. The notion and interpretation of fair and equitable treatment (Babić, 2012, pp. 375-395), as well as the relationship of these standard BIT provisions to general customary international law has occupied Croatian doctrine as well (Muhvić, 2016, pp. 33-42). Most BITs provide for arbitration under "ICSID or UNCITRAL rules, or ICSID, UNCITRAL or ICC rules." As a rule, they also include a mandatory attempt at amicable dispute resolution. Legal theory has raised an issue that many BITs contain problematic provisions, particularly the ones prescribing for the prior and mandatory mediation procedure and subsequent elective jurisdiction of different bodies (Vuković & Kunštek, 2005, pp. 343-345).

As a party to several BITs, Croatia has been a party to a number of international investment arbitration proceedings over the last decade. To present an overview of

Croatia's international investment arbitration proceedings, the paper will focus on the more recent cases dating from 2018 to 2024. Before that date, Croatia had been involved in investment disputes settled before ICSID, both as the respondent and the home state. Croatia acted as the respondent State in cases V*an Riet v. Croatia*, *Adria Beteiligungs v. Croatia*, and *Ulemek v. Croatia*, all of which were decided in Croatia's favour. Croatia acted as the home State in *Tvornica Šećera v. Serbia*, *HEP v. Slovenia* and *Pren Nreka v. Czech Republic*, with the two former cases decided in favour of the State, and the latter one decided in favour of the investor.[2] The available data will be analysed to establish the possibility and adequacy of contracting alternative more efficient methods for international investment dispute resolution in terms of efficiency,[3] recovering the damage claimed, and protecting fundamental rights. The conclusion will be examined in light of *the Achmea* judgment from March 2018. These considerations will inform the authors in their comments on the possible direction for developing international investment dispute resolution mechanisms compatible with EU law.

2. International Investment Arbitration Proceedings

2.1. Requirements for Initiating and Participating in the Proceedings

To a large extent, international treaties on the protection of foreign investments (hereinafter: BIT) were concluded back in the 1990s between the old EU Member States and Eastern European countries to protect European investors from the political risks of investing during the period of significant transition reforms in the communist countries. A decade later, some of these countries, including Croatia, became EU Member States. However, the availability of recourse mechanisms under EU law has challenged the importance of BITs that had long provided the basis for international investment arbitration and their coherence with EU law. Their long-term future is one of the issues that will be further discussed in this paper. Notably, the BITs have resulted in several international investment arbitration proceedings initiated by foreign investors.

In accordance with the provisions of Art. 43 para. 1 of the State Attorney's Office Act (hereinafter: SAOA), the Croatian State Attorney's Office (hereinafter: SAO) represents Croatia in property disputes and other proceedings for the protection of Croatia's property rights and interests before foreign courts, international and national bodies. This includes also international investment arbitration

[2] Detailed analysis is available in earlier scholarly work (Župan & Čuljak, 2019, pp. 68-94).

[3] Taking into account procedural economy and costs.

proceedings. They are initiated by foreign investors against Croatia for BIT violations or because the Contracting Parties, one of which is Croatia, have agreed on international arbitration instead of dispute settlement before state courts. If under the applicable law, the SAO cannot represent Croatia in the international arbitration proceedings, the Croatian State Attorney General may authorise a foreign attorney to represent Croatian interests, with the consent of the Croatian Government (Art. 43, para. 2, SAOA). To ensure transparency and cost-effectiveness (Report of the SAG 2023, p. 237), the SAOA and the State Attorney's Office Rules of Procedure (hereinafter: SAORP) prescribe the procedure for selecting an attorney to represent Croatia in investment arbitration (arg. *ex* Art. 153, SAORP), as well before foreign courts and bodies (arg. *ex* Art. 154, SAORP). The procedure starts when the notification of the intent to initiate arbitration or a request for arbitration for a BIT violation is received. The SAO publishes a public call on its official website to attorneys and law firms specialising in the relevant type of proceedings to express interest in representing Croatia.[4] The call contains the basic information on the subject matter of the dispute (arg. *ex* Art. 153, para. 1, SAORP). After attorneys and law firms submit their representation strategy, financial offers and their references, a Commission appointed for the selection of attorneys to represent Croatia before foreign courts and international bodies examines the received offers, conducts interviews, if necessary, and draws up an opinion on the choice of attorney, which they then submit to the Croatian State Attorney General. After the Croatian Government has accepted the opinion on the selected attorney, the State Attorney General concludes a representation contract (arg. *ex* Art. 153, para 3-5, SAORP). In urgent cases, the State Attorney General may authorise an expert to perform certain steps in the proceedings, provided he/she regularly reports to the Croatian Government (Art. 43, para. 5, SAOA). The procedure for selecting an attorney in international arbitration proceedings agreed on by Contracting Parties slightly differs. If the Croatian SAO cannot represent Croatian interests, or if it would not be cost-effective to represent Croatia, the Deputy Chief State Attorney requests a proposal or a list of attorneys or law firms that could represent Croatia in the proceedings from the diplomatic mission in the State in question, and sends them a written invitation to express an interest in representation (arg. *ex* Art. 154, para. 2-3, SAORP).

[4] A call was published on 24 June 2024 on the official website of the SAO for expressing interest in representing Croatia in international investment arbitration proceedings before ICSID in the case MOL Hungarian Oil and Gas Public Limited Company c/a Republic of Croatia (ICSID Case No. ARB/24/19; DORH, 2024). State of the case on August 8, 2024 - Following appointment by the Claimant, Oscar M. Garibaldi (Argentinian/US); accepted his appointment as arbitrator.

2.2. Amicable Dispute Resolution Procedure

The international investment arbitration procedure is usually preceded by amicable dispute resolution initiated upon a request from the foreign investor to the Croatian inter-departmental Commission for foreign investors' requests related to disputes arising from Croatia's investment promotion and protection international treaties (hereinafter: the Commission) (Report of the SAG, 2023, p. 237).

In 2018, German investors submitted a request for an amicable settlement of the investment dispute as they has been prevented from exercising their property rights due to the duration of court proceedings, claiming damages in the amount of EUR 168,337,520.00. In 2019, five requests for an amicable dispute settlement were submitted with unknown claim amount. Foreign investors referred to the investment protection agreements Croatia concluded with Bosnia and Herzegovina, Israel, Austria, Germany, and UK. In 2020, three requests for an amicable dispute settlement were submitted with unknown claim amount. These were typically multi-million claim requests. Foreign investors referred to the investment protection agreements Croatia concluded with the United States of America (hereinafter: USA) and Hungary. No requests were submitted in 2021 and 2022, while in 2023, one request was submitted for an amicable dispute resolution with unknown claim amount. The foreign investor referred to the investment protection agreement concluded by Croatia with the Kingdom of the Netherlands. According to the available data on the outcomes of the amicable dispute resolution procedures, in 2021, the State Attorney's Office proposed a settlement with Colgate/McCallum Ltd., based in Novi Sad, Gavin Michael Susman, a resident of Novi Sad, and Proficiom d.d., which was accepted.[5] This ended the dispute resulting from the decisions of the Croatian Privatisation Fund, which had violated the provisions on fair and equitable treatment and expropriated American investors, depriving them of effective judicial protection within the Croatian judicial system (Report of the SAG, 2021, p. 206). According to the SAO, these procedures had a legal dimension, in addition to the political one, which was reflected in the possibility to determine the relevant facts based on assessing the merits of the request and the outcome of arbitration proceedings. They can also be understood as an indication of the need to change the procedures of competent authorities and persons and amend certain legislation (Report of the SAG, 2023, p. 238). In addition, the amicable dispute resolution procedures have a deterring effect in terms of avoiding exceptionally high costs of the international investment arbitration proceedings, which can often reach several million euros (Report of the SAG, 2023, p. 238).

[5] For information on requests for amicable dispute resolution before the initiation of arbitration for foreign investment protection available in the SAO reports from 2018 until 2023, see: DORH, 2024; ICSID, 2024.

2.3. The Outline of the Proceedings

2.3.1. ICSID Proceedings

Since 2018, the proceedings against Croatia presented herein have been conducted before ICSID. The first case was brought by the Dutch company B3 Croatien Courier Cooperativ, also the owner of the Croatian company CityEx, for breaching the BIT concluded with the Kingdom of the Netherlands, resulting in damages amounting to EUR 53,000,000.00. In April 2019, the Tribunal ruled that, despite the violations of their rights, the applicants did not suffer any damage, rejecting their claim for damages. Croatia was ordered to bear the costs of the arbitration proceedings amounting to USD 554,616.31 and EUR 365,607.49. These costs were paid in part in 2019.

The second case was brought by the Dutch company Amlyn holding B.V., claiming damages in the amount of EUR 85,000,000.00, which it had allegedly suffered as a result of a breach of a provision of the Energy Charter Treaty (hereinafter: ECT) (Arts. 10, 13, ECT) consisting of arbitrary changes in the legal framework and favouring other investors. The evidence was obtained in 2018, and all legal actions were taken to prepare for the hearing before the Tribunal, scheduled for May 2019.

On 22 October 2022, the Tribunal delivered its award rejecting the claim for damages amounting to EUR 71.1 million, including 8.34% interest per annum charged from 3 April 2015 until payment. Since the Tribunal found that Croatia had breached one of the four ECT obligations, it ordered payment of 25% of the costs of the proceedings amounting to EUR 1,100,088.78, and ICSID administrative costs amounting to USD 611,937, 42.

The third case was brought by the Dutch company Elitech B.V. and Golf Development Ltd. from Zagreb for damages amounting to EUR 123,000,000.00. The applicants claimed that they had invested significant funds in the development of a golf project in the Dubrovnik area for the purchase of land and the obtained documentation, but over more than ten years, the project was not implemented due to numerous actions by NGOs, populist groups and certain influential politicians, which had created a negative perception of the project and influenced the decision-making of administrative bodies and courts. The applicants claimed they were deprived of their right to the expected profit from the value of the golf project, which represented direct expropriation without any compensation made by Croatia. The hearing was held in October 2021. By order of 23 May 2023, the Tribunal found that Croatia had not violated the provisions of Article 3, paras. 1, 2 and 4 on fair and equitable treatment, and legitimate expectations, and Art. 6 of the Croatia - Netherlands BIT, and that there had been no discriminatory treatment by the competent authorities.

Four arbitration proceedings was instituted by banks for their alleged damages brought about by the adoption of the Act on Amendments to the Consumer Credit Act and the Act on Amendments to the Credit Institutions Act. The borrowers were entitled to have their previously concluded loan agreements with a Swiss Franc foreign exchange clause converted into EUR loans at the exchange rate prevailing at the time of the conclusion of the loan agreement, and the banks were obligated to do so, resulting in new calculations, including the cost of converting the loans, at the detriment of the banks.

Croatia reached agreements regarding the proceedings initiated before ICSID and domestic courts and not yet instituted proceedings with six banks (Unicredit Bank Austria A. G., Zagrebačka banka d.d., Raiffeisen Bank International AG and Raiffeisenbank Austria d.d., Erste Group Bank AG, Steiermärkische Bank und Sparkassen AG and ERSTE & STEIERMÄRKISCHE BANK d.d., OTP Bank Plc, Intesa Sanpaolo S.p.A., Zagreb d. commercial Bank and Sberbank Europe AG and Sberbank d. d. Zagreb). In the arbitration proceedings brought by Unicredit Bank Austria A. G., Zagrebačka Bank d., Raiffeisen Bank International AG and Raiffeisenbank Austria d. d., Erste Group Bank AG, Steiermärkische Bank und Sparkassen AG and ERSTE & STEIERMÄRKISCHE BANK d. d., OTP Bank Plc, the parties agreed to suspend the proceedings, after which the arbitration proceedings and any future disputes were terminated.

No agreement was reached with Addiko Bank AG, Addiko Bank d.d., and Societe General S.A. The applicants Addiko Bank AG and Addiko Bank d.d., Austrian investors, initiated arbitration proceedings against Croatia before ICSID for damages amounting to EUR 201,100,000.00. The claim was subsequently reduced to EUR 163,500,000.00. The hearing was held in March 2021. The French investor Societe General S.A. initiated arbitration proceedings before ICSID for damages amounting to EUR 37,000,000.00. The written phase of the proceedings was completed in 2023. In June 2024, the Tribunal held a hearing on jurisdiction and the merits.

In the eighth arbitration case in mid-2018, George Gavrilovic and Gavrilovic d.o.o. succeeded in their action for damages amounting to EUR 198,500,000.00, and the Tribunal established that Croatia had violated the Croatia - Austria BIT. Gavrilovic d.o.o. was awarded damages in the amount of HRK 9,699,463.73 and EUR 1,658,460.49, and the costs in the amount of EUR 2,593,642.36 and USD 285,288.28, including interest. In the remainder, the claim was rejected, whereby Croatia's success in the dispute was 98.5%, while the success of Gavrilovic d.o.o. was only 1.5% of the damages claimed.

Marko Mihaljevic, a German investor, registered the ninth arbitration proceedings against Croatia before ICSID on 31 December 2019 for damages amounting to 200 million euros. In his application, he claimed that his father, Srecko

Mihaljevic, had made an investment in Croatia by purchasing real estate in July 1993 from a company owned by Gortan Construction (Gortan) for approximately EUR 1 million and later gifted it to his son, the applicant Marko Mihaljevic. According to his claims, the authorities' actions had deprived the applicant of his property rights. Croatia submitted a preliminary objection in accordance with ICSID rule 41/5, which was rejected. On 19 May 2023, the Tribunal issued its award in which it fully accepted the objection of lack of competence raised by Croatia, and awarded the costs of the proceedings to Croatia in the amount of USD 1,974,516.27, with interest charged from the date of the award until payment. Namely, the SAO had objected to the application registration before ICSID, arguing that Marko Mihaljevic was a national of both Croatia and Germany. As a dual national with nationality of the State against which the arbitration proceedings were initiated, the applicant did not enjoy the right to protection under the Convention on the settlement of investment disputes between States and nationals of other States of 1965 (hereinafter: the ICSID Convention). However, this objection was ignored, and ICSID registered the application. The Tribunal ruled that the jurisdiction prerequisite had not been met as the applicant was a dual national of Croatia and Germany at the application registration date, which excluded the jurisdiction of ICSID under Article 25 (2)(a) of the ICSID Convention. One of the arbitrators in the proceedings issued a supportive opinion stating that the application had to be dismissed, not only for the reasons stated in the ruling but also due to the violation of the proceedings, which SAO had pointed out when registering the application and subsequently during the proceedings.

The eleventh request for arbitration before ICSID was registered on 2 March 2020. The applicants were Adria Group B. V. and Adria Group holding B. V., Netherlands, which claimed that by adopting the Act on extraordinary administration procedure in companies of systemic importance to Croatia in 2017, Croatia had violated the Croatia - Netherlands BIT, and request compensation amounting to several billion EUR. Croatia requested a separate ruling on jurisdiction before discussing the case's merits, to which the Tribunal agreed. Croatia challenged the jurisdiction of the Tribunal, pointing out that the arbitration proceedings had been initiated based on the Croatia - Netherlands BIT, which was subsequently terminated by the Agreement on Termination of Bilateral Investment Treaties between the Member States of the European Union. On 30 October 2023, the Tribunal rejected the Croatian objection to the lack of jurisdiction. However, Croatia still had the possibility to raise issues concerning the jurisdiction or admissibility of the action. By the Tribunal's procedural order, the applicants were to submit a claim in July 2024.

In 2020, the twelfth arbitration case was initiated with the registration of the request by the applicant Ahron Frankel before ICSID. The proceedings was based

on the Croatia - Israel BIT for damages amounting to EUR 100,000,000.00. The applicant claimed he had been deprived of the right to the expected profit from the value of his investment in the golf project, which represented direct expropriation without any compensation made by Croatia. Although significant funds had been invested in developing this project, it was not implemented for over ten years, as the administrative authorities and courts did not approve it due to the alleged activities of numerous NGOs, populist groups, and politicians. Croatia requested bifurcation and the Tribunal decided to stay the proceedings pending the decision in *Elitech B.V. and Golf Development Ltd. v Croatia*, given the interconnectedness of the case. The proceedings were continued after the decision was rendered in the *Elitech B.V. and Golf Development Ltd. v Croatia* case.

2.3.2. Proceedings Under UNCITRAL Rules

Under the UNCITRAL rules, a Canadian national, Haakon Korsgaard, initiated arbitration proceedings against Croatia for damages amounting to EUR 200,000,000.00 for an alleged violation of Art. 12, para. 4 of the Croatia - Canada BIT. The applicant argued that he was prevented from acquiring property rights on real estate in Croatia that had previously been public property with the right of use by public enterprises from the Republic of Serbia, according to the State of ownership on 8 October 1991. The applicant's investment in Croatia was disputed, and it was pointed out that property rights could not be acquired directly under the Succession Agreement, Annex G. Furthermore, the objection was raised that the arbitration clause did not cover succession issues. On 7 November 2022, the Tribunal dismissed the claim in its entirety and awarded the costs of the proceedings to Croatia, having taken the view that Annex G. could not be applied. Instead, an agreement had to be concluded under which issues concerning the property rights relations between Croatia and the Republic of Serbia needed to be resolved, including war damages.

In February 2020, Raiffeisenbank International AG and Raiffeisenbank Austria d. d. submitted a request for arbitration for a violation of the Austria - Croatia BIT in accordance with the UNCITRAL arbitration rules. In the request for arbitration, Frankfurt, Germany, was selected as the seat of the Tribunal, which the SAO accepted because it was able to bring an action before the competent German court to establish that the arbitration proceedings were inadmissible (on the grounds that the arbitration clause contained in the Austria – Croatia BIT was invalid).

The applicants pointed out that by having adopted the Act on extraordinary administration procedure in companies of systemic importance for Croatia in 2017, Croatia had violated the Austria – Croatia BIT and claimed damages in the amount of

EUR 26 million. On 11 February 2021, the Croatian request was accepted, and the arbitration proceedings was declared inadmissible on the grounds that the arbitration clause was invalid (*Achmea* case). On 30 November 2021, the German Federal Court of Appeal (Bundesgerichtshof, hereinafter: BGH) dismissed the banks' appeal. This decision is a precedent and a great success for Croatia in international arbitration proceedings.

In October 2022, MOL Hungarian oil and gas Plc. (MOL) initiated *ad hoc* arbitration proceedings against Croatia on its own behalf and on behalf of INA-oil industry d.d. (INA), claiming that Croatia had violated the provisions of a series of mutual agreements. This request was part of a dispute brought by MOL before ICSID in the ARB/13/32 case, where the Tribunal, in its ruling of 5 July 2022, declared that it did not have jurisdiction, having taken the view that the dispute was not an investment dispute. The applicant sought damages for violations of provisions of the GMA, FAGMA, SHA and FASHA suffered by INA and MOL amounting to approximately EUR 34,000,000.00 and EUR 89,000,000.00 for compensation of procedural costs and the corresponding interest. In June 2023, MOL submitted the claim, and in October of that same year, Croatia submitted its response.

3. Feature Analysis

3.1. Costs of Proceedings

From 2018 to 2023, the costs of conducting international arbitration and proceedings before foreign courts and bodies gradually had decreased, from the initial 70 to 80% of the total annual allocation for SAO operations to 52.7% in 2023. As the cost data are presented in summary form including both international arbitration proceedings and proceedings before foreign courts and other bodies, this does not allow for reliable conclusions on the reasons for the significant cost reduction regarding the proportion of costs that relate to international arbitration. One possible reason could be the number of proceedings, which has decreased by one-half since 2021. In addition, the success of amicable dispute settlement in that period, especially the settlements with the six banks in the proceedings initiated for the alleged damages caused by the adoption of the Act on amendments to Consumer Credit Act and the Act on Amendments to Credit Institutions Act have contributed significantly to the reduced number of arbitration proceedings. Furthermore, a certain contribution should be attributed to the fact that the SAO has been participating in international arbitration proceedings for some time now, and the knowledge and experience it has acquired over time has significantly influenced Croatia's success in the disputes.

Table 1. The costs of conducting international arbitration proceedings and proceedings before foreign courts and other bodies (available in 2018-2023 SAO reports)

Year	State Attorney's Office budget	Cost of arbitration/ procedures before foreign courts and other bodies	Percentage
2018	60,717,444.00	42,476,500.00	70 %
2019	103,176,931.00	82,759,000.00	80.21%
2020	Data not available		
2021	65,790,615.00	44,102,000.00	67 %
2022	50,462,718.00	28,294,085.00	56 %
2023	52,696,799.10	27,747,153.90	52.7 %

Despite the decreasing trend, the costs of conducting international arbitration are still considerable. Although this includes, according to the reports, administrative costs of the arbitration tribunal, arbitrator's fees, foreign attorneys' fees, experts' fees and expenses (according to ICSID rules, applicable law is a fact to be proved), the cost of translation of extensive documents, the costs of witnesses, and travel and accommodation during the hearings, the cost breakdown is not available. Therefore, it is impossible to assess which aspect of the proceedings has the highest share in these costs. The reports indicate the Tribunal's operating costs as problematic, but despite efforts to reduce them, the overall costs of arbitration proceedings have been on the rise in recent period, ignoring, as the critics point out, "precedential concerns, equality of arms, settlement efforts, and public interest" and potentially limiting *access to justice* (Behn, Langford & Létourneau-Tremblay, 2020, p. 205). Allocating the costs of the proceedings is also a significant issue. Critics point out that applying the loser-pays rule is more likely to benefit investors than it is to ensure the success of the states.[6] Concerning the cases analysed in this paper, in the observed period, there seems to be several cases where, despite the preliminary objection of the lack of competence, the application went on to be registered before the ICSID, only for the Tribunal to decide in the course of the proceedings that it did not have jurisdiction in the case. Such practice puts states in a position where they are forced to conduct international arbitration proceedings, which is extremely cost and resource intensive, but ultimately does not result in obtaining redress for the parties. Moreover, it could be argued that the initiated proceedings merely justify the work of the Tribunal appointed to preside over the case in the period leading to the decision on the lack of jurisdiction.

[6] Franck's most recent study indicates a certain inequality when the loser-pays rule is applied, namely that it is primarily for the benefit of winning investors rather than for the winning states. (Behn, Langford & Létourneau-Tremblay, 2020, p. 205).

3.2. Legal Certainty

It appears that in international investment arbitration proceedings ensuring legal certainty is more challenging than in court proceedings.

In principle, a more flexible and less formal approach is highlighted as an advantage of international investment arbitration proceedings. This concerns, in particular, the diversity in the composition of tribunals, election and appointment of arbitrators, the nature of investment law, and the manner of deciding on the merits. However, according to surveys, these characteristics could also be possible reasons for greater dispute resolution disparities and even decision-making disparities (for example, regarding decisions on jurisdiction) (IBA Report, 2018, p. 13). Since issues decided in international investment arbitration proceedings are of public interest, the identified weaknesses should be considered more carefully.

The analysis of the observed cases reveals discrepancies in decision-making regarding certain questions whilst resolving preliminary issues compared to deciding those same questions whilst resolving the merits. However, a more detailed analysis comparing decisions to explore possible impacts of the different arbitration panel composition or the circumstances of the selection of arbitrators by the parties to the proceedings is not possible. However, one can suggest a link between the nature of investment law, whose broad concepts allow it to be adapted to different situations, and the procedural framework, often much more flexible in comparison to judicial proceedings, and the discrepancies in decision-making in individual disputes (IBA Report, 2018, p. 13).

Parallel proceedings are among the factors undermining economy, efficiency, and legal certainty in international investment arbitration proceedings. This concerns primarily the simultaneous proceedings before courts and arbitration tribunals, but in many cases different tribunals as well (ICSID and UNCITRAL). A possible solution is to stay the pending proceedings until the conflict of jurisdiction issue is resolved. However, the practitioners consider this solution problematic, arguing that it is applicable only if it is necessary to ensure equality, the right to be heard, and prevent unreasonable delays, and if the outcome of the parallel proceedings is 'material' to the outcome of the arbitration (IBA Report, 2018, p. 21).

The occurrence of parallel proceedings is problematic in the context of the outcomes of such proceedings. The existence of two awards on damages in the same legal matter raises the issue of the recognition and enforcement of awards and the reimbursement of costs of proceedings. In such cases, the *res iudicata* objection is limited to successive but not simultaneous proceedings. At the same time, the *lis pendens* objection can be raised only in proceedings where there is an identity of the parties, the subject matter of the dispute and the submitted claim. Another

problem discussed alongside the issue of parallel proceedings is the possibility of their consolidation to achieve uniform outcomes. Consolidation as a mechanism to increase the likelihood of consistent awards has been included on ICSID's agenda to amend its arbitration rules (IBA Report, 2018, p. 21).

In the meantime, the suitability of *de facto* consolidation, achieved by bringing both the proceedings before the same arbitration panel, should also be explored. The applicability of this solution, however, would depend on the parties' willingness to bring the proceedings before an arbitration panel of the same composition. As such, it would be of limited effect. Additionally, it could raise an objection that arbitrators would be inclined to take decisions that, by their content and effect, would suit the parties' expectations concerning *de facto* consolidation.

3.3. Duration of Proceedings

The duration of proceedings, which significantly impacts the effectiveness of dispute resolution in international arbitration proceedings, is discussed increasingly in legal literature. According to the surveys, international arbitration proceedings lasted an average of 3.73 years until 2018, with a tendency of increased duration in recent years. Some theorists attribute this increase to the greater complexity of the cases and a larger set of actors involved in dispute resolution (Behn, Langford & Létourneau-Tremblay, 2020, p. 209). However, factors such as stages of proceedings, rules contributing to procedural flexibility, time limits, penalties, and the unavailability of arbitrators and lawyers representing the parties to the dispute also need to be considered. In this context, the duration of the period between the conclusion of the hearing before the arbitration panel and the delivery of the award appears to be particularly problematic. The legal literature points out that users and observers in investment arbitration are concerned that the costs associated with arbitration undermine the efficient resolution of investment disputes (IBA Report, 2018, p. 50). The available data on the observed international investment arbitration proceedings from 2018 until today, in which Croatia is a party, suggest that it took several years (approx. 5 to 7 years) until the award was made. Although not offering a large sample, the comparison with the duration and success of the amicable dispute settlement procedures can nevertheless inform certain conclusions. According to the available data for the period 2018 to 2023, ten amicable dispute resolution procedures were initiated. One settlement was concluded in 2021, but there is no information on the duration of the period from initiating and examining the request until proposing that the settlement be concluded to the Croatian Government. The comparison of the 5 year period (2016 to 2021) it took from the initiation of several international investment arbitration proceedings by the banks

and agreeing to the settlements to the duration of the two still ongoing international investment arbitration proceedings initiated by Addiko Bank AG and Addiko Bank d.d. and Societe General S.A. is also relevant in this context.

3.4. Selection of Arbitrators

As the data analysis suggests, the selection of arbitrators is an important element both in terms quality and outcome and in terms of the duration of the international investment arbitration proceedings. Theorists thus take that the reason behind the long-time parties may take in appointing arbitrators is that 'the selection of the party-appointed arbitrator may be the most critical decision in an international arbitral proceeding'. Indeed, it is often said to be the reason for parties to prefer arbitration over litigation (IBA Report, 2018, p. 39). Having the autonomy to appoint an arbitrator to the panel remains a central appeal of the investment treaty arbitration system to many of its users (IBA Report, 2018, p. 41). However, while the choice and appointment of arbitrators is clearly a determining feature of arbitration, awareness of possible problems connected to it is increasing. Some commentators have suggested that a party-appointed arbitrator may feel the need to pay specific regard to the facts or arguments presented by the party appointing him or her, even – controversially – going so far as to actively promote the appointing party's interests in tribunal deliberations (IBA Report, 2018, p. 40).

Greater transparency in the appointment of arbitrators could be a potential remedy to at least some of the above objections. This can be understood as a request for more attention to the requirement of increased transparency in institutional decision-making on the appointment and challenges to arbitrators, as well as consideration of arbitrator performance in making arbitral appointments (IBA Report, 2018, p. 53). However, it should be kept in mind that this goes directly against the idea of arbitration proceedings as proceedings where the parties are guaranteed confidentiality of proceedings and flexibility, including greater autonomy in deciding on the composition of the arbitration panel.

Among the solutions that would contribute to the objectivity of the proceedings, cost-effectiveness and thus efficiency, some authors suggest the appointment of a single arbitrator for less complex proceedings. So far, this has not been the case in international investment arbitration proceedings in which Croatia is a party to the proceedings. In order to consider this solution, the number of less complex proceedings in international investment arbitration proceedings should be estimated. Furthermore, this does not resolve the open issues related to complex proceedings. It only relieves a certain (smaller) number of proceedings of the objections concerning the manner and lengthy duration of the selection of the arbitration panel.

In addition, will the parties be motivated to entrust the dispute resolution to a single arbitrator, or will they consider that, given the other characteristics of the arbitration, it is more adequate to refer the matter to the court? Since the complexity of the proceedings is not always easy to assess, and it might even contribute to prolonging the procedure, it is necessary to allow for the possibility of subsequent appointment of an arbitration panel if the proceedings prove to be more complex than the initial assessment.

3.5. Duration of Specific Stages in the Proceedings

Often, criticism of the duration of specific stages in the proceedings concerns the resolution of unfounded applications. In many court systems, a meritless claim, which is either legally, factually or jurisdictionally deficient, can be dismissed long before trial. In international arbitration, however, the claimant is often permitted to request documents from the other side, submit witness statements, submit expert reports and conduct a full hearing on all issues. After these numerous steps, a tribunal may rule that the claim was meritless. Such a ruling could often come earlier in the proceedings, eliminating the need for extensive factual development and the time and expense necessary to provide expert testimonies and argue at hearings (IBA Report, 2018, p. 41).

In certain proceedings, the parties object to the Tribunal's jurisdiction by referring to the ICSID 41/5 rule. Croatia referred to the ICSID 41/5 rule in Marko Mihaljevic's case against Croatia. After its objection was rejected, Croatia disputed jurisdiction and succeeded in 2023, after having participated in a five-year long proceedings. However, there is growing criticism as to its efficiency.[7] Rule 41(5) objections that are overruled may cause the arbitration proceedings last longer and be more costly because they must be argued and ruled upon before the discussion on the merits. The 'manifestly without legal merit' standard requires the 'respondent to establish its objection clearly and obviously, with relative ease. The standard is thus set high'. 'Manifest' implies that it is not necessary to engage in elaborate analysis. Accordingly, objections involving complex legal issues are outside the scope of Rule 41(5). This high bar protects the due process of claimants. However, it impedes efforts to increase efficiency in international investment arbitration proceedings (IBA Report, 2018, p. 43).

As regards the possibility of concluding a settlement in the amicable dispute resolution procedure preceding the international investment arbitration proceedings or during the arbitration proceedings, according to surveys, until 2014, out

[7] In *Global Trading v Ukraine*, ten months passed from filing the objection until the award date (IBA Report, 2018, p. 43).

of the 400-plus ICSID cases filed, only nine cases (approximately two per cent) included conciliation. Moreover, while most BITs have a so-called cooling-off period built in to enable the parties to negotiate amicably at the outset of the dispute, no guidelines or international norms suggest how the parties could use this period productively (IBA Report, 2018, p. 45).

Furthermore, while arbitration rules allow for a settlement or consent awards, they do not assist the parties in re-evaluating and actively exploring additional dispute resolution mechanisms. If they propose negotiation or consultation, the parties may need guidance and education to overcome concerns about conveying a perception of weakness. Additionally, parties may not utilise cooling-off periods effectively. They may even waste them by 'turning the temperature up, not down, and concentrating on arbitration, not settlement' (IBA Report, 2018, p. 45).

From the states' perspective, governments often hesitate to use mediation in international investment cases, apparently due to transparency and personal liability concerns (IBA report 2018, p. 45). Furthermore, the host state may be weary of negotiating a settlement because any such settlement 'may be challenged by political opponents and the media as 'selling out to foreigners', weakness, or the product of corruption'. Some authors have even asserted that ADR mechanisms can potentially destroy state sovereignty because they do not constitute a resolution of the dispute pursuant to law (IBA Report, 2018, p. 45). A case in which Croatia was a party is an example of the opposite position of the State. As expected, the settlements concluded with the six banks were met with disapproval and criticism accompanied by doubts whether it was opportune to conclude such agreements with the banks in the light of the protection of the public interest.[8] Although bifurcation in cases of high factual and legal complexity has been highlighted as a solution promoting procedural economy and efficiency of conduct, recent analyses of international arbitration proceedings indicate a possible weakness of this position. Bifurcation is the separation of the procedure into the stage of examination of the question referred for a preliminary ruling relating to jurisdiction, admissibility of the application, the application of the applicable law or the authenticity of the documents, and the stage of discussion and decision on the substance. It is considered that this ensures timely resolution of the issues determined to proceed as the weak cases can be dismissed at the jurisdictional stage without the need to deal with the entire consideration of the merits (Behn, Langford & Létourneau-Tremblay, 2020, p. 212).

In the observed procedures to which Croatia is a party, a bifurcation request was raised in several cases (case *Raiffeisen Bank International AG and Raiffeisen Bank Austria d.d., v. Croatia* from 2018 in which a settlement was subsequently concluded between the parties, case *Erste Group Bank AG, Steiermaerkische Bank und*

[8] For the reports on the concluded settlement, see: INDEX.HR, 2023; NACIONAL.HR, 2023).

Sparkasse AG and Erste & Steiermaerkische v. Croatia in which the proceedings are still pending, and a case from 2020 by Prosecutor Ahron G. Frankel before ICSID, in which an application for bifurcation was filed in 2022, and the court ruled on the stay pending the conclusion of the proceedings in *Elitech B.V. and golf Development Ltd. v RH,* resuming the proceedings after its conclusion).

However, according to the research, in addition to the previously analysed impact of the duration of the selection of arbitrators and their potential subsequent recall (arbitrator challenges and arbitrator replacement), bifurcation can affect mostly the length of or delays in the proceedings.[9] When a tribunal bifurcates proceedings and 'at the end of the jurisdictional stage decides it does have jurisdiction, the result is usually a very long case', and bifurcation can be very time and cost intensive if the case ends up with pleadings in every stage (IBA Report, 2018, p. 52). Therefore, more recent interpretations suggest that the possibility of bifurcation should even be completely disregarded.

