slovenska arbitražna praksa

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Bi moral fiskus zardeti, ko obdavči storitev arbitriranja?

Arbitriranje je gospodarska dejavnost, ki se izvaja na trgu. Njen razvoj v Sloveniji – po zgledu razvitejših arbitražnih okolij – temelji predvsem na arbitrih, ki profesionalno arbitrirajo preko podjetja (denimo odvetniki preko podjetja gospodarske družbe, arbitri kot samostojni podjetniki). Posamezna dejavnost pa se lahko razvija le, če ji država ne postavlja administrativnih preprek oziroma je ne omejuje z nerazumnimi (davčnimi) obremenitvami.

Za razvoj dejavnosti arbitriranja je torej treba spodbujati izvajanje te dejavnosti preko gospodarske družbe. To pa trenutno posredno ovirata Ministrstvo za finance in Finančna uprava RS. Zastopata namreč stališče, da je plačilo storitve arbitriranja davčno dohodek fizične osebe in ga je kot takega treba tudi obdavčiti, čeprav je izplačan gospodarski družbi. To v prevodu pomeni, da se ob plačilu za storitev arbitriranja po računu gospodarske družbe, odvedejo enake dajatve, kot se odvedejo arbitru, ki je delo opravil kot fizična oseba na podlagi civilnopravne pogodbe. Gospodarski družbi pa se nakaže zgolj neto znesek, ki je kot njen prihodek ponovno vključen v davčno osnovo za davek od dohodka pravnih oseb.

In tako pridemo do naslova tega uvodnika. Ta črpa navdih v latinskem reku *"Fiscus non erubescit"*, ki v prevodu pomeni *"fiskus ne zardi"*. Njegov avtor Cicero nam je želel z njim povedali predvsem dvoje. Prvič, da fiskus (državno blagajno) ne moti izvor dohodka, ki je predmet obdavčitve, četudi je le-ta oporečen. In drugič, fiskus je pri pobiranju davkov nesentimentalen (gl. Kranjc, J., Latinski pravni reki, Cankarjeva založba, 2000, str. 98). Oboje lahko razumemo. V današnjih časih pa bi Cicerovi kazuistiki lahko dodali še en "pojav". Vse pogosteje se namreč srečujemo s fiskalno motivirano "kreativno razlago" zakonov s strani davčnih organov. Ta včasih že meji na avtentično razlago. In prav slednje se je fiskus poslužil (tudi) pri davčni kvalifikaciji izvajanja dejavnosti arbitriranja preko gospodarske družbe. Omejitve dejavnosti, ki jih ne določa področna zakonodaja, je davčni organ določil s samovoljno razlago davčne zakonodaje. *In zdi se, da pri tem ni zardel.*

Davčna obravnava stroškov arbitražnega postopka je bila v Sloveniji dolgo časa povsem zapostavljena. V aktualni številki ji zato namenjamo osrednjo mesto, obenem pa želimo utreti pot sistematičnemu razvoju tega pomembnega področja, ki mu bo – upajmo – kmalu zmožna slediti tudi praksa davčnih organov. Za začetek bo zadostovalo, če bo dejavnost arbitriranja s strani fiskusa pravilno razumljena in bodo odstranjena nerazumna bremena za izvajanje te dejavnosti preko gospodarske družbe.

Marko Djinović
strokovni urednik

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The Quest for Truth in International Arbitration

Iura Novit Curia vs. Ne Ultra Petita

Yoanna Schuch

Yoanna Schuch is an associate at Platte Rechtsanwälte, Vienna and has been involved in several international arbitrations. She studied law at the University of Vienna (Mag. iur.) and the University of Geneva (Certificat de droit transnational). Yoanna is an active member of several international arbitration associations and has worked inter alia at the Austrian Trade Commission in New York, the Vienna International Arbitral Centre (VIAC) and the United Nations Commission on International Trade Law (UNCITRAL). She speaks German, English, French and Russian.

When is "Truth-Finding" Becoming an Issue?

May the arbitral tribunal request additional information to undermine uncontested evidence? Is it bound to decide only on invoked facts? May the arbitral tribunal disregard the law if the parties fail to prove it? Or may the arbitral tribunal even go so far as to develop its own line of arguments?

Since arbitration is a final, binding and enforceable independent determination of a dispute, the primary obligation of an arbitrator is to resolve the dispute in an adjudicatory manner. This involves making determinations of facts under applicable principles of the admission and weighing of evidence, including burdens and standards of proof. The arbitrator undertakes these steps with the ultimate goal to deliver an accurate award, based on a reasonably ascertainable picture of reality.[1] To this end, the parties introduce the facts that are in dispute, the evidence that proves the facts and the legal sources and arguments that shall constitute the basis for the arbitral award – in the best case. But what if a party fails to bring forward facts and/or legal arguments that are prerequisite for making a solid legal decision? What if one of the parties does not participate in the proceedings? How shall the arbitral tribunal proceed if a party does not mention the obvious? What if a party's submission simply does not make any sense?