4. Conclusion

Providing legal protection in international investment disputes is among the more challenging tasks, as it requires careful balancing between protecting private investor interests and the public interest in the State of investment. Entrusting this task to *ad hoc* arbitration tribunals, which adjudicate based on a specific body of investment law, and its open concepts, has been under increasing criticism. The justification can be found in the nature of the Tribunal, composed based on the parties' decision. It is criticised that the impermanence and the disparities in the composition of the Tribunal and inconsistencies in the appointment of arbitrators allow for different interpretations of the broad concepts of investment law and, thus, for disparate awards. This brings into question the level of protection afforded in relation to an individual dispute and legal certainty. Certain characteristics of arbitration, including the way arbitrator is selected, i.e., the lack of transparency and scrutiny of the process, raise objections to the length and costs of proceedings and arbitrariness in decision-making. The example of the proceedings in which Croatia was a party suggests that despite certain advances brought by more extensive experience in participation in international investment arbitration proceedings, the costs associated with the proceedings, regardless of the success rate, are still too high. Their reduction in the observed period is partly due to Croatia's approach to the possibility of concluding settlements in several

[9] However, in 2011, Greenwood questioned whether bifurcation might cause the problem rather than be the solution. (Behn, Langford & Létourneau-Tremblay, 2020, p. 209).

proceedings. However, this practice is often subject to serious criticism, and states as parties to the proceedings do not resort sufficiently to it in international investment arbitration proceedings. The voiced criticism allows for a conclusion that the characteristics that distinguish arbitration from court proceedings are, at the same time, its greatest shortcomings. On the trail of this reflection, there is increasing advocacy for establishing a special court for international investment disputes, resulting in initial preparatory steps and the opening of negotiations for its establishment in 2018. Additional support in this regard is provided in the *Achmea* case, which called into question proceedings before *ad hoc* arbitration tribunals in the light of the application of EU law. However, setting up such a court requires a strong willingness on the side of the EU and Member States and significant organisational efforts and resources. Although it is impossible to concur with its success, considering the quality concerns regarding investment arbitration, it is a path worth exploring in the coming period.

References

Babić, P. 2012. Pravičan i pošten tretman ulaganja u međunarodnom investicijskom pravu. In: Sikirić, H. *et al.* (eds.), *Liber amicorum Krešimir Sajko*. Zagreb: Sveučilište u Zagrebu, pp. 375-395.

Behn, D., Langford, M. & Létourneau-Tremblay, L. 2020. Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter? *Journal of World Investment & Trade,* 21(2-3), pp. 188-250. https://doi.org/10.1163/22119000-12340172

Borovikov, E., Evtimov, B. & Crevon-Tarassova, A. 2016. European Union. In: Carter, J. J. (ed.), *The International Arbitration Review.* London : Law Business Research , pp. 186-195.

Dika, M. 2016. Marginalije uz nagoviještene pravce reforme Hrvatskog arbitražnog prava. In: Varadi, T. *et al.* (eds.), *Liber Amicorum Gašo Knežević.* Univerzitet u Beogradu - Pravni fakultet, Udruženje za arbitražno pravo, pp. 372-408.

International Bar Association. 2018. *Subcommittee on Investment Treaty Arbitration, Consistency, Efficiency and Transparency in Investment Treaty Arbitration Report* (IBA Report, 2018).

Marošević, K. & Romić, J. 2011. Strana izravna ulaganja u funkciji razvitka Vukovarsko-srijemske županije. *Ekonomski vjesnik,* XXIV(1), pp. 155-169.

Meijer Dusman, F. 2012. Responsibility of State for Acts of Local Authorities which Constitute Breaches of Bilateral Investment Treaties. *Croatian Arbitration Yearbook*, 19, pp. 167-182.

Muhvić, D. 2016. Fair and Equitable Treatment Standard in Investment Treaties and General International Law. In: Primorac, Ž. *et al.* (eds.), *Economic and Social Development (Book of Proceedings), 16th International Scientific Conference on Economic and Social Development – "Legal Challenges of Modern World".* Varaždin, Split, Koprivnica, pp. 33-42.

Pečarić, M., Jakovac, P. & Miličić, M. 2020. Utjecaj priljeva stranog kapitala na ekonomski rast zemlje primateljice: Hrvatska u krilu bogova? In: Tomljenović, M. (ed.), *Suvremeni izazovi EU, Republike Hrvatske i zemalja Zapadnog Balkana*. Rijeka: Sveučilište u Rijeci, Ekonomski fakultet, pp. 133-150.

Petrović, S. & Ceronja, P. 2012. Croatia. In: Shan, W. (ed), *The Legal Protection of Foreign Investment-A Comparative Study*, Hart Publishing, pp. 287-312.

Sajko, K. 2009. *Međunarodno privatno pravo*. Zagreb: Narodne novine.

Sornarajah, M. 1999. *The international law of foreign investment*. Cambridge University Press.

Uzelac, A. & Nagy, T. 2011. Croatia. In: Liebscher, C. & Fremuth-Wolf, A. (eds.), *Arbitration Law and Practice in Central and Eastern Europe*. JurisNet, pp. 165-278.

Župan, M. & Čuljak, A. M. 2019. Investment Arbitration in Croatia. In: Nagy, I. C. (ed.) *Investment Arbitration in Central and Eastern Europe: Law and Practice*. Edward Elgar Publishing, pp. 68-94. https://doi.org/10.4337/9781788115179.00012

Vuković, Đ. & Kunštek, E. 2005. *Međunarodno građansko postupovno pravo*. Zagreb: Zgombić i Partneri.

Legal sources

Companies Act, 1993. *Official Gazette*, no. 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15, 40/19, 34/22, 114/22, 18/23, 130/23.

Arbitration Act, 2001. *Official Gazette*, no. 88/01.

Constitution of Republic of Croatia, 1990. *Official Gazette*, no. 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 (ICSID Convention).

Report of the State Attorney General of the Republic of Croatia on the work of the State Attorney's Offices in 2023 (Report of the SAG, 2023), Zagreb, 2024.

Report of the State Attorney General of the Republic of Croatia on the work of the State Attorney's Offices in 2021 (Report of the SAG, 2021), Zagreb, 2022.

State Attorney's Office Act of the Republic of Croatia (SAOA).

State Attorney's Office Rules of Procedure of the Republic of Croatia (SAORP).

Case Law

Adria Beteiligung v. The Republic of Croatia, UNCITRAL.

Case C-284/16 *Slowakische Republik (Slovak Republic) v. Achmea BV*, Court of Justice of the European Union of 6 March 2018, ECLI:EU:C:2018:158.

ICC (International Chamber of Commerce), *Tvornica Šećera v. Serbia*.

ICSID, *HEP v. Slovenia,* ICSID Case No. ARB/05/24.

ICSID, V*an Riet v. Croatia,* Case No. ARB/13/12.

ICSID, *Elitech B.V. and Golf Development Ltd. v Croatia*, Case No. ARB/17/32.
ICSID, *Erste Group Bank AG, Steiermaerkische Bank und Sparkasse AG and Erste & Steiermaerkische v. Croatia,* Case No. ARB/17/49.
ICSID, *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia (I),* Case No: ARB/13/32.
ICSID, *MOL Hungarian Oil and Gas Public Limited Company v. Republic of Croatia*, Case No. ARB/24/19.
ICSID, *Raiffeisen Bank International AG and Raiffeisen Bank Austria d.d., v. Croatia,* Case No. ARB/17/34.
Pren Nreka v. Czech Republic, UNCITRAL.
Ulemek v. Croatia, Application no. 21613/16.

Internet Sources

Croatian Ministry of Economy. 2024. Available at: https://investcroatia.gov.hr/o-hrvatskoj-2/, 4. 9. 2024.
DORH. 2024. *State Attorney's Office of the Republic of Croatia*. Available at: https://dorh.hr/en, 25. 11. 2024.
ICSID. 2024. Cases Databases. Available at: https://icsid.worldbank.org/cases/case-database, 25. 11. 2024.
INDEX.HR. 2023. Available at: https://www.index.hr/vijesti/clanak/udruga-franak-ako-je-nagodba-s-bankama-korisna-zasto-je-onda-vlada-ne-objavi/2427768.aspx, 25. 11. 2024.
Ministry of Finance. 2024. Available at: https://www.porezna-uprava.hr/bi/Stranice/Dvostruko-oporezivanje.aspx, 4. 9. 2024.
NACIONAL.HR. 2023. Available at: https://www.nacional.hr/tajni-dokument-otkriva-kako-su-plenkovic-i-maric-stali-na-stranu-banaka-u-slucaju-franak/#google_vignette, 25. 11. 2024.
UNCTAD. 2024. Available at: https://investmentpolicy.unctad.org/international-investment-agreements/countries/51/croatia, 4. 9. 2024.
World Bank Group. 2024. Available at: https://data.worldbank.org/?locations=HR-XT, 4. 9. 2024.

Tsvetelina Dimitrova*

Review Scientific Paper
UDC: 347.918(497.2)
doi: https://doi.org/10.56461/SPZ_24413KJ
Received: 7. 1. 2025.
Accepted: 13. 1. 2025.

CLARIFYING ARBITRATION AGREEMENTS' VALIDITY, BUT CONFUSING ENFORCEMENT: BULGARIA'S ARBITRAL TANGO

Summary

This paper deals with recent developments in Bulgarian arbitration world, focusing on the Supreme Court of Cassation's Interpretative Ruling No, 1 of 21 February 2024, which has finally clarified two key issues: that the assignee is bound by the arbitration agreement concluded between the assignor and the debtor, and that no explicit power of attorney is required under Bulgarian law for concluding arbitration agreements. Despite this advancement, the paper highlights the ongoing uncertainty surrounding the recognition and enforcement of foreign arbitral awards, specifically regarding the formal requirements for the documents to be supplied to the Bulgarian courts. The core issue the Bulgarian courts are debating is whether the requirement in the domestic legislation for providing the court with arbitral award with notarisation of the signatures and the capacity of the arbitrators, along with a certificate that the award has entered into force, are applicable in the process of recognition and enforcement of foreign arbitral awards.

Keywords: arbitration, Bulgaria, assignment, recognition and enforcement of foreign arbitral awards.

* PhD, Senior Assistant Professor at Sofia University, Faculty of Law, Department of International Law and International Relations; Partner at Georgiev, Todorov & Co Law Offices; Arbitrator in the List of Arbitrators of the International Arbitration Court at the Aassociation "Institute of Private International Law" – Sofia, Bulgaria.
E-mail: *cvetelina.dimitrowa@gmail.com*
ORCID: *https://orcid.org/0000-0001-7186-9967*

VALIDNOST ARBITRAŽNIH SPORAZUMA I PROBLEMI U NJIHOVOM SPROVOĐENJU: BUGARSKI ARBITRAŽNI TANGO

Sažetak

Predmet ovog rada tiče se nedavnih dešavanja u bugarskom arbitražnom svetu, sa fokusom na interpretativnu presudu Vrhovnog kasacionog suda br. 1 od 21 februara 2024, kojom su konačno razjašnjena dva ključna pitanja: da je primalac obavezan sporazumom o arbitraži zaključenim između prenosioca i dužnika, i da prema bugarskom nije potrebno specijalno punomoćje zakonu za zaključivanje sporazuma o arbitraži. Uprkos ovom napretku, Rad naglašava postojeću neizvesnost oko priznavanja i izvršenja stranih arbitražnih odluka, posebno u vezi sa formalnim uslovima za dokumente koji se dostavljaju bugarskim sudovima. Osnovno pitanje koje bugarski sudovi raspravljaju je da li se uslov za priznanje i izvršenje stranih arbitražnih odluka ogleda u podnošenju sudu arbitražne odluke sa overom potpisa arbitara, te sa potvrdom da je odluka stupila na snagu.

Ključne reči: arbitraža, Bugarska, dodelavanje, priznavanje i izvršenje stranih arbitražnih odluka.

1. Introduction

On the national level, arbitration in Bulgaria is governed by the International Commercial Arbitration Act (Bulgarian International Commercial Arbitration Act, hereinafter: ICAA), which provides the principal legislative framework for both domestic and international arbitration proceedings in the country. The ICCA is based on the UNCITRAL Model Law on International Commercial Arbitration (1985), but it does not incorporate the 2006 amendments (see: United Nations, 2006). The ICAA was enacted and promulgated in the State Gazette No. 60 on 5 August 1988. Since its adoption, the ICAA has been amended only seven times, with the most recent amendment in 2017, reflecting its relatively stable legislative framework over the years.

The 2017 revision introduced significant changes to the ICAA, addressing both procedural and substantive aspects of arbitration. One of the key changes involved additional eligibility criteria for arbitrators. Specifically, Article 11, paragraph 3 of the

ICAA now requires that an arbitrator be a competent adult citizen who has not been convicted of an intentional crime of a general nature, who holds a higher education degree, has at least eight years of professional experience, and demonstrates high moral character (see. Art. 11, para. 3, ICAA). These criteria were introduced to ensure higher standards of professionalism and integrity among arbitrators.

In addition to setting stricter standards for arbitrators, the 2017 amendments also removed the public policy violation ground for annulment of arbitral awards by the Supreme Court of Cassation. The legislature justified this by reasoning that annulment proceedings take place in the State where the arbitration is seated. Therefore, it would be inconsistent to claim that an arbitral award violates the public policy of the same state, as doing so would undermine the credibility of the Bulgarian arbitration. This particular change, however, was met with substantial criticism by Bulgarian professionals and academics, who questioned its implications for safeguarding public interest and legal certainty.

Another significant amendment in 2017 dealt with the validity of arbitration awards. The revision stipulated that arbitration awards issued in disputes over matters not subject to arbitration would be deemed null and void. This amendment shall be read in conjunction with the amendment of Article 19 of the Bulgarian Civil Procedure Code), which now includes consumer disputes in the list of non-arbitrable disputes (see: Art. 19, Bulgarian Civil Procedure Code, hereinafter: CPC). Consequently, the number of arbitration cases in the country has decreased, as consumer disputes had constituted a substantial portion of arbitration caseloads.

Despite this decline, arbitration has remained a relatively popular dispute resolution mechanism in Bulgaria, particularly for commercial disputes. The number of cases for annulment of arbitral awards could serve as an indication for the amount of arbitration proceedings in Bulgaria. According to one Bulgarian legal information system – Ciela, the number of such cases in 2024 is 139; in 2023 – 127, in 2022 – 120, and in 2021 – 138 (Ciela, 2024). Currently, there are approximately 40 active arbitration institutions operating in the country. The most prominent include the Arbitration Court at the Bulgarian Chamber of Commerce and Industry, which reportedly handles around 500 cases annually (see: Bulgarian Chamber of Commerce and Industry, 2024) the Arbitration Court at the Bulgarian Industrial Chamber; the Arbitration Court at the Association "Institute of Private International Law", etc.

These developments in Bulgarian arbitration law provide a broader context for analysing recent judicial interpretations and rulings. While legislative amendments, such as those in 2017, have sought to refine the framework for arbitration, judicial decisions have played an equally critical role in clarifying contentious issues and ensuring the system's adaptability. As will be discussed below, the Bulgarian

Supreme Court of Cassation (hereinafter: SCC) has addressed key issues concerning the validity and enforcement of arbitration agreements and awards, further shaping the arbitration landscape in Bulgaria.

The realities of the Bulgarian arbitration landscape can be aptly described using the classical metaphor of a tango: two steps forward, one step back, as the court practice strides stumble, moving in a rhythm marked by uncertainty. The Bulgarian case law regarding the fate of arbitration agreements after assignment of rights has now reached a significant milestone. After years of legal uncertainty and inconsistent rulings, the matter has been conclusively addressed by the Bulgarian SCC's Interpretative Ruling, clarifying two critical issues: firstly, that after the assignment of rights, the assignee remains bound by the arbitration agreement; and secondly, that no explicit power of attorney is required for the conclusion of an arbitration agreement. These clarifications have resolved important legal uncertainties, contributing to a more predictable arbitral framework, particularly in cases involving the assignment of contractual rights. However, this clarity comes with a caveat. While the arbitration agreement's fate is now well defined, ambiguity persists in the realm of recognition and enforcement of foreign arbitral awards – a crucial aspect of international arbitration practice. That is due to a number of recent court decisions requesting notarisation of the signatures and the capacity of the arbitrators under the award, and a specific certificate that the award has entered into force, and last, but not least – the re-opened debate about certification of those documents by the Bulgarian Ministry of Foreign Affairs. These issues will be addressed in turn in the analysis below.

8. (Un)Resolved Questions in Bulgarian Arbitration: Assignment of Rights and Proxy Authority

For a long time, two main issues had stirred the Bulgarian arbitration world, with the first one being: "What happens with the arbitration agreement in cases of assignment of rights?," and the second one: "Is an arbitration agreement incorporated in a contract valid and binding for the parties if the contract was signed by a proxy having general powers to represent one of the parties and sign contracts, without explicitly conferring authority to sign arbitration agreements?" It should be noted that the Bulgarian arbitral tribunals and doctrine have never had doubts about the affirmative answer to both these questions (Zhelyazkova, 2019, pp. 95-97). However, the practice of the Bulgarian SCC (competent under Article 47 of the ICAA) in the proceedings of setting aside arbitral awards took different views, a long time creating for legal uncertainty.

2.1. Assignment of Rights

The assignment of rights under the "main" contract typically creates room for interpretation whether the arbitration agreement is binding for the assignee. In the constant practice of the SCC, summarised for example in Judgment No. 261 of 1 August 2018 in the SCC Case No. 624/2017 (referring to Judgment No. 71 of 9 July 2015 in the SCC Case No. 3506/2014, Judgment No. 44 of 29 June 2016 in the SCC Case No. 971/2015, Judgment No. 70 of 15 June 2012 in the SCC Case No. 112/2012, Judgment No. 122 of 18 June 2013 in the SCC Case No. 920/2012),[1] it was accepted that the arbitration agreement had a relatively independent character in relation to the contract in which it was incorporated; it was subject to a separate legal regime, and was not an appurtenance to the contract in which it was incorporated. The SCC stressed that the rights and obligations of the parties under the substantive legal relationship were distinct from the rights and obligations under the arbitration agreement, and therefore, the right of a party to refer to arbitration a dispute arising out of the substantive legal relationship could not be assigned together with the rights under the legal relationship unless the counterparty had expressly agreed thereto in writing. It was understood that in the absence of an express written consent, the arbitration agreement could not be deemed to have been assigned by the assignment agreement, irrespective of whether the assignment was communicated to the debtor, and irrespective of whether the assignment of the rights under the substantive legal relationship was effective for the debtor.

For the sake of completeness, it should be noted that in Judgment No. 51 of 23 September 2013 in the SCC Case No. 610/2012, the panel sitting on this case supported the opposite view that: "Taking into account the legal characteristic of the assignment contract and the legal consequences it entails, it should be assumed that the assigned receivable passes to the new creditor with all the privileges and appurtenances, such as the agreed method of dispute resolution between the co-contractors in case of default under the contract."

In contrast to assignment of rights by virtue of contractual relations, situations of universal succession did not create controversies about the validity of the arbitration agreement. It was generally accepted in the case law that where a party was substituted in the entirety in the rights and obligations under a contract, the arbitration clause contained in that contract remained valid in the original party's relations with the substituted party (for instance Judgment No. 91 of 26 July 2019 in the SCC Case No. 251/2019; Judgment No. 46 of 8 May 2013 in the SCC Case No. 789/2012).

[1] The same was accepted in Judgment No. 46 of 21 July 2015 in the SCC case No. 3556/2014.

However, two cases of the Bulgarian SCC stirred the *status quo* in 2022:

In the first case, by virtue of an arbitral award rendered on 3 November 2021, the Arbitration Court at the Bulgarian Chamber of Commerce and Industry (hereinafter: AC at BCCI) upheld the claim filed by "Multiple Plus" EOOD against "Intercommerce 2010" EOOD for payment of electricity supplied under a sales contract. It should be noted that the said contract was concluded between "Intercommerce 2010" EOOD and "Future Energy" EOOD. The contract contained an arbitration clause empowering AC at BCCI with jurisdiction to hear disputes arising from the contract. However, "Future Energy" EOOD became insolvent. "Multiple Plus" EOOD was a creditor of "Future Energy" EOOD. In the process of cashing in the property of "Future Energy" EOOD, its receivables under the contract with "Intercommerce 2010" EOOD were awarded under Article 717з of the Bulgarian Commerce Act in favour of "Multiple Plus" EOOD (assignment in lieu of payment). To justify its jurisdiction, the majority of the arbitral tribunal correctly accepted that current situation was specific, but most closely resembled the hypothesis of universal succession since the receivables had been awarded in the insolvency proceedings. The presiding arbitrator issued dissenting opinion, arguing that the acquisition of rights under Article 717z of the Commerce Act was essentially a compulsory assignment - the debtor's claim in insolvency was transferred to the patrimony of a third party against payment of a price. Although in this hypothesis the claim passed independently of the will of the original creditor, in both cases - voluntary assignment and compulsory assignment - it passed independently of the debtor's will. It is the latter, according to the presiding arbitrator, that presupposed the application by analogy of the rulings in the SCC case law concerning succession to the arbitration clause in the case of assignment - denied accordingly.

Naturally, "Intercommerce 2010" EOOD brought a claim for setting aside the arbitral award under Article 47 (1), point 2 of the ICAA, claiming that the award had been rendered in the absence of valid arbitral agreement and essentially repeating the arguments of the dissenting opinion. By virtue of Judgment No. 50 of 14 July 2022 rendered in Case No. 36/2022, the SCC explained that both the theory and the case law accepted the binding nature of the arbitration clause in case of universal succession on the side of the creditor or the debtor, as well as by an express consent of the assignor, the assignee and the debtor. However, the SCC underlined that: "In the present hypothesis, the decree of assignment of the insolvency debtor's claim in favour of a creditor of the insolvent does not result in succession both in the rights and in the obligations under the material contract concluded between the bankrupt merchant as a creditor and its debtor." Hence, the claim for setting aside the arbitral award due to lack of valid arbitration agreement was honoured by the SCC.

It is important to note that the decision of the SCC was signed also with a dissenting opinion on the side of one of the judges regarding the jurisdiction of the arbitral tribunal. The said judge argued that the doctrine of separability of the arbitration clause from the main contract did not suffice to assume that the assignment of rights transferred only the material rights under it. Furthermore, the dissenting judge stressed that the principle *res inter alios acta* also could not support the view that the assignment did not "assign" the procedural right of the party to refer to arbitration. In support of this argument, the dissenting judge explained that there was no legal definition of what "appurtenance" to a contract meant, and there was no legal argument to exclude the arbitration clause from such concept.[2] On the contrary, the judge gave example with the right to file *actio Pauliana,* which was accepted by the General Assembly of the Commercial Department of the SCC in Interpretative Ruling No. 2 of 26 March 2021 in Interpretative Case No. 2/2019 to pass to the assignee by virtue of assignment. Hence, the dissenting judge underlined that: "With an assignment of the claim, the identity of the creditor changes, but the choice of arbitration is not made in view of the identity of the creditor, who is a party not subject to the contract, but in view of the credibility of the particular arbitration chosen and its preference, as a means of procedural remedy, over the state judicial institutions. The choice and stipulation of that arbitration, in the event of a dispute arising out of a substantive legal relationship, is the subject-matter of that procedural contract, and that subject-matter is not altered by the assignment of the claim. Except for reasons of fear of unregulated relations between the assignor and the arbitral tribunal, which do not rest on the law, a change of creditor cannot be equated with a loss of confidence in the arbitral tribunal on the part of the debtor. The change of creditor does not place the debtor in a worse position with regard to the substantive relationship, in so far as it continues to have all the objections it had to the old creditor. It should also be borne in mind that it is often the arbitration clause that determines the assignee's interest in acquiring the claim, in view of certain advantages of arbitration over judicial dispute resolution and its suitability for commercial purposes. As is shared in legal theory: arbitration agreements are not "personal covenants," but part of the economic value of the material right transferred."

In the second case, quite the opposite view was expressed in an almost identical case, namely Arbitration Case No. 23/2021 of the AC at BCCI. "Multiple Plus" EOOD filed a claim against "Agroasu" EAD for payment of electricity under a sales contract. Identically to Arbitration Case No. 17/2022, the contract contained an

[2] According to Article 99 (2) of the Bulgarian Obligations and Contracts Act, the assigned claim shall pass to the new creditor with its privileges, liens and other appurtenances, including accrued interest, unless otherwise agreed.

arbitration clause, but the receivables under the contract were acquired by "Multiple plus" EOOD in the insolvency proceedings of "Future energy" EOOD – the party to the contract with "Agroasu" EAD. In the following set aside proceedings before the SCC in Commercial Case No. 1144/2022, the court reasoned that it shared the views expressed in Judgment No. 51 of 23 September 2013 in the SCC Case No. 610/2012, and in the above quoted dissenting opinion in the SCC Case No. 36/2022, according to which, considering the legal characteristic of the assignment and the legal consequences that it entailed, it should be assumed that the assigned claim passed to the new creditor with all the privileges and appurtenances, including in particular the arbitration agreement. Consequently, by virtue of Judgment No. 50169 of 9 December 2022, the court rejected the claim for annulment of the arbitral award due to lack of a valid arbitral agreement.

These controversies have led to the president of the Bulgarian Supreme Bar Council exercising his powers under Article 125 of the Bulgarian Judicial System Act (see: Art. 125, Bulgarian Judicial System Act), namely: to suggest the General Assembly of the Commercial Department of the Bulgarian SCC to issue an interpretative ruling. According to Article 124, para. 1, Point 1 of the Bulgarian Judicial System Act, in situations of inconsistent application and interpretation of law, the General Assembly of the respective SCC department can make an interpretative ruling, which according to Article 130, para. 2 of the Bulgarian Judicial System Act shall be binding for the judicial and executive authorities, for local self-government authorities, and for all authorities that issue administrative acts. Hence, by virtue of Interpretative Ruling No. 1 of 21 February 2024 of the General Assembly of the Commercial Department of the SCC, Point 1, it was finally (and in the author's view) and correctly accepted that: "… by transferring the claim to a new creditor and by notifying the debtor of the assignment, the arbitration clause included in the substantive contract retains its effect in the event of a future dispute between the assignor and the debtor. The arbitral tribunal is therefore competent to hear disputes between them in cases where the arbitration agreement meets all the legal requirements for its validity and modalities." Any other interpretation would practically mean that a bad faith party to an arbitration agreement could easily circumvent the agreed dispute settlement method by a simple act of assignment even in favour of a related entity.

1.2. Power of Attorney

Similarly to the assignment debate, the Bulgarian legal community had struggled with an inconsistent practice on whether a general power of attorney sufficed for the conclusion of arbitration agreement, or the power of attorney needed to include explicit reference that the proxy was authorised to conclude arbitration

agreements. Naturally, such discussion arose only in set aside proceedings before the SCC where the losing party was trying to obtain an annulment of the arbitral award, by claiming, *inter alia*, that there was no valid arbitration agreement. The SCC case law on the matter was divided. Some court panels accepted that no specific power of attorney was required for the conclusion of an arbitration agreement.[3] The reasoning of the court in these cases was that situations where explicit power of attorney was required were explicitly envisaged in law. For example:

- Article 34 (2) of the Bulgarian Civil Procedure Code (hereinafter: CPC) requires explicit power of attorney for civil status claims, including matrimonial claims (see: Art. 34(2), CPC.
- Article 34 (3) of the CPC requires explicit power of attorney for the conclusion of a settlement, for the reduction, withdrawal or waiver of a claim, for the acknowledgment of the claims of the other party, for participation in a mediation procedure, for the receipt of money or other valuables, as well as for acts constituting a disposal of the subject matter of the case (see: Art. 34(3), CPC).
- Article 136 (7) of the Commerce Act requires explicit power of attorney for participating in a limited liability company's shareholders' general meeting on behalf of a shareholder etc (see: Art. 136(7), Commerce Act).

In contrast to that, neither the Bulgarian CPC, nor the ICAA contain a provision on the power of attorney for the conclusion of arbitration agreements. The court panels also relied on the findings of the General Assembly of the Civil and Commercial Department of the SCC expressed in their Interpretative Ruling No. 5 of 12 December 2016 in Interpretative Case No. 5/2014, where in the reasoning to Point 1 of the Interpretative Decision it was clarified that under the principle of freedom of contract adopted by the legislator in the general regulation of the authorisation (Arts. 36-42, Bulgarian Obligations and Contracts Act), it was necessary and sufficient that the power of attorney clearly and unequivocally, generally expressed the will of the authorising person to carry out legal transactions or actions on his behalf through his chosen attorney. Only when a legal provision expressly established certain requirements regarding the necessary content of a given type of power of attorney, it should meet these requirements. The same approach and reasoning were adopted in Judgment No. 59 of 21 April 2021, rendered in the SCC Commercial Case No. 2390/2020.

[3] The same view is expressed also in Judgment No. 193 of 21 January 2021 in Commercial Case No. 1510/2020; Judgment No. 198 of 16 November 2012 in the SCC Case No. 149/2012; Judgment No. 60 of 28 April 2015 in the SCC Case No. 3527/2014; Judgment No. 60023 of 29 June 2021 in the SCC Case No. 1407/2020; Judgment No. 2 of 15 February 2022 in the SCC Case No. 1406/2020: Judgment No. 194 of 14 January 2021 in the SCC Case No. 794/2020; Judgment No. 37 of 23 March 2021 in the SCC Case No. 795/2020.

The opposite view, namely – the need of an explicit power of attorney for the conclusion of arbitration agreements, was expressed in Judgment No. 8 of 8 February 2017 in the SCC Case No. 1706/2016, and in Judgment No. 157 of 11 January 2013 in the SCC Case No. 611/2012. The main argument in support of such thesis was that the arbitration agreement was separate from the main contract, and it did have different procedural consequences. Hence, these panels accepted that the general power of attorney did not include, *per se*, powers for the conclusion of an arbitration agreement.

The debate was finally settled by the same Interpretative Ruling No. 1 of 21 February 2024 – in Point 2. Similarly to the assignment issue, the General Assembly took an arbitration-friendly approach in line with the international practice, and by referring predominantly to the arguments in previous SCC decisions, took the view that the conclusion of an arbitration agreement did not require an explicit power of attorney. The author believes that such approach should be supported as it creates predictability and certainty for the parties, especially for companies having complex management system and operating in different markets. Practice shows that companies typically issue one general power of attorney for handling their commercial affairs, and that requiring additional explicit power of attorney is an unjustified administrative burden and sometimes practically impossible.

While the Interpretative Ruling No. 1 of 2024 has finally clarified the status of arbitration agreements in cases of assignment of rights and those established through a general power of attorney, the enforcement of arbitral awards now faces a new layer of ambiguity. Allow me to put this issue into perspective:

3. Evolving Judicial Requirements for Arbitral Award Authentication and Certification in the Enforcement Process

Briefly summarised, enforcement of foreign arbitral awards in Bulgaria is subject to Article 51(2) of the ICAA, providing that enforcement of foreign arbitral awards shall be subject to the international agreements closed by the Republic of Bulgaria. In particular, unless the international agreement to which the Republic of Bulgaria is a party provides otherwise, according to para. 3 of the same article, a claim for recognition and enforcement of a foreign arbitral award shall be filed before the Sofia City Court, and the rules of Articles 118-122 of the Code of Private International Law (hereinafter: CPIL) shall apply accordingly with the exception of the right of the debtor to make an objection that the receivables are extinguished. Article 51(2) of the ICAA essentially means that the recognition and enforcement

of a foreign arbitral award[4] most likely[5] would be subject to the rules of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, ratified by Decree No. 284 of the Presidium of the National Assembly of 8 July 1961 (Extraordinary No. 57 of 1961), Promulgated in State Gazette No. 2 of 8 January 1965 (hereinafter: New York Convention). In other words, Article III of the New York Convention, providing: "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral award" shall apply (Art. III, New York Convention; see also: Born, 2021, §26.02).

In practical terms, if a foreign arbitral award is made in the territory of a Contracting State to the New York Convention, a claim for recognition and enforcement of the foreign arbitral award in Bulgaria shall be made as follows:

- A claim[6] for recognition and enforcement of the foreign arbitral award shall be filed before the Sofia City Court (Art. 51(3), ICAA);
- The requirements of Article IV of the New York Convention shall be followed (if the award was made in the territory of a Contracting State), i.e., the claim shall be accompanied by a translated and duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement or a duly certified copy thereof, where the translation shall be certified by an official or sworn translator or by a diplomatic or consular agent. The Bulgarian doctrine accepts that the term "duly authenticated" shall be interpreted to mean certification of the signatures of the arbitrator(s) rendering the award by the respective body of the arbitral institution (in cases of institutional arbitration) or certification by

[4] In contrast to an award rendered under the auspices of a foreign arbitral institution seated abroad, but where the seat of the arbitration itself was expressly agreed to be in the territory of the Republic of Bulgaria – see Decision No. 50052 of 21 March 2024, rendered in the SCC Commercial Case No. 2031/2021.

[5] The New York Convention shall apply when the award was rendered in the territory of a Contracting State since Bulgaria has made a reciprocity reservation. In addition, with regard to awards made in the territory of non-contracting States, Bulgaria applies the Convention only to the extent to which those States grant reciprocal treatment.

[6] According to Ruling No. 200 of 17 March 2011, rendered in the SCC Private Commercial Case No. 82/2011, the claim for recognition and enforcement of the foreign arbitral award is a specific type of constitutive claim, which was considered in the light of the legal standing of the claimant to file such claim in a situation where there were open insolvency proceedings against the defendant.

competent national body, for instance a notary public, of the signatures of the arbitrators in cases of *ad hoc* arbitration (Stalev, 1997, p. 155).

- Pursuant to Article III of the New York Convention, the recognition and enforcement of such foreign arbitral award shall be made in accordance with the rules of procedure in Bulgaria, which the Bulgarian case law interprets to mean "in accordance with Article 51 (3) ICAA, (see: Zhelyazkova, 2019, p. 345) referring to Articles 118-122 CPIL.[7] However, Article 119 (2) CPIL is the one creating havoc, as it, in principle, governs recognition and enforcement of foreign state court judgments, providing that: "The claim [for recognition and enforcement] shall be accompanied by a copy of the judgment, certified by the court which delivered it, and a certificate from that court that the judgment has entered into force. These documents must be certified by the Ministry of Foreign Affairs of the Republic of Bulgaria." The Bulgarian court practice accepts that these documents shall be supplied to the court along with the claim for recognition and enforcement of the arbitral award, and these documents constitute a condition for the regularity of the claim (See: Ruling No. 79 of 25 February 2015 in the SCC Civil Case No. 7343/2014).

Three questions arise from the applicability of Article 119 (2) CPIL in the proceedings of enforcement of a foreign arbitral award:

1) Is the certificate that the arbitral award has entered into force a mandatory requirement in the process of recognition and enforcement of the award, or can it be substituted by other documents?

This is a key question as the practice shows that sometimes obtaining a certificate that the award has entered into force is burdensome and difficult to explain to the arbitral institution, especially given the clear provisions in most rules of arbitral institutions explicitly providing that the award rendered under these rules is final and binding for the parties (for instance, Article 46 of the Rules for Expedited Arbitrations of the Stockholm Chambers of Commerce Arbitration Institute; Article 31, p. 6 of the ICC Rules of Arbitration, etc.) (See: Emanuilov, 2023, pp. 100-115).