In this regard, some situations are particularly often encountered in practice and pose a challenge to most arbitrators: May the arbitral tribunal request additional information to undermine uncontested evidence? Is it bound to decide only on invoked facts? May the arbitral tribunal disregard the law if the parties fail to prove it? Or may the arbitral tribunal even go so far as to develop its own line of arguments?[2]

In these situations, arbitrators usually find themselves on a dangerous crossroad: on the one hand, arbitrators who chose to develop legal issues in a strict application of the *iura novit curia* approach take the risk of "taking the arbitration away" from the parties and appearing partial while, on the other hand, arbitrators who fail to seek clarification of legal issues in order to maintain a passive and neutral role take the risk of – eventually – being forced to render an incorrect award. Commentators' opinions range from the encouragement of a pro-active role of the arbitral tribunal[3] to

1 William W. Park, Arbitrators and Accuracy, in Journal of International Dispute Settlement, Vol. 1, No. 1 (2010), 25.

2 For a detailed answer to these questions, see Giuditta Cordero Moss, *Is The Arbitral Tribunal Bound by the Parties' Factual and Legal Pleadings?*, in Stockholm International Arbitration Review 2006, 17 *et seqq.*

3 E.g. W. Wiegand, *Iura novit curia vs. Ne ultra petita – Die Anfechtbarkeit von Schiedsgerichtsurteilen im Lichte der jüngsten Rechtsprechung des Bundesgerichts*, in Greiner, Berger, Grüngerich (eds.), *Rechtsetzung und Rechtsdurchsetzung, Festschrift für Franz Kellerhals* (2005), 127 *et seqq*; C. Schreuer, *Three Generations of ICSID Annulment Proceedings,* in E. Gaillard, Y. Banifatemi (eds.)*, Annulment of ICSID Awards* (2004), 30 *et seq.*

skepticism towards such role[4] and nearly exclusion thereof.[5]

In order to determine the "right path" for the arbitral tribunal to take when dealing with such issues it is necessary to first address the following general questions: Does an arbitral tribunal have the power under the applicable procedural rules to investigate the facts of the case and the applicable law? In case such a power is admissible, is its exercise subject to certain conditions?

The first part of this paper will examine the impact of different legal traditions and the general authority of arbitral tribunals to investigate the facts and the law applicable *ex officio*. The second part will determine certain basic guidelines that an arbitral tribunal must always take into account when being confronted with issues of truth finding, which, as we will see, can only be ascertained on a case-by-case basis.

The Impact of Legal Culture

International arbitration is to a high degree influenced by the background of the procedural culture of its seat and the legal education and experience of the participants.[6] Both common and civil law jurisdictions are in agreement that facts are to be pleaded and proven by the parties and that courts in general should decide only on proven facts and not make inquiries as to issues that were not raised by the parties.[7] The legal traditions have, however, developed very divergent approaches as to the causes of action and as to ascertaining the applicable law (at least in theory):

- In most civil law countries the principle *iura novit curia* applies under which the court is assumed to know the law and the parties only have to prove the facts supporting their claim and identify the relief they seek. According to this principle, the judge applies the law *ex officio* without being bound by the legal arguments or legal reasoning put forward by the parties.

- In common law countries the court is required to rely on the initiative of the parties to plead and prove the law. The parties are to indicate the cause of action and to assist the court in applying the law by giving the legal arguments that support the relief sought.[8]

These divergent approaches to the ascertainment of law constitute a manifestation of fundamental differences concerning the function of courts and the judge in the different legal systems. The common law systems are premised on the belief that it is more constructive to establish the truth by way of presentation and investigation of issues in an adversarial manner, whereas the civil law systems are premised on the belief that justice can be better served by granting the court a wider scope of power to search for truth in co-operation with the parties or even independently from them.

International arbitration is to a high degree influenced by the background of the procedural culture of its seat and the legal education and experience of the participants

Investigating the Facts and the Law: A Discretionary Power?

Given that court practices are not directly applicable to international arbitration, the analysis must focus on the procedural rules or principles that the arbitral tribunal must comply with:

Arbitration Agreement

Generally, arbitration agreements do not contain limitations to the arbitral tribunal's authority. They do, however, often provide for instructions in respect of the applicable law that may limit the arbitral tribunal's discretionary power in this regard. Moreover, arbitration agreements sometimes specify that the arbitral tribunal shall be empowered to decide only on a certain relief (for example reimbursement of damages).

4 Recommendations of the International Law Association on *Ascertaining the contents of the applicable law in international commercial arbitration* (2008) advocate for a limited intervention by arbitrators while ascertaining the law; see also Phillip Landolt, *Arbitrators' Initiatives to Obtain Factual and Legal Evidence, in The Journal of the London Court of International Arbitration*, Vol. 28 Number 2 (2012), 173 *et seqq*.

5 E.g. Gabrielle Kaufmann-Kohler, *The Arbitrator and the Law: Does he/she know it? Apply it? How? And a few more questions*, in Markus Wirth, *Best practices in international arbitration: ASA Swiss arbitration Association Conference of January* 27, Association Suisse de l'Arbitrage (2006), 87 - 95.

6 Peter F. Schlosser, *The „Search for Truth" in Arbitration: The Civil Law View – The German Perspective*, in ASA Special Series No. 35, 35.

7 J.A. Jolowicz, *Adversarial and inquisitorial models of civil procedure*, 52 ICLQ 281 *et seqq.*

8 Cf. LIA Report, Rio de Janeiro Conference (2008), *Ascertaining the Contents of the Applicable Law in International Commercial Arbitration*, 8 *et seq.*

Arbitration Rules

Arbitration rules are generally silent on the question to which extent the arbitral tribunal is bound by the parties' factual pleadings and legal arguments, except for the following regulations:

Most arbitration rules explicitly grant the arbitral tribunal the power to request additional evidence and clarifications from the parties *ex officio*

Most arbitration rules explicitly grant the arbitral tribunal the power to request additional evidence and clarifications from the parties *ex officio*.[9] By this means, the arbitral tribunal may request additional information and new elements that were not (sufficiently) pleaded by the parties.

Likewise, many arbitration rules provide that the arbitral tribunal shall order that the proceedings continue in spite of the failure of one party to participate

Likewise, many arbitration rules provide that the arbitral tribunal shall order that the proceedings continue in spite of the failure of one party to participate.[10] Once the arbitral jurisdiction is established, a party may not prevent the award from being rendered. In this regard, some arbitration rules[11] also specify that the arbitral tribunal shall not, in case of failure by one party to participate in the proceedings, treat such failure as an admission of the other party's submissions. The open question that remains is how far the arbitral tribunal can go in its independent evaluation of a party's pleadings.

Arbitration Law

In general, arbitration laws do not determine the specific authority of an arbitral tribunal to investigate the facts and the law on its own initiative. Nevertheless, some arbitration laws do provide for the existence of such powers as well as for strict conditions under which these powers can be exercised:

Swiss and Austrian arbitration law, for example, gives the arbitral tribunal discretion in the matter of taking evidence.[12] German arbitration law provides for the arbitral tribunal's right to establish the facts of the case by all appropriate means, including the taking of evidence *ex officio*.[13] In this regard, an arbitral tribunal is under the duty to inform the parties if it wants to base its decision on a legal argument not raised by the parties. Its failure to do so results in a violation of the right to be heard. However, this does not amount to a general duty of the arbitral tribunal to discuss its legal views with the parties or to give them a preliminary legal assessment of the case.[14]

Some legal systems make the arbitral tribunal's power to investigate the facts at its own initiative subject to agreement between the parties. Section 34(1) English Arbitration Act, for example, provides that "*[i]t shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter*". A few national laws contain specific provisions on the arbitrators' power to investigate the law.[15] Pursuant to most arbitration laws, however, decisions *ex aequo et bono* or as *amiable compositeur* are only permitted if the parties have expressly authorised the arbitral tribunal accordingly.[16]

Encountering the Ultimate Boarders

While the applicable arbitration rules and laws leave a certain room for the arbitral tribunal to choose its own role in obtaining factual and legal evidence, the ultimate boarders to the arbitral tribunal's discretion are defined by the remedies that affect the validity or enforceability of the arbitral award, as regulated in the

9 E.g. Art 27.3 UNCITRAL Arbitration Rules; Art 31.2.ii Ljubljana Arbitration Rules; Art 25.5 ICC Rules; Art 29(1) Vienna Rules; Art 22.1 LCIA Rules; Art 19.3 ICDR/AAA Rules; Art 24.3 Swiss Rules; Art 24 SIAC Rules; Art 24(1) CIETAC Rules; regarding investment disputes see, for example, Art 43 ICSID Convention or Art 34(2)(a) ICSID Rules; see also Art 3.10, 4.10, 6 and 7 IBA Rules on the Taking of Evidence.

10 E.g. Art 30.1(b) UNCITRAL Arbitration Rules; Art 35 Ljubljana Arbitration Rules; 30.2 SCC Rules; Art 6.8 ICC Rules; Art 29(2) Vienna Rules; Art 15.8 LCIA Rules; Art 42 ICSID Rules.

11 E.g. Art 30.1(b) UNCITRAL Arbitration Rules; Art 35.2 Ljubljana Arbitration Rules; Art 42(3) ICSID Rules; according to Art 30.3 SCC Rules, the arbitral tribunal may draw inferences as it considers appropriate. The ICC Rules and the Vienna Rules, for example, do not expressly deal with this matter.

12 Art 184 of the Swiss Private international law Act provides that "*The tribunal shall itself conduct the taking of evidence*". Art 599(1) Austrian Code of Civil Procedure provides that *"[t]he arbitral tribunal is authorized to decide upon the permissibility of the taking of evidence, to conduct such taking of evidence, and to freely evaluate such evidence",* see also F. Schwarz, C. Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (2009), 20-183 – 20-192.