The answer to this question was summarised in the SCC in Ruling No. 79 of 25 February 2015, rendered in Civil Case No. 7343/2014, with the Civil Department accepting that: "The foreign judgment whose recognition is sought must be submitted with the application under Article 118(2) CPIL. The certificate of its entry into force is closely linked to this judgment, therefore the law requires their joint submission, and this with the certification of Ministry of Foreign Affairs. However, the certificate is an ancillary document, so in certain cases it may be replaced by

[7] It should be noted that Article 51(3) of the ICAA was introduced with the amendments to the ICAA as of 2001.

other evidence establishing beyond any doubt the fact of entry into force of the foreign judgment. This exception may apply in cases where, due to the particularities of the foreign law, the party has difficulty in producing such a certificate. The case law recognises cases in which it is accepted that the entry into force of the foreign judgment is established by the presentation of the legislation of the foreign state…"

In other words, the Bulgarian court practice, in the author's view, has interpreted this requirement *ratio legis* and correctly adopted a flexible approach rather than a formalistic one.

2) What does it mean that the award needs to be certified by the court that delivered it in terms of arbitral awards?

As elaborated above, the requirement for "duly authenticated" award in Article IV of the New York Convention was interpreted by the Bulgarian doctrine and case law as a requirement for certification of the award by the competent body of the arbitral institution or by notary public in *ad hoc* arbitrations (Stalev, 1997). However, some recent case law (see: Ruling No. 743 of 28 December 2015, rendered in the SCC Private Commercial Case No. 2415/2015) does not differentiate between these types of arbitration proceedings, interpreting Article IV of the New York Convention in conjunction with Article 51(3) ICAA, referring to Article 119 (2) CPIL, as a requirement for *a certification by a notary public of the signatures and capacity of the persons who have issued the award*. That same approach was adopted in Ruling No. 331 of 26 July 2022, rendered in the SCC Private Commercial Case No. 414/2022.

Such interpretation can be supported neither by the wording of Article IV of the New York Convention, nor by the objectives to create sufficient security for the parties and authentication of the award. Moreover, such approach is not in conformity with the requirement of Article III of the New York Convention obliging the Contracting State, in this case Bulgaria, not to impose substantially more onerous conditions on the recognition or enforcement of foreign arbitral awards than those imposed on the recognition or enforcement of domestic arbitral awards (Zhelyazkova, 2019, p. 341).

3) Must these documents always be certified by the Bulgarian Ministry of Foreign Affairs?

On the one side, according to the Bulgarian Regulation on the Legalisations, Authentications and Translations of Documents and Other Papers, the Ministry of Foreign Affairs (hereinafter: MFA) legalises only official documents, while a foreign arbitral award is considered a private document. Therefore, certification by the MFA could be done with respect to 1/ the notarisation of the arbitrators' signatures; 2/ the notarisation of copies of the award; 3/ the certificate that the award has "entered into force," and/or 4/ the translator's signature as a guarantee of the

authenticity of the judgment and the documents submitted. However, the Bulgarian court practice (summarised in Ruling No. 743 of 28 December 2015, rendered in the SCC Private Commercial Case No. 2415/2015) accepts that the requirement for certification by MFA is considered to be complied with when the documents are legalised by means of the Apostille certificate pursuant to Article 4 of the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (hereinafter: Apostille Convention) to which Bulgaria acceded on 30 April 2001. Therefore, the court accepted in the said Ruling that: " […] the certification of the copies of the foreign arbitral award and the certificate of its entry into force by the Bulgarian Ministry of Foreign Affairs in the proceedings under Art. 51 para. (3) ICAA is not always mandatory**,** as there are exceptions to the rule of Article 119(2) CPIL. In the first place, such certification is not necessary in cases where the documents referred to in Article 119(2) CPIL are subject to Apostille certification under Article 4 of the Apostille Convention. Once the documents have been apostilled, they are subject to a formal procedure at the consular section of the Ministry of Foreign Affairs, during which the signature of the sworn translator is certified. Secondly, this requirement is waived where there is a bilateral legal aid treaty between Bulgaria and the country in which the documents were issued, providing for a more lenient legalisation regime than the Convention, leading to their direct recognition in cases where the documents have an administrative seal from a court or other state institution or are certified by a notary. In this case, too, only the signature of the sworn translator is subject to certification by the MFA [Ministry of Foreign Affairs]…"

However, by virtue of Judgment No. 260095 of 7 February 2022, rendered in the of Sofia City Court's Commercial Case No. 17/2021, recognition and enforcement of a foreign arbitral award of 17 July 2019, rendered in Case No. M-39/2019 of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, was granted in the territory of the Republic of Bulgaria. By virtue of the award, Animex Ltd. was ordered to pay to Rostselmash Combine Plant of the Russian Federation certain amounts. The Sofia City Court took into account the Legal Assistance Treaty concluded between the Republic of Bulgaria and the Russian Federation, i.e., the Treaty between the People's Republic of Bulgaria and the Union of Soviet Socialist Republics on Legal Assistance in Civil, Family and Criminal Matters, Documents of 1976. Pursuant to Article 12(2) of the Legal Assistance Treaty, all documents that have been drawn up or authenticated by competent authorities in accordance with the prescribed form in the territory of one of the Contracting Parties shall be accepted in the territory of the other Contracting Party without legalisation. The Legal Assistance Treaty prevails over the CPIL rules (Article 3(1) CPIL). Therefore, the court considered that in view of

the text of Article 51(2) ICAA, providing that the recognition and enforcement of a foreign arbitral award shall be subject to the international treaties concluded by the Republic of Bulgaria, the preferential regime for the recognition of documents between the two States provided for in the Legal Assistance Treaty should apply. Consequently, the Sofia City Court accepted that if the arbitral award submitted was the original, it was sufficient to submit a certified translation without the need for legalisation or even Apostille. The Sofia first instance court decision was upheld by the Sofia Appellate Court. The defendant lodged a cassation appeal and maintained, *inter alia*, that the understanding of the court was in clear contrast with the existing court practice which established ground for cassation. This was accepted by the SCC panel of judges, and by virtue of Ruling No. 2327 of 26 August 2024, rendered in the SCC Commercial Case No. 2105/2023, the cassation appeal was granted under the question: "Is the mandatory provision of Article 119(2) CPIL applicable in proceedings for recognition and enforcement of foreign arbitral awards or does it apply only to judicial awards?"

At the time of writing this paper, the cassation case hearing has yet to be scheduled. However, the author believes that the answer to this question is clear if one considers the hierarchy of the legal acts. The rules of the New York Convention as a multilateral treaty should prevail over domestic rules, i.e., no additional requirement for notarisation of the signatures and capacity of the arbitrators should be applied in the proceedings of recognition and enforcement of foreign arbitral awards. The rules of a bilateral treaty abolishing legalisation should also exclude the necessity of legalisation by the MFA.

In any event, the SCC ruling in this case would finally bring some clarity to the process of recognition and enforcement of foreign arbitral awards, putting a stop to a long-standing debate about what must be supplied to the court in the process of enforcement of an award.

4. Conclusion

In conclusion, it can be argued that a progress has been made in Bulgarian case law, albeit in small steps. Whereas in tango the forward and backward steps contribute to a beautiful harmony, we can only hope that the backward steps in Bulgarian arbitration case law will be minimised, and that Bulgaria will remain an attractive and arbitration-friendly destination for both foreign and domestic companies.

References

Born, G. 2021. *International Commercial Arbitration*,.Kluwer Law International.

Emanuilov, E. 2023. Practical issues regarding the exequatur of foreign arbitral awards in the light of the recent practice of the supreme cassation court concerning the authentication of the award. In: Iossifova, T. (ed.), *Arbitration in favour of the Bulgarian business – challenges and perspectives, Collection with reports from the Conference held of the CA at BIA on 30 November 2022*. Sofia: Smart Impress, pp. 100-115.

Stalev, Zh. 1997. *Arbitration of private law disputes*. Sofia: Ciela.

Zhelyazkova, V. 2019. *Arbitration as a proprietary dispute resolution method*. Sofia: Nova Zvezda.

Legal Sources

Bulgarian Civil Procedure Code, CPC, 2007 as amended.

Bulgarian Code of Private International Law, CPIL, 2005 as amended.

Bulgarian Commerce Act, 1991 as amended.

Bulgarian International Commercial Arbitration Act – ICAA, 1988 as amended.

Bulgarian Judicial System Act, 2007 amended.

Bulgarian Obligations and Contracts Act, 1999 as amended.

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York Convention, 1959.

United Nations. 2006. United Nations Commission On International Trade Law. Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. Available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status, 15. 12. 2024.

Internet Sources

Bulgarian Chamber of Commerce and Industry. 2024. Available at: https://www.bcci.bg/english/, 15. 12. 2024.

Ciela. 2024. Software Integration. Legal and Reference Software. Available at: https://www.ciela.net/?i18n-id=2, 15. 12. 2024.

Case Law

Decision No. 50052 of 21 March 2024, rendered in the SCC Commercial Case No. 2031/2021.

Judgment No. 2 of 15 February 2022 in the SCC Case No. 1406/2020.

Judgment No. 8 of 8 February 2017 in the SCC Case No. 1706/2016.

Judgment No. 37 of 23 March 2021 in the SCC Case No. 795/2020.

Judgment No. 44 of 29 June 2016 in the SCC Case No. 971/2015.
Judgment No. 46 of 8 May 2013 in the SCC Case No. 789/2012.
Judgment No. 46 of 21 July 2015 in the SCC case No. 3556/2014.
Judgment No. 51 of 23 September 2013 in the SCC Case No. 610/2012.
Judgment No. 59 of 21 April 2021, rendered in the SCC Commercial Case No. 2390/2020.
Judgment No. 60 of 28 April 2015 in the SCC Case No. 3527/2014.
Judgment No. 70 of 15 June 2012 in the SCC Case No. 112/2012.
Judgment No. 71 of 9 July 2015 in the SCC Case No. 3506/2014.
Judgment No. 91 of 26 July 2019 in the SCC Case No. 251/2019.
Judgment No. 122 of 18 June 2013 in the SCC Case No. 920/2012.
Judgment No. 157 of 11 January 2013 in the SCC Case No. 611/2012.
Judgment No. 193 of 21 January 2021 in Commercial Case No. 1510/2020.
Judgment No. 194 of 14 January 2021 in the SCC Case No. 794/2020.
Judgment No. 198 of 16 November 2012 in the SCC Case No. 149/2012.
Judgment No. 261 of 1 August 2018 in the SCC Case No. 624/2017.
Judgment No. 260095 of 7 February 2022, rendered in the of Sofia City Court's Commercial Case No. 17/2021.
Judgment No. 50169 of 9 December 2022.
Judgment No. 60023 of 29 June 2021 in the SCC Case No. 1407/2020.
Ruling No. 79 of 25 February 2015 in the SCC Civil Case No. 7343/2014.
Ruling No. 2327 of 26 August 2024, rendered in the SCC Commercial Case No. 2105/2023.
Ruling No. 743 of 28 December 2015, rendered in the SCC Private Commercial Case No. 2415/2015.

Eirini Roussou*

Review Scientific Paper
UDC: 336.765(495)
doi: https://doi.org/10.56461/SPZ_24414KJ
Received: 9. 1. 2025.
Accepted: 13. 1. 2025.

INTERNATIONAL ARBITRATION IN GREECE

Summary

Arbitration in Greece has both a long history, and an exciting present. This paper explores the landscape of arbitration in Greece and its key features. Recent key points include the reform of arbitration legislation, modernising the legal framework to make Greece a popular and trusted arbitration centre. Similarly, as an EU Member State, Greece has been involved in the ongoing post-Achmea investment arbitration turbulence in the EU, and it remains to be seen what the future will bring.

Keywords: UNCITRAL Model Law, arbitration, investment arbitration, costs, legal reform.

* Senior Lead Lawyer in DLA Piper UK LLP (Brussels).
E-mail: *eirini.roussou@dlapiper.com*
ORCID: *https://orcid.org/0009-0003-4585-9572*

MEĐUNARODNA ARBITRAŽA U GRČKOJ

Sažetak

Arbitraža u Grčkoj ima i dugu istoriju i uzbudljivu sadašnjost. Ovaj rad istražuje arbitražu u Grčkoj i njene ključne karakteristike. Fokus analize stavljen je na reformu arbitražnog zakonodavstva, te modernizaciju pravnog okvira kako bi Grčka postala popularan i pouzdan arbitražni centar. Takođe, kao država članica EU, Grčka je uključena u tekuće turbulencije investicione arbitraže nakon Achmea u EU, te, u tom smislu, ostaje da se vidi šta će budućnost doneti.

Ključne reči: UNCITRAL Model zakon, arbitraža, investiciona arbitraža, troškovi, pravna reforma.

1. Introduction

Greece and international arbitration go back in time. Although the concept of international arbitration (and its institutions) is the creation of modern times, and particularly the 20th century (Schinazi, 2021), its origins can be traced back to Ancient Greece (Ralston, 1929). Greece was not absent from arbitration fora during the 20th century either, including well-known cases such as The Lighthouses Arbitration and Ambatielos (Konstantinakou, 2023, pp. 354-386). This chapter provides a short summary of international commercial arbitration and investment treaty arbitration from the Greek perspective.

2. Greece and International Commercial Arbitration

On 4 February 2023, Law 5016/2023 on international commercial arbitration entered into force (International Commercial Arbitration Act of Greece, hereinafter: Law 5016/2023). The Law incorporates almost all the provisions of the UNCITRAL Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006 (The UNCITRAL Model Law). However, in an attempt to address evolving practice in international arbitration and recent case law, this Law goes beyond the UNCITRAL Model Law in many respects. It applies only to international

commercial arbitration whose seat is in Greece (Article 3(1), Law 5016/2023). It does not intend to unify the provisions on international and domestic arbitration. Therefore, Greece has preserved the dualist system, distinguishing between international and domestic arbitration, which is governed by Articles 867-903 of the Greek Code of Civil Procedure (Calavros, 2023a, pp. 3-12). This paper focuses on the most innovative provisions of the Law 5016/2023 with a particular emphasis on those provisions that are either not found in the UNCITRAL Model Law at all or that adopt an "UNCITRAL Model Law" approach.

2.1. Rebuttable Presumption of Arbitrability

Pursuant to Article 3(4) of the Law 5016/2023, "any dispute may be submitted to arbitration unless prohibited by law." Article 3(4) of the Law 5016/2023 establishes an express presumption of arbitrability of any private and/or public law dispute provided that the disputing parties have the power of free disposal of the subject matter of the dispute. Under Greek law, penal disputes, family disputes, insolvency proceedings, and enforcement proceedings are deemed non-arbitrable. There is no similar provision in the UNCITRAL Model Law.

2.2. Validity of Arbitration Agreement

Article 11 of the Law 5016/2023 is another innovative provision that is not found in the UNCITRAL Model Law. Pursuant to Article 11(1) of the Law 5016/2023, "an arbitration agreement shall be valid if it is valid in accordance with (a) the law to which the parties have subjected it, or (b) the law of the place of arbitration (*lex arbitri*), or (c) the law governing the substantive agreement of the parties (*lex causae*)". Only rarely do arbitration rules provide for the law applicable to the arbitration agreement. For instance, Article 16(4) of the London Court of International Arbitration (LCIA) Rules (2020) provide as follows: "Subject to Article 16.5 below, the law applicable to the Arbitration Agreement and the arbitration shall be the law applicable at the seat of the arbitration, unless and to the extent that the parties have agreed in writing on the application of other laws or rules of law and such agreement is not prohibited by the law applicable at the arbitral seat."

The Law 5016/2023 introduces the principle of validation, the purpose of which is to uphold the validity of the arbitration agreement not only on the basis of one applicable law (each time), but on the basis of three different laws, which may apply in the alternative (Brekoulakis, 2023, pp. 82-96). The substantive validity of the arbitration agreement is assessed on the basis of the respective substantive national law, as opposed to the conflicts of laws rules, thereby excluding the renvoi mechanism.

Pursuant to Article 11(2) of the Law 5016/2023, "bankruptcy or insolvency proceedings shall have no effect on an arbitration agreement, unless otherwise provided by law". This provision intends also to uphold the validity of the arbitration agreement.

The applicable law, and subsequently the effects of the insolvency proceedings on an arbitration agreement, will be determined on the basis of two criteria. First, whether the insolvency proceedings have a cross-border dimension (as opposed to purely domestic procedures), and second, whether a party to an arbitration agreement was declared bankrupt/insolvent prior to or after the commencement of the arbitral proceedings.

2.3. Multiparty Arbitration Proceedings

Article 16 of the Law 5016/2023 provides that, in case of multiparty arbitrations, each side, i.e., claimants and respondents, shall jointly appoint one arbitrator. If the multiple parties on one side fail to make a joint appointment within the time limit provided for in the arbitration agreement, or failing such agreement, within thirty (30) days, the competent national Court may make such appointment (Art. 11a, Explanatory Report on the Draft Law 5016/2023). This provision ensures that the arbitration proceedings are not obstructed when a joint decision on a co-arbitrator cannot be reached in multiparty arbitrations, which are common in practice. There is no similar provision in the UNCITRAL Model Law.

2.4. Challenging Arbitrators

Article 19(2) of the Law 5016/2023 dictates that the decision on the challenge of an arbitrator is rendered by the arbitral tribunal without the participation of the challenged arbitrator after having first heard his/her views. This provision reflects the *nemo iudex in cause sua* principle, according to which no one should be judge in their own case (Arts 12-15a, Explanatory Report on the Draft Law 5016/2023). Article 19(2) of the Law 5016/2023 deviates from Article 13(2) of the UNCITRAL Model Law, which implies that the challenged arbitrator participates in the decision on the challenge.

2.5. Arbitrators' Liability

Article 22 of the Law 5016/2023 provides that an arbitrator shall only be liable for intentional misconduct and gross negligence (Arts. 12-15a, Explanatory Report on the Draft Law 5016/2023). There is no similar provision in the UNCITRAL Model Law.

2.6. Joinder and Consolidation

Article 24(1) of the Law 5016/2023 expressly governs the joinder of either an additional claimant (active joinder) or an additional respondent (passive joinder) or a third-party intervener who has a legal interest in the resolution of the dispute. A prerequisite for the expansion of the *ratione personae* scope of the arbitral proceedings under the above three cases is that the third party must be bound by the arbitration agreement. As a general principle, whether a non-signatory third party can be bound by the arbitration agreement and subsequently join a pending arbitration procedure as an additional party is a complex legal matter, which needs to be decided upon by the arbitral tribunal on the basis of the applicable law, internationally developed doctrines, and third party legal theory, as well as the facts of each specific case.

In these circumstances, it remains unclear why a third-party intervener who is bound by the arbitration agreement would still need to show a legal interest in the resolution of the dispute. As opposed to the Law 5016/2023, other foreign arbitration laws do not require a third party to show a legal interest as long as they can show that they are bound by the arbitration agreement (Brekoulakis, 2023, pp. 82-96, para. 42).

A third party can join in the arbitration either when the respondent submits a request in its response to the request for arbitration or by a separate motion. Following acceptance of the expansion of the *ratione personae* scope of the arbitral proceedings, the new parties shall have the same rights and obligations as the initial parties to the arbitration. Any new party to the arbitration shall also accept the already constituted arbitral tribunal.

Article 24(2) of the Law 5016/2023 expressly governs consolidation of arbitral proceedings between the same parties and before the same or different tribunals. Consolidation can be ordered by the arbitral tribunal without the parties' prior consent provided that (a) the consolidation promotes the principles of legal certainty and expedition of the arbitration proceedings, and (b) the consolidation is deemed to ensure a uniform determination of relevant issues and disputes after the arbitral tribunal has considered all factual and legal issues at stake, and especially the current stage of the proceedings. The Law 5016/2023 requires the parties' express agreement if the arbitrations are between the same parties but before different tribunals.

Article 24(2) remains silent as to whether the arbitration agreements giving rise to multiple arbitration proceedings should be identical to each other. The legal theory suggests that they must be at least compatible to each other both from a substantive (e.g., the parties to the different arbitration agreements are the same) and a procedural point of view (e.g., number of members of the arbitral tribunal, seat, language, applicable law, and applicable procedure) (Calavros, 2023b, pp. 400-412, paras. 20-22). Be that as it may, these issues would need be considered by the arbitral tribunal on a

case-by-case basis before it reaches its decision on consolidation (Petrochilos, 2023, pp. 25-37, paras. 36-37). The arbitral tribunal has the power to decide on the consolidation after all the parties concerned have had a chance to express their views. Similarly as the application for joinder, the request for consolidation of different arbitral proceedings must be submitted as soon as possible following the commencement of the arbitral proceedings. There is no similar provision in the UNCITRAL Model Law.

2.7. Interim Measures

Article 25 is an innovative provision of the Law 5016/2023, which builds upon Article 17 of the UNCITRAL Model Law and goes beyond it (Art. 16a, Explanatory Report on the Draft Law 5016/2023). Article 25(1) of the Law 5016/2023 provides that the arbitral tribunal may order any measure it deems necessary, either in the form of an award or in any other form, in connection with the arbitral proceedings (for example, interim measures to safeguard the evidence, the confidentiality of the procedure, security for the costs (see, in this regard, Dimolitsa, 2023, pp. 38-44) and/or the subject matter of the dispute. Unlike the UNCITRAL Model Law, the Law 5016/2023 does not set out a list of different interim measures. In ordering interim measures, the arbitral tribunal is not bound by the parties' respective requests. The arbitral tribunal has also the power, either *ex officio* or upon the parties' request, to modify, suspend or terminate an interim measure, as well as any security it has ordered, provided that the conditions under which the interim measure and/or the security were ordered have changed. Pursuant to Article 25(2) of the Law 5016/2023, interim measures can be ordered should the following conditions be cumulatively met: (a) urgency or prevention of imminent risk, and (b) *prima facie* establishment of the right whose protection is sought (*fumus boni iuris*). In ordering interim measures the arbitral tribunal should comply with the general principle of proportionality in the sense that (a) no interim measures beyond those necessary may be ordered, and (b) if there is a choice among several measures, the least onerous measure must be preferred.

Pursuant to Article 25(3) of the Law 5016/2023, in circumstances of extreme urgency and after hearing the respondent, the arbitral tribunal may issue a preliminary order to regulate the situation pending its decision on interim measures. As a rule of thumb, the party against whom the preliminary order is issued must have the opportunity to be heard prior to the issuance of the preliminary order unless such a hearing would undermine the effectiveness of the preliminary order. In this exceptional case, the arbitral tribunal shall issue the preliminary order *ex parte,* and shall provide after the lapse of 24 hours an opportunity to the party against whom a preliminary order is issued to present its case during a dedicated hearing. Such preliminary order shall expire after 20 days from its issuance, unless otherwise ordered by the

arbitral tribunal in exceptional circumstances. Article 25(4) of the Law 5016/2023 provides that the interim and preliminary orders adopted by the arbitral tribunal shall be binding on the parties, which shall comply with them immediately, and before having been recognised and declared enforceable by the competent national courts (Calavros, 2023b, pp. 413-439, paras. 22-23). Interim and preliminary orders have a provisional effect, and do not affect the resolution of the main dispute.

Article 25(5) of the Law 5016/2023 provides that the competent national court shall recognise and declare enforceable (within Greece) any interim measure ordered, unless such interim measure is contrary to international public policy within the meaning of Section 33 of the Greek Civil Code or the national court has already been seized upon the relevant request to order a similar interim measure. Notably, Article 17i of the UNCITRAL Model Law specifies more cases under which enforcement might be refused. Once the competent national court has declared the interim measures ordered as enforceable in Greece under Article 25(5) of the Law 5016/2023, said decision can be recognised and declared enforceable (on a cross-border basis) either pursuant to Regulation (EU) 1215/2012 or the general provisions of the *lex fori* (Calavros, 2023b, pp. 413-439, paras. 29-38). This is an additional procedure, which will delay the enforcement of any interim measures/preliminary orders issued by the arbitral tribunal, and therefore may limit the effectiveness of the interim relief granted by that tribunal (Tsikrikas, 2024, p. 130).

Finally, Article 25(6) of the Law 5016/2023 provides that the requesting party may be condemned to pay reasonable damages (in the sense of Sections 225, 286, 674, 918, 932 of the Greek Civil Code) should it violate its duty of good faith in the conduct of the arbitral proceedings, or in case the interim measure turns out to be unjustified. Of particular note is the fact that, in the second case, reasonable damages can be ordered even in the absence of a culpable conduct by the party who applied for the interim measure simply because on assessing the merits of the case, the arbitral tribunal found in favour of the party against which the interim measure was ordered. Said damages can be sought either before the arbitral tribunal that will decide on them in its final award or before the competent national court. The purpose of this provision is to prevent and sanction vexatious litigation tactics whose only goal is to harass and delay the arbitral proceedings.

2.8. Document Production

Article 35 of the Law 5016/2023 allows the arbitral tribunal to order on its own initiative or upon a party's request, and at any stage of the arbitral proceedings, that the parties produce documents and other evidence (including for instance a witness statement by a person who as it arises from the case file must have knowledge

of the facts of the case), which is in their possession, and which is likely to have a material effect on the outcome of the dispute. The arbitral tribunal can exercise this power after having heard the parties to the dispute. Should the party who has been ordered to produce a document/evidence fail to do so, the arbitral tribunal can draw adverse inferences. The arbitral tribunal will also consider the party's refusal to produce the requested evidence in its decision on costs (Calavros, 2023b, pp. 519-522, para. 6). This provision does not relate to the document production stage of an arbitral procedure during which the parties have agreed to exchange requests for the production of documents relevant to the outcome of the dispute. Should a party refuse to voluntarily produce a document requested by the other party, the arbitral tribunal may order that these documents be produced.

Article 35 of the Law 5016/2023 grants to the arbitral tribunal a broader power than during the document production stage where the arbitral tribunal's power is constrained by the parties' requests. Article 35 affords to the arbitral tribunal increased control and verifies its case management powers over the proceedings (Art. 26a, Explanatory Report on the Draft Law 5016/2023). There is no similar provision in the UNCITRAL Model Law.

2.9. Action to Set Aside

Article 43 of the Law 5016/2023 builds upon Articles 34-36 of the UNCITRAL Model Law and goes beyond them. In particular, Article 43(2)(a)(ee) of the Law 5016/2023 establishes a new annulment ground not found in the UNCITRAL Model Law. This ground applies when there is a final and irrevocable decision by a competent criminal court regarding fraud or false testimony/false documents, or the occurrence of passive bribery or breach of duty (as set out in Article 544(6) and (10) of the Greek Code of Civil Procedure). In this case, the time limit for filing an action to set aside the arbitral award is sixty days (60) from the date the criminal judgment has become irrevocable as opposed to the general deadline for setting aside the award, which is three (3) months from the date of service of the arbitral award. Article 43(4) reflects the principle of *exceptio doli generalis* according to which a party may not rely upon its own actions or omissions to have an award set aside. Reflecting a pro-arbitration ethos, Article 43(5) provides that when the Court of Appeal determines that there is a ground for annulment, it may refer the dispute to the original arbitral tribunal in order for said tribunal to cure the relevant defect to the extent that the original tribunal can be reconstituted and the defect is curable. A new award must then be rendered within ninety (90) days from the referral. Article 43(6) provides that the arbitration agreement may be revived in respect of the dispute that was adjudicated by the arbitral tribunal in case the arbitral award

is set aside. Pursuant to Article 43(7) of the Law 5016/2023, by express and specific written agreement, the parties may waive at any time their right to seek to set aside an arbitral award. However, such waiver shall have no impact on the parties' right to contest and resist the enforcement of an arbitral award by raising relevant setting aside grounds (Mantakou, 2023, pp. 77-81).

2.10. Res Judicata and Enforceability

Article 44 (2) of the Law 5016/2023 provides first that an arbitral award shall be *res judicata* from its issuance by reference to Sections 322, 324-330 and 332-334 of the Greek Code of Civil Procedure. The *res judicata* effect of the arbitral award only covers the operative part of the arbitral award. Secondly, the *res judicata* extends to preliminary matters determined by the arbitral tribunal within the scope of the arbitration agreement such as its validity. Thirdly, the arbitral award can only extend to third parties if they are bound by the arbitration agreement (Art. 35, Explanatory Report on the Draft Law 5016/2023). Article 44(3) of the Law 5016/2023 provides that the action to set aside does not automatically suspend the enforcement of the arbitral award. Enforcement may be suspended pursuant to the procedure for interim measures if it is *prima facie* likely that a setting aside ground may be upheld. There is no similar provision in the UNCITRAL Model Law.

2.11. Greek Arbitral Institutions

Article 46 of the Law 5016/2023 specifies the minimum requirements for the establishment of arbitral institutions in Greece. For example, these entities must have the corporate form of a *société anonyme* with a minimum fully paid-up share capital of One Hundred Thousand Euros (EUR 100,000) or be public-law legal entities. They must also provide rules of arbitration and a roster of recognised arbitrators (Art. 37, Explanatory Report on the Draft Law 5016/2023). Arbitral institutions in Greece may operate following the lodging of a declaration (not a permit) with the Ministry of Justice, and a verification by the State that the minimum requirements are met. There is no similar provision in the UNCITRAL Model Law.

3. International Investment Treaty Arbitration in Greece

According to the United Nations Conference on Trade and Development (UNCTAD), Greece is a party to 29 Bilateral Investment Treaties (BITs). These BITs were negotiated and concluded in the 1990s and 2000s with non-Western States in

which Greek investors were (or were hoping to be) active. In other words, at least from the Greek perspective, the Greek BIT project was oriented towards protecting Greek investors abroad rather than protecting (and, thereby promoting) foreign investment in Greece. Greece is also a party to both the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

Until 2010, there was no (known) investment treaty arbitration against Greece. Most of the publicly available investment treaty arbitrations against Greece arose in the context of the Greek financial crisis. The Greek financial crisis triggered certain major investment treaty arbitrations (Mitsou, 2016, pp. 687-721). In particular, it was the voluntary restructuring of the Greek sovereign debt in 2011 and 2012 under the auspices of the European Commission, the European Central Bank (ECB) and the International Monetary Fund (IMF) that triggered claims under BITs (Glinavos, 2014, pp. 475-497). In *Istrokapital* case, the dispute concerned directly the Greek sovereign debt restructuring. Unlike in the cases involving Argentina, in *Istrokapital* case, the ICSID tribunal adopted a narrow definition of investment and, as a result, declined jurisdiction (*Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*; Nakajima, 2016, pp. 472-490). In the parallel cases of Cyprus Popular Bank and Bank of Cyprus, the scope of the dispute was broader and concerned the treatment of the Cypriot banks that were present in Greece during the crisis (*Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic; Bank of Cyprus Public Company Limited v. Hellenic Republic*). Investment treaty cases launched by Greek investors are greater in number and more diverse, ranging from the construction sector (*Avax S.A. v. Lebanese Republic*), the banking sector (again in the context of the financial crisis) (*Marfin Investment Group Holdings S.A., Alexandros Bakatselos and Others v. Republic of Cyprus*), and metallurgy and mining sectors (*Mytilineos Holdings v. Serbia*).

In March 2018, the Court of Justice of the European Union (CJEU) handed down its judgment in the *Achmea* case, ruling that the arbitration clause of the Netherlands-Slovakia BIT was incompatible with EU law (*Slovak Republic v. Achmea*). Unfortunately, from the perspective of those favouring investment treaty arbitration, the *Achmea* judgment was followed by subsequent CJEU's judgments dealing further blows to the compatibility of investment treaty arbitration with the EU legal order (*Republic of Moldova v. Komstroy*; *Republic of Poland v. PL Holdings Sàrl*). Following the *Achmea* judgment, 23 EU Member States (including Greece) signed the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union.

4. Conclusions

For reasons analysed above, it is unclear whether in the foreseeable future there will be a rise in investment treaty arbitration involving either Greek investors as claimants or Greece as respondent. This is due to the legal developments within the EU in relation to investment treaty arbitration in the aftermath of the *Achmea* judgment, as well as the fact that the Greek legal and political system offers an adequate level of protection to foreign investors. In relation to international commercial arbitration, the recent Law 5016/2023 has significantly enhanced the position of Greece as an arbitration hub. The Law 5016/2023 did not blindly transpose the UNCITRAL Model Law into the Greek legal order, but went beyond the UNCITRAL Model Law in many respects. As a result, the Law 5016/2023 includes some of the most innovative provisions at international level, transposing best practice in international arbitration and recent case law into the Greek legal order. By adopting a policy favouring arbitration, the Law 5016/2023 could contribute to making Greece a modern, attractive arbitration hub, providing legal certainty and ensuring a fair and efficient arbitral process based on international standards.

References

Brekoulakis, S. 2023. Comparative overview of Law 5016/2023 in light of the English Arbitration Act and the UNCITRAL Model Law on International Commercial Arbitration. *Diaitisia,* 1/, pp. 82-96.

Calavros, C. 2023a. The physiognomy of the new Law 5016/2023. *Diaitisia,* 1, pp. 3-12.

Calavros, C. 2023b. *International Commercial Arbitration*, *Volume I, Law 5016/2023-Commentary*. 2nd Edition. Athens-Thessaloniki: Sakkoulas.

Dimolitsa, A. 2023. Article 25 of Law 5016/2023 on International Commercial Arbitration. *Diaitisia,* 1, pp. 38-44.

Glinavos, I. 2014. Haircut Undone? The Greek Drama and Prospects for Investment Arbitration. *Journal of International Dispute Settlement*, 5(3), pp. 475-497. https://doi.org/10.1093/jnlids/idu008

Konstantinakou, D. G. 2023. Past and Present? Greece in International Arbitration in the Twentieth Century. *Journal of the History of International Law*, 25(3), pp. 354-386. https://doi.org/10.1163/15718050-bja10087

Mantakou, A. 2023. Action to set aside (Article 43). *Diaitisia*, 1, pp. 77-81.

Mitsou, A. O. 2016. Greek Debt Restructuring and Investment Treaty Arbitration: Jurisdictional Stumbling Blocks for Bondholders. *Journal of International Arbitration*, 33(6), pp. 687-721. https://doi.org/10.54648/JOIA2016043

Nakajima, K. 2016. Parallel Universes of Investment Protection? A Divergent Finding on the Definition of Investment in the ICSID Arbitration on Greek Sovereign Debts.

The Law and Practice of International Courts and Tribunals, 15(3), pp. 472-490. https://doi.org/10.1163/15718034-12341334
Petrochilos, G. 2023. Joinder and consolidation. *Diaitisia*, 1, pp. 25-37.
Ralston, J. 1929. *International Arbitration, from Athens to Locarno*. Stanford: Stanford University Press.
Schinazi, M. 2021. *The Three Ages of International Commercial Arbitration*. Cambridge: Cambridge University Press. https://doi.org/10.1017/9781108891837
Tsikrikas, D. 2024. Interim measures ordered by the arbitral tribunal (Article 25). In: Pampoukis, Ch. (ed.), *Arbitration: International Commercial-Domestic-Investment*. Athens: Nomiki Vivliothiki, p. 130.