13 Vincent Fischer-Zernin, Abbo Junker, *Between Scylla and Charybdis: Fact Gathering in German Arbitration'*, Journal of International Arbitration 4 (1987) 2, 9-34, at 13.

14 Stefan Kröll, *Commentary on the German Arbitration Law*, in K.-H. Böckstiegel, S. M. Kröll et al (eds), *Arbitration in Germany: The Model Law in Practice*, 2nd edition, para 90.

15 Art 1044 Dutch Code of Civil Procedure; Section 27(2) Danish Arbitration Act.

16 E.g. Section 603(3) Austrian Code of Civil Procedure.

New York Convention.[17] Arbitral awards may be set aside in the country of the seat of the arbitration or its recognition and enforcement may be refused, respectively, (1) if the arbitral tribunal exceeds its mandate (i.e. if the award goes beyond the factual scope of the dispute as agreed upon by the parties)[18] and (2) if fundamental principles of due process or mandatory rules of the applicable arbitration rules (or investment treaty) are violated. In this regard, fundamental principles of due process particularly encompass the arbitral tribunal's strict duty of independence and impartiality and the duty to maintain the parties' right to be heard (i.e. both parties must be given the possibility to present their cases). The right to be heard may also be violated if the arbitral tribunal awards more than was requested by the parties (*ultra petita*). In such a case, the aggrieved party would not have a chance to defend itself against the claim as it comes as a surprise.[19]

Which Factors Should Arbitrators Take into Account When Exercising their Discretion?

Although the arbitral tribunal is vested with wide discretionary powers regarding truth finding there is a narrow range of acceptable responses to any procedural question. Arbitrators shall use their discretion to adapt the procedure to the specific circumstances of the case at hand, by respecting the ultimate limits (as illustrated *supra*) and by referring to principal factors discouraging or favoring a pro-active approach of the arbitral tribunal in the respective situation.

Such principal factors include, *inter alia*:

Party autonomy

The crucial value of party autonomy in international arbitration and the parties' primary intention to keep control of their case should always guide the arbitral tribunal in its determination whether it should take initiative to obtain evidence.

Efficiency (time and costs)

Supplementary activity by the arbitral tribunal necessarily entails an increase of costs and time. Early interventions may help saving costs, but will at the same time limit party autonomy.

Predictability and certainty

The presence of an active arbitral tribunal might change the dynamics between the parties and create uncertainty if the actions of the arbitral tribunal are not sufficiently transparent.

Right to be heard and due process

The concern not to reduce predictability or to take the parties by surprise (by rendering an award *ultra petita*) is linked to the arbitral tribunal's obligation to afford the parties an adequate opportunity to present their case. This can include a duty to give sufficient guidance to the parties as to what actually constitutes the main legal challenge that the parties are facing at each stage of the proceedings. In doing so, the arbitral tribunal has to consider other due process norms such as the duty to treat the parties equally and the ongoing duty to ensure that justifiable doubt as to impartiality should not arise.

Although the arbitral tribunal is vested with wide discretionary powers regarding truth finding there is a narrow range of acceptable responses to any procedural question

Accuracy of the arbitral award

Accuracy in the interpretation of the contract and the application of the law should always be the basis for the arbitral tribunal's decisions, irrespective of whether a violation thereof might "only" be considered as a wrong decision on the merits and thus not lead to the invalidity and unenforceability of the arbitral award.

Conclusion

Arbitral tribunals, unlike national courts, typically have wide authority in most procedural matters, within a framework based on fundamental principles such as due process, fairness to the parties, limits on arbitral mandates and respect for mandatory rules. The various arbitration rules and laws establish that an arbitral tribunal may, in general, investigate the facts

Arbitral tribunals, unlike national courts, typically have wide authority in most procedural matters, within a framework based on fundamental principles such as due process, fairness to the parties, limits on arbitral mandates and respect for mandatory rules

17 The most significant restriction to the scope of applicability of the grounds for setting aside or refusing to enforce an arbitral award is that the court does not have the jurisdiction to review the arbitral award on the merits: an error in the arbitral tribunal's interpretation of the contract, evaluation of the evidence or application of the law may thus not lead to invalidity or unenforceability of the arbitral award.

18 This applies only to the factual scope of the dispute and not to the arguments made by the parties, cf. A.J. Van den Berg, *Consolidated Commentary on New York Convention*, in ICCA Yearbook Commercial Arbitration XXVIII (2003), 512.

19 In determining whether a decision is *ultra petita* not only the wording of the application itself, but also the submission as a whole, as well as the applicable law, should be considered.

or the law on its own initiative, for example, by seeking an opinion from a third party, appointing an expert, introducing evidence not brought forward by the parties, proceeding with its own legal research and, as the case may be, adopting a different line of legal argument than the one submitted by the parties – provided that such new evidence or legal argument is submitted to the parties for comment beforehand. At the same time, the arbitral tribunal risks the assumption that it favors one party over the other if it bases its decision on an argument that was not brought forward by the parties. In my opinion, the best approach to resolve the tension between an arbitral tribunal's duty to identify the facts and legal arguments on the one hand, and the risk of jeopardizing its impartiality and independence on the other hand, is to exercise *ex officio* powers only subject to a prior general agreement of the parties, or at least after consultation of the parties. Absent such agreement, the tribunal should, in general, avoid the *ex officio* investigation of facts. While the arbitral tribunal is empowered to, and – in my view – actually should conduct independent legal research, any new legal argument that it would adopt should be submitted to the parties for comment.

In my opinion, the best approach to resolve the tension between an arbitral tribunal's duty to identify the facts and legal arguments on the one hand, and the risk of jeopardizing its impartiality and independence on the other hand, is to exercise *ex officio* powers only subject to a prior general agreement of the parties, or at least after consultation of the parties. Absent such agreement, the tribunal should, in general, avoid the *ex officio* investigation of facts

To sum up, the ultimate goal of truth-finding in international arbitration is to establish a balance between aforementioned principal factors, tailored to the specific circumstances of the case at hand, or, to put it in the words of William W. Park: *"A notion of proportionality lies at the heart of intelligent truth-seeking in arbitration, accommodating the interconnected pillars of due process and efficiency"*.[20]

20 William W. Park, *Arbitrators and Accuracy*, in Journal of International Dispute Settlement, Vol. 1, No. 1 (2010), 52.

Vpliv določb o zastopanju pri večstopenjskih klavzulah

Maruša Malus Kovačič

Z arbitražo se je prvič srečala kot tekmovalka in mentorica na tekmovanju Willem C. Vis ICA Moot. Leta 2012 je z odliko diplomirala na Pravni fakulteti Univerze v Mariboru. Po opravljeni diplomi je bila eno leto zaposlena v pravni službi gospodarske družbe GEN energija d.o.o.. Trenutno opravlja sodniško pripravništvo na Višjem sodišču v Ljubljani.

Večstopenjske klavzule

Ob sklenitvi pogodbe ni mogoče predvideti vseh situacij in posledično nesoglasij ter sporov, ki se pojavijo v zvezi s pogodbo. Lahko pride do nesoglasij, ki so manj kompleksna in jih je moč rešiti s pogajanji med strankama ali z minimalnim posredovanjem tretje osebe, na drugi strani pa do kompleksnih sporov, kjer je potrebna vključitev tretje osebe kot razsodnika. V interesu strank je, da je postopek reševanja spora prilagojen samemu sporu oziroma da se vzpostavi sistem reševanja preko več stopenj, kar poveča možnost za rešitev spora po mirni poti.[1]

Večstopenjske klavzule so klavzule, vključene v pogodbo med strankama, s katerimi se ureja reševanje morebitnih bodočih sporov med njima. Tovrstne klavzule predpisujejo stopnjevit proces reševanja sporov (v dveh ali več fazah oziroma stopnjah). Ti procesi se pogosto pričnejo z notifikacijo in opisom spora s strani prizadete stranke, čemur sledi obdobje posvetovanja, pogajanj (kot prva stopnja), v primeru neuspešnih pogajanj temu sledi mediacija ali konciliacija (druga stopnja). V kolikor strankama na takšen način ne uspe rešiti spora (celotnega ali le dela), večstopenjske klavzule ponavadi napotijo stranki na pravdo oziroma pogosteje na arbitražo (tretja stopnja). Te klavzule imajo tako potencial, da pripeljejo do hitre rešitve spora z minimalnim poslabšanjem medsebojnih odnosov.[2] Ravno iz tega razloga so priporočljive za dolgoročne pogodbe, kjer se pričakuje kontinuirano sodelovanje med strankama.[3]

Večina arbitražnih pravil določa, da mora biti tovrsten sporazum v pisni obliki, zato je vključitev klavzule v pogodbo temeljnega pomena za sam postopek. Sicer je postopek lahko izpeljan tudi brez veljavne večstopenjske klavzule, vendar bi lahko na zadnji stopnji (tj. arbitraža) ravno pomanjkanje veljavnega sporazuma povzročilo, da arbitražna odločba ne bi bila izvršljiva.

V interesu strank je, da je postopek reševanja spora prilagojen samemu sporu oziroma da se vzpostavi sistem reševanja preko več stopenj, kar poveča možnost za rešitev spora po mirni poti

1 J. D. M. Lew, L. A. Mistelis, S. M. Kröll, Comparative International Commercial Arbitration, Kluwer Law International, Hague, 2003, str. 182.