Case Law

Avax S.A. v. Lebanese Republic, ICSID Case No. ARB/16/29, Award, 20 June 2024.
Bank of Cyprus Public Company Limited v. Hellenic Republic, ICSID Case No. ARB/17/4.
Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic, ICSID Case No. ARB/14/16, Award, 15 April 2021, and Decision on Annulment, 30 November 2022.
Marfin Investment Group Holdings S.A., Alexandros Bakatselos and Others v. Republic of Cyprus, ICSID Case No. ARB/13/27.
Mytilineos Holdings v. Serbia, PCA Case No 2014-30, Award, 22 August 2017.
Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic, ICSID Case No. ARB/13/8 *(Poštová banka v. Greece).*
Republic of Moldova v. Komstroy, Case C-741/19, EU:C:2021:655.
Republic of Poland v. PL Holdings Sàrl, Case C-109/20, ECLI:EU:C:2021:875.
Slovak Republic v. Achmea BV, Case C-284/16, EU:C:2018:158.

Legal Sources

Explanatory Report on the Draft Law 5016/2023.
Greek Civil Code, 1946.
Greek Code of Civil Procedure, 1968.
Law 5016/2023, International Commercial Arbitration Act of Greece, *Official Gazette* No. A21, 4 February 2023.
London Court of International Arbitration (LCIA) Rules, 2020.

Michal Hrušovský*
Pavel Lacko**

Review Scientific Paper
UDC: 336.765 (437.6)
doi: https://doi.org/10.56461/SPZ_24415KJ
Received: 7. 10. 2024.
Accepted: 13. 1. 2025.

ARBITRATION IN THE SLOVAK REPUBLIC: MODERN TRENDS AND LEGAL CHALLENGES

Summary

Arbitration in the Slovak Republic has grown steadily as the preferred commercial dispute resolution method, driven by a robust legal framework under the Arbitration Act aligned with the UNCITRAL Model Law. Despite its increasing popularity, the adoption of arbitration remains relatively slow, hindered by the issues such as judicial interference, limited public awareness, and perceived complexities. Efforts to popularize arbitration include enhancing arbitrator expertise, educating judges, and fostering institutional support. The integration of technology, such as online dispute resolution platforms and virtual hearings, has modernized the arbitration process, improving its efficiency and accessibility. However, the challenges persist. Addressing these challenges requires continued public awareness campaigns, legislative reforms, and stricter oversight to ensure transparency and fairness. By embracing these measures, Slovakia could strengthen its arbitration framework, making it a more attractive venue for domestic and international commercial disputes and fostering a more favorable environment for effective alternative dispute resolution. In this paper, the authors will attempt to summarize the modern trends and legal challenges of arbitration in Slovakia.

Keywords: arbitration, modern trends, legal challenges, judicial interference, online dispute resolution.

* JUDr., PhD, Attorney-at-law, Managing Associate at the Kinstellar law firm (Bratislava).
E-mail: *michal.hrusovsky@kinstellar.com*
ORCID: *https://orcid.org/0009-0004-1402-1838*

** JUDr., LL.M., PhD., Attorney-at-law, Partner at Motúzova & Lacko law firm (Bratislava).
E-mail: *lacko@akmotuzova.sk*
ORCID: *https://orcid.org/0009-0001-7616-6774*

ARBITRAŽA U REPUBLICI SLOVAČKOJ: SAVREMENI TRENDOVI I PRAVNI IZAZOVI

Sažetak

Popularnost arbitraže u Republici Slovačkoj, kao poželjnog načina za rešavanje privrednih sporova, u konstantnom je usponu, koji je posledica pravnog okvira sadržanog u Zakonu o arbitraži, a koji je ustrojen po uzoru na UNCITRAL Model zakon. Napori da se popularizuje arbitraža uključuju unapređenje stručnosti arbitra, obrazovanje sudija, i podsticanje institucionalne podrške. Razvoj tehnologije, koja je omogućila platforme za rešavanje sporova na mreži i virtuelna saslušanja, modernizovala je arbitražni proces i povećala njegovu efikasnost i dostupnost. Međutim, izazovi još uvek postoje. Rešavanje tih izazova zahteva kontinuirane kampanje podizanja svesti javnosti, kao i zakonodavne reforme, te stroži nadzor u cilju omogućavanja transparentnosti i pravičnosti. Usvajanjem ove mere, Slovačka može da ojača svoj arbitražni okvir, što može da ga učini atraktivnijim mestom za domaće i međunarodne trgovinske sporove i stvori povoljnije okruženje za efikasno alternativno rešavanje sporova. U ovom članku, autori su pokušali da sumiraju savremene trendove i pravne izazove arbitraže u Slovačkoj.

Ključne reči: arbitraža, savremeni trendovi, pravni izazovi, sudsko mešanje, onlajn rešavanje sporova.

1. Introduction

As an alternative dispute resolution mechanism, arbitration has gained significant traction globally, and in the Slovak Republic as well. This paper aims to provide a comprehensive overview of the current state of arbitration in Slovakia, exploring its modern trends, legal frameworks, and the primary challenges encountered by practitioners and the disputing parties.

This paper explores the current state of arbitration in the Slovak Republic, highlighting the key trends, challenges, and the ongoing efforts to enhance its effectiveness as a dispute resolution method. The first section provides an overview of the legal framework governing arbitration in Slovakia, focusing particularly on the alignment of Slovak legislation with international standards such as the UNCITRAL Model Law. This sets the stage for understanding the way arbitration is structured in the country and its growing appeal.

The following sections delve into modern trends shaping Slovak arbitration, including the rising popularity of institutional arbitration, the increased focus on arbitrator expertise and training, and the integration of technological advancements such as online dispute resolution platforms. These developments illustrate the progressive steps taken to modernize and streamline the arbitration practice.

Subsequent sections address the primary challenges facing arbitration in Slovakia. These include judicial interference, enforcement issues, legislative ambiguities, and the misuse of the "appointing authority" mechanism, affecting trust in the process. The paper argues that while arbitration is advancing, these obstacles hinder its broader adoption.

Finally, the paper discusses potential solutions, such as public awareness campaigns, judicial education, legislative reforms, and enhanced institutional support, arguing that these measures are crucial for building a more robust and reliable arbitration framework in Slovakia.

2. Current Legal Framework

The principal legislation governing arbitration in Slovakia includes (i) Act No. 244/2002 Coll. on Arbitration (hereinafter: Arbitration Act), subsequently amended by the Act No. 336/2014 Coll. effective from 1 January 2015 and aligning the Arbitration Act with the UNCITRAL Model Law on International Commercial Arbitration, and (ii) Act No. 335/2014 Coll. on Consumer Arbitration (hereinafter: Consumer Arbitration Act) relating specifically to consumer arbitration. This alignment of the Arbitration Act with the UNCITRAL Model Law on International Commercial Arbitration signifies Slovakia's commitment to international standards, ensuring it is a competitive arbitration venue. In the explanatory report accompanying the draft of the Arbitration Act, the Slovak government explicitly stated that adopting the UNCITRAL Model Law principles would promote legal certainty, predictability, and consistency, thus fostering a more favorable business and investment climate. This broader approach was framed as a commitment to modernizing Slovakia's legal system, positioning it in line with other reputable arbitration jurisdictions. The Arbitration Act emphasizes party autonomy, allowing freedom in choosing arbitrators, procedural rules, and the place of arbitration.[1] It provides procedural flexibility, with

[1] In this regard, the following provisions of the Arbitration Act are especially relevant: (i) Article 8 (Agreement on the Appointment of Arbitrators) - this Article grants the parties the autonomy to choose their arbitrators, allowing them to select individuals based on their expertise, neutrality, and suitability for the specific dispute; it outlines the procedure for appointing arbitrators and allows the parties to agree on their preferred method, and (ii) Article 23 (Place of Arbitration) - this provision gives the parties the right to agree on the place of arbitration, which can be either within Slovakia or any other jurisdiction; if the parties cannot agree, the tribunal

clear commencement provisions, adaptable conduct rules, and the power for tribunals to grant interim measures (see: Arts. 22 *et seq*., Arbitration Act). The enforceability of arbitral awards is a cornerstone, ensuring finality with limited grounds for challenge[2] and adherence to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted by a United Nations diplomatic conference on 10 June 1958 (New York Convention, 1958), which Slovakia (respectively former Czechoslovakia) has ratified. This alignment with the UNCITRAL Model Law harmonizes Slovakia's framework with international standards, enhancing legal certainty and competitiveness. By maintaining high standards, the Arbitration Act provides a reliable and efficient dispute resolution mechanism, reinforcing Slovakia's reputation in the global arbitration landscape.

3. Modern Trends in Slovak Arbitration

3.1. Slow Rise in Popularity

Slovakia has been making efforts to popularize the use of arbitration in commercial disputes, but the progress has been relatively slow. Despite the robust legal framework provided by the Arbitration Act, which is aligned with international standards such as the UNCITRAL Model Law, arbitration has yet to reach its full potential. Various initiatives, including awareness campaigns, training programs for legal professionals, and the establishment of arbitration institutions, aim to promote arbitration as an efficient and flexible alternative to traditional litigation.[3]

has the authority to determine the place, considering the circumstances of the case.

[2] The relevant provisions emphasizing the finality and enforceability of arbitral awards include: (i) Article 35 (Effect of Arbitral Award) - this Article states that an arbitral award has the same effect as a final court judgment, making it binding and enforceable on the parties; this provision underscores the finality of arbitral awards, equating them with judicial decisions; (ii) Article 40 (Grounds for Setting Aside an Arbitral Award) - this Article details the limited grounds on which an arbitral award can be set aside by a court. The grounds include procedural irregularities, excess of jurisdiction, incapacity of a party, invalid arbitration agreement, and public policy considerations. This narrow scope ensures that challenges to awards are restricted, supporting the finality of arbitral decisions, and (iii) Article 44 (Enforcement of Arbitral Awards) - this provision outlines the procedure for the enforcement of arbitral awards, specifying that awards rendered under the Act are enforceable in the same manner as court judgments.

[3] Efforts to promote arbitration in Slovakia are supported by various initiatives, such as awareness campaigns and training programs led by institutions like the Arbitration Court of the Slovak Bar Association (SBA). The SBA Arbitration Court actively promotes arbitration as an alternative to the traditional court litigation through educational activities, seminars, and public

However, several challenges have hindered its widespread adoption. Public awareness and understanding of arbitration remain limited, resulting in a preference for court litigation. Additionally, arbitration cost concerns and its perceived complexity deter some businesses from opting for it. Judicial interference and inconsistent enforcement of arbitral awards further slow down the uptake. To accelerate the adoption of arbitration, continued efforts to educate businesses and legal practitioners about its benefits, streamline procedural aspects, and ensure robust enforcement of arbitral awards are crucial. By addressing these challenges, Slovakia can enhance the attractiveness and effectiveness of arbitration as the preferred commercial dispute resolution method.

3.2. Emphasis on Arbitrator Expertise and Training

Slovakia puts a significant emphasis on arbitrator expertise and training to enhance arbitration quality and effectiveness. Slovak professionals participate also in various activities of the renowned arbitration institutions, including ICC and VIAC (VIAC, 2024). Much of this effort is driven individually by the professionals who seek to enhance their knowledge and skills through specialized training programs, workshops, and international certifications. This individual commitment ensures that arbitrators are well equipped to handle complex commercial disputes with competence and professionalism.

In addition to these individual efforts, there are broader initiatives aimed at educating relevant judges about arbitration, and particularly about the arbitration principles, procedures, and the importance of minimal judicial intervention.[4] This judicial education is crucial for ensuring that courts support rather than hinder the arbitration process, particularly in the enforcement of arbitral awards.

outreach efforts designed to build confidence in arbitration among businesses and legal professionals. They provide resources and host events to raise awareness about the benefits of arbitration, aiming to increase its adoption as an efficient dispute resolution method in commercial settings. Additionally, events such as the annual Richard Dewitt Arbitration Conference, organized by AmCham Slovakia in cooperation with the Law Faculty of Comenius University, bring together legal professionals, academics, and business leaders to discuss the current trends and challenges in arbitration. These conferences are crucial for promoting arbitration, sharing best practices, and educating stakeholders about the importance of impartiality and expertise in arbitral proceedings. For more details on these initiatives, you can explore the official website.

[4] One prominent example is the training program offered by the Slovak Bar Association's Arbitration Court, which actively promotes the use of arbitration as an alternative to traditional litigation. The Court organizes workshops and seminars specifically targeted at judges and legal professionals to enhance their understanding of arbitration and foster a supportive judicial environment. This includes training on procedural rules and the limited role of courts in arbitration, which is crucial for maintaining the autonomy of the arbitration process.

Moreover, efforts to popularize arbitration include awareness raising among businesses and the general public about its benefits (VIAC, 2024). Arbitration is promoted through conferences, publications, and outreach activities. By enhancing arbitrator expertise, educating judges, and increasing public awareness, Slovakia aims to foster a more robust and effective arbitration environment.

In 2024, already the 10th Richard DeWitt Arbitration Conference took place in Bratislava (Comenius University in Bratislava, Faculty of Law, 2024). The conference is organized annually and brings together legal professionals, scholars, and industry experts from around the world to discuss the latest trends and developments in arbitration. The event facilitates the exchange of information and ideas, contributing to the development of arbitration practice in Slovakia. Thus, it serves as the main forum for the Slovak arbitration community to meet, form particular ideas, and propose legislative changes. The keynote speeches, panel discussions, and interactive workshops cover a wide range of topics, from international arbitration practices to technological advancements in dispute resolution. The participants have the opportunity to engage with the leading figures in the field, gain insights into the emerging issues, and network with their peers, thereby strengthening the arbitration framework in Slovakia.

4. Legal Challenges in Slovak Arbitration

Despite the positive developments, the arbitration landscape in Slovakia faces several legal challenges that need to be addressed to ensure its continued growth and effectiveness.

4.1. Judicial Interference and Support

One of the primary challenges is the degree of judicial interference in arbitration proceedings. While the Arbitration Act provides for limited court intervention,[5] there have been instances where courts have overstepped, leading to delays and uncertainties (Slovak Constitutional Court, Decision No. III. ÚS 162/2011 and

[5] Some of the key provisions illustrating this limited judicial involvement include: (i) Article 8 (Agreement on the Appointment of Arbitrators) - Courts may only intervene in the appointment of arbitrators if the parties fail to appoint them according to their agreement, or if the chosen method fails, and (ii) Article 40 (Grounds for Setting Aside an Arbitral Award) - the grounds on which a court can set aside an arbitral award are strictly limited to issues such as the invalidity of the arbitration agreement, lack of proper notice, excess of jurisdiction, or violations of public policy; this Article is crucial in ensuring that court intervention is minimal and exercised only in cases where the fundamental legal principles are at stake.

III. ÚS 547/2013).[6] Ensuring that the judiciary respects the autonomy of arbitration and adheres to the principles of minimal intervention is crucial for maintaining confidence in the arbitration process.

Two crucial steps in the not-so-far history have helped to limit the engagement of state courts in arbitration proceedings.

On 1 January 2015, Act No. 336/2014 Coll. came into effect, significantly amending the Arbitration Act. This amendment introduced, *inter alia*, two major changes impacting the prevention of misuse of arbitration proceedings and the need for the constitutional court to intervene in the decision-making activities of arbitration tribunals.

The first change expanded the grounds for filing a lawsuit to annul an arbitration award to include conflicts with public order. This allowed general courts to correct significant breaches of fundamental principles of justice in arbitration proceedings.

The second change was the exclusion of consumer disputes from the scope of Arbitration Act and the adoption of a separate regulation governing consumer arbitration proceedings (Consumer Arbitration Act), significantly strengthening consumer protection and ensuring their sufficient awareness of the various aspects of arbitration proceedings.

This amendment aimed to prevent the misuse of arbitration proceedings and ensure that the constitutional court is not forced to correct the situation by intervening in the decision-making activities of arbitration courts.

In 2015, the Constitutional Court also issued Opinion PLz. ÚS 5/2015, which dealt with its previous contradictory jurisprudence, defined the nature of arbitration proceedings, and specified a clear approach to the issue of the Constitutional Court's jurisdiction to decide on complaints against the actions or decisions of arbitration tribunals.

According to this opinion, the Constitutional Court stated that "[a]rbitration is an institute of private law, in which arbitrators, as private law persons, decide disputes based on a private legal enactment of the participants. Arbitrators and arbitration courts are not formally or materially entrusted with the exercise of public power, and for this reason cannot be passively legitimized in proceedings on complaints under Article 127[7] of the Constitution." (Opinion of the Constitutional Court, PLz. ÚS 5/2015, para. 26). This is a clear departure from the jurisdictional theory of arbitration, and an approach towards the contractual or mixed theory.

[6] In these decisions, the court has held that a constitutional claim is available against the decision of the arbitral tribunal.

[7] Article 127 of the Slovak Constitution grants the Constitutional Court the authority to protect constitutional rights by reviewing and deciding on complaints filed by individuals who claim that their rights have been violated by a public authority.

The Constitutional Court also stated that "the arbitration court remains a private contractual entity of fundamentally autonomous (not heteronomous) law (Opinion of the Constitutional Court, PLz. ÚS 5/2015, para. 33).

The private law nature of arbitration does not mean that arbitration is not subject to any form of control by general courts. "This does not mean that the designation of a private law enactment (arbitration award) as an enforcement title is exempt from any public law control or intervention. This control has been entrusted by the legislator to general courts in the proceedings on annulment of arbitration awards under s. 40 of the Arbitration Act, or in enforcement proceedings under s. 57(1)(l) of the Enforcement Code. These mechanisms ensure protection against violations of specific fundamental norms applicable to arbitration. However, this does not imply that the arbitration court itself is (or becomes at the time of issuing an arbitration award) a public authority. The fact that the Arbitration Act allows for a mild review of arbitration awards is only a balance by the legislator between private autonomy and the 'radiated' fundamental right to a fair trial, and does not make them regular courts of some zeroth instance. As stated, this 'review' is not an instance review but an assessment of whether a private subject - the arbitration court – has violated legal provisions in private relationships between three private subjects, similar to an assessment of the validity of a contract in substantive law." (Opinion of the Constitutional Court, PLz. ÚS 5/2015, paras. 33 and 35).

The Constitutional Court in their opinion also referred to decisions of foreign constitutional courts (Czech Constitutional Court, Decision No. IV.ÚS 174/02 and IV. ÚS 435/02; German Constitutional Court, Decision No. BVerfG, 1 BvR 744/94 and BVerfG, 1 BvR 698/99), reaching the same conclusions that arbitration courts do not constitute public authorities, and therefore constitutional complaints against their decisions are not admissible.

The Constitutional Court also addressed the issue of effective protection of the participants in the proceedings and the right to a fair trial under Article 46 of the Slovak Constitution, and Article 6(1) of the Convention on the Protection of Human Rights and Fundamental Freedoms. The Constitutional Court stated that "in the context of the grounds for annulment of arbitration awards defined in s. 40 of the Arbitration Act, some types of procedural defects that constitute a violation of the fundamental right to a fair trial under Article 46(1) of the Constitution and the right under Article 6(1) of the Convention in proceedings before general courts could be grounds for annulment of an arbitration award. After the recent amendment by Act No. 336/2014 Coll. effective from 1 January 2015, another ground for annulment of an arbitration award or filing a lawsuit against it was included in s. 40, specifically a conflict with public order (s. 40(1)(b) of the Arbitration Act). It can be assumed that the general court could consider extreme procedural defects as part of this ground."

(Opinion of the Constitutional Court, PLz. ÚS 5/2015, para. 50). Effective protection of participants should thus be ensured through general courts, including the possibility of annulment of an arbitration award in case of its conflict with public order.

Opinion PLz. ÚS 5/2015 thus brought a long-awaited and necessary clarification to the relationship between arbitration proceedings and the right to a fair trial. This decision also clarified the nature of arbitration and resolved the issue of the admissibility of complaints against arbitral awards. This opinion has coincided with the adoption of the amendment to the Arbitration Act, which should also contribute to stability and legal certainty in arbitration proceedings.

4.2. Legislative Gaps and Ambiguities

The Arbitration Act, while comprehensive, includes also certain gaps and ambiguities that can lead to interpretational challenges. For instance, the provisions relating to the appointment and challenge of arbitrators, the conduct of proceedings, and the grounds for setting aside awards require clearer guidelines. Legislative reforms aimed at addressing these ambiguities and aligning with international best practices could enhance the effectiveness of the arbitration framework.

The appointment and challenge of arbitrators is critical to ensuring impartiality and fairness in arbitration. The current Slovak Arbitration Act provides a basic framework for these processes, but it falls short of offering specific criteria and procedures necessary to maintain the integrity of arbitration. The Arbitration Act only mentions in s. 6(1) and 6(3) that "any natural person agreed upon by the parties may become an arbitrator if he or she is of legal age, has full legal capacity and a clean criminal record. Where a legal or natural person to be appointed arbitrator is selected by the parties or by a court, they shall have regard to the qualifications required of the arbitrator under the agreement of the parties and to the circumstances for the appointment of an independent and impartial arbitrator."

The arbitrator must be impartial and independent from the time he or she is appointed to the position in a given dispute, and must remain impartial and independent throughout the arbitration proceedings. However, there is no further guidance as to what this actually means.

Detailed guidelines on the qualifications of arbitrators would be essential. These could include educational background, professional experience, and specific expertise relevant to the dispute. For instance, arbitrators handling commercial disputes should have a strong background in commercial law and relevant industry experience. By setting high standards for arbitrator qualifications, the Arbitration Act could ensure that only competent and knowledgeable individuals are appointed, thereby enhancing the credibility of the arbitration process.

The selection process for arbitrators also needs more clarity. Guidelines outlining a transparent procedure for selecting arbitrators, including the method of nomination, appointment by the parties, and involvement of arbitration institutions would be essential. This could help avoid delays and disputes over the selection process, ensuring that the arbitration can proceed efficiently. Pursuant to s. 8(2) of the Arbitration Act: "If the parties have not agreed either on the person(s) to be appointed arbitrator(s) or on the procedure for their additional appointment, (a) in a three-arbitrator arbitration, each party shall appoint one arbitrator and the arbitrators so appointed shall subsequently appoint the third presiding arbitrator; if a party fails to appoint an arbitrator within 15 days of the other party's request, or if the two arbitrators so appointed fail to appoint the third presiding arbitrator within 30 days of their appointment, the arbitrator shall be appointed by the person or tribunal of their choice at the request of the party, (b) in the case of an arbitration with more than three arbitrators, the procedure under subparagraph (a) shall be followed *mutatis mutandis*, (c) in the case of an arbitration with a single arbitrator, that arbitrator shall be appointed by the selected person or court at the request of the contracting party." In practice, it is very problematic if the court has to decide on the appointment of a tribunal member since courts have very little experience in how to choose such person and the process is very slow.

Moreover, the grounds for challenging arbitrators must be specified explicitly to prevent any conflicts of interest and biases. A clear procedure for raising and duly and timely resolving challenges is also necessary to address any concerns promptly and fairly. According to s. 9(4) and 9(5) of the Arbitration Act: "If the parties do not agree on a procedure for objecting to the arbitrator, the party wishing to object to the arbitrator shall, within 15 days of becoming aware of the circumstances for objection, send a written statement of the grounds for objection to the arbitral tribunal within 15 days of the date when they became aware of these circumstances. If the arbitrator against whom the objection has been raised does not resign or if the other party does not agree with the objection, the arbitration tribunal shall rule, at the request of the party, on the objection within 60 days of the receipt of the objection. If the objection to the arbitrator is not upheld or decided within the specified time limit [...], the objecting party may, within 30 days of the receipt of the decision rejecting the objection or after the expiration of the time limit for deciding on the objection [...] request that the court decide on the objection." The problematic points include cases when there is a sole arbitrator who decides on the challenge against himself or herself and cases when the court decided on the challenge since the statutory reasons are very vague, and the court decision on challenge against the arbitrator could take considerable time.

Implementing these detailed guidelines would both prevent conflicts of interest and enhance the perception of fairness in the arbitration process. Where the

parties have confidence that arbitrators are selected and assessed based on transparent and objective criteria, they are more likely to trust the arbitration process and its outcomes. This trust is crucial for the acceptance and success of arbitration as an alternative dispute resolution mechanism.

4.3. Public Perception and Awareness

Despite its advantages, arbitration in Slovakia is not as widely understood or accepted as it should be. There is a need for greater public awareness and education about the benefits of arbitration as a dispute resolution mechanism. Legal practitioners, business communities, and educational institutions could play a vital role in promoting arbitration and dispelling misconceptions.

4.4. Lack of Experienced and Renowned Arbitration Experts

One of the reasons to select a particular place as the place for arbitration is also the sufficient number of experienced and renowned arbitration lawyers, as well as the availability of arbitrators who have experience and knowledge of the specific place of arbitration (Queen Mary University of London & School of International Arbitration, 2018).

If we compare Slovakia with other popular arbitration jurisdictions, based on the perception of the authors and their experience and difficulties in finding suitable arbitrators in the proceedings in which they have represented clients, Slovakia lacks arbitration practitioners. A good sign in that regard is the younger generation of arbitration lawyers, who have been acquiring experience and arbitration knowledge in Slovakia and abroad. However, it will take some time for them to build a reputation and experience.

4.5. Transparent Activities of Arbitration Courts and Disclosure of Information

Arbitration courts build their reputation in various ways, but mainly through the arbitral institution website, effective arbitration rules, detailed statistics, list of arbitrators and their expertise (Šimalová, 2019, pp. 25-26). The websites of all renowned arbitration institutions such as ICC, LCIA, SIAC, and HKIAC are very high quality in terms of both their content and visual side. In addition to arbitration rules, model arbitration clauses and information on the fees, they provide also information on various news, conferences, planned events, manuals for the disputing parties and arbitrators, extensive Q&A, detailed annual reports, anonymized review of decisions on objections, etc.

Most Slovak arbitration courts still lack transparency. At the end of September 2024, there was 108 active permanent arbitration courts listed by the Slovak Ministry of Justice. Most of them do not even have a website. They usually disclose only the statutory minimum information on the arbitration proceedings. The Arbitration Court of the Slovak Bar Association is a bright exception.[8]

The founders of the permanent arbitration courts in Slovakia are obliged under Section 12 (6) of the Arbitration Act to publish on their website a report on the activities of the permanent arbitration court for the previous calendar year by April 30 every year. However, this report must contain only the minimum information – specifically, the numbers on initiated, pending and completed proceedings. The Arbitration Act does not establish any sanction for violation of the above provision, and many permanent arbitration courts in Slovakia still fail to fulfill this information obligation.

The Slovak permanent arbitration courts still have a lot work to do on information disclosure and transparency. There is also a need for the Slovak legislator to revise the relevant statutory provisions to order permanent arbitration courts in Slovakia to disclose more information on the proceedings and activities, and the mechanism to effectively enforce such obligation.

4.6. Overall Trust in the Arbitration Courts and Arbitration

Arbitration in Slovakia had suffered a significant reputational damage in the past, primarily due to its abuse in consumer disputes and the lack of independence and impartiality due to a large number of arbitration courts having connections with one (usually stronger) disputing party. For example, before the adoption of a separate Consumer Arbitration Act, there were some arbitrators who had decided several thousands of disputes within a year. One of the reasons for adopting a separate Consumer Arbitration Act was the following: "The need for a separate legal regulation of consumer arbitration arose from the current unflattering state of affairs and the fact that the incidence of negative experiences with the activity of arbitral tribunals in consumer disputes has expanded over the last period of time." (Explanatory Memorandum to the Commercial Arbitration Act, p. 1).

Trust cannot be forced and it can be very difficult to build (on the other hand, it can be lost quickly) (Gyárfáš & Števček, 2019, p. 13).

General lack of trust in the arbitration courts and low level of trust in arbitration by the business people in Slovakia are among the biggest obstacles to arbitration proceedings in Slovakia. The above issues reduce the attractiveness of Slovakia as a place for arbitration.

[8] The Arbitration Court of the Slovak Bar Association annually publishes the report on their activities (Annual Reports of the Arbitration Court of the Slovak Bar Association, 2024).

Because of the already mentioned legislative changes, the restart of arbitration in Slovakia was successful. Arbitration proceedings in Slovakia are slowly beginning to regain the lost trust. However, arbitrators and arbitration tribunals will have to be careful so that their actions and decisions do not cause a renewed loss of trust by the parties to arbitration, state courts and the public.

5. Enhancing the Arbitration Framework

To address these challenges and further strengthen the arbitration framework in Slovakia, several measures could be considered.

5.1. Institutional Support and Development

Institutional support and development play a crucial role in the advancement of arbitration in Slovakia. The key institutions, such as the Slovak Bar Association, have been instrumental in promoting arbitration as a viable alternative to traditional litigation. These institutions provide structured environments for arbitration, offering comprehensive procedural rules, administrative support, and access to a roster of qualified arbitrators.

Efforts are being made to enhance the capabilities of these institutions to better serve the needs of the business community. This includes updating arbitration rules to reflect international best practices, improving administrative efficiency, and incorporating technological advancements.[9] These updates aim to make arbitration more accessible, efficient, and user-friendly.

Moreover, the development of new arbitration centers across Slovakia is encouraged to increase accessibility and provide more options for the parties. These centers focus on various sectors, including construction, energy, and international trade, catering to the specific needs of different industries.

Through these initiatives, institutional support aims to build confidence in arbitration, ensuring it is perceived as a reliable, efficient, and effective method for resolving commercial disputes. By continuously developing and strengthening arbitration institutions, Slovakia is poised to enhance its reputation as a favorable destination for arbitration.

[9] The current Rules of Procedure of the Permanent Arbitration Court of the Slovak Bar Association (which reflect the modern trends) are available online here: https://info.sak.sk/sud/rokovaci-poriadok/, 11 November 2024.

5.2. Embracing Technological Advancements

Embracing technological advancements is crucial for modernizing arbitration in Slovakia and making it more efficient and accessible. The integration of technology into arbitration processes has gained momentum, especially in light of the COVID-19 pandemic, which underscored the need for remote solutions. Online dispute resolution (ODR) platforms are now increasingly utilized, allowing the parties to manage their cases digitally, submit documents electronically, and attend virtual hearings.[10]

These technological tools offer various benefits, including reduced costs, increased flexibility, and the elimination of geographical barriers, making arbitration more attractive to both domestic and international parties. Video conferencing, digital evidence presentation, and electronic signatures are becoming standard practices, streamlining procedures and enhancing the overall efficiency of arbitration.

On the other hand, technological advancements have also brought several challenges and risks, such as abuse of data and data breaches, breach of confidentiality, ineffectiveness of certain technical solutions, and other related issues. Technological development has to go hand in hand with confidentiality, data protection and ensuring a high level of security and effectiveness of arbitration.

5.3. Misuse of the Appointing Authority Mechanism

Despite the advancements in arbitration in Slovakia, some elements continue to undermine the trust in the system. A significant issue is the misuse of the appointing authority mechanism.

In institutional arbitration, an appointing authority, often an established institution, is responsible for appointing arbitrators if the parties cannot agree. However, there have been instances where this role is exploited, with the institutions or individuals presenting themselves as independent appointing authorities while lacking the necessary impartiality and credibility. This occurs when, in order to avoid regulations applicable to permanent arbitration courts, entities present themselves as appointing authorities in *ad hoc* arbitrations, doing this repeatedly in many disputes. However, such conduct has all the characteristics of a permanent arbitral institution. This practice can lead to biased arbitrator appointments and questions about the legitimacy of the arbitral process. It can also lead to concerns about transparency and fairness.

[10] For example, the casefiles of the Permanent Arbitration Court of the Slovak Bar Association are now fully accessible online for the parties to the arbitration and the arbitrators.

Such misuse erodes confidence in arbitration as a fair and effective dispute resolution method. The parties may fear that arbitrators appointed in this manner could be biased or could lack the requisite expertise. This perception is particularly damaging in *ad hoc* arbitrations, where the absence of a robust institutional framework makes ensuring impartiality and fairness even more challenging. In Slovakia, this authority is often an entity specifically designated by the parties. The challenge in *ad hoc* arbitration is the potential misuse of the appointing authority function by one party manipulating the process to select arbitrators favorable to them. This undermines the neutrality that is vital for arbitration, especially in the absence of institutional oversight that could otherwise help ensure impartiality and fairness.

Addressing this issue requires stricter regulations and oversight to ensure that appointing authorities are genuinely impartial and qualified. Enhancing transparency in the appointment process and promoting the use of reputable institutions can help restore trust and reinforce the integrity of arbitration in Slovakia.

6. Conclusion

Arbitration in the Slovak Republic has made significant strides, with increasing popularity, institutional support, and technological integration marking its progress. However, challenges such as judicial interference, enforcement issues, legislative gaps, and public perception need to be addressed to fully realize the potential of arbitration as an effective dispute resolution mechanism.

By implementing targeted reforms, enhancing judicial and public awareness, and embracing technological advancements, Slovakia can strengthen its arbitration framework and foster a conducive environment for resolving commercial disputes. As the experts with two decades of experience, we are both optimistic about the future of arbitration in Slovakia and confident that, with concerted efforts, it can achieve greater prominence and effectiveness in the global arbitration landscape.

References

Gyárfáš, J. & Števček, M. 2019. Odkiaľ prichádza, kde sa nachádza a kam kráča arbitráž na Slovensku. *Bulletin slovenskej advokácie (Bulletin of Slovak Advocacy)*, No. 3, pp. 13-20.

Šimalová, K. 2019. Sú aj slovenské rozhodcovské súdy na správnej ceste?. *Bulletin slovenskej advokácie (Bulletin of Slovak Advocacy)*, No. 5, pp. 22-27.

Internet Sources

Annual Reports of the Arbitration Court of the Slovak Bar Association. 2024. Available at: https://info.sak.sk/sud/aktivity-sudu/, 30. 9. 2024.

Comenius University in Bratislava, Faculty of Law. 2024. Information about the Richard DeWitt Arbitration Conference 2024, Available at: https://www.flaw.uniba.sk/detail-aktuality/back_to_page/pravnicka-fakulta-uk/article/konferencia-arbitrazna-konferencia/, 31. 8. 2024.

Queen Mary University of London & School of International Arbitration. 2018. International Arbitration Survey: The Evolution of International Arbitration. Available at: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf, 28. 8. 2024.

Rules of Procedure of the permanent Arbitration Court of the Slovak Bar Association. Available at: https://info.sak.sk/sud/rokovaci-poriadok/, 30. 9. 2024.

Slovak Arbitration Act. Available at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2002/244/20240701.html, 31. 8. 2024.

Slovak Consumer Arbitration Act. Available at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2014/335/20240701, 30. 9. 2024.

VIAC. 2024. List of practitioners acting as arbitrators at VIAC. Available at: https://www.viac.eu/en/arbitration/list-of-practitioners, 31. 8. 2024.

Legal Sources and Case Law

Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by a United Nations diplomatic conference on 10 June 1958 – New York Convention, 1958.

Decision of the Slovak Constitutional Court, No. III. ÚS 162/2011.

Decision of the Slovak Constitutional Court, No. III. ÚS 547/2013.

Explanatory Memorandum to the Commercial Arbitration Act.

Opinion of the Constitutional Court, PLz. ÚS 5/2015.

Cristina Alexe*
Oana Șoimulescu**

Review Scientific Paper
UDC: 336.765(498)
doi: https://doi.org/10.56461/SPZ_24416KJ
Received: 3. 10. 2024.
Accepted: 13. 1. 2025.

ARBITRATION IN ROMANIA: LOOKING GOOD, HOPING FOR MORE

Summary

This paper provides a current overview of the arbitration legal framework in Romania, analysing the historic development of an arbitration friendly jurisdiction. The paper goes on to describe the implementation of the expected international arbitration pillars, and illustrate some novel and progressive legal provisions on arbitration relating, inter alia, to, applicable law, parallel proceedings and arbitrators' liability. It provides a critical commentary on certain persistent 'arbitration unfriendly' terms in the Romanian national arbitration law and take on two very recent legislative developments involving investment arbitration and regulation of institutional arbitration. It also pinpoints the need for construction disputes to be settled by appropriate fora such as specialist construction courts or in arbitration, and the need for the current expert practice with respect to the evaluation of time extensions and additional payment (which are, at present, reflecting the common law approach) to be adapted to the civil liability principles enshrined in the Romanian Civil Code.

Keywords: arbitration legal framework, real estate disputes, construction arbitration, FIDIC, construction disputes.

* PhD, FCIArb, Partner in a Romanian law firm ACEADVISOR.
E-mail: *cristina@aceadvisor.ro*
ORCID: *https://orcid.org/0009-0009-7260-2290*

** FCIArb, Romanian construction lawyer and founder of Soimulescu&Partners, the first specialist construction law boutique in Romania.
E-mail: *oana.soimulescu@oflaw.eu*
ORCID: *https://orcid.org/0009-0003-5884-1638*

ARBITRAŽA U RUMUNIJI: IZGLEDA DOBRO, NADAMO SE DA ĆE BITI BOLJE

Sažetak

Ovaj rad je deo zbirke radova o izazovima i perspektivama arbitraže u jugoistočnoj i centralnoj Evropi i usmeren je na pregled pravnog okvira za arbitražu u Rumuniji. U tom smislu, u radu se analizira istorijski razvoj arbitraže, opisana je implementacija očekivanih rešenja u kontekstu međunarodne arbitraže i ilustrovane su neke nove i progresivne zakonske odredbe, paralelni postupci i odgovornost arbitara. Autori daju kritički komentar određenih „neprijateljskih" uslova za arbitražu još uvek postoje u rumunskom zakonu, sa osvrtom na investicionu arbitražu i način na koji je regulisana. Autori takođe ukazuju na potrebu da se građevinski sporovi rešavaju na odgovarajućim forumima, kao što su specijalizovani građevinski sudovi i arbitraže, kao i na potrebu za prilagođavanjem prakse u pogledu procene produženja rokova i pitanja dodatnog plaćanja (koji su, u ovom trenutku, odraz common law pristupa) sa principima građanske odgovornosti sadržanim u rumunskom Građanskom zakoniku.

Ključne reči: arbitražni pravni okvir, sporovi o nepokretnostima, razvoj arbitraže, FIDIC, građevinski sporovi.

1. Setting the Stage

As a civil law jurisdiction and EU Member State since 1 January 2007, Romania has a history of arbitration going back to early XIX Century, which is French and Swiss inspired, and which has resisted through the XX century conflicts and communist regime to recover in the early 1990's with the UNCITRAL Model Law inspired legislation. Romania is an early signatory to the Convention on the Recognition and Enforcement of Arbitral Awards of 1958 (hereinafter: New York Convention),[1] the European Convention on International Commercial Arbitration of 1961 (hereinafter: Geneva Convention),[2] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1975 (hereinafter: ICSID Convention).[3]

[1] Ratified by Romania through State Decree No. 186 published in Official Gazette of 24 July 1961.

[2] Ratified by Romania on 16 August 1963.

[3] Ratified by Romania through State Decree on 7 June 1975.

In 2010, Romania undertook a comprehensive reform of its Civil Code and Civil Procedure Code. The arbitration reform departed from the UNCITRAL Model Law whilst staying compatible with and inspired by the French, Italian and German Codes of Civil Procedure and the Quebec Province Code of Civil Procedure (see: Baias, 2016, pp. 10-28). The Law 134/2010 on the New Civil Procedure Code ("NCPC") entered into force on 15 February 2013 (as established by Law no. 76/2012 on implementation of Law no. 134/2010 on the Civil Procedure Code), and was subsequently amended on a significant number of occasions, two times impacting the arbitration framework. The NCPC provides for different regimes for domestic arbitration (Book IV - "On Arbitration") and international arbitration (Book VII, Title IV- "On International Arbitration and the Effects of Foreign Arbitral Awards"), containing separate sections on institutional arbitration and on recognition and enforcement of foreign arbitral awards (see: Smeureanu &. Hickman, 2013, pp. 1-24).

Institutional arbitration has existed in Romania since the interwar period, within chambers of arbitrators attached to each exchange that had jurisdiction to resolve disputes under the 1929 Exchange Law (see: Baias, 2016, pp. 10-28; Stoica, 2016, pp. 287-315). After WWII and during the communism period, the idea of arbitration was somehow taken over in the communist legislation: Decree No. 259/1949 established the 'State arbitration' for settling disputes between 'Romanian socialist organizations'. The State arbitration functioned until 1985, when disputes falling within its jurisdiction were transferred under Decree No. 81/1985 to national courts. An institutional arbitration form was organized during the very first years of communism (1953) to settle disputes between Romanian foreign trade organizations and their foreign partners, attached to the Chamber of Commerce of Romania. This type of arbitration had a spectacular development, and thus, several legal professionals specialized in this matter, and a doctrine was dedicated to the field as "being the only form of non-state arbitration in Romania, an islet where the 1887 Commercial Code and, generally, the trade legislation continued to be consistently applied (…). (…) our commercial case law had developed, serving as the source of several valuable papers on foreign trade law." (Băcanu, 1994, p. 15). This institution had a not so straightforward development, its name and structure having been modified on several occasions both during the communist period and subsequently, when the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania ("CICA CCIR") was created under Article 13 of Decree No. 139/1990 on Chambers of Commerce and Industry of Romania.

Presently, institutional arbitration in Romania is attached to organizations of an associative nature. Under Article 616, para. 1 NCPC, all institutions organizing arbitration enjoy autonomy and are of public utility nature, acting as not-for-profit legal entities.

The CICA CCIR is currently the leading permanent arbitration institution in Romania, continuing the tradition of the former arbitral institution, created more than seventy years ago.[4] There are three other main institutionalized arbitration options in Romania: the Court of Arbitration of the Romanian-German Chamber of Industry and Commerce (AHK Court), the Bucharest International Arbitration Court (BIAC), and the Romanian Chapter of the European Court of Arbitration.

The most popular international arbitration institutions for Romanian parties and Romanian arbitration disputes, both domestic or international, are the ICC, VIAC, LCIA, SCC Arbitration Institute, and the Swiss Arbitration Centre (Tăbârță, 2021, pp. 47-67).

2. Romania as an Arbitration Friendly Jurisdiction

2.1. Arbitrability

As a rule, Romanian arbitration law follows the principle that disputes are arbitrable to the extent the parties may dispose of the concerning disputed right.

For domestic arbitration, Article 542 NCPC sets out the rules applicable to objective arbitrability (*ratione materiae*) in paragraph 1, and subjective arbitrability (*ratione personae*) in paragraphs 2 and 3, as follows: "Article 542 - Subject matter of arbitration (1) Persons with full legal capacity may agree to resolve disputes between themselves through arbitration, except for those disputes concerning personal status, personal capacity, inheritance, family relations, as well as those rights of which the parties cannot freely dispose. (2) The State and public authorities have the right to enter into arbitration agreements only if authorized by law or by international conventions to which Romania is a party. (3) Legal entities of a public nature whose scope of activity includes entering into economic transactions may conclude arbitration agreements, unless their statute or bylaws provide otherwise".

For international arbitrations[5] seated in Romania, Article 1112 NCPC on arbitrability sets out the following rules: (1) Any dispute pertaining to an economic

[4] Under the NCPC provisions on institutional arbitration and the Chamber law, the Court does not have its own legal personality, but is independent of the Chamber with full separation of the domestic and international arbitration activity carried out based on the Court's rules of arbitration adopted by the Chamber following approval by the Court management.

[5] The definition of what is regarded as an international arbitration under the Romanian arbitration law may be found in Chapter I, International Arbitration Proceedings, Article 1111, NCPC – Definition and Scope, as follows: "(1) Under this title, an arbitration that takes place in Romania is considered international if it arises from a private law relation with a foreign element. (2) The provisions of this chapter shall apply to any international arbitration if the place of

interest (*cauza de natură patrimonială*) is arbitrable provided it concerns rights of which the parties may freely dispose and the law of the place of arbitration does not reserve such matters for the exclusive jurisdiction of the courts. (2) If one of the parties to the arbitration agreement is a State, a State-owned enterprise or an organization controlled by the State, this party cannot invoke its right to contest the arbitrability of a dispute or its capacity to be a party in the arbitral proceedings."

Therefore, in the case of domestic arbitration, all disputes that concern any rights that the parties may freely dispose of[6] may be resolved through arbitration seated in Romania, irrespective of whether they pertain to patrimonial and non-patrimonial rights save for those: (i) reserved for the exclusive jurisdiction of Romanian national courts (e.g. insolvency procedure, certain corporate disputes under Company Law No. 31/1990 as amended,[7] petty offences, eviction from unlawfully used or occupied estates, contentious administrative disputes, rights acquired based on acquisitive prescription (*usucapio – uzucapiune* in Romanian),[8] and (ii) expressly excluded by Article 542 NCPC (i.e., concerning personal status, personal capacity, inheritance, family relations).

For international arbitration seated in Romania, the same rule on arbitrability *ratione materiae* linked to rights that the parties may freely dispose of applies, with the additional requirements that such rights must have a patrimonial character (to encompass an economic interest), and that they are not reserved to the exclusive jurisdiction of national courts (in Romania or in other jurisdictions).

As in most jurisdictions, arbitrability rules are deemed mandatory and falling under public policy at the seat of arbitration, thus affecting also the validity of any arbitration agreement having as subject matter a dispute that is not arbitrable under Romanian law, in line with the New York Convention and the Geneva Convention.

---

arbitration is in Romania and at least one of the parties, at the time when the arbitration agreement was concluded, did not have its domicile or its habitual residence or, respectively, its headquarters in Romania, unless the parties have excluded their application in the arbitration agreement or thereafter in writing. (3) The place of arbitration shall be determined by the parties or by the arbitral institution."

6 Some examples of Romanian law for rights that the parties cannot freely dispose of include: disputes concerning goods that are taken out of the civil circuit and inalienable, according to Article 135 of the Romanian Constitution, disputes regarding individual labour conflicts or those pertaining to social insurance, as they involve rights which the parties cannot waive.

7 For example cases regarding social creditors' opposition to decisions concerning amendments to the articles of incorporation, winding up of the company, action in nullity of the company, challenging GMS decisions, actions requesting exclusion or withdrawal from the company.

8 For more details on arbitrability under Romanian law see: Briciu, 2016, pp. 85-96.

2.2. Separability. Competence-Competence. Law Applicable to the Arbitration Agreement.

As the Romanian arbitration law, in its the fundamental arbitration pillars, expressly recognizes *separability* of the arbitration agreement (Article 550, para. 2, NCPC – for domestic arbitration, and Article 1113, para. 3, NCPC – for international arbitration) and *competence - competence* (Article 579, NCPC – for domestic arbitration, and Article 1119, NCPC – for international arbitration), arbitrability is tested by national courts and arbitral tribunals.

The public policy provisions at the national and EU levels are mandatory for the arbitral tribunals seated in Romania (as an EU Member State) for determining the validity of the arbitration agreement (capacity of the parties and the subject matter) under the law applicable to the arbitration agreement considering that for international arbitrations seated in Romania the NCPC specifies (similar to the Swiss Federal Statute on International Private Law) the law applicable to the substance of the arbitration agreement in absence of a choice by the parties, under Article 1113, para. 2, NCPC as follows: "(2) As to its substance, the arbitration agreement shall be valid if it meets the requirements prescribed by one of the following laws: a) the law chosen by the parties; b) the law governing the subject matter of the dispute; c) the law governing the contract containing the arbitration clause; d) Romanian law."

2.3. Setting Aside

Public policy considerations at the national and EU levels are obviously relevant also for setting aside, as Article 608, para. 1, NCPC, in line with the Geneva Convention (and the UNCITRAL Model Law), includes amongst the grounds for setting aside also breach of public policy or mandatory law at the seat of arbitration (ltem h), as well as the case when the dispute is not capable of resolution by arbitration (Item a), or the arbitral award was rendered based on an inexistent, null or inoperative arbitration agreement (Item b).[9]

[9] Article 608 NCPC - Action for annulment: "(1) The arbitral award may only be set aside through an action for annulment for one of the following reasons: a) The dispute was not capable of resolution by arbitration; b) The arbitral tribunal resolved the dispute in the absence of an arbitration agreement or based on an agreement that was null or inoperative; c) The arbitral tribunal was not constituted in accordance with the arbitration agreement; d) The party was not present at the oral argument and the notification procedure was not legally fulfilled; e) the award was made after the expiry of the time limit for the arbitration specified in Article 567, even if at least one of the parties declared that it understood that it may invoke its lapse (*caducitatea* in Romanian), and the parties did not agree to continue the proceedings pursuant to Article 568 (1) and (2); f) The arbitral tribunal dealt with matters not requested by the parties or awarded more than it was requested; g)

An interesting provision in the Romanian arbitration law on the procedure for setting aside/annulment is to allow, subsequent to the arbitral award being set aside, if both the parties expressly request so, for the competent national court (Court of Appeal) to rule on the merits of the dispute *ex aequo et bono* if such express authorisation for arbitration *ex aequo et bono* was initially granted by the parties to the arbitral tribunal. This is specified in Article 613, para. 3, Item b) NCPC: "(3) On finding the action for annulment admissible, the court of appeal shall annul the arbitral award and shall: a) in the cases specified in Article 608(1) (a), (b) and (e), remand the dispute for resolution to the competent court, in accordance with the law; b) in all other cases specified in Article 608(1), remand the dispute to the arbitral tribunal, if at least one of the parties expressly so requests. Otherwise, if the dispute is set for resolution, the court of appeal shall decide the merits within the scope of the arbitration agreement. If, however, the court of appeal needs new evidence to decide the merits, the court shall render a decision after the administration of such evidence. In this latter case, the court shall first render the annulment decision and then, after the evidence is administered, shall decide the merits, and, if the parties expressly agreed that the dispute shall be resolved by the arbitral tribunal *ex aequo et bono*, the court of appeal will decide in that manner."

As for waiver of the right to set aside (action for setting aside/annulment), the Romanian arbitration law does not allow *ex ante* waiver, such preclusion being expressly included in Article 609 NCPC: "(1) The parties cannot waive their right to file an action for setting aside/annulment of the arbitral award in their arbitration agreement. (2) This right can be waived only after the award is made."

2.4. Recognition and Enforcement of Foreign Arbitral Awards in Romania

Under Article 1125 NCPC, a foreign arbitral award[10] shall be recognized and may be enforced in Romania if the underlying dispute can be resolved through

The arbitral award does not contain the dispositive part and the reasoning, does not indicate the date and place of issuance, or is not signed by the arbitrators; h) The arbitral award infringes public order (*ordine publică* in Romanian), good morals or the mandatory provisions of the law; i) If, after the award is made, the Constitutional Court decides on an objection raised in that case, declaring unconstitutional a law, a government ordinance or a provision of a law or an ordinance that was the subject of that objection, or other provisions from being dissociated from the provisions mentioned in the action for annulment. (2) The irregularities that have not been raised pursuant to Article 592 (1) and (3) or that can be remedied under Article 604 cannot be relied on as grounds for annulling the award. (3) Only documents can be used as new evidence to prove the grounds for annulment."

[10] Where foreign arbitral awards are defined by the Romanian arbitration law as: "Any domestic or international arbitral awards rendered in another state, and not considered national awards in Romania are foreign arbitral awards." (Art. 1123, NCPC).

arbitration in Romania and the award does not infringe any public order (*ordine publică* in Romanian) provisions of Romanian private international law.

Romania is a signatory to both the New York Convention and the Geneva Convention, and therefore an arbitral award annulled at the seat of arbitration may be recognized and enforced in Romania if the said award was set aside for grounds other than those included in Article IX (1) of the Geneva Convention, since Article IX (2) of the Geneva Convention limits the application of Article V (1) (e) of the New York Convention.

The New York Convention grounds for refusing recognition and enforcement have been transposed in the Romanian arbitration law in Article 1129 NCPC, with an unfortunate translation error, i.e., the *pro exequatur* "may be refused" of Article (1) in the New York Convention was improperly translated into "shall be refused" as follows: "(1) Recognition and enforcement of foreign arbitral awards shall be refused if the party against whom the foreign arbitral award is invoked proves the existence of one of the following circumstances: a) The parties did not have the capacity to conclude the arbitration agreement under the law applicable to each of them in accordance with the law of the State where the arbitral award has been made; b) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereof, under the law of the country where the arbitral award was made; c) The party against whom the arbitral award is invoked was not given proper notice of the appointment of the arbitrators or the arbitration proceedings or was otherwise unable to present its defence in the arbitration; d) The constitution of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, absent such agreement, was not in accordance with the law of the place where the arbitration took place; e) The arbitral award deals with a difference not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the arbitration agreement. If, however, the decisions contained in the arbitral award that concern matters submitted to arbitration can be separated from those not so submitted, the former may be recognized and enforced; or f) The arbitral award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

3. Examples of Advanced Regulatory Framework for Arbitration

The advanced/progressive examples of the Romanian regulatory framework for arbitration include:

3.1. Plea for Unconstitutionality Raised in Arbitration Proceedings

One important point specific to the Romanian jurisdiction is recognizing the right of the parties to raise a plea for unconstitutionality of a law, a provision of law, or a government ordinance that pertains to the merits and is relevant for the dispute before arbitral tribunals as well, in either domestic or international arbitrations seated in Romania.

This right is recognized in the Romanian Constitution (Article 146, Item d)) and in the Law on Constitutional Court (Article 29), and is duly reflected in the NCPC provisions on arbitration, where arbitral tribunals (as do national courts) act as initial filters deciding on the admissibility of such a plea for unconstitutionality through a procedural order that can be separately challenged with setting aside within 5 days (Article 594, NCPC) and without the obligation to stay the arbitral proceedings until the Constitutional Court has ruled on the respective law provision.

If considered admissible and in the (rare) case the Constitutional Court issues an affirmative decision on deeming the said law provision unconstitutional, the arbitral award may be set aside within three (3) months from the publication of the relevant Constitutional Court decision in the Romanian Official Gazette (Articles 608 and 611, NCPC). Consequently, under the Romanian jurisdiction, for any tensions relating to fundamental access to justice rights (constitutionally recognized) and the right to enforce an arbitration agreement that might be affected (covering both the signatory party or the subject matter), there is an additional possibility to test this compatibility also before the Romanian Constitutional Court. This is in addition to the preliminary reference procedure before the CJEU, which can be initiated only before a national court involved in arbitration.

3.2. Parallel Proceedings in International Arbitration

In line with the International Law Association (ILA) Recommendations on *Lis Pendens* and *Res Judicata* and Arbitration (Executive Committee of the International Law Association, 2006, Annex 1; De Ly & Sheppard, 2009, pp. 83-86), the fundamental *competence-competence* pillar has been recognized also in international arbitration with a legislative solution being put forward for parallel proceedings. Under Article

1119 NCPC, the first paragraph recognizes the principle, whilst its second paragraph allows the arbitral tribunal seated in Romania to address its own jurisdiction regardless of a parallel procedure between the same parties before a national court or another arbitral tribunal, save for justified grounds that would require suspending the arbitration proceeding, thus being an example of advanced legislation.[11]

3.3. Unlimited Voie Directe for the Law Applicable to the Merits

As to the law applicable to the merits for international arbitration under Article 1120 NCPC, the Romanian law expressly recognizes the arbitral tribunal's full discretion on deciding on the applicable law (unlimited - pure *voie directe*), which is a tailored choice of law process, without conditioning it upon the preliminary conflict of laws rule, similar to modern institutional arbitration rules, as follows: Article 1120 NCPC - Applicable law: "(1) The arbitral tribunal applies the law chosen by the parties and, if the parties have not chosen their applicable law, the law that it considers appropriate, taking into account at all times the usages. (2) The arbitral tribunal may decide *ex aequo et bono* only with the parties' express authorization."

3.4. Arbitrator's Liability Under the Romanian Law

Legislative solutions on arbitrators' liability vary in different countries, depending on their theoretical interpretation of arbitrators' status, rights and obligations. It is generally accepted that arbitrators are protected by immunity to allow them to resolve disputes calmly and, hence, impartially (Romero, 2012). There are nonetheless limits on arbitrators' immunity in national laws and under arbitration rules.

The possible legal grounds under which an arbitrator can be held liable are considered to be extraordinary circumstances and their existence will depend on the applicable national law or arbitration rules, or rarely, these would be specified in the arbitrator's terms of appointment (see: Gaillard & Savage, 1999, pp. 597, paras. 1096-1100; Born, 2009, pp. 1654-1657; Lew, 2012; ICC, 1996; Romero, 2012; Fry, Greenberg & Mazza, 2012, paras. 3-1530-3-1536). National laws vary significantly, usually providing for the arbitrator's liability only for acts or omissions in bad faith. Other jurisdictions, following the UNCITRAL Model Law, tend to be silent on this matter.

[11] See full text of Article 1119 NCPC - Jurisdiction of the tribunal: "(1) The arbitral tribunal shall determine its own jurisdiction. (2) The arbitral tribunal shall determine its own jurisdiction without taking into account any proceeding involving the same parties and the same subject matter which is already pending before a court or an arbitral tribunal, except when serious grounds compel suspension of the proceedings. (3) Any jurisdictional objection shall be raised before any defence on the merits."

In most national laws, total exclusion of liability by a contractual approach would be ineffective if the arbitrator was accused of certain particularly serious faults (deliberate or inexcusable wrongful acts or omissions). According to the ICC Commission Report on Status of Arbitrator (ICC, 1996), in the course of carrying out his or her task as arbitrator, the arbitrator is not liable for any detriment caused by his or her acts or omissions, except in the case of deliberate wrongdoing or if he or she resigns without a valid reason. The parties may withhold or claim back all or a part of the arbitrator's fees should he or she be found guilty of any of the wrongful acts or omissions.

The extraordinary circumstances usually fall under: (i) fraud; (ii) intentional wrongdoing; or (iii) gross negligence – especially if it results in a denial of justice, except when it pertains to the purpose of adjudicating the dispute.

To this end, the Romanian NCPC includes (apart from the details on conflicts of interests in Article 562, NCPC) detailed provisions on arbitrators' liability for all arbitrations seated in Romania (Article 565, NCPC – applicable also to international arbitrations as referenced in Article 1123, NCPC).

Under Article 565 NCPC – Liability of arbitrators, "[a]rbitrators are liable under law for the damage incurred if they: a) resign, without cause, after accepting the appointment; b) fail, without cause, to participate in the resolution of the dispute or do not render the award within the term required by the arbitration agreement or the law; c) fail to observe the confidential character of the arbitration, by either publishing or disclosing information acquired in their capacity as arbitrators without the parties' approval; or d) breach other duties in bad faith or gross negligence."

The Romanian civil procedure doctrine (Ciobanu & Nicolae, 2016, pp. 170-172) qualifies arbitrators' liability for damages under this Article 565 as a contractual liability, similar in its last part with that of national court judges, whilst the criteria for what constitutes "bad faith" or "gross negligence" are in line with the Superior Council for Magistrates Decision no. 1/J/20.01.2013 on judges' liability. This refers to breaches of substantive or procedural laws that are so serious that they severely influence the procedural acts rendered by a magistrate, affect their validity, and without doubt or cause severely affect the parties' rights or legitimate interests. Civil liability does not of course exclude criminal liability of arbitrators where their misconduct meets such conditions (i.e., bribery, corruption, illicit behaviour).

4. Unfriendly Characteristics of Romanian Law on Domestic Arbitration

The current Romanian arbitration law unfortunately includes two 'arbitration unfriendly' provisions, which are considered to apply exclusively to domestic arbitration seated in Romania. These two articles were not contained in the original NCPC

draft, and were subsequently incorporated during the legislative process in parliament,[12] before the NCPC was enacted, as justified at the time due to taxation purposes, and subject to pressures from the notary public community (Ciobanu & Nicolae, 2016, p. 227). Both have been unanimously criticized by practitioners and scholars in the field, and are still waiting to be repealed by the upcoming NCPC amendments.

4.1. Authenticated Form Requirement for Arbitration Agreements Pertaining to Real Rights Disputes

As a signatory of the New York Convention, Romania's arbitration law has always included the minimum requirement for the arbitration agreement from Article II, which is proposed also by the UNCITRAL Model Law, i.e., the written form. This is currently provided under Article 548, para. 1, NCPC: "(1) The arbitration agreement shall be concluded in writing, under the sanction of nullity (*nulitate* in Romanian). The written form requirement is fulfilled when the parties agree to resort to arbitration through an exchange of correspondence, irrespective of form, or through an exchange of procedural submissions."

Unfortunately, what has been added to this classic requirement is a segregation of certain types of arbitrable disputes (concerning real rights) for which the arbitration agreement should be concluded in the authenticated form in order to be considered valid and enforceable under Romanian law, as shown by the addition to Article 548, para. 2, NCPC: "(2) If the arbitration agreement concerns a dispute connected with the transfer of a property right and/or the creation of another right *in rem* related to immovable assets, the arbitration agreement must be authenticated by a notary public under the sanction of absolute nullity (*nulitatea absolută* in Romanian)."

Considering that the corresponding text on the form of the arbitration agreement relating to international arbitration (i.e., Article 1113, para. 1, NCPC) does not contain this addition, scholars and arbitration users have unanimously held that the authentication requirement is valid only for domestic arbitration (domestic disputes concerning real rights) (Leaua, 2016a, p. 103). In practice, with respect to the most often arbitrated construction agreements, the parties did not authenticate the entire agreement (due to the burdensome costs and formalities), but chose to conclude submission agreements for each type of dispute once it arose, notarizing only the said submission agreement (Leaua, 2016a, p. 101).

[12] Law no. 206/2012 approving Government Emergency Ordinance no. 44/2012 on amending Article 81 of Law 76/2012 on the implementation of Law no. 134/2010 on the Civil Procedure Code and amending other normative acts published in *Official Gazette* no. 762 of 13 November 2012, amending the initial text of the NCPC before the NCPC entering into force in January 2015.

4.2. Additional Scrutiny of Arbitral Awards Pertaining to Real Rights Before Being Allowed Enforcement

The other provision that impacts finality/enforcement of certain (significant) types of arbitral awards, which need to be "scrutinized" before a national court or notary public in order to become a court judgment or an authenticated notarial deed before being allowed enforcement is discussed below.

According to Article 615 NCPC: "An arbitral award is a writ of enforcement and shall be enforced exactly as a court judgment". This text was altered by Law no. 17/2017, adding a second line to Article 615 NCPC specifying: "The provisions of Article 603 para. (3) shall remain applicable."

Article 603(3) NCPC (in force since 2015) stipulates: "If the arbitral award refers to a dispute related to transfer of ownership right and/or establishment of another right *in rem* over a real property, the arbitral award shall be submitted to the court or the notary public in order to obtain a court judgment or, as the case may be, an authenticated notarial deed. After the court's or notary public's review of compliance with requirements, and after carrying out the procedures enforced by law, and after the parties have paid the real estate tax pertaining to the ownership right transfer, a Land Registry record shall be made and the relevant property shall be transferred and/or another right *in rem* shall be established over the said real estate. If the arbitral award is subject to judicial enforcement, previous formalities will be carried out by the court seized with the enforcement request."

Much to the Romanian arbitration community's regret, Article 603(3) NCPC is still considered "a text incompatible with arbitration" (Baias, 2016, p. 28) and "an unclear addition, lacking rigor, and which did not bring any positive element to the initial rule" (Leaua, 2016b, p. 192), having adverse effect on real estate arbitration (including FIDIC contracts), considering that such types of arbitral awards can no longer be registered directly in Land Registry Books (Baias & Leaua, 2012, pp. 30-51).

The text of Article 603(3) NCPC speaks for itself. It clearly degrades, and does so in a discriminatory fashion, an important category of arbitral awards ruling on matters of real estate ownership or other real rights. This provision deems such type of arbitral awards as lacking finality and enforceability until they are transformed and reviewed on form (?) or on the merits (?) by a national court, or by a notary public administering justice (?), converting the said arbitral award in an authenticated deed, with the said "requirements" subject to review entirely unregulated.

One wonders if the purpose of Article 603(3) NCPC was limited only to avoid arbitral awards ruling on real estate matters with tax evasion risks or to facilitate Land Registry registration process, could this not have been achieved by simply requesting arbitral tribunals in these cases to communicate the arbitral award to

the Tax or Land Register Authorities, or in any such simpler manner that would not affect the equivalency of enforceability between final and binding arbitral awards and national court judgements on real estate matters?

Only in 2022 did the High Court of Cassation and Justice (High Court) limit the above incongruent practice by interpreting the lacunar provisions of Article 603, para. 3, NCPC on "formalities checked" in an arbitral award concerning real rights to refer only to conditions on the form, and not on the merits (see: High Court of Cassation and Justice Decision no. 1/2022 [A] on uniform interpretation and application of Article 603, para. 3, Civil Procedure Code). However, it has failed to offer any further guidance on the other abnormalities of this provision.

As aptly argued by a reputed civil procedure author, hope remains that, until such procedural anomaly is repealed, the only practical manner is to apply Article 603(3) NCPC as restrictively as possible, by limiting all effects that such an "examination" may have on the substance and form of the arbitral award, and interpreting it as applicable only to *ad hoc* arbitration and not to institutionalized arbitration, on the ground that such latter proceedings have their particular procedural framework. Such a restrictive application would allow the notary public or enforcement court only the right to verify whether the corresponding taxation formalities have been followed for the respective real right transaction (Ciobanu & Nicolae, 2016, p. 227).

5. Recent Legislative Updates

Two recent legal developments from Romania are relevant for the world of arbitration, one concerning investment arbitration proceedings, and the other one relating to incorporation and organization of institutional arbitration in Romania, as follows.

5.1. Investment Arbitration Proceedings Involving Romania and Romanian State Authorities

On 16 April 2024, Law no. 101/2024 was passed approving two previous Government Ordinances on representing Romania or Romanian public institutions in ICSID arbitration proceedings or before other international arbitral tribunals, stating that such representation shall be reserved exclusively to the Ministry of Finance. This is valid also in the post-award stage for any potential court proceedings for recognition and enforcement in any other State. What is more, that same Law provides for an obligation of Romanian public authorities' management to take all legal measures necessary to ensure that all persons involved in the subject

matter to the international dispute (including dignitaries) shall participate in all meetings requested by the counsels representing Romania, to prepare the witness statements, take part in any oral hearings or sign any other relevant procedural act for each international litigation if Romania's counsels consider such information and documents useful for the defence.

5.2. NCPC Institutional Arbitration Definition Interpreted by the High Court

On 17 June 2024, the High Court ruled in favour of an opinion lodged by the General Prosecutor submitted to the High Court on 16 April 2024 requesting the High Court to interpret the legal requirements provided for by Article 616 (1) NCPC on the conditions for organizing institutional arbitration in Romania, stating that Romanian NGOs incorporated and functioning under Government Ordinance no. 26/2000 cannot have the organization of institutional arbitration as their scope, unless a separate law allows for such activity (see: Romanian High Court of Cassation and Justice, Decision no. 905/1/2024; Public Prosecutor's Office, Document No. 155/35TLLL-512024, 2024). This has led to the interpretation that Romanian entities that organize institutional arbitration are authorized to carry out such activities only by law and not by authorization of a national court incorporating an NGO.

On 26 August 2024, the detailed reasoning came from the High Court, published on the following day, backing up the same interpretation, i.e., that unless a specific law authorises an NGO to organize arbitration, it is not allowed to carry out such activities, leaving open the question of private NGOs organizing institutional arbitration, and also those of international institutional arbitration organizations with arbitrations seated in Romania.

In the author's opinion, such international institutions carrying out arbitrations seated in Romania should be covered by the original text of Article 616, para. 1 NCPC on the notion of institutional arbitration authorizing international institutions to handle institutional arbitration in Romania, since the High Court can only interpret and not add to a legal provision, as fundamental as the Civil Procedure Code is. Under Article 616, para. 1 NCPC: "(1) Institutional arbitration is the form of arbitration that is constituted and functions permanently under the auspices of an organization or a domestic or international institution or as an autonomous non-governmental public interest organization, pursuant to the law, based on its own rules, which are applicable to all the disputes that are brought before it for resolution under an arbitration agreement. The activity of the arbitral institution shall not have an economic character and shall not be for profit." (Vasile, 2024, pp. 169-177). Further reactions and developments from the arbitration community are expected.

6. Focus on Construction Arbitration

6.1. Construction Dispute Resolution in Romania – –an Ever-changing Landscape

Under the partnership with the European Union and to their express recommendation, under the Financing Memoranda entered by Romania with the European Commission for the grants extended under the Instrument for Structural Policies for Pre-accession for the period 2000-2002, Romania has adopted the conditions of contract issued by the FIDIC (International Federation of Consulting Engineers) – Conditions of Contract of 1987, and respectively First Edition, 1999, for its infrastructure projects.

Regardless of the contract form effectively adopted, all infrastructure contracts provided, with no amendments whatsoever, for a two-tiered dispute resolution clause essentially entailing adjudication and ICC arbitration.

The 2000-2006 period was a test period for the arbitration of disputes concerning contracts for public works, in the end of which the Romanian Government was able to draw two important conclusions: (i) statistically, state owned employers lost most of the disputes with private contractors settled by ICC arbitration, and (ii) arbitral disputes were cost-intensive when it came to arranging for the proceedings and the defence.

After Romania signed the Accession Agreement with EU on 25 April 2005, the Romanian Government decided to continue to use FIDIC contracts for their infrastructure works, nevertheless subject to an important set of amendments intended to privilege the public partner and limit the claim rights of private contractors, accordingly.

The first step in this regard was the signing of an Agreement between the Romanian Ministry of Economy and Finance ("MoEF") and FIDIC on 12 July 2006. Under this Agreement, FIDIC granted the MoEF non-exclusive rights to have the following documents translated into Romanian language and included in the domestic legislation: the Conditions of Contract for Construction, First Edition, 1999, and the Conditions of Contract for Plant and Design-Build, First Edition, 1999.

In 2010, Government Decision no. 1405/2010 ("GD 1405/2010") was issued, which was virtually a Romanian translation of the FIDIC General Conditions of Contract, First Edition of 1999, for construction contracts (the Red Book) or plant and design-build contracts (the Yellow Book). This enactment was followed in 2011 by Ministry Order 146/2011 ("OMoTI 146/2011"), providing a set of mandatory Particular Conditions of Contract including important amendments to the main terms and principles of the FIDIC suite of contracts.