2 J. D. File, United States: multi-step dispute resolution clauses, Mediation Committee Newsletter, 2007, URL: http://www.wilmerhale.com/files/Publication/520f6bc0-fccd-4e3c-80a6-4880fe375f5e/Presentation/PublicationAttachment/a610f0ac-5675-4d85-bf42-4b7c65ebbc15/File_Jason_IBAMediation_July07.pdf (28. 3. 2015), str. 33; A. Jolles, Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement, Sweet & Maxwell, London, 2006, str. 329; D. Chakravati, Handling potentially complex disputes: Multi-tiered dispute resolution clauses, International Arbitration Insights, 20. 10. 2006, URL: http://www.claytonutz.com/publications/newsletters/international_arbitration_insights/20061020/handling_potentially_complex_disputes_multi-tiered_dispute_resolution_clauses.page (20. 3. 2015); Center for Democracy and Governance, Alternative Dispute Resolution Practioners' Guide, Technical Publication Series, Center for Democracy and Governance, Bureau for Global Problems, Field Support, and Research, Washington D.C., 1998, str. 4.

3 K. P. Berger, Arbitration International, Law and Practice of Escalation Clauses, The Journal of the London Court of International Arbitration, vol. 22, št. 1/2006, str. 1.

Sporazum o reševanju morebitnih sporov je lahko vključen v samo pogodbo (v obliki arbitražne oziroma večstopenjske klavzule), lahko pa je ločen od temeljne pogodbe (v obliki ločenega predložitvenega sporazuma).[4]

Zahteva po določeni osebi na posamezni stopnji večstopenjske klavzule

V pravdi je zastopanje nekaj vsakdanjega tako za fizične kot pravne osebe. Pravila pravdnega postopka urejajo, kdo je lahko zastopnik, kdo pooblaščenec stranke, obseg in učinek pooblastila, itd. Družbo lahko tako zastopajo korporacijski zastopniki, prokuristi in pooblaščenci. Sodišče mora biti pozorno na veljavnost zastopanja (ali ima zastopnik oziroma pooblaščenec potrebna pooblastila).[5] Tudi vpliv zastopanja ni vprašljiv, saj gre v primeru nepravilnega zastopanja za tako bistveno kršitev postopka, da je stranki dana možnost uveljavljanja pravnih sredstev (ob izpolnitvi ostalih predpostavk, ki se za posamezno pravno sredstvo zahtevajo).

Postopki alternativnega reševanja sporov so precej bolj neformalni in razna pravila za posamezne postopke vsebujejo zgolj okvirne določbe, saj je urejanje samega postopka prepuščeno strankam

Postopki alternativnega reševanja sporov (v nadaljevanju: ARS) pa so precej bolj neformalni[6] in razna pravila za posamezne postopke vsebujejo zgolj okvirne določbe, saj je urejanje samega postopka prepuščeno strankam. Tako je tudi bolj vprašljivo zastopanje v teh postopkih in predvsem posledice, ki jih ima lahko nepravilno zastopanje v posameznem postopku.

Stranki, ki kot način reševanja morebitnih sporov določita večstopenjsko klavzulo, bi morali razmisliti še o vključitvi določbe o zastopanju na začetnih stopnjah in si tako zagotoviti, da bosta zastopani s strani kompetentnih oseb, ki se bodo lotile reševanja spora s potrebno skrbnostjo

Stranki, ki kot način reševanja morebitnih sporov določita večstopenjsko klavzulo, bi morali razmisliti še o vključitvi določbe o zastopanju na začetnih stopnjah in si tako zagotoviti, da bosta zastopani s strani kompetentnih oseb, ki se bodo lotile reševanja spora s potrebno skrbnostjo. Od zastopnikov strank se pričakuje, da bodo delovali v skladu z načelom skrbnosti in poštenosti, hkrati pa se naj ne bi vključevali v aktivnosti, ki bi lahko nepotrebno podaljšale ali podražile proces reševanja spora (vključujoč taktiziranje z namenom oviranja arbitražnega postopka).[7]

Prav tako si z določitvijo zastopnikov stranki zagotovita bolj enakovreden položaj pri reševanju spora, saj so tako zastopniki strank v enakovrednem položaju v razmerju do družbe in posledično z načeloma enakimi pooblastili pri reševanju spora. V nasprotnem primeru bi lahko v sporu eno stranko zastopal poslovodja z vsemi pooblastili, medtem ko bi drugo stranko zastopal njen pooblaščenec, ki bi se moral o vsaki pomembni odločitvi prej posvetovati s korporacijskimi zastopniki te družbe in morebiti ne bi poznal celotne situacije oziroma področja delovanja družbe tako dobro, kot jo poznajo njeni korporacijski zastopniki. Neenakovreden položaj in pooblastila zastopnikov lahko v praksi precej podaljšajo (če ne celo ogrozijo) postopek reševanja spora, kar pa je v nasprotju z načelom hitrega in učinkovitega alternativnega reševanja sporov.

Smiselno je tudi, da določba vsebuje zahtevo, da stranko zastopa oseba na visokem položaju v podjetju, ki ima popolna pooblastila, da se pogaja in sklene sporazum.[8] Proces alternativnih oblik reševanja spora je tako kvaliteten, kot je kvalitetno zastopanje strank glede zavezujoče narave zastopnikovih dejanj zoper stranki. Sicer se lahko proces konča neuspešno zaradi pomanjkanja pooblastil pri sklepanju kompromisov ali odločitev, ki so ključnega pomena za reševanje spora.[9]

Vpliv določbe o zastopanju na prvi stopnji (**pogajanja**)

Pogajanja so najbolj neformalna oblika ARS in so v celoti prepuščena urejanju s strani strank, kar pomeni, da se za njih upoštevajo splošno sprejeta načela.

Zaradi neformalnosti pogajanj je tudi veliko lažje ugotoviti, ali je stranka zastopana s strani prave osebe. Stranki v fazi pogajanj namreč komunicirata neposredno, takoj lahko preideta k bistvu, morebiti celo že

4 C. Murray, D. Holloway, D. Timson-Hunt, Schmitthoff's export trade, The Law and Practice of International Trade, Sweet & Maxwell, London, 2007, str. 545.

5 Glej 4. in 5. poglavje Zakona o pravdnem postopku (v nadaljevanju: ZPP), Uradni list RS, št. 73/07 – uradno prečiščeno besedilo, 45/08 – ZArbit, 45/08, 111/08 – odl. US, 57/09 – odl. US, 12/10 – odl. US, 50/10 – odl. US, 107/10 – odl. US, 75/12 – odl. US, 40/13 – odl. US, 92/13 – odl. US in 10/14 – odl. US.

6 Stopnja neformalnosti se razlikuje od postopka do postopka – od najbolj neformalnih (pogajanja) do bolj urejenih, vendar še vseeno neformalnih (arbitraža) postopkov.

7 Glej International Bar Association, IBA Guidelines on Party Representation in International Arbitration (v nadaljevanju: Smernice IBA), London, 25. 5. 2013, str. 2.

8 M. L. Moses, The Principles and Practice of International Commercial Arbitration, Cambridge University press, New York, 2008, str. 47.

9 F. Roberts, Drafting the Dispute Resolution Clause: The Midnight Clause, str. 4. URL: http://www.nigerianlawguru.com/articles/arbitration/DRAFTING%20THE%20DISPUTE%20RESOLUTION%20CLAUSE.pdf (10. 3. 2015).

v začetku jasno povesta svoje stališče, da od njega ne odstopata in je lahko takoj jasno, da proces pogajanj ne bo uspešen, s čimer stranki tudi skupno zaključita pogajanja.

Ravno neposrednost ima za posledico dejstvo, da bi morala vsaka stranka oziroma njen zastopnik jasno seznaniti nasprotno stranko z obsegom oziroma morebitnimi omejitvami pooblastil pri zastopanju. To je v postopku pogajanj pomembno, saj lahko pomanjkanje potrebnega pooblastila pripelje do zaključka pogajanj. Zastopnikova opustitev izjave o obsegu pooblastil, lahko pomeni zavajanje nasprotne stranke in posledično kršitev pravil poklicnega ravnanja.[10]

Če pride do kršitve, se pogajanja lahko ponovijo ali pa stranki, kot rečeno, skleneta, da sami ne bosta mogli doseči rešitve in tako sporazumno zaključita prvo stopnjo ter nadaljujeta reševanje spora na naslednji stopnji. Če bi ena od strank kršila zahtevo po določenem zastopniku, bi bila nasprotna stranka upravičena zahtevati ponovna pogajanja. Tudi če bi stranka v kršitvi to zahtevo zavrnila in namesto tega začela postopek konciliacije/mediacije (druga stopnja večstopenjske klavzule, v nadaljevanju: konciliacija), tj. poslala nasprotni stranki pisni predlog za začetek konciliacije, lahko ta še vedno predlog za konciliacijo zavrne.[11] V kolikor bi to privedlo do začaranega kroga zavrnitev ponovnih pogajanj z ene strani in zavrnitev postopka konciliacije z druge strani, lahko ena izmed strank to prekine in spor predloži arbitraži. Arbitraža bi tako ob presojanju svoje pristojnosti za odločanje v sporu ugotovila, da predpostavke za arbitražo niso izpolnjene in stranki napotila na stopnjo, ki bi po njenem mnenju morala biti izčrpana.

Sicer pa je na stopnji pogajanj bolj verjetno, da bo prišlo do prekoračitve zastopanja, kar pomeni, da bodo imeli učinki kršitve omejitev posledice le v notranjem razmerju. Redko pa bo prišlo do kršitev, ki bi imele vpliv na sam postopek.