This set of contractual conditions was in force between 2011 and 2017, and provided for two-tier dispute settlement: adjudication and arbitration under the ICC Rules by the Court of International Commercial Arbitration. This amendment to the arbitration clause alone led to numerous disputes regarding the arbitral institution effectively entrusted with dispute settlement. In fact, private contractors referred their disputes to the ICC, whilst public employers disputed jurisdiction of the ICC, claiming that the CICA CCIR would be in fact the competent arbitral institution "*under the ICC Rules*."

In July 2017, the Ministry of Transport and Infrastructure issued Order no. 600/2017 ("OMoTI 600/2017") repealing OMoTI 146/2011 and enforcing drastic amendments to the dispute settlement clause by completely removing the pre-arbitration adjudication clause and providing for the settlement of all disputes exclusively by national courts of law and, more specifically, by the commercial panel of the competent District Courts.

Consequently, between 2018 and 2023, all disputes arising from or in connection with the contracts incorporating the terms of OMoTI 600/2017 were referred to the national courts of law.

This exercise highlighted the fundamental flaws of that system, confirming the major concerns related to the settlement of construction disputes in litigation as opposed to arbitration.

In a nutshell, this experience demonstrated: (i) the judges' lack of specific experience with the settlement of such complex and document-heavy files, (ii) inadequacy of the civil procedural rules applicable to construction disputes as regards the time periods allowed in the NCPC for preparation of claims and defences, (iii) insufficient number of court approved experts capable to undertake proper delay and quantum analysis by using appropriate software typically used in the industry, (iv) impossibility to present such complex cases in public hearings where the parties are allowed only minutes to present their case as opposed to weeks in arbitral proceedings.

At the same time, litigation brought with it a series of major inconveniences for the contractors, pressed to debate aspects related to the confidential structure of their prices and their work methods in public hearings, considering that, under Romanian law, court filings and trial testimony are generally open to competitors in public court hearings. Furthermore, given that prior to 2018 all construction disputes had been settled in ICC arbitrations, and considering the confidential character of the awards issued in such proceedings, the lack of publicly available relevant Romanian construction case law led to even further pressures, confusion and lack of predictability, such that, in most cases, national court judges tended to identify quick "exits" such as procedural grounds to deny the file in an early stage, before entering any merits, in order to avoid ruling on such complex matters.

Statistically, during this period, unless technical expertise was allowed, most cases were ruled in favour of the public employer.

But the life of OMoTI 600/2017 was to be short, only 6 months, considering that, in January 2018, against the many grievances generated by the amendments laid down in OMoTI 600/2017, the Government issued the Government Decision no. 1/2018 ("GD 1/2018") reintroducing arbitration as a means of dispute settlement, whilst expressly providing for the exclusive jurisdiction of CICA CCIR, based in Bucharest, and for complete elimination of the pre-arbitral adjudication stage and its replacement with optional mediation.

Even though this seemed to provide a better and more adequate procedural framework for construction dispute settlement, enlarging significantly the parties' freedom regarding the administration of evidence, presentation of their cases, and, most importantly, the timeline for the procedure, construction dispute settlement in Romania still suffers from the lack of an adequate adaptation of the main principles of delay and quantum expertise (enshrined in the common-law based SCL Protocol on Delay and Disruption – which is extensively used as a reference in current arbitration procedures) to the civil law principles of contractual liability and evaluation of damages and other remedies (such as the extension of the Time for Completion).

Nevertheless, this regulatory framework was soon to be revisited, as the statutory conditions of contract included in GD 1/2018 – were further amended in March 2022, by Government Decision 375/2022 ("GD 375/2022").

This amendment introduced the right of the contracting authorities (only) to choose between litigation and arbitration, provided that such option was clearly set out in the Tender Documents. This amendment referred to Article 53 of Law 101/2016 whereby the *civil panels* of the relevant District Courts were set as the national competent courts to settle construction disputes in connection to these contracts.

This provision, as introduced by GD 375/2022, breaches the provisions of Government Ordinance 92/1997 on direct investments in Romania, as ratified by Law 241/1998, which provides in Article 4: "(1) The investments made in Romania, as well as the possession, use and disposal of a property benefit from the guarantees and facilities provided by this Emergency Ordinance. (2) Investors in Romania shall mainly benefit from the following guarantees and facilities: […] g) the right of investors to choose the competent courts of law or arbitration for the settlement of any disputes." (Government Emergency Ordinance, no. 92 of 30 December 1997 on promoting direct investments, Article 4).

We are not aware of any actions taken by international contractors present in the Romanian market to request in court cancellation of GD 375/2022, despite an express right to do so.

In September 2022, Law 101/2016 was itself amended by Law 208/2022 to provide that any disputes arising from or in connection with public procurement contracts (including construction disputes) were to be referred to *the contentious administrative panel* of the competent District Courts.

In this case, in addition to the main concerns and inconveniences related to litigating in relation to construction disputes described above, in international projects, generally, local courts are not always trusted to be unbiased in their determination of disputes. With the jurisdiction transferred from the *civil panels* to the *contentious administrative panels* of the District Courts such concerns are even more likely to rise.

In addition, rather than consolidating the experience already gained by the civil panel court judges with settlement of complex construction cases (which could have been a step towards establishing specialized construction courts), the transfer of jurisdiction to the contentious administrative panels adds further unpredictability to the already shaking ground of construction litigation in Romania.

7. Conclusion. Current Status of Construction Disputes Jurisdiction in Romania

While construction disputes are most adequately settled in international arbitration, the fluctuating legislative framework in Romania still does not seem to have decided firmly which way to take, and leaves, in practical terms, the decision regarding the jurisdiction and the related procedural framework in the exclusive hands of the public employer (entitled to choose between national courts or CICA CCIR institutional arbitration) - seeding uncertainty and lack of predictability for private contractors.

Regardless of whether construction dispute settlement will continue to be referred to international arbitration administered under the Rules of CICA CCIR in Bucharest, the fundamentals of construction disputes still require the attention of the relevant fora.

While the construction forms of contract originally imported in Romania in the early 2000s were based on common law principles, and came along with a series of customary approaches typical for this legal system, no steps have been taken by the relevant government authorities to adapt these principles to the Romanian local civil law legislation.

Despite the formal abandonment of the FIDIC Conditions in 2018 by the enactment of GD 1/2018, Romania still refers, as part of these conditions, to concepts with no equivalent in the Romanian legal system and to causation systems that are not confirmed as prevailing by the existing civil law doctrine and case law on contractual liability.

Similarly, common law trained experts who assist parties in arbitration procedures in relation to GD 1/2018 based contracts still use the common law principles in determining the compensable delays and disruptions and evaluating time-related costs in delay and disruption claims.

For all the above reasons, the authors believe that clear measures should be adopted shortly to bring clarity and predictability in relation to construction dispute settlement by considering all related specifics. Until and unless specialized courts and specific procedures are established to settle construction cases, construction disputes should be referred to international arbitration as opposed to litigation.

In addition, the Romanian professional associations should get more involved in adapting the current methods for evaluating the impact of delays and disruptions in construction contracts to the civil law principles or in developing alternative assessment methods in light of the civil law jurisdiction.

De lege ferenda, a new and more robust form of statutory contract must be considered by the Romanian legislator alongside a Construction Code regulating (at the very least) the situation of public construction projects. Such codification should harmonize all relevant provisions related to design - including potential changes to the feasibility studies/tender design - permitting, price structure, archaeology, expropriation, utility relocation, time extensions and additional time-related payments, and introduce clear procedures for variations within the limits and with due observance of the public procurement legislation.

References

Băcanu, I. 1994. Noua reglementare a arbitrajului în Codul de procedură civilă român. *Dreptul,* 1.

Baias, F. A. 2016. Chapter 1 §1.02 The Evolution of the Romanian Legislation on Arbitration. In: Leaua, C. & Baias F. A. (eds.), *Arbitration in Romania: A Practitioner's Guide*, Kluwer Law International, pp. 10-28.

Baias, F. A. & Leaua, C. 2012. Unele probleme privind înregistrarea în Cartea funciară a hotărârilor arbitrale pronunţate în materie imobiliară. *Revista Română de Drept,* 6, pp. 30-51.

Born, G. 2009. Rights and Duties of International Arbitrators-B. Status of International Arbitrators, In. Born, G. (ed.), *International Commercial Arbitration*. Kluwer Law International, pp. 1654-1657.

Briciu, T. C., 2016. Chapter 3 §3.01 The Arbitrability of Disputes. Iin: Leaua, C. & Baias, F.A. (eds.), *Arbitration in Romania: A Practitioner's Guide*, Kluwer Law International, pp. 85-96.

Ciobanu, V. M. & Nicolae, M. 2016. *Noul Cod de procedură civilă comentat și adnotat*, vol. II. Bucharest : Universul Juridic.

De Ly, F. & Sheppard, A. 2009. ILA Recommendations on *Lis Pendens* and *Res Judicata* and Arbitration. *Arbitration International*, 25(1), pp. 83-86. https://doi.org/10.1093/arbitration/25.1.83

ICC. 1996. Final Report on the Status of the Arbitrator. *ICC International Court of Arbitration Bulletin*, 7(1).

Fry, J., Greenberg, S. & Mazza, F. 2012. *The Secretariat's Guide to ICC Arbitration*. ICC.

Leaua, C. 2016a. Chapter 3 §3.02 The Arbitration Agreement. In: Leaua, C. & Baias F. A. (eds.), *Arbitration in Romania: A Practitioner's Guide*, Kluwer Law International.

Leaua, C. 2016b. Chapter 3 §3.07 The Arbitral Award. In: Leaua, C. & Baias F. A. (eds.), *Arbitration in Romania: A Practitioner's Guide*, Kluwer Law International.

Lew, J. D. M. 2012. The Tribunal's rights and duties: Why they should be more involved in the Arbitral Process. In: Hanotiau, B. & Mourre, A. (eds.), *Players' Interaction in International Arbitration*. Institute Dossier IX.

Gaillard, E. & Savage, J. 1999. The Status of the Arbitrators. In: Gaillard E. & Savage, J. (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International, pp. 560-597.

Smeureanu, I. M. & Hickman, B. 2013. Book IV, Romanian New Civil Procedure Code. In: Paulsson, J. & Bosman L. (eds.), *ICCA International Handbook on Commercial Arbitration*, Kluwer Law International, Supplement No. 74, pp. 124.

Stoica, C. I. 2016. Chapter 5 §5.01 Institutional Arbitration in Romania. In: Leaua, C. & Baias, F.A. (eds.), *Arbitration in Romania: A Practitioner's Guide*, Kluwer Law International.

Romero, E. S. 2012. Immunity and Liability of Arbitrators: What is the proper balance?. In: Hanotiau, B. & Mourre, A. (eds.), *Players' Interaction in International Arbitration*. Institute Dossier IX.

Tăbârță, C. 2021. Selected Statistics Regarding the State of Commercial Arbitration in Romania. *Romanian Arbitration Journal*, 4, pp. 47-67.

Vasile, C. 2024. Romania's Supreme Court Decides that Associations and Foundations Based in Romania Can Only Set up Arbitral Institutions if Authorized by Law. *Jus Mundi Arbitration Review (JMAR)*,1(1), pp. 169-177.

Legal Sources

Convention on the Recognition and Enforcement of Arbitral Awards of 1958 – New York Convention 1958.

European Convention on International Commercial Arbitration of 1961 – Geneva Convention 1961.

Executive Committee of the International Law Association. *International Law Association (ILA) Recommendations on Lis Pendens and Res Judicata and Arbitration*. June 2006.

Law 101/2016 on Remedies in the Field of Awarding Public Procurement Contracts, Sectoral Contracts and Works Concession and Service Concession Contracts, as well as for the Organization and Functioning of the National Council for the Settlement of Disputes, *Official Gazette* no. 393 of 23 May 2016.

Law 101/2024 Regarding the Approval of the Government's Emergency Ordinance, no. 6/2024 for the Amendment and Completion of Government Emergency Ordinance no. 126/2005 Regarding the Representation of Romania or Public Institutions Before the Courts of Arbitration of the International Centre for the Settlement of Investment Disputes, *Official Gazette* no. 358 of 17 April 2024.

Public Prosecutor's Office, Document No. 155/35TLLL-512024. Available at: https://www.iccj.ro/wp-content/uploads/2024/04/sesizare-RIL-905-1-2024.pdf (11 November 2024).

Romanian Company Law No. 31/1990, Republished in the *Official Gazette of Romania*, no. 1066/2004 as amended.

Romanian Constitution of 1991 with Amendments through 2003.

Romanian Law on Constitutional Court, no. 47/1992 as amended.

Romanian New Civil Procedure Code ("NCPC") entered in force on 15 February 2013 (as established by Law no. 76/2012 for Implementation of Law no. 134/2010 on the Civil Procedure Code).

Case Law

Government Decision 375/2022 ("GD 375/2022").

Government Emergency Ordinance, no. 92 of 30 December 1997 on stimulating direct investment, *Official Gazette*, No. 385/1997. Available at: https://investmentpolicy.unctad.org/investment-laws/laws/540/romania-government-emergency-ordinance-no-92-1997, 11. 11. 2024.

High Court of Cassation and Justice, Decision no. 1/2022 [A] regarding uniform interpretation and application of Article 603, para. 3, Civil Procedure Code, *Official Gazette* no. 284, March 24, 2022. Available at: https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=187623#highlight=##, 11. 11. 2024.

Romanian High Court of Cassation and Justice, Decision no. 905/1/2024, June 17, 2024. Available at: https://www.iccj.ro/2024/06/17/minuta-deciziei-nr-10-din-17-iunie-2024/, 11. 11. 2024.

Superior Council for Magistrates Decision no. 1/J/20.01.2013. Available at: www.csm1909.ro, 11. 11. 2024.

Fahira Brodlija*

Review Scientific Paper
UDC: 341.63:339.5(497.6)
doi: https://doi.org/10.56461/SPZ_24417KJ
Received: 24. 9. 2024.
Accepted: 13. 1. 2025.

INTERNATIONAL COMMERCIAL ARBITRATION LAW AND PRACTICE IN BOSNIA AND HERZEGOVINA: LESSONS FROM INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) REFORM

Summary

International arbitration, both commercial and investment, is generating increasing interest and practice in Bosnia and Herzegovina (BiH), as well as more generally in the Western Balkans region. The past decade has seen an increased number of international business transactions and investments, but also related disputes involving parties or claims connected to BiH. However, the desired progress and growth of commercial arbitration are hampered by the outdated legislative and institutional framework, and the lingering lack of capacity of the local courts, which are expected to act as domestic legal anchors of arbitration agreements and awards.

The sluggish development of the commercial arbitration framework lies in stark contrast to the dynamics in investment arbitration, which is undergoing intensive reforms in BiH and in the world. In this space, BiH has been at the forefront of innovative legal and institutional reforms, revitalizing its investment protection standards and creating mechanisms for their effective application.

This paper explores the distinct features of the two legal systems in BiH, looking into the underlying issues faced, their common denominators, and the investment arbitration reform success factors that can be emulated to enhance the commercial arbitration framework. As such, it aims to reverse engineer the adopted reforms and lessons learnt from the investment arbitration sphere that could help unlock the potential of commercial arbitration in BiH.

* The Rule of Law Advisor for a regional GIZ legal reform project focusing on the reform of the legal framework for investment protection and investor-state dispute settlement in the Western Balkans. Adjunct lecturer at the International University of Sarajevo.
E-mail: *fahira.brodlija@giz.de*
ORCID: *https://orcid.org/0009-0007-9422-8573*

The article will unfold as follows: it will first provide a primer on the existing legal and institutional framework for commercial arbitration in BiH, highlighting their special features, distinct from the prevailing international standards. Then the analysis turns to investment arbitration, outlining the motivations, policy background, and concrete reform measures implemented in this field. Finally, the paper arrives at the potential intersections between the two fields and provides recommendations for their mutual reinforcement.

Keywords: international commercial arbitration, investment arbitration, Bosnia and Herzegovina, ISDS Reform, dispute resolution, dispute prevention and mitigation.

PRAVNI OKVIR I PRAKSA MEĐUNARODNE TRGOVINSKE ARBITRAŽE U BOSNI I HERCEGOVINI: "LEKCIJE" IZ REFORME REŠAVANJA SPOROVA IZMEĐU INVESTITORA I DRŽAVE (ISDS)

Sažetak

Međunarodna arbitraža, kako trgovinska tako i investiciona, postaje predmet sve većeg interesovanja, a takođe i njena uloga u praksi u Bosni i Hercegovini (BiH), kao i regionu Zapadnog Balkana uopšte sve više raste. U protekloj deceniji zabeležen je povećan broj međunarodnih poslovnih transakcija i investicija, što posledi

no povećava i broj sporova koji iz njih nastaju. Međutim, željeni napredak i rast trgovinske arbitraže su otežani zastarelim zakonodavnim i institucionalnim okvirom, dugotrajnim nedostatkom kapaciteta lokalnih sudova.

Spor razvoj okvira trgovinske arbitraže leži u oštroj suprotnosti sa dinamikom u investicionoj arbitraži, koji prolazi kroz intenzivne reforme u BiH i širom sveta. U tom smislu, BiH je na čelu inovativnih zakonskih i institucionalnih reformi, revitalizujući svoje standarde zaštite investicija i stvarajući mehanizme za njihovu efikasnu primenu.

Ovaj članak istražuje različite karakteristike dva pravna sistema u BiH, te tako analizira osnovna pitanja sa kojima se isti suočavaju, zatim njihove zajednički osobine, i faktore koji su doveli do "uspeha" investicione arbitraže, a koji bi mogli poslužiti kao primer prilikom reforme trgovinske arbitraže.

U radu će se najpre će pružiti analiza postojećeg pravnog i institucionalnog okvira trgovinske arbitraže u BiH, uz naglašavanje njihove posebnosti, te ukazivanje na razlike u odnosu na važeće međunarodne standarde. Zatim se analiza okreće investicionoj arbitraži i navode se motivi, pozadina i konkretne reformske mere sprovedene u ovoj oblasti.

Konačno, u članku se ukazuje na pojedine razlike između ova dva polja, te se nastoje da daju preporuke za njihovo međusobno unapređenje.

Ključne reči: međunarodna trgovinska arbitraža, investiciona arbitraža, Bosna i Hercegovina, ISDS reforma, rešavanje sporova, sprečavanje i ublažavanje sporova.

1. Introduction: Special Features of the BiH Legal and Institutional Framework

Bosnia and Herzegovina (BiH), a transitioning market economy tucked in the heart of Southeast Europe, disposes of a complex government structure. Stemming from an international peace agreement (The General Framework Agreement for Peace in Bosnia and Herzegovina, hereinafter: Dayton Peace Agreement, 1995), the BiH Constitution (Dayton Peace Agreement, 1995, Annex 4) lays out a multi-tiered system consisting of the State government headed by a three-member Presidency, and two entities (Federation of BiH, which itself consists of 10 cantons, and Republic of Srpska) (Annex 4, Art. 3, Dayton Peace Agreement, 1995).

The status of the city of Brčko, as the last outstanding territorial issue during the Dayton Peace Accords, was resolved by arbitral proceedings under the United Nations Commission on International Trade Law (UNCITRAL) Rules (UNCITRAL Rules of International Arbitration, 2021). The Final Award granted Brčko neutral status as a district (District of Brčko BiH), keeping it outside of the jurisdiction of either entity, as a separate administrative unit under State sovereignty (*The Federation of Bosnia and Herzegovina v. Republic of Srpska* – Final Award, 1999, paras. 9-10).

In total, there are fourteen governments operating within the country, with parallel legislative competencies. The regulation of civil law and procedure, commercial and contract law is within the remit of the entities. This framework has contributed to uneven and fragmented legal systems, which can be particularly challenging to navigate in commercial matters with a foreign element.

2. Overview of Commercial Arbitration Law, Institutions and Practice in Bosnia and Herzegovina

2.1. Legal Framework

There is no self-standing law governing arbitration in Bosnia and Herzegovina, whether domestic or international. Instead, the national arbitration legislation is condensed to 12 articles in the Civil Procedure Codes (CPC) at the entity and District levels (Arts. 434-453, The Code of Civil Procedure of Federation Bosnia and Herzegovina – hereinafter: CPC FBiH; Arts. 434-453, The Code of Civil Procedure of the Republic of Srpska – hereinafter: CPC RS; Arts. 427-446, The Code of Civil Procedure of Brcko District – hereinafter CPC BC) (hereinafter: BiH arbitration legislation, unless indicated otherwise).

The respective provisions on "Arbitration Procedure" were included in the section on "Special Procedures" and largely maintained the current civil procedure framework, with elements influenced by the UNCITRAL Model Law on International Commercial Arbitration (hereinafter: UNCITRAL Model Law). The texts of the three applicable laws are largely identical, which further indicates the lack of legislative attention to the specificities of the arbitration framework and its position in the BiH legal system. Although BiH is considered a Model Law country, its arbitration legislation deviates from the prevailing international standards, including those emulated by other countries in the region.

For example, Croatia (Arbitration Law, 2001), Montenegro (Arbitration Law, 2015), North Macedonia (Arbitration Law, 2006) and Serbia (Arbitration Act, 2006) all have standalone arbitration legislation, which is adapted to the objectives and purpose of the Model Law.

2.2. Alignment with International Standards

When compared to contemporary arbitration legislation, the BiH Arbitration Law can be described as a hybrid between the outdated norms from the Yugoslav Code of Civil Procedure and the Model Law, which it does not fully emulate in content and spirit. Such gaps and deviations from the Model Law artificially create space for misinterpretations and inconsistencies, in an area that is largely settled in international practice. This relates, for example, to the definition of the arbitration agreement (Art. 435, CPC RS), which appears to be more restrictive than the Model Law definition (Art. 7, UNCITRAL Model Law, 2006). Namely, the Arbitration Law in BiH strictly requires the arbitration agreement to be in writing and signed by the parties, which precludes the conclusion of valid arbitration agreements orally or by

conduct. In addition, the law does not expressly refer to electronic communication as a means to conclude arbitration agreements, but the existing definition could be interpreted to allow such practices.

Perhaps most importantly, the standards for the setting aside of arbitral awards deviate from the well-established norms under the Model Law. For example, the BiH arbitration legislation provides that awards can be set aside if they are not properly reasoned, or signed by the tribunal; if the award is incomprehensible or contradictory; if the award is contrary to the State and entity Constitution; and if there are any grounds for remand under the CPC (Art. 451, CPC FBiH; Art. 451, CPC RS). There are no provisions on the enforcement of foreign arbitral awards, which means that the NYC would apply directly. Therefore, parties considering arbitration in BiH, as a Model Law country, may face unexpected challenges during the arbitral proceedings, and in the post-award period.

2.3. Special Features of the BiH Arbitration Legislation

While otherwise supportive of party autonomy in arbitral proceedings, the BiH arbitration legislation provides some unusual and potentially problematic default rules related to the appointment of and decision making by arbitrators, in the absence of party agreement.

The provisions on the judicial termination of the arbitration agreement are a blatant example of such rules. Namely, in case the parties cannot agree on a jointly appointed arbitrator, or the co-arbitrators cannot agree on a presiding arbitrator, or the person named as the arbitrator in arbitration agreement cannot or will not act, either party can: 1. request the competent court to make the relevant appointment, or 2. it can request the same court to terminate the arbitration agreement instead. The laws do not provide any standards or qualifications under which the requested court could assess whether to proceed with the termination, or the consequences of the termination for the parties in the pending disputes.

Rather, Articles 440 and 441 of the FBiH and RS Civil Procedure Code, and Articles 433 and 434 of the BD Civil Procedure Code state that:

> "A party who does not wish to use [the default court appointment] can file a motion to the competent appointing court to declare the arbitration agreement as terminated."

Separately, the same mechanism applies in situations when the arbitral tribunal cannot reach a unanimous decision (Art. 446, CPC FBiH and CPC RS; Art. 436, CPC BD), which is particularly harmful, as the entire process has unfolded, and the parties have already invested time and expenses into the arbitration proceedings. In addition,

the Rules of the BiH Arbitration Court do not provide a solution for the deadlock, but instead in Article 47, they reference the relevant provisions of the CPC.

Arbitration rules in other countries provide default solutions to break the possible deadlocks in appointments or decision-making by the tribunal, which do not create avenues to terminate the arbitration agreement. For example, the Rules of the Court of Arbitration of Republic of Srpska (Arts. 27-30, The Rulebook on Arbitration of the Chamber of Commerce of Republic of Srpska, 2018) provide that the stalled appointments will be made by the President of the Arbitration Court. In the other scenario, when the tribunal cannot reach a majority decision, arbitral rules often provide that the decision in such cases will be made by the presiding arbitrator (e.g. Art. 40, Ljubljana Arbitration Rules, 2014).

Under the combined application of the BiH Arbitration Law and Arbitration Rules, however, the parties can effectively break the deadlock by breaking out of the arbitration agreement. If so applied, the BiH arbitration laws would effectively enable judicial overreach into the arbitration process and the underlying contractual relationship between the parties.

This framework is contrary to Article II of the New York Convention (*Scherk v. Alberto-Culver Co.,* paras. 506, 517, no.10; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc*., paras. 614, 626-27), and the long-held international standard adopted by courts around the world, giving effect to arbitration agreements, acting from a presumption of validity and enforceability of the arbitration agreement (*B.K.M.I. Industrieanlagen v. Dutco,* 1989, para. 723; *Fillold C. M. v. Jacksor Enterprise, Fillold C. M. v. Jacksor Enterprise*, 1986, para. 179).

These provisions also open the gates for far-reaching unilateral measures by parties seeking to avoid arbitration and perhaps an unfavorable outcome in a specific case, even against the will and under objection from the opposing side. All it would take is to delay or refuse to appoint an arbitrator, or otherwise derail the appointment process. It can even lead to a paradoxical situation where one party approaches the competent court to act as appointing authority, and the other requests the termination of the arbitration agreement.

In addition, there are no mechanisms against the abuse of this process by the parties, and consequently the fate of the arbitration agreement is put at the discretion of the requesting party and the requested court. There are no known cases under these provisions, and thus no indication on how the BiH courts would deal with these matters.

However, these provisions run contrary to the international arbitration framework and its main principles and purpose as they add uncertainty, potentially frustrating the process and the parties' access to a binding determination by a neutral tribunal. By concluding an arbitration agreement, the parties express their common

intention to resolve their disputes outside of national courts, in a flexible, neutral, and arguably more efficient process. Instead, the BiH arbitration laws empower the national courts to give effect to either party's desire to withdraw from an arbitration proceeding and commitment which is no longer convenient.

For these and other reasons, the provisions on the judicial termination of the arbitration agreement should be a reform priority, and should be removed from the BiH arbitration laws as their very existence defeats the purpose of the arbitration law itself.

2.4. Legislative Gaps in the BiH Arbitration Legislation

The BiH arbitration legislation also lacks provisions on crucial elements of international arbitration, such as the initiation of arbitral proceedings, *competence-competence* and separability of the arbitration agreement, judicial support for arbitral proceedings, the seat of arbitration, the law applicable to the arbitration, the replacement of arbitrators, amicable settlement (e.g. through mediation), etc. These legislative gaps require the disputing parties to rely on the default rules of civil procedure in the relevant law. This would certainly contravene the purpose of opting for international arbitration over national courts.

The current state of the BiH Arbitration Law is not only detrimental to the reputation of BiH as a seat of arbitration, but it may also have significant practical implications. Since the national arbitration laws (*lex arbitri*) generally provide default rules in the absence of party agreement on particular matters, the existing gaps in the BiH Arbitration Law leave a legal vacuum, which causes uncertainty, time and cost delays and may require additional support by local courts. Such practices are contrary to the essential objectives of international arbitration, to provide a neutral, flexible, efficient and effective alternative to local courts.

2.5. Institutional Framework

On the other hand, there seems to be no political will or appetite for the reform of the arbitration legislation in BiH, nor are such initiatives coming from the arbitral institutions established in the country: the Court of Arbitration of the Foreign Chamber of Commerce BiH, and the Court of Arbitration of the Chamber of Commerce of Republic of Srpska, which are the primary arbitration venues in the country.[1]

[1] Information about the BiH arbitration institutions is available on their respective websites: The Court of Arbitration of the Foreign Chamber of Commerce BiH, 2024. Available at: https://komorabih.ba/pravilnik-o-arbitrazi-2/, 20 September 2024; The Court of Arbitration of the Chamber of Commerce of Republic of Srpska, 2021. Available at: https://komorars.ba/arbitraza/, 20 September 2024.

From the outside, it is difficult to learn about the arbitration practice in BiH, since the institutions do not publish their caseload statistics, or any summaries of cases and outcomes. The institutional rules are behind on the international standards and practice, although the Rules of the Arbitration Court in Republic of Srpska provide a more detailed procedural frame than the Rulebook of the Arbitration Court of BiH, whose provisions date back to 2003. Although amendments to the Rulebook were adopted in 2023, they focused primarily on the changes in the internal organization and function of the court, and not the arbitral procedure itself (Rulebook on Amendments BiH, 2023).

3. Judicial Interpretation of the BiH Arbitration Legislation

The BiH judiciary, organized around the complex government structure and allocation of powers, is known for its slow pace and extensive backlog of cases (OSCE, 2022, pp. 16-27). In FBiH, there are no specialized courts that would deal with arbitration-related proceedings, and such cases are within the competence of the courts that would hold jurisdiction if there were no arbitration agreement between the parties (Art. 440, CPC FBiH, 2003). The situation is somewhat different in the RS entity, where cases related to commercial contracts and arbitration are within the jurisdiction of the commercial courts (High Commercial Court Banja Luka, and six regional courts).

The lack of efficiency and predictability is one of the main reasons disputing parties seek to avoid the BiH courts by concluding arbitration agreements. Just as any other transitioning economy, BiH courts and institutions are also perceived as more prone to bias and influence, which impacts also the level of legal certainty and rule of law (USAID & MEASURE, 2022. pp. 16-23; World Justice Project, 2024).

However, regardless of whether the parties ultimately trust the domestic courts, modern arbitration legislation provides two functions for the courts of the seat of arbitration – 1. a supporting role during the proceedings (e.g. issuance of interim measures, ordering security for costs, conducting evidentiary measures, appointing arbitrators as appointing authority, etc.), and 2. deciding on requests to set aside or enforce arbitral awards. This internationally accepted standard is reflected in the UNCITRAL Model Law, which also clarifies that the exercise of the parties' rights to approach the competent courts in this regard does not represent a waiver of the arbitration agreement, or a withdrawal of their consent to arbitration (Art. 9, UNCITRAL Model Law, 2006).

As noted above, BiH has only partially adopted the UNCITRAL Model Law in its arbitration legislation, and in doing so, it has failed to integrate the provision on the supporting role of the judiciary. It has also deviated from the grounds set aside provided in the Model Law, further distancing the BiH system from the international standards.

While BiH courts have not inherently demonstrated any animosity towards arbitration, both in terms of the proceedings or the resulting awards, the incomplete and outdated legal framework in BiH makes it difficult for them to interpret the existing provisions consistently with international law. This was particularly challenging in more complex cases related to the jurisdiction of the tribunal and the validity of the arbitration agreement.

Nevertheless, the courts have managed to bridge the normative gaps by referencing the UNCITRAL Model Law, the New York Convention, and the European Arbitration Convention, applying their standards in combination with the basic rules under the BiH arbitration legislation. For instance, courts have affirmed the separability principle and competence-competence, even though they are not provided under the BiH Arbitration Law. In doing so, they have recognized the international standards established under the UNCITRAL Model Law, affirming the jurisdiction of the arbitral tribunal to decide on matters related to the validity of the arbitration agreement, as well as the validity of the underlying contract itself.

More complex issues, such as the determination of the law applicable to the arbitration agreement, have lead to less elegant solutions, requiring the intervention of the Supreme Court of FB&H (SCFBiH). In one such instance, the SCFBiH reversed the appellate court's ruling that the arbitration agreement provided online in terms and conditions was invalid as it was not signed by the parties (Meškić, 2020, pp. 42-43). The SCFBiH affirmed that the validity of the arbitration agreement must be determined under the law applicable to it. In the absence of party agreement in the relevant case, and the silence of the BiH arbitration legislation on the matter, the court explored the various conflict of law rules provided in the UNCITRAL Model Law, the NYC, and the EAC to finally arrive at French law as the law of the seller under the standards of the BiH conflict of law rules (Meškić, 2020, pp. 30-36). While the detailed analysis of this decision is beyond the scope of this chapter, it is a clear example of a complex issue that could have had a much clearer and effective solution if the BiH Arbitration Law closely followed the standards established in the UNCITRAL Model Law.

This perfect storm of circumstances has prevented the necessary reforms and progress in the field, despite the growing interest and expertise among legal practitioners and scholars. However, there are still vast opportunities for effective progress, even under these conditions, as demonstrated by the recent developments in the BiH investment protection and dispute resolution framework, including investment arbitration. The following sections will outline the robust set of legal and institutional reforms in the field, the lessons for the commercial arbitration framework in BiH, and potential areas of interaction for the mutual benefit of both regimes.

4. Lessons and Best Practices from Investment Arbitration for the Commercial Sphere

Unlike the sphere of commercial arbitration, the reforms and developments of investor-state policies and dispute resolution mechanisms have been much more active and dynamic. Over the past five years, Bosnia and Herzegovina has been at the forefront of the regional efforts to enhance the investment protection policies and safeguard the States' right to regulate in the public interest. These reforms are currently unfolding at the international level (UNCITRAL Working Group III, 2024), fortified by the efforts to mitigate climate change and enable a streamlined and just energy transition (Energy Chapter Treaty Modernization Proposal, 2022).

The international reforms target primarily the international investment treaties that form the legal framework for investment protection and investment arbitration against the host States. After its first experiences in investor-State disputes, Bosnia and Herzegovina has initiated significant reform efforts in the legal and institutional frameworks for investor-State disputes, based on the lessons from previous cases and international best practices (including those in the EU) (Sulejmanović, 2023). This section will outline some of the most prominent reform solutions already adopted in BiH and lessons that could be useful in future reforms of commercial arbitration in the country.

It should be noted as a preliminary matter that the reforms of international investment policies are distinct from the commercial area in several significant aspects. Firstly, investor-State disputes implicate the political and economic interests of the host State, including the effects of any unfavorable outcomes on local communities and its general population. Considering the growing public interest in investor-State disputes, BiH and other States are compelled to make visible and tangible efforts to strengthen their legal framework and institutional capacities to reduce the risks and possible negative effects of investment arbitration. In addition, investor-State disputes are more transparent, and a large volume of arbitral awards is publicly available (and in some cases the hearings can be viewed by the public as well) (e.g. the hearings in the *Vattenfall v. Germany* or *Rand Investment v. Serbia* cases). Therefore, States design and implement the desired reforms, as the main stakeholders and decision-makers in the reform process. Commercial parties and practitioners can only propose necessary policies and reforms for the commercial arbitration legal and institutional frameworks, but there is no guarantee of any specific outcome in this respect.

Furthermore, interventions in the field of investment protection and dispute resolution are made in a unified legal framework in Bosnia and Herzegovina, since matters of foreign trade and investment are regulated at the State level. Therefore,

the legal framework is not fragmented and consists of a network of international investment treaties negotiated by a single institution (the Ministry of Foreign Trade and Economic Relations BiH, MoFTER BiH), and the BiH Law on Foreign Investment Policies. On the other hand, commercial arbitration is subject to entity laws, while the State level laws (including the New York Convention) come into play at the enforcement stage.

To date, Bosnia and Herzegovina has been the Respondent in five known investment arbitrations, two of which were decided in favor of the investor, one was settled, and two remain pending, including the largest investment claim against BiH brought by "Elektrogospodarstvo Slovenia" worth EUR 750 million (*ESG v. BiH;* UNCTAD, 2014). It is possible that the total number of investment claims is bigger, with some cases remaining confidential or others settled before the notice of arbitration. In any case, through this limited exposure to investment arbitration, BiH has already faced significant financial exposure and has identified the weaknesses in its legal and institutional frameworks for investor-State disputes. This has prompted intensive reform measures to address the risks and challenges faced by the State in investment arbitration, starting from the substantive and procedural provisions for future investment treaties.

4.1. New BiH Model Bilateral Investment Treaty (BiH Model BIT)

BiH developed a new model BIT in 2023, which will serve for the re-negotiation of the existing and negotiation of new investment treaties (BiH Model Bilateral Investment Treaty, 2023 – hereinafter: BiH Model BIT).[2] The BiH Model BIT addressed both the substantive and procedural risk factors that existed under the old-generation treaties and served as the legal basis for all the investment claims brought against BiH. On the substantive side, the primary aim was to narrow the interpretive discretion of the arbitral tribunal and set out in precise terms the nature and scope of the investment protection standards provided by the State. Most importantly, this includes qualified provisions on fair and equitable treatment, full protection and security, most favored nation and national treatment, and expropriation. For further clarity and context, MoFTER BiH also prepared the Principles and Standards for Investment Treaty Negotiation, which can serve as an interpretive tool during the negotiations with other States, and for arbitral tribunals deciding investment disputes brought under the treaty (Principles and Standards). While a detailed analysis of the substantial reforms is beyond the scope of this chapter, suffice it to say that the modernized provisions should help reduce

[2] The BiH Model BIT has not been published as of the date of writing, but the author has access to a copy.

the risk of future investment claims, and rebalance the largely asymmetrical treaties, which previously focused solely on investment protection.

The procedural reforms laid out in the dispute resolution clause demonstrate the thoughtful and calibrated consideration of experiences from past cases, and international best practices resulting in robust and layered solutions. The procedural reform encompassed both the pre-dispute phase (dispute prevention and amicable settlement) and the investment arbitration procedure, tied to the existing international and domestic institutions.

4.2. Dispute Prevention and Mitigation

In the pre-dispute phase, the investor is required to submit a request for consultations, providing details of the investment, its status as covered investor, the factual background, contested measure, and the government institution or agency involved in the dispute. Investors can only initiate arbitration based on claims specified in the request for consultations, and subject to a time limitation after the first notice. The parties are also encouraged to initiate amicable settlement proceedings at any time, which would suspend the consultations and arbitral proceedings.

These provisions are a direct response to the common challenge States face in investor-State disputes, where gaps and inefficiencies in pre-dispute communication with investors often prevent any effective opportunity to avoid or at least mitigate potential claims (World Bank & Energy Charter Secretariat, 2023). In an effort to improve the communication channels in the pre-dispute phase and increase the chances of effective settlement outside of arbitral proceedings, the BiH Model BIT refers the parties to choose the mediation rules governing the process, which now include specialized rules issued by ICSID (ICSID, 2021a) and other arbitral institutions, or the Mediation provisions and guidelines recently adopted by UNCITRAL WGIII (UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution, 2023; UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution, 2023).

The dispute prevention and mitigation process defined in the BiH Model BIT is embedded in the institutional innovations adopted by BiH in the ISDS reform process (Sulejmanović, 2023), i.e., the two-tier mechanism consisting of a focal point for early investor grievances (within the network of foreign investment protection agencies), which would seek to resolve the issue at a direct, technical level, and a coordination body, which would engage in attempts of amicable settlement. The coordination body consists of competent institutions in the area of international law and dispute resolution, with *ad hoc* members related to the specific case (Council of Ministers BiH, 2017). If this process does not lead to a settlement, the coordination body supports

the State Attorney's Office, which represents BiH in all proceedings between international courts and tribunals (Council of Ministers BiH, 2017).

This structure, supported by the clear and streamlined rules and directions provided in the BiH Model BIT, creates a promising framework, which should enable BiH to provide a timely reaction to emerging investment disputes and reduce the risks of their escalation to investment arbitration. Even when attempts to prevent and settle investor claims are not successful, the activities in the pre-dispute phase enable the coordination of the relevant institutions and preparation of materials and evidence that can be useful in further adversarial proceedings. If applied consistently and effectively, these reforms can bring significant improvement compared to the existing practices.

4.3. Investor-State Dispute Settlement (ISDS) Clauses

If a dispute survives the consultation phase and the cooling-off period, investors can initiate proceedings in the national courts of the host State or opt for arbitration under the ICSID Rules (ICSID, 2021b), *ad hoc* arbitration under the UNCITRAL Rules (UNCITRAL Guidelines on Mediation for International Investment Disputes, 2023), or other rules selected by the parties. The claims can only relate to the alleged treaty breaches identified in the request for consultations (Art. 21(2), BiH Model BIT, 2023).

Although the referenced arbitration rules typically provide detailed procedural steps and mechanisms for investment arbitration, the BiH Model BIT explicitly lays out several key procedures of importance for the State. This includes an express authorization for the arbitral tribunal to order security for costs and consolidation, and requires the disclosure of the name and address of third-party funders (Arts. 22-23, BiH Model BIT, 2023). This normative choice is a direct reflection of the previous ISDS experiences by BiH and other countries in the region.

In addition, and in line with the international ISDS reform processes, the ISDS provision incorporates by reference the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution and the UNCITRAL Transparency Rules (UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 2014). This makes BiH one of the first countries to adopt these instruments into their model investment treaties.

5. Future Reform Prospects and Opportunities

The outlined legal and institutional improvements in the area of investment arbitration provide a robust and fresh example for the nature and scope of reforms that are possible in BiH, despite its complex legal framework and other disadvantages, which are evident in the commercial arbitration spheres. Although the two systems operate in different contexts, the reform method and scope are widely transferrable to the dispute resolution process. Thus, there are opportunities for stakeholders in commercial arbitration to benefit from experiences and practices in the investment regime, and *vice versa*. The following sections will outline first the investment arbitration reform lessons for the commercial context, and subsequently the possible intersections and areas of mutual support between these two fields in BiH.

5.1. Possible Intersections between Commercial and Investor-State Dispute Resolution and Areas of Mutual Support in BiH – – No Need to Reinvent the Wheel

Considering the broad scope of legal and institutional reforms that would be necessary to revitalize the framework for commercial arbitration in BiH, there is a risk that policy-makers may be reluctant to embark on any efforts in this direction. However, and as demonstrated in the field of investment law and dispute resolution, there are avenues to accomplish meaningful progress without dismantling the entire legal framework, and to build on the existing norms and structures.

As noted above, the Arbitration Law in BiH is based on the UNCITRAL Model Law, despite the gaps and inconsistencies that have created the existing legal and practical issues. Therefore, future amendments would be fully consistent with the existing framework, but they would fill the legislative gaps and provide the necessary interpretive clarity for the parties and adjudicators.

In this sense, the government could opt to extend and revise the existing BiH arbitration legislation, although the preferable solution would be to adopt a detailed and dedicated standalone law on arbitration. If there is no political will to endorse a standalone law, the reform efforts should not be abandoned as significant improvements could be made through the amendment of the existing framework. There are examples of jurisdictions without standalone arbitration laws, which are perceived as desirable seats for international arbitration.

The BiH policy makers and other stakeholders can take advantage of the rich expertise of BiH practitioners and scholars who can develop and propose initial draft provisions with annotations explaining the nature and functions of the

relevant norms. This legislative history, if well documented and distributed, can be of immense benefit in fostering a harmonized application and interpretation by arbitral tribunals and judges alike.

Finally, to ensure coherency and cohesiveness within the BiH legal framework, it will be important to harmonize the arbitration legislation in both entities and the District of Brčko. To the extent possible, the arbitration rules of the respective entity arbitration courts should also be aligned with the revised legislation to avoid inconsistencies and overlaps that could be detrimental to the arbitral process itself.

The systemic integration of international standards in the legal and institutional frameworks in BiH would go a long way towards overcoming the existing challenges. This has been accomplished in the investment arbitration sphere through the development of the Principles and Standards for Treaty Negotiation and the BiH Model BIT. The same could be done by strengthening the legal and institutional framework for commercial arbitration in BiH through alignment with the well-established international standards.

5.2. Common Language of the International Framework and More Predictable Standards and Procedures

The adoption of arbitration legislation compliant with international standards would not only bolster the status of a jurisdiction as a favorable seat of arbitration, but also be an effective way to align the interpretation of the legal norms by arbitral tribunals and the competent courts with the expectations of the disputing parties. As demonstrated by the BiH case law, the existing arbitration legal framework in BiH has created difficulties for the domestic courts applying best efforts to interpret the law in congruence with the applicable international legal standards. The arbitration laws adopting the UNCITRAL Model Law would have spared the court of the interpretive expeditions through secondary connecting sources and provided a clear path to the norms governing the contested issues.

In addition to clear legislation based on international standards, the legislator could provide further guidance through an official commentary and legislative history outlining the policy background and intentions behind the relevant provisions. The MoFTER BiH Principles and Standards for Treaty Negotiation in BiH are a fresh example of BiH institutions recognizing the importance of interpretive guidance for the effectiveness of key policies, which provide legal certainty and narrow the discretionary space for broad interpretations by the disputing parties and adjudicators (both arbitral tribunals and domestic courts).

5.3. Building Judicial Capacities in Support of Arbitral Proceedings

One less-explored, but highly valuable area of collaboration in BiH lies in the potential to bolster the capacities of the competent institutions and judiciary through direct engagement with arbitration practitioners and experts. Capacity development activities in this field could help bridge the analytical and terminological gaps that exist within the BiH institutions, drawing from the international and domestic experience of the experts, and helping to foster sustained institutional knowledge over time. Such activities could become a part of the regular educational programs within the government and judicial systems.

Through the continuous capacity development of the judiciary, aligned with international best practices and domestic law, the BiH courts would be in a better position to fulfill their main two roles related to arbitration. As noted above, BiH courts strive to implement the standards derived from the Model Law and the NYC, but they have had difficulties in delineating judicial support from intervention in this space. Unless national courts are confident in their role related to arbitral proceedings, the parties could be deprived of their procedural and substantive rights in the arbitration.

5.4. Transparency

To enable a continuous exchange of information and assessment of the trends unfolding in practice, BiH should foster a more transparent and open framework for international arbitration. This primarily relates to the proper categorization and publication of court decisions related to arbitration, which would allow the assessment of the application of the arbitration law over time. In addition to the benefits of transparency as a function of the rule of law, it would also provide insights into the relevant areas for normative and practical improvement on an ongoing basis.

The same applies to the arbitral institutions, which should consider publishing annual case reports, and overviews of the main features of its caseload (such as those published by the International Chamber of Commerce International Arbitration Court (ICC), London Court of International Arbitration (LCIA), Singapore International Arbitration Center (SIAC), etc.). This way, the policy makers and practitioners can track the development of judicial and arbitral jurisprudence in BiH and identify progressively the emerging trends and needs for legislative amendments.

5.5. Openness and Flexibility: Expanding the Spectrum for Commercial Dispute Resolution

The laws and rules on commercial arbitration in BiH leave much to the imagination in terms of procedural flexibility and adaptability to the needs of the disputing parties. As such, arbitral institutions are in the position to limit party autonomy, even in the context of amicable settlement, the selection and appointment of arbitrators or neutrals, and other procedural aspects of the dispute.

Since disputing parties cherish their autonomy in appointing arbitrators and mediators and the continuous availability of non-adversarial mechanisms (Queen Mary University & Pinson Masons, 2022, p. 31), the BiH legal framework should not minimize these rights. The BiH Model BIT demonstrates how an open and flexible dispute resolution spectrum can be placed in an otherwise sensitive and calibrated set of norms, setting clear expectations and a balance between both parties (Art. 21, BiH Model BIT, 2023).

Mediation is increasingly explored and fortified in the investor-State dispute settlement system, as a viable alternative or complement to investment arbitration (ICSID, 2021b). As such, it is becoming a feature of new generation investment treaties, either as a mandatory pre-arbitration step, or an option available at all stages of the process (for example, European Union (EU)-Vietnam Investment Protection Agreement (IPA), 2019; Burkina Faso-Canada Bilateral Investment Agreement (BIT), 2015. Art. 23; Netherlands Model Bilateral Investment Agreement (BIT), 2019. Art. 17(1)). Some recent EU treaties include a bespoke set of mediation rules, and a code of conduct that applies equally to adjudicators and mediators (Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, 2017; General Secretariat of the Council of Europe, 2016; EU-Singapore IPA, 2018, Annex 14-B; EU-Vietnam IPA, 2019, Annex 15-B). In its Model BIT, BiH opted for providing consultations in the pre-arbitration phase, and mediation at any stage of the dispute, leaving it to the disputing parties to select mediation rules that they prefer (Art. 21, BiH Model BIT, 2023). This is a robust and predictable procedural framework, suitable for both commercial and investment disputes, ensuring effective dispute resolution.

While both the arbitration courts in BiH provide administrative service for "amicable settlement", the procedure resembles conciliation more than mediation, as the neutral can propose solutions to the disputing parties (Arts. 5-10, Arbitration Court BiH, 2003; Art. 6, Arbitration Court RS, 2018). Mediation, on the other hand, is a much more flexible process, where the neutral facilitates negotiations between the parties towards a common solution, without offering proposed settlements, unless requested by the parties. The recently adopted Alternative Dispute

Resolution Act in Montenegro (Alternative Dispute Resolution Act Montenegro – hereinafter: Montenegro ADR Act, 2020) encompasses mediation, early neutral assessment, and sector-specific dispute resolution methods, in line with international standards (Art. 1, Montenegro ADR Act). As such, it is a good model, which BiH legislators could consider in devising such policies in the future.

As the final point, to secure the finality and enforceability of settlement agreements, it is crucial that the parties can formalize settlement agreements as awards, which can be enforced under national laws and the New York Convention. The rules of both the BiH arbitration courts allow the parties to request the issuance of the settlement agreements in the form of a binding arbitral award. The Singapore Convention on Mediation (United Nations Convention on International Settlement Agreements Resulting from Mediation – hereinafter: Singapore Convention, 2019) could provide an additional layer of protection, as it sets forth an international framework for cross-border enforcement of settlement agreements among its member states. BiH is not yet a signatory, while Montenegro, North Macedonia and Serbia have signed, but still have to ratify the Convention (UN Treaties Status, 2024). This convention could apply equally to commercial and investment disputes, demonstrating a cohesive and harmonized dispute resolution framework in BiH.

6. Conclusion and Outlook for Bosnia and Herzegovina: Opportunities to Unlock the Arbitration Potential

Just as the system of international commercial arbitration does not exist in a vacuum, and inevitably interacts with domestic laws, the worlds of commercial and investment arbitration also have areas of intersection and complementarity. Quite counterintuitively, the development and modernization of the investment arbitration framework in BiH has been much more dynamic and tangible than the commercial realm, despite a growing cohort of arbitration experts and arbitration claims converging in the region and in the country itself.

This is largely due to the outdated laws operating in the fragmented legal framework in BiH, and the lack of insights and information related to the practice of commercial arbitration in the arbitration institutions, which could prompt targeted legislative reforms. Nevertheless, until there are more insights from the commercial perspective, the inherently more transparent investment protection system could offer valuable reform models and lessons for the commercial space.

As the BiH example demonstrates, the policy makers for investment protection have engaged in a systemic reform tackling normative improvements through the new BiH Model BIT, while simultaneously creating an institutional framework that can effectively implement the new standards. The reforms also embraced the emerging

international best practices, calibrated to the legal and institutional frameworks in BiH. Although the new mechanisms are formally established for the first time, they are built around existing agencies and institutions, which are now placed in better coordination. Finally, the reform process and the implementation of the resulting solutions is padded with continuous capacity development activities and practical training to build institutional knowledge and sustain the attained progress.

This reform model can be emulated in commercial arbitration, starting from the adoption of a standalone arbitration law, more closely aligned with international standards and practices, to the intensified engagement between legal practitioners with institutions and the judiciary to enhance their capacities in this realm. As a general matter, the BiH legislators should strive to create a more flexible and open space for the parties to exercise their party autonomy in full and to take advantage of non-adversarial methods that are suitable and favorable to their needs. These positive changes will depend largely on modern legislation that would fill the existing gaps and amend the problematic provisions that may deter parties from choosing to arbitrate in BiH.

It remains to be seen if commercial arbitration in BiH will become a vibrant field, which is not only practiced, but also seen as a transparent, predictable and modern legal framework. With many conditions already in place, there will be no need to reinvent the wheel, but to effectively put it in motion.

References

Sulejmanović, S. 2023. Investor-State Dispute Prevention and Resolution Mechanism in Bosnia and Herzegovina. In: Beaumont, B., Brodlija, F., Ashdown, R. & Terrien A. (eds.). *The Future of ISDS – Reforming Policies, Procedures and Perspectives*. Kluwer Law International.

Meškić, Z. 2020. Applicable Law to the Arbitration Agreement in General Conditions of Sale Available on Seller's Website - A Pro-Arbitration Approach in the Jurisprudence of The Supreme Court of the Federation of Bosnia and Herzegovina. *Revija Kopaoničke škole prirodnog prava*, 1, pp. 29-46. Available at: https://scindeks-clanci.ceon.rs/data/pdf/2683-443X/2020/2683-443X2001029M.pdf, 12. 9. 2024. https://doi.org/10.5937/RKSPP2001029M

ICSID. 2021a. *Background Paper on Investment Mediation.* Available at: https://icsid.worldbank.org/sites/default/files/publications/Background_Paper_on_Investment_Mediation_Oct.2021.pdf, 12. 9. 2024.

ICSID. 2021b. *Overview of Investment Treaty Clauses on Mediation.* Available at: https://icsid.worldbank.org/sites/default/files/publications/Overview_Mediation_in_Treaties.pdf, 12. 9. 2024.

OSCE. 2022. *Successes and Challenges in the Implementation of the National War Crimes Processing Strategy of Bosnia and Herzegovina.* Available at: https://www.osce.org/files/f/documents/9/0/521149.pdf, 12. 9. 2024.

Queen Mary University London & Pinson Masons. 2022. *Future of International Energy Arbitration Survey Report.* Available at: https://www.qmul.ac.uk/arbitration/media/arbitration/docs/Future-of-International-Energy-Arbitration-Survey-Report.pdf, 12. 9. 2024.

UNCITRAL Working Group III. 2024. Database of Working papers and submissions. Available at https://uncitral.un.org/en/investmentmediationanddisputeprevention, (6 September 2024).

UN Treaties Status. Singapore Convention on Mediation, Jurisdictions. Available at: https://www.singaporeconvention.org/jurisdictions, 14. 9. 2024.

USAID & MEASURE. 2022. *Judicial Effectiveness Index of Bosnia and Herzegovina*. Available at: https://www.measurebih.com/uimages/JEI-BiH_2022_Report.pdf, 14. 9. 2024.

World Bank & Energy Charter Secretariat. 2023. *Enabling Foreign Direct Investment in Renewable Energy Sector: Reducing Regulatory Risks and Preventing Investor-State Conflicts*. World Bank Group. Available at: https://www.energycharter.org/fileadmin/DocumentsMedia/Occasional/Renewable_Energy_FDI_Final__032923.pdf, 14. 9. 2024.

World Justice Project. 2024. *Rule of Law Index*. Available at: https://worldjusticeproject.org/rule-of-law-index/country/2023/Bosnia%20and%20Herzegovina, 14. 9. 2024.

Legal Sources

Alternative Dispute Resolution Act Montenegro – Montenegro ADR Act, 2020.

BiH Model Bilateral Investment Treaty, 2023 (unpublished, reviewed by the author).

Burkina Faso-Canada Bilateral Investment Agreement (BIT), 2015.

Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, 2017. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex-%3A22017A0114%2801%29, 14. 9. 2024.

Council of Ministers Bosnia and Herzegovina, 2017. Decision of the Council of Ministers of BIH on the Establishment of the Negotiating Body for the Amicable Settlement of International Investment Disputes. *Official Gazette of BIH*, no 17/18. Available at http://www.sluzbenilist.ba/page/akt/1boIlQelogztz5k76kjn45hA=, 6. 9. 2024.

Energy Charter Treaty Modernization Proposal, 2022.

General Secretariat of the Council of Europe, 2016. Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States. Available at: https://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf%3E, 6. 9. 2024.

Ministry of Foreign Trade and Economic Relations BiH, 2023. *Information on the implementation of Investment Protection Treaties Entered into by Bosnia and Herzegovina and Recommendations for Next Steps* (document not publicly available, reviewed by the author).

Netherlands Model Bilateral Investment Agreement, 2019.

Rulebook on Amendments to the Rulebook on Organization and Work of the Arbitral Tribunal of BiH – Rulebook on Amendments BiH, 2023. Available at: https://komorabih.ba/wp-content/uploads/2023/04/Pravilnik-arbitraza-Izmjene-i-dopune-bos.pdf, 11. 9. 2024.

The Code of Civil Procedure of Brcko District – CPC BD, *Official Gazette of Brcko District*, No. 28/2018 and 6/2021.

The Code of Civil Procedure of Federation Bosnia and Herzegovina – CPC FBiH, *Official Gazette of Federation Bosnia and Herzegovina*, No. 53/2003, 73/2005, 19/2006, and 98/2015.

The Code of Civil Procedure of the Republic of Srpska – CPC RS, *Official Gazette of RS*, No. 58/2003, 85/2003, 74/2005, 63/2007, 105/2008 – CC Decision, 45/2009 – CC Decision, 49/2009, 61/2013, 109/2021 – CC Decision, and 27/2024.

The Court of Arbitration of the Chamber of Commerce of Republic of Srpska, 2021. Available at: https://komorars.ba/arbitraza/, 20. 9. 2024.

The Court of Arbitration of the Foreign Chamber of Commerce BiH, 2024. Available at: https://komorabih.ba/pravilnik-o-arbitrazi-2/, 20. 9. 2024.

The European Union (EU) - Singapore Investment Protection Agreement (IPA), 2018.

The European Union (EU) - Vietnam Investment Protection Agreement (IPA), 2019.

The General Framework Agreement for Peace in Bosnia and Herzegovina - Dayton Peace Agreement, 1995. Available at: https://www.osce.org/bih/126173, 12. 9. 2024.

The Ljubljana Arbitration Rules, 2014. Available at: https://www.sloarbitration.eu/Portals/0/Ljubljanska-arbitrazna-pravila/The%20Ljubljana%20Arbitration%20Rules.pdf, 11. 9. 2024.

The Rulebook on Arbitration of the Chamber of Commerce of Republic of Srpska, 2018. Available at: https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fkomorars.ba%2Fwp-content%2Fuploads%2F2023%2F06%2FPravilnik-o-Arbitrazi-pri-PKRS.doc&wdOrigin=BROWSELINK, 11. 9. 2024.

The Rulebook on the organization and functioning of the Arbitration Court of the Foreign Chamber of Commerce of Bosnia and Herzegovina, 2003. Available at: https://www.komorabih.ba/wp-content/uploads/2019/02/pravilnik-o-arbitrazi.pdf, 11. 9. 2024.

UNCTAD, Investment Dispute Settlement Navigator. *EGS v. Bosnia and Herzegovina,* 2014, Available at: https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/591/egs-v-bosnia-and-herzegovina, 12. 9. 2024.

UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution, 2023. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2318824e-coc_arbitrators_ebook_11june.pdf, 12. 9. 2024.

UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution, 2023. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2401497e_mediation_guidelines_-ebook_eng.pdf, 12. 9. 2024.
UNCITRAL Guidelines on Mediation for International Investment Disputes 2023. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2318944e-coc_judges_ebook-11june.pdf, 12. 9. 2024.
UNCITRAL Model Law on International Commercial Arbitration, 1985, with amendments as adopted in 2006.
UNCITRAL Rules of International Arbitration, 2021.
UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014.
United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention), 2019.
United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards, 1958 (New York Convention).

Case Law

B.K.M.I. Industrieanlagen GmbH v. Dutco Construction Co. Ltd, 1989. CA Paris, 5.5.1989. 1989 REV. ARB. para. 723.
Elektrogospodarstvo Slovenije - razvoj ininzeniring d.o.o. v. Bosnia and Herzegovina - ESG v. BiH (ICSID Case No. ARB/14/13).
Fillold C. M. v. Jacksor Enterprise, Fillold C. M. v. Jacksor Enterprise, 1986. TGI Paris, 31.1.1986.1987 REV. ARB. para. 179.
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 1985. 473 U.S. paras. 614, 626-27.
Rand Investments Ltd. and others v. Republic of Serbia (ICSID Case No. ARB/18/8) – Public Hearing on Provisional Measures, 2021. Available at: https://icsid.worldbank.org/resources/multimedia?topic%5B346%5D=346, 10. 9. 2024.
Scherk v. Alberto-Culver Co., 1974. 417 U.S. 506, 517 n.10.
The Federation of Bosnia and Herzegovina v. Republic of Srpska, 1999. Final Award. The Arbitration on the Inter-entity boundary in the Brčko Area. Available at: https://www.ohr.int/final-award/ (12 September 2024).
Vattenfall AB and others v. Federal Republic of Germany (ICSID Case No. ARB/12/12): Hearing on Tribunal Question 8, 2020. Available at: https://icsid.worldbank.org/resources/multimedia, 10. 9. 2024.

UPUTSTVO AUTORIMA

PRIJAVLJIVANJE RUKOPISA ZA OBJAVLJIVANJE

Autori mogu da dostave radove napisane latiničkim pismom na srpskom ili na engleskom jeziku u elektronskom formatu, kao *Word* dokument. Rokovi za predaju radova su: za prvi broj – 15. februar, za drugi broj – 15. maj, za treći broj – 15. avgust i za četvrti broj – 15. novembar. Rukopisi se dostavljaju putem linka: http://aseestant.ceon.rs/index.php/spz/, izuzetno elektronskom poštom na adresu uredništva: **redakcijaspz@gmail.com**, koje će ih uputiti kako da se prijave na sistem *Assestant (CEON)*. Autori tom prilikom daju i autorsku izjavu. U slučaju dostavljanja koautorskih radova, korespondencija se u ime svih autora odvija sa autorom koji je rad poslao i koji će biti odgovoran za komunikaciju sa ostalim autorima (tzv. autor za korespondenciju). Autorskom izjavom autori garantuju da su prihvatili uređivačku politiku časopisa i da su prilikom izrade rada i njegovog prijavljivanja za objavljivanje poštovali etičke standarde publicistike i naučnog rada.

Očekuje se da autori u radu, kako bi ostvarili naučni doprinos, pođu od rezultata već sprovedenih istraživanja na datu temu, konsultujući relevantnu domaću naučnu i stručnu literaturu na sistematičan način, moguće korišćenjem digitalnih repozitorijuma domaćih naučnoistraživačkih organizacija i drugih zbirki naučnih i stručnih publikacija u otvorenom pristupu.

Sve aktivnosti vezane za uređivanje časopisa (od prijema rukopisa do objavljivanja elektronskog izdanja časopisa) obavljaju se posredstvom elektronskog sistema *Assestant* (CEON) koji omogućava pripremu i objavljivanje časopisa u elektronskom obliku (*Open Journal Systems* – OJS). U slučaju da autor nema nalog, potrebno je da se registruje preko linka: *http://aseestant.ceon.rs/index.php/spz/user/register*. Detaljno uputstvo za registraciju autora i prijavu rukopisa može se preuzeti sa sajta časopisa *Strani pravni život* (www.stranipravnizivot.rs). Navedene aktivnosti se obavljaju unutar samog sistema, pod nadzorom glavnog i odgovornog urednika i tehničkog urednika, a ključna obaveštenja koja su namenjena autorima, recenzentima ili drugim korisnicima automatski se prosleđuju elektronskom poštom. Zahvaljujući sistemu *Assestant* (CEON) obezbeđeno je čuvanje svih verzija objavljenih radova i odbijenih radova u elektronskoj bazi podataka. Autori, takođe, mogu da se upoznaju u svakom trenutku sa tokom i ishodom postupka recenziranja.

NAPOMENE VAŽNE ZA PRIPREMU RUKOPISA

Način oblikovanja naučnih članaka i ostalih priloga koji se dostavljaju redakciji *Stranog pravnog života* uređen je ovim uputstvom. Molimo autore da svoje priloge prilagode tematici časopisa i predviđenom načinu oblikovanja rukopisa, kako prilozi ne bi bili eliminisani nakon početne provere, budući da uredništvo primenjuje kriterijume iz važećeg podzakonskog akta o uređivanju naučnih časopisa.

Naučni i stručni članci mogu biti napisani na srpskom ili engleskom jeziku. Oni moraju sadržati podatke o autoru, naslov, sažetak, ključne reči i spisak referenci (literaturu i pravne izvore, po potrebi i spisak citiranih sudskih i drugih odluka). Uz priloge koji se objavljuju na srpskom jeziku, dostavlja se prevod naslova rada, rezimea i ključnih reči na engleskom jeziku. Prilozi koji se dostavljaju na engleskom jeziku sadrže prevod naslova, sažetka i ključnih reči na srpski jezik.

Autorski članci po pravilu ne prelaze obim od jednog autorskog tabaka (28.800 znakova sa razmacima), font Times New Roman, veličina 12pt, prored 1,5, leva margina 3,5 cm, a desna 3 cm. Izuzetno, prihvatiće se duži rukopis i to obima do 1,5 tabaka, ako to zahteva tema rada, po prethodnom dogovoru autora sa glavnim i odgovornim urednikom. U ostalim situacijama, rad većeg obima biće vraćen autoru radi skraćivanja. U obim se ne računaju tekstovi navedeni u beleškama na dnu strane (dodatni podaci o autoru, organizaciji u kojoj je zaposlen, druge napomene), naslov članka, sažetak (do 800 karaktera sa razmacima), ključne reči (do 5 pojmova ili sintagmi), spisak literature, pravnih izvora i sudskih odluka. Naučni članci se klasifikuju u: originalne (u kojima se iznose prethodno neobjavljeni rezultati sopstvenih istraživanja zasnovanih na primeni naučnih metoda) i pregledne (koji sadrže originalan, detaljan i kritički prikaz istraživačkog problema ili područja u kojem je autor ostvario određeni doprinos, prikazan u vidu autocitata). Za razliku od naučnih radova, u stručnom radu autor na osnovu izvršenog istraživanja zasnovanog na prikupljanju postojećih teorijskih saznanja i raspoloživih činjenica ukazuje na iskustva značajna za unapređenje prakse u određenoj oblasti, preporučuje promene u načinu primene propisa i slično.

U časopisu je moguće objaviti i **naučnu kritiku ili polemiku**, koja predstavlja raspravu, zasnovanu na naučnoj argumentaciji, na određenu naučnu temu. Obim naučnog rada ove vrste može da iznosi do 10.000 znakova sa razmacima. Osim podataka o autoru i naslova članka, naučna kritika mora da sadrži apstrakt (do 400 znakova sa razmacima), ključne reči (do 5 pojmova ili sintagmi) i spisak bibliografskih izvora. Svi navedeni podaci ne uračunavaju se u obim rada.

Ostali prilozi. Komentari sudskih odluka mogu da imaju najviše do 15.000 znakova. Izlaganja sa naučnih i stručnih skupova, prikazi knjiga i slično po pravilu ne smeju biti obima većeg od 7.000 znakova. Ne sadrže apstrakt i rezime.

Osnovno oblikovanje teksta

Svi prilozi moraju biti sačinjeni u Microsoft Word-u, latiničkim pismom, fontom Times New Roman, veličine 12 pt, sa proredom 1,5, na strani formata A4, sa uvlačenjem pasusa za 1 tabulator, bez deljenja reči na slogove (hifenacije). Posle svakog znaka interpunkcije staviti samo jedan razmak. Za posebna slova iz srpskog i stranog latiničkog pisma koriste se raspoloživi simboli – dijakritički znaci. Ćirilički znaci iz stranog pisma i iz drugih pisama (kineskog, japanskog, arapskog itd.) transliterišu se i transkribuju prema tablici dostupnoj na: *https://www.loc.gov/catdir/cpso/roman.html*. Imena i prezimena stranih autora navode se u originalu, osim kada se moraju transkribovati na latinicu (na primer imena iz ruskog jezika). Kada se autor poziva na radove objavljene u *Stranom pravnom životu*, koristi isključivo naziv časopisa na srpskom jeziku. Reference na srpskom jeziku koje se citiraju u radu pisanom na engleskom jeziku se ne prevode.

Prevod stručnih pojmova iz strane literature, kada je to moguće, treba da bude zamenjen odgovarajućim nazivom u srpskom jeziku. Prevod latinskih pravnih izraza ili izreka nije potreban. Strani pojmovi pišu se kurzivom. Druge strane reči ili sintagme koje označavaju specifične izraze ili institute u stranom pravu, koje se ne mogu sa preciznošću prevesti na sprski jezik ili ne postoje u srpskom pravu, zadržavaju se u originalnom nazivu (složene kurzivom), s tim što se objašnjava njihovo značenje na srpskom jeziku. U tekstu ne treba koristiti podebljana (boldirana) niti podvučena slova.

Strani pravni život prihvata citiranje i oblikovanje referenci prema stilu citiranja i referenciranja – Harvard britanski standard, prema modelu autor/rad. Navedeni stil je modifikovan jedino u pogledu načina citiranja pravnih izvora. Način primene navedenog stila pri citiranju i sastavljanju spiska literature i popisa pravnih izvora objašnjen je detaljno u ovom uputstvu.

S obzirom na prihvaćeni stil referenciranja, beleške u dnu teksta (fusnote) sadrže dopunska objašnjenja, a ne treba da upućuju na korišćenu literaturu, što se čini u tekstu. Članovi i stavovi pravnih odredbi na koje se poziva autor navode se u tekstu, a ne u fusnotama.

Ime, srednje slovo i prezime autora (jednog ili više njih) navode se na prvoj strani rukopisa u gornjem levom uglu. Pišu se uz upotrebu posebnih znakova (č, đ, š itd.), bez naučnih titula. Imena stranih autora takođe se pišu dijakritičkim znacima, bez obzira na jezik rada.