Vpliv določbe o zastopanju na drugi stopnji (konciliacija/mediacija)

Za razliko od pogajanj so na drugi stopnji pravila, ki jih je kljub primarnem načelu dispozitivnosti strank potrebno upoštevati. Če je za stopnjo konciliacije dogovorjen točno določen zastopnik in bo stranko zastopal kdorkoli drug, ali pomeni to neveljavnost konciliacije oziroma kršitev določbe večstopenjske klavzule o konciliaciji? Načeloma naj bi bilo tako, vendar je v postopku konciliacije pomembno, da se pri interpretaciji določb ne držimo le dobesednega pomena uporabljenih izrazov, ampak izhajamo iz skupnega namena strank.[12]

Stranki določita zastopnika za postopek na stopnji konciliacije z namenom, da sta zastopani s strani oseb, ki imajo zadosten obseg pooblastil, da lahko vplivajo na potek in uspeh konciliacije

Stranki določita zastopnika za postopek na stopnji konciliacije z namenom, da sta zastopani s strani oseb, ki imajo zadosten obseg pooblastil, da lahko vplivajo na potek in uspeh konciliacije. Tako ne bi šlo za kršitev določila o zastopanju, če bi stranko zastopala katera druga oseba, ki bi imela enaka pooblastila kot določen zastopnik. Na primer, če stranki določita, da ju bo zastopal izvršni direktor, je namen strank dosežen tudi, če ju zastopa namestnik izvršnega direktorja s pooblastilom, ki mu daje enak obseg pooblastil, kot jih ima izvršni direktor. Tudi v predmetnem postopku pa samo obseg pooblastil ni zadosten kriterij za presojo, ali je bil namen strank s tem kršen. Če bi izvršni direktor pooblastil neko drugo osebo, da namesto njega zastopa stranko v postopku konciliacije, pa ta oseba sicer ni povezana z družbo, ne moremo samodejno sklepati, da je to v skladu z namenom strank. Poleg obsega pooblastil sta stranki očitno želeli v postopku konciliacije osebi, ki sta bolj seznanjeni z delovanjem in poslovanjem družbe, kot pa neka zunanja oseba, ki se ji le podeli pooblastilo in morda šele takrat začne svoje sodelovanje z družbo. Tako recimo odvetnik, s sicer primernim pooblastilom, ne bi ustrezal zastopniku, predvidenem za ta postopek konciliacije, saj nivo njegovega poznavanja delovanja družbe, kljub njegovi strokovnosti, ne dosega nivoja poznavanja in znanja, kot ga ima izvršni direktor družbe.

Konciliator, ki kot tretja nevtralna oseba pomaga strankama pri reševanju spora, nima dolžnosti, da bi preverjal in opozarjal na to, ali je stranka pravilno

10 S. Blake, J. Browne, S. Sime, A practical approach to Alternative Dispute Resolution, Oxford University Press, New York, 2011, str.158.

11 Tretji odstavek 2. člena UNCITRAL Conciliation Rules (v nadaljevanju: Konciliacijska pravila UNCITRAL), UNCITRAL, 23. 7. 1980.

12 Gl. Točko 4.1 UNIDROIT Principles of International Commercial Contracts, 2004; drugi odstavek 82. člena Obligacijskega zakonika, Uradni list RS št. 97/2007 s spremembami.

Če ena stranka ni zastopana s strani določene osebe, lahko nasprotna stranka še vedno presodi, da je zastopnik prve stranke vseeno primeren za zastopanje v konciliaciji.

V kolikor pa meni, da prva stranka ni pravilno zastopana, mora ugovarjati. Stranka ima dolžnost, da ugovarja pravočasno. Če so ji tekom konciliacije ta dejstva že znana, mora ugovarjati že takrat, sicer bo izgubila pravico do ugovora v postopku arbitraže

zastopana.[13] Naj bi pa stranka oziroma njen zastopnik, enako kot je bilo rečeno za stopnjo pogajanj, jasno povedal nasprotni stranki, kakšna pooblastila ima oziroma morebitne omejitve njegovega pooblastila pri zastopanju.

Za člane organov vodenja in nadzora gospodarskih družb se pričakuje opravljanje njihovih nalog s skrbnostjo vestnega in poštenega gospodarstvenika.[14] Kadar udeleženci izpolnjujejo obveznosti iz svoje poklicne dejavnosti, se opustitev skrbnosti ali pomanjkljiva strokovnost razloži kot malomarnost.[15] V postopku konciliacije se tako od korporacijskega zastopnika pričakuje, da se bo pozanimal, kdo je zastopnik nasprotne stranke. Tako bo izvedel, ali je nasprotna stranka pravilno zastopana in zadostil načelu skrbnosti.[16]

Mogoče so situacije, ko bi zastopnik stranke zmotno menil, da je sam primeren zastopnik v smislu določbe o zastopanju (ker je sicer namestnik te osebe) in zato nasprotne stranke ne bi obvestil o morebitnih omejitvah pooblastil. Nasprotna stranka pa bi, v kolikor bi za to okoliščino vedela, menila drugače in bi ugovarjala primernost zastopanja. Kakorkoli, če se zastopnik nasprotne stranke ne pozanima o tem, s katero osebo