Ostali podaci koji se odnose na autore: naučna i stručna zvanja, akademske titule, ORCID broj autora, naziv ustanove autora i podaci za kontakt (mejl autora) navode se u posebnoj belešci (fusnoti) na istoj strani ispod teksta, označeni zvezdicom.

Naziv ustanove autora (afilijacija): navodi se potpun, zvanični naziv i sedište ustanove (grad i država) u kojoj je autor zaposlen ili u kojoj je obavio istraživanje. Studenti poslediplomskih studija navode naziv ustanove u kojoj studiraju.

Istraživački podatak / istraživački projekat. Autor može nakon naslova uneti posebnu fusnotu u kojoj će navesti tačne, potpune i aktuelne podatke o okolnostima pod kojima je rad nastao (u okviru međunarodne saradnje, međunarodnog programa, kao deo naučnog ili istraživačkog projekta, u okviru postdiplomskih studija ili postdoktorskih studija, kao saopštenje sa održanog naučnog skupa, gostujuće predavanje i slično) i/ili naznaku o instituciji, državnom organu ili međunarodnoj organizaciji koja je finansijer ili korisnik projekta.

U zahvalnici (posebnoj napomeni na prvoj strani rada ispod teksta označeno zvezdicom posle naslova rada) navode se imena drugih lica koja nisu autori, ali su imala učešća u istraživanju ili su pomagala u priređivanju rada, sa objašnjenjem njihove uloge. U fusnoti se može navesti i obaveštenje da je rad urađen u okviru određenog naučnoistraživačkog projekta, da je ranije usmeno izlagan na naučnom skupu i slično.

Naslov rada piše se malim slovima na sredini, font 14 pt. Naslov ne bi trebalo da ima više od 10 do 12 reči.

Sažetak se navodi ispod naslova članka. Sažetak ne sme da bude duži od 800 znakova sa razmacima. Veličina fonta je 11 pt (složeno kurzivom). U sažetku autor ukazuje na značaj teme, osnovno istraživačko pitanje/hipotezu, cilj istraživanja, metodologiju i rezultate istraživanja. U apstraktu treba koristiti termine koji se često koriste za indeksiranje i pretraživanje članaka.

Ključne reči su termini ili fraze koji najbolje opisuju sadržaj članka za potrebe indeksiranja i pretraživanja. Potrebno je dati pet ključnih reči ili sintagmi na srpskom. U članku se navode ispod apstrakta (veličina fonta 11 pt, kurzivom).

Naslov rada, Sažetak i ključne reči na engleskom jeziku (ako je članak na srpskom jeziku), **odnosno, na srpskom jeziku** (ako je članak na engleskom jeziku) navode se dva reda ispod.

Podnaslovi u tekstu se pišu na sredini, malim slovima i podebljanim (boldiranim) slovima, veličine 12 pt i numerišu se arapskim brojevima. Uvod i zaključak se, takođe, označavaju rednim brojevima. Podnaslovi drugog reda se pišu podebljanim (boldiranim) slovima, složeno kurzivom. Podnaslovi trećeg reda se pišu kurzivom.

Tabele, grafikoni i slični prilozi dostavljaju se posebno u formatu i rezoluciji pogodnoj za štampu.

Popis korišćene literature, pravnih izvora i spisak sudskih i drugih odluka navode se na kraju rada, fontom 11 pt. Popis bibliografskih jedinica sastavlja se po abecednom redosledu imena autora, bez numerisanja.

NAČIN CITIRANJA I SASTAVLJANJA SPISKA REFERENCI

Navođenje izvora unutar teksta

Od autora se očekuje da navedu korišćene izvore, i to potpuno i tačno, i da precizno prenesu tuđe navode, te se prilikom citiranja knjiga ili članaka preporučuje da, gde je moguće, budu navedene strane sa kojih se preuzima tuđi tekst. Brojevi stranica moraju biti sadržani kod doslovnog citiranja tuđeg teksta, prilikom parafraziranja ili upućivanja na određeni deo knjige ili članka. Jedna stranica se označava sa „p.", a više strana sa „pp." (skraćeno lat. *paper – pluta paper).* Moguće je koristiti i rad prihvaćen za objavljivanje, pod uslovom da je za rad određen digitalni identifikator (DOI broj), koji će biti naveden u spisku literature uz druge podatke o citiranom radu.

Način navođenja izvora zavisi od toga da li je potrebno istaći ime autora ili sadržaj njegovog teksta. U prvom slučaju se ime autora čiji se rad koristi navodi u samoj rečenici; u drugom slučaju se navodi na kraju rečenice u zagradi, uz godinu objavljivanja rada (po potrebi i strana). Na primer:

> Kako je istakao profesor Konstantinović (2006, p. 36) obimnost Skice za Zakonik o obligacijama i ugovorima bila je posledica težnje da zakon bude razumljiv svima, a ne da učesnike u prometu nauči pravu.
>
> Skica za Zakonik o obligacijama i ugovorima bila je obimna, zato što se težilo da zakon bude razumljiv svima, a ne da učesnike u prometu nauči pravu (Konstantinović, 2006, p. 36).

Isticanje imena autora. Kada se u rečenici pominje ime nekog autora, bez dodatnih informacija o sadržaju rada koji se citira (sumarni pregled ili ukazivanje na izvor), dovoljno je navesti prezime autora i u zagradi godinu u kojoj je objavljen rad. Navodimo primer:

> U svom radu Ćirić (2008) konstatuje da je…

Kada se upućuje na posebne delove u radu, mora biti naveden i broj stranice ili stranica na kojima se nalazi citat. Primeri:

> U svom radu Ćorić (2017, pp. 26-30) opisuje procesna sredstva za naknadu štete u sudskom poretku Evropske unije.
>
> Stoga, prema Đorđeviću (2016, pp. 28-29), trebalo bi da se uzmu u obzir i drugačija rešenja iz uporednog prava.

Preuzeti sadržaj drugog autora se može saopštiti i parafraziranjem:

> Stoga Perović u predgovoru ponovljenom izdanju Skice za Zakonik o obligacijama i ugovorima (Konstantinović, 2006, p. 16) zaključuje da svaki pravni sistem dopušta slobodu ugovaranja, ali do izvesne granice.

Ako se citira neodređen broj strana, navodi se samo početna stranica sa koje se preuzima citat, dok iza nje stoji „i dalje". Na primer:

> Sve ove teorije se mogu podeliti u nekoliko grupa (Čolović, 2009, pp. 83 i dalje)…

Kada se upućuje na izvor iz fusnote nekog rada, posle broja strane piše se skraćenica „fn.":

> Navedeno rešenje je nesumnjivo podložno kritici (Jovanović, p. 8, fn. 14)…

Doslovno citiranje koristi se retko, uglavnom da bi se izbeglo pogrešno tumačenje originalnog teksta, da se istakne bitan argument ili ideja koja će potom biti posebno analizirana ili pobijana ili kada je na lep i efektan način autor izrazio svoju misao, a taj efekat bi parafraziranje poništilo. U svakom slučaju doslovnog citiranja teksta drugog autora neophodno je navesti tačnu stranicu (ili strane) na kojima se citat nalazi, kako bi zainteresovani čitalac mogao proveriti iznete podatke.

Kraći citati, dužine do 30 reči, sastavni su deo rečenice, istaknuti navodnicima. Mogu biti direktno ili indirektno citirani, na primer:

> Kako ističe Stanković (1972, p. 177) „neimovinska šteta predstavlja posebnu pojavu i pojam za sebe".

Ili:

> Sve su to razlozi što treba prihvatiti da „neimovinska šteta predstavlja posebnu pojavu i pojam za sebe" (Stanković, 1972, p. 177).

U citate duže od 30 reči autor nas uvodi svojim rečima, a zatim počinje citat, koji ističe navodnicima, obavezno uz naznaku prezimena autora i tačne strane ili strana na kojima se nalazi citat. Tekst se može preuzeti direktno:

> Nemogućnost korišćenja uništene stvari može da izazove neimovinsku štetu, nezavisno od *pretium affectionis*. Prema Stankoviću (1972, p. 307) reč je o slučajevima: „u kojima nemogućnost upotrebe uništene odnosno oštećene stvari unosi veliki poremećaj u oštećenikov svakodnevni praktični život, lančanu reakciju raznovrsnih maltretiranja i ograničavanja, koja mogu predstavljati potpunu dezorganizaciju oštećenikovog načina života i njegovih svakodnevnih navika".

Indirektno se isti tekst može preuzeti na sledeći način:

> Nemogućnost korišćenja uništene stvari može da izazove neimovinsku štetu, nezavisno od *pretium affectionis*, u slučajevima „u kojima nemogućnost upotrebe uništene odnosno oštećene stvari unosi veliki poremećaj u

> oštećenikov svakodnevni praktični život, lančanu reakciju raznovrsnih maltretiranja i ograničavanja, koja mogu predstavljati potpunu dezorganizaciju oštećenikovog načina života i njegovih svakodnevnih navika" (Stanković, 1972, p. 307).

Dugačke citate bi najpravilnije bilo preuzeti tako što se iza dve tačke navedu u posebnom redu uvučeno, složeno manjim fontom (11pt), uz naznaku izvora i stranice. Izostavljeni deo reči iz citata označava se trima tačkama u ugaonim zagradama, na primer:

> Prilikom organizacije izvršenja rada u javnom interesu „pragmatični razlozi […] ukazivali bi na potrebu većeg učešća lokalne zajednice (u sektoru službi socijalne zaštite)" (*Alternative zatvorskim kaznama*, 2005, p. 44).

Citiranje različitih radova dva autora. Kada se u istoj rečenici upućuje na radove dva autora (bilo da imaju saglasne ili oprečne stavove) u tekstu se navodi prezime svakog od autora, uz godine kada su radovi objavljeni, prema sledećim primerima:

> I Đorđević (2012, p. 34) i Mrvić Petrović (2011, p. 86-87) smatraju da uvođenje sistema dani-novčane kazne nije ostvarilo željene efekte u pravnom sistemu Republike Srbije.
>
> Kauzalitet kod propuštanja se različito objašnjava po teoriji aliud agere u odnosu na teoriju prethodno preduzete radnje (vid. za prvu Welp, 1968, p. 30, a za drugu Rudholphi, 1972).

Citiranje imena dva ili tri autora istog rada. U tekstu se upućuje na zajednički rad autora uz navođenje prezimena oba autora povezana simbolom &, dok se u zagradi navodi godina u kojoj je rad objavljen.

> Na ovakav odnos države i crkve trebalo bi da obratimo posebnu pažnju (Đorđević & Stanić, 2015, p. 63).
>
> U svom radu Nikolić & Čović (2018) ukazali su na…
>
> Uporednopravno istraživanje (Mrvić Petrović & Petrović, 2018) potvrdilo je…
>
> Mrkšić, Popović & Novaković (2018, pp. 477) analiziraju…

Citiranje rada koji ima više od tri autora. U tekstu se navodi samo prezime prvog autora i iza njega opšteprihvaćena skraćenica „*et al*." (*et alia*). Na primer:

> Ćeranić *et al.* (2018) istražili su..

Citiranje više radova istog autora, objavljenih iste godine. U tekstu se uz prezime autora i godinu dodaju latinična slova a, b, c, d, kako bi se označili različiti radovi istog autora objavljeni iste godine. Primer:

> Svakako, navedeni vid krivice trebalo bi da je više u našem fokusu (Ćirić, 2004a, p. 70)… Pored „tvrde", ne bismo smeli da zaboravimo „meku moć"… (Ćirić, 2004b, p. 334).

Citiranje rada objavljenog pod okriljem organizacije. U slučaju da je navedeni tekst objavila neka organizacija (pravno lice, udruženje, ustanova, međunarodna, nevladina organizacija i slično), tako da pojedini autor nije posebno naveden, u tekstu treba uputiti na naziv organizacije i godinu objavljivanja rada. Dozvoljena je upotreba uobičajenih službenih skraćenica međunarodnih organizacija ili njihovih tela, na primer:

> Od presudne je važnosti istraživati izborne procese u domaćem i stranom pravu (Institut za uporedno pravo, 2013, pp. 32-35).
>
> Media and information technologies can offer such spaces to allow different groups to interact with each other, so in Tallin Guidelines on National Minorities and the Digital Age (OSCE, 2019)…

Citiranje rada nepoznatog autora. Umesto podataka o autoru koristi se naslov rada:

> U *Teoriji države i prava* (1995, p. 204) jasno se kaže…

Rad nepoznate godine izdanja. U navedenom slučaju koristi se skraćenica n.d. (od *no date*):

> Zirojević (n.d.) ukazuje na obeležja terorizma…

Ili indirektno:

> Obeležja savremenog terorizma su… (Zirojević, n.d.).

Sekundarne reference. Ako primarni izvor nije bilo moguće pronaći, nego ga autor preuzima iz rada drugog autora, mora se pozvati na primarni izvor i sekundarnu referencu na sledeći način:

> Zlatarić (1967), kako navodi Kambovski (2005, p. 701) uključuje u saizvršilaštvo i radnje preduzete pre ili posle dovršenja krivičnog dela.

Ili:

> U ranijoj teoriji se smatralo da saizvršilaštvo uključuje i radnje preduzete pre ili posle dovršenja krivičnog dela (Zlatarić, 1967, navedeno u Kambovski, 2005, p. 701).

Navođenje propisa. Naziv zakona i drugog propisa navodi se u tekstu punim nazivom (složeno običnim slovima), uz broj godine kada je usvojen, sem kada se analizira određena izmena ili dopuna propisa, kada se navodi kao izvor službeno

glasilo u kome je objavljena takva izmena. Prilikom prvog pominjanja propisa može se dodati crta posle naziva i navesti skraćenica pod kojom će se isti propis dalje u tekstu navoditi. U daljem tekstu dovoljno je koristiti samo skraćenicu. Isto pravilo važi i za inostrane pravne akte, s tim što se podaci koji se na njih odnose navode na način kako je to uobičajeno za to strano pravo. Skraćenice se sačinjavaju prema izvornom nazivu propisa, a ne prema njihovom prevodu na srpski ili engleski jezik.

U krivičnom zakonodavstvu Srbije (Krivični zakonik RS, 2005 – KZ).

Temeljna reforma krivičnih dela protiv privrede u pravu Republike Srbije izvršena je 2016. godine (Zakon o izmenama i dopunama Krivičnog zakonika, 2016).

Pravo na obeštećenje se žrtvama nasilja u Nemačkoj priznaje od 1976. godine na osnovu posebnog saveznog zakona, s tim što je 1985. godine donet novi (*Gesetz* über *die Entschädigung für von Gewalttaten* – OEG) s tim što je 1985. godine donet novi zakon koji je i sada na sanzi (OEG, 1985).

U francuskom Građanskom zakoniku (*Code civil* – CC), prema poslednjoj verziji od 1. oktobra 2018. Godine predviđeno je… (CC, 1804).

Akti međunarodnih organizacija citiraju se tako što se u tekstu navodi donosilac akta i pun naziv akta, koji se, po potrebi skraćeno, navodi u zagradi uz naznaku godine u kojoj je donet.

U Istanbulskoj konvenciji Saveta Evrope (CETS No. 210) od 11. 5. 2011. godine (CoE CETS, 2011) predlaže se…

Prava deteta, regulisana Konvencijom Organizacije ujedinjenih nacija o pravima deteta (Zakon o ratifikaciji Konvencije Ujedinjenih nacija o pravima deteta, 1990)…

U pravu Evropske unije doneta je Uredba o stečajnim postupcima br. 1346/2000 (Concil Regulation (EC), 2000)…

Na isti način kako je citiran propis naveden u tekstu, mora biti označen u popisu literature.

Autor može da koristi tekst propisa preuzet sa interneta sa službene stranice nadležnog organa ili javnog servisa zaduženog za objavljivanje pravnih propisa i praćenje izmena. U tom slučaju u popisu literature moraju biti označeni osnovni podaci o propisu i godini u kojoj je objavljena poslednja verzija dostupna na službenoj stranici nadležnog organa ili preuzeta sa javnog servisa zaduženog za objavljivanje pravnih propisa i praćenje izmena. Autor može da koristi tekst propisa i prema objavljenom službenom prevodu na engleski (ili neki drugi) jezik (što mora biti naznačeno).

Član, stav i tačka propisa skraćeno se pišu čl., st. i tač., a iza napisanih brojeva se ne stavlja tačka. Na primer:

čl. 5, st. 2, tač. 3 ili čl. 5, 6, 9 i 10 ili čl. 4–12.

Navođenje sudske prakse i odluka drugih organa. Autor u tekstu treba da navede što potpunije podatke: vrstu odluke sudskog, upravnog tela ili Ustavnog suda, naziv donosioca i druge podatke na osnovu kojih je odluka klasifikovana (slovo koje označava vrstu postupka, broj postupka, godinu pokretanja postupka) i datum kada je doneta i, ako postoji, izvor iz kog je preuzeta. Za presude Evropskog suda za ljudska prava merodavan je i broj predstavke. Iza teksta autor navodi u zagradi skraćeno oznaku odluke, koja će biti korišćena i u popisu literature. Na primer:

Odluka Ustavnog suda Republike Srbije, broj IUo-173/2017 utvrđena je nesaglasnost… (Odluka US, 2017).

Cass. crim., 19 December 1991, RCA 1992.170 (*Ius Commune Casebook for the Common Law of Europe*, 2018).

… kako se navodi u obrazloženju Presude Apelacionog suda u Beogradu, Gž.636/2011 od 28. 5. 2012 (*Arhiv Apelacionog suda u Beogradu*, 2012).

Odluke međunarodnih sudova i tribunala treba da sadrže što potpunije podatke (vrsta odluke, podaci o sudskom veću koje je odluku donelo, datum donošenja odluke, uobičajeni naziv predmeta, registarski broj, kod (ako ga ima), strana, stav ili tačka na koju se upućuje ili sa koje je citiran deo odluke). Odluke međunarodnih sudova ili tribunala navode se uz korišćenje skraćenica za nazive sudova npr: PCIJ, ECHR, ICJ, ICTY i slično. Prilikom citiranja sudskih slučajeva koristi se veznik skraćenica „*v*" za veznik *versus*, npr. *Fremkin v Russia*, *Goobald v Mahmood*.

Prilikom citiranja prakse Evropskog suda za ljudska prava navodi se i broj podnete predstavke. Na primer:

Borodin v Russia, predstavka br. 41867/04, presuda ECHR, 6. 2. 2013, par. 166.

Sudska praksa Suda Evropske unije obavezno se navodi uz korišćenje evropske identifikacione oznake sudske prakse (*European Case Law Identifier* – ECLI). Na primer:

Judgment of the General Court (Second Chamber) of 13 October 2015. *Intrasoft International SA v European Commission* (Case 403/12, ECLI:EU:T:2015:774)

Citiranje referenci preuzetih sa interneta. Ukoliko se u radu koriste sadržaji sa interneta, navode se na isti način kao i ostali sadržaji, ako su poznati autori ili organizacije ili državne ustanove koje su ih publikovale, s tim što će u spisku literature na odgovarajući način biti naglašeno da je reč o URL izvoru ili o članku sa DOI brojem. Elektronski dostupni sadržaji retko imaju označene stranice, pa se preciznost kod navođenja citata postiže pozivanjem na odeljke ili pasuse, ako su numerisani u tekstu.

Citiranje rada nepoznate godine izdanja ili rada nepoznatog autora. U radu se navedena vrsta rada citira tako što se na mestu gde bi trebalo da stoji godina navodi „n.d." (*non dated* – nepoznat datum), na primer:

> Njihov značaj za parlamentarne procese je nemerljiv (Ostrogorski, n.d).

Ako se u rukopisu koristi rad nepoznatog autora, navešće se naslov rada koji se citira, uz godinu, ako je poznata:

> Sve nam to potvrđuje i mešovita, objektivno-subjektivna teorija (Elementi krivičnog dela, 1986, p. 13).

Sastavljanje spiska literature i popisa pravnih izvora

Spisak literature je obavezan na kraju rada. U spisak literature se unose sve bibliografske jedinice korišćene u radu, osim pravnih izvora i spiska sudskih odluka, koji se posebno navode, iza spiska literature.

U spisku literature se bibliografske odrednice (reference) navode po abecednom redu, prema početnom slovu prezimena autora, početnom slovu organizacije u slučaju da je autor nepoznat ili, ako su nepoznati i autor i organizacija, prema početnom slovu naslova bibliografske jedinice. Kod koautorstva, neophodno je navesti prezime i početno slovo imena svakog koautora.

1. Knjige (elektronske), druge monografije i udžbenici, poglavlja u monografijama

Navode se obavezno sledeći elementi po modelu: Prezime, inicijal(i) autora. Godina izdavanja. *Naslov: podnaslov.* Podatak o izdanju. Mesto izdanja: izdavač. Kada ima više od četiri autora, knjiga se sortira prema početnom slovu prezimena prvog autora, a umesto imena ostalih autora može se koristiti skraćenica „*et al.*". Kada knjiga nema podatak o autoru, ali je istaknuto ime urednika ili organizacije, umesto autorovog imena navodi se ime urednika (uz naznaku tog svojstva) ili naziv organizacije koja je izdala publikaciju.

Za urednike koristiti skraćenicu „ur." (ako je knjiga izdata na srpskom jeziku), a „ed." (za knjige na engleskom jeziku sa jednim urednikom) ili „eds." (kada ima dva ili više urednika). Na primer:

- Ćirić, J. 2008. *Objektivna odgovornost u krivičnom pravu*. Beograd: Institut za uporedno pravo.
- Ćeranić, J. 2015. *Unitarni patent*. Beograd: Institut za uporedno pravo; Banja Luka: Pravni fakultet Univerziteta.
- Sime, S. 2018. *A Practical Approach to Civil Procedure*. 31st ed. Oxford: Oxford University Press.
- Carlen, P. & Worrall, A. 1987. *Gender, Crime and Justice*. Philadelphia: Open University.
- UNICRI. 1997. *Promoting Probation Internationally*. Publ. no 58. Rome/ London: UNICRI.
- Tappan, P. W. (ed.). 1951. *Contemporary corrections*. New York: McGraw-Hill.
- Srzentić, N., Stajić, A. & Lazarević, Lj. 1995. *Krivično pravo Jugoslavije. Opšti deo*. 18. izd. Beograd: Savremena administracija.

Obavezni elementi koji se moraju navesti kada se citira sadržaj elektronske knjige su: Autor, Inicijal(i) godina. Naslov knjige, [e-book], Izdanje (samo u slučaju da se ne radi o prvom izdanju), Mesto izdavanja e – knjige: Izdavač, pristup preko Naziv baze podataka, URL za tu e – knjigu (datum pristupa). Na primer:

- Molan, M. T. 2012. *Series: Questions & Answers*, [eBook]. 8th ed, 2012-2103. Oxford: OUP Oxford. Database: eBook Academic Collection. Dostupno na: http://eds.a.ebscohost.com/ (18. 1. 2019).

2. Doktorske disertacije, magistarski ili završni master radovi

Obavezno se navode: Prezime, inicijal(i) autora. Godina izdavanja. *Naslov*. Doktorska disertacija. Mesto publikovanja: fakultet/univerzitet na kome je odbranjen. Na primer:

- Stanić, M. 2017. *Pravna priroda poslaničkog mandata*. Doktorska disertacija. Beograd: Pravni fakultet Univerziteta u Beogradu.

3. Poglavlja u knjigama i naučni/stručni radovi objavljeni u zbornicima i zbirkama radova sa naučnih skupova

Podaci o navedenim bibliografskim jedinicama sadrže obavezno sledeće elemente koje treba navesti po modelu: Prezime, inicijal(i) autora. Godina izdava-

nja. Naslov rada: podnaslov. U: Prezime, inicijal(i) urednika (ur.). *Naslov zbornika: podnaslov.* Mesto izdavanja: izdavač, str. od-do.

Za urednike koristiti skraćenicu „ur." (ako je zbornik na srpskom jeziku), a „ed." (za zbornike na engleskom jeziku sa jednim urednikom) ili „eds." (kada zbornik uređuju dva ili više urednika). Primer:

- Moss, G. 2015. New World and Old World: Symphony or Cacophony?. In: Parry, R. & Omar, P. (eds.), *International Insolvency Law: Future Perspectives.* Nottingham/Paris: INSOL Europe, pp. 17-42.
- Čolović, V. 2011. Status stranog stečajnog postupka u nemačkom zakonodavstvu. U: Vasiljević, M. & Čolović, V. (ur.), *Uvod u pravo Nemačke.* Beograd: Institut za uporedno pravo i Pravni fakultet Univerziteta u Beogradu, pp. 524-541.

4. Članci

Obavezni elementi koji se navode su: Prezime, inicijal(i) autora. Godina izdavanja. Naslov članka: podnaslov. *Naslov časopisa,* oznaka sveske/godišta/volumena (broj), str. od-do. Ako je članak prihvaćen za objavljivanje ili je već objavljen sa DOI brojem, taj broj treba dodati u obliku linka: https://doi.org/DOIbroj.

Navodimo primere:

- Kostić, J. 2018. Investiranje društava za osiguranje na tržištu kapitala Republike Srbije. U: Petrović, Z. & Čolović, V. (ur.), *Odgovornost za štetu, naknada štete i osiguranje: zbornik radova sa XXI međunarodnog naučnog skupa*. Beograd/Valjevo: Institut za uporedno pravo, pp. 463-476.
- Gasmi, G., Prlja, D. & Jerotić, A. 2017. European leading legal principles of combating gender based violence: "Istanbul Convention". U: Lilić, S. (ur.), *Perspektive implementacije evropskih standarda u pravni sistem Srbije: zbornik radova. Knj. 7*, (Biblioteka Zbornici). Beograd: Pravni fakultet, Centar za izdavaštvo i informisanje, pp. 335-349.
- Đukić-Milosavljević, I. *et al*. 2017. Jedinice za podršku deci žrtvama i svedocima u krivičnom postupku – Domaće pravo i praksa. *Temida,* 20(1), pp. 45-64.
- Višekruna, A. 2018. Ostvarivanje saradnje u stečajnim postupcima sa elementom inostranosti: primer protokola. *Strani pravni život*, 62(3), pp. 65-88. Dostupno na: https://doi.org/10.5937/spz1803065V (18. 1. 2019).

5. Članci objavljeni u elektronskom časopisu ili online bazi podataka

Navode se sledeći podaci: Prezime, inicijal(i) autora. Godina izdavanja. Naslov rada: podnaslov. *Naslov časopisa* volumen/godište (broj). DOI broj, ako ga članak ima ili URL adresa elektronskog izdanja časopisa ili naziv *online* baze podataka (datum posete stranici). Odlučujući kriterijum za određeni način navođenja jeste kako korisnik najlakše može pronaći dokument koji ste citirali. Na primer, prethodno navedeni izvor u kome je naznačen link sa DOI brojem (Višekruna, A.) može biti citiran i na sledeće načine:

- Višekruna, A. 2018. Ostvarivanje saradnje u stečajnim postupcima sa elementom inostranosti: primer protokola. *Strani pravni život*, 62(3), pp. 65-88. Dostupno na: https://www.stranipravnizivot.rs/index.php/SPZ/article/view/686 (18. 1. 2019).

Ili:

- Višekruna, A. 2018. Ostvarivanje saradnje u stečajnim postupcima sa elementom inostranosti: primer protokola. *Strani pravni život*, 62(3), pp. 65-88. Dostupno u: SCIndeks.ceon.rs (18. 1. 2019).

6. Članci, izveštaji, radovi iz zbornika dostupnog na internetu, koji imaju autora

Članci koji su dostupni na internetu, sa poznatim autorom, ali nisu iz elektronskog časopisa, i različiti izveštaji navode se prema sledećem modelu: Prezime, inicijal(i) autora. (godina izdavanja). *Naslov: podnaslov*. Mesto izdavanja: izdavač ili organizacija odgovorna za održavanje stranice na internetu. URL: (datum posete stranici). Na primer:

- Mutavdžić Obradović D. 2015. *Odgovornost vlasnika odnosno držaoca psa za štetu koju je prouzrokovao drugom licu*. Beograd: Paragraf. Dostupno na: https://www.paragraf.rs/ (18. 1. 2019).
- Lietonen, A. & Ollus, N. 2017. *The costs of assisting victims of trafficking in human beings: a pilot study of services provided in Latvia, Estonia, Lithuania, Report Series 87.* Helsinki: HEUNI. Dostupno na: https://www.heuni.fi/material/attachments/heuni/reports/HY3EXasQ3/HEUNI_Report_no.87.pdf (18. 1. 2019).

Podaci o radu iz zbornika čiji je sadržaj objavljen na internetu navode se na sledeći način: Prezime, inicijal(i) autora. Godina izdavanja. *Naslov rada* (sa

nazivom časopisa i drugim podacima koji se zahtevaju za članak). URL: (datum posete stranici).

- Rabrenović, A. 2008. Razvoj službeničkog sistema federalne uprave SAD: od potrage za političkim plenom ka ostvarenju javnog interesa. U: Ćirić, J. (ur.), *Uvod u pravo SAD*. Beograd: Institut za uporedno pravo, pp. 49-70. Dostupno na: http://iup.rs/wp-content/uploads/2017/10/Uvod-u-pravo-SAD.pdf (18. 1. 2019).

7. Članak dostupan na internetu koji nema naznačenog autora

Osnovni podaci koje treba navesti su: Naslov rada, godina izdanja, URL ili naziv *online* baze podataka, (datum pristupa stranici). Na primer:

- *National Action Plan to combating corruption – Mongolia*. 2016. Dostupno na: https://www.opengovpartnership.org/.../06-national-action-plan-combating-corruption (18. 1. 2019).

8. Spisak korišćenih pravnih izvora i izvora sudske prakse

Popisuju se nazivi zakona i drugih propisa korišćenih u radu, sa brojevima službenih glasila u kojima su objavljeni ili podacima o elektronskim izvorima sa kojih su preuzeti. U slučaju potrebe, razdvajaju se domaći od stranih propisa (u podnaslovima se navodi na koju se državu propisi odnose). Propisi se navode prema hijerarhiji citiranih pravnih akata (od Ustava, preko zakona do uredbi i pojedinačnih akata). Ako se navodi više akata iste pravne snage, koristi se abecedni red. Kada se navode akti Evropske unije, obavezno se navodi broj službenog glasnika u kome je propis objavljen i strana na kojoj se nalazi:

- Krivični zakonik RS 2005. *Službeni glasnik RS*, br. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016.
- Izmene KZ RS 2016. *Službeni glasnik RS*, br. 94/2016.
- OEG, 1985. Gesetz über die Entschädigung für Opfer von Gewalttaten, od 7. januara 1985 (*BGBl*. I S. 1), sa poslednjom izmenom od 17. jula 2017 (*BGBl*. I S. 2541). Dostupno na: https://www.gesetze-im-internet.de/oeg/ (18. 1. 2019).
- CC, 1804. Code civil, poslednja verzija od 25. decembra 2018. Dostupno na: https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721 (18. 1. 2019).
- CETS, 2011. Council of Europe, Convention on preventing and combating violence against women and domestic violence (CETS No.210) od 11. 5. 2011. godine. Dostupno na: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210 (18. 1. 2011).

- EU Decision 2010. EU Commission Decision of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under document C(2010) 593 (Text with EEA relevance). *OJ* L 39, 12. 2. 2010, pp. 5-18.
- Rec 2011. Council of Europe, Recommendation CM/Rec (2011)13 of the Committee of Ministers to member states on mobility, migration and access to health care. Adopted by the Committee of Ministers on 16 November 2011.
- UNSC Resolution 1286, UN dok. S/RES/1286 (19 January 2000).

Izvori sudske prakse ili prakse drugih državnih organa se posebno navode. Praksa međunarodnih sudova ili tribunala navodi se uz korišćenje službenih skraćenica sudova, na primer: ICJ, PCIJ, ICTY, ICTR, ECHR, zatim se piše naziv predmeta, vrsta odluke, datum donošenja, publikacija u kojoj je odluka objavljena i strane na kojoj je objavljena.

Kod presuda međunarodnih krivičnih tribunala se nakon naziva predmeta navodi i sudsko veće (po potrebi i podaci koji se tiču izdvojenih sudskih mišljenja, ako se na njih pozivao autor u radu), dok se kod odluka Evropskog suda za ljudska prava navodi i broj predstavke. Sudska praksa Suda Evropske unije obavezno se navodi uz korišćenje evropske identifikacione oznake sudske prakse (*European Case Law Identifier* – ECLI).

Domaće i strane sudske presude, pravna shvatanja i slično, kao i presude međunarodnih sudova mogu se navoditi uz pozivanje na elektronske pravne baze iz kojih su preuzete (Paragraf Lex, Intermex, EUR-Lex, CURIA, Lexiweb.co.uk, Légifrance, HUDOC itd.).

Različite načine navođenja ilustruju sledeći primeri:

- Pravno shvatanje, 1999. Pravno shvatanje utvrđeno kroz odgovore na pitanja na sednici Odeljenja za privredne sporove Višeg privrednog suda od 6. oktobra 1999, dostupno u elektronskoj pravnoj bazi Paragraf Lex.
- Odluka US, 2017. Odluka Ustavnog suda Republike Srbije, broj IUo-173/2017 o utvrđivanju nesaglasnosti sa Ustavom i Zakonom Pravilnika opštine Bečej iz 2013. godine o kriterijumu i postupku dodele sredstava crkvama i verskim zajednicama, *Službeni glasnik RS*, br. 68/2018.
- Cass. crim., 19 December 1991, RCA 1992.170. *Ius Commune Casebook for the Common Law of Europe*, 2018.
- Presuda Apelacionog suda u Beogradu, Gž.636/2011 od 28. 5. 2012. *Arhiv Apelacionog suda u Beogradu*, 2012.
- *Goobald v Mahmood*, 2005 All ER (D) 251 (Apr). Dostupno na: https://Lexisweb.co.uk/cases/2005/april/godbold-v-mahmood (18. 1. 2019).

- *Intrasoft International SA v European Commission*, 2015. EGC, Judgment of the General Court (Second Chamber) of 13 October 2015 (Case 403/12, ECLI:EU:T:2015:774). Dostupno na : https://eur-lex.europa.eu/l (18. 1. 2019).

Uredništvo stoji na raspolaganju autorima i za sva druga neophodna razjašnjenja (pitanja uputiti elektronskom poštom na adresu uredništva).

CIP - Каталогизација у публикацији
Народна библиотека Србије, Београд

34

STRANI pravni život = Foreign legal life / glavni i odgovorni urednik Katarina Jovičić. - 1956, br. 1- . - Beograd : Institut za uporedno pravo, 1956- (Beograd : Birograf Comp). - 24 cm

Tromesečno. - Drugo izdanje na drugom medijumu: Strani pravni život (Online) = ISSN 2620-1127
ISSN 0039-2138 = Strani pravni život
COBISS.SR-ID 86244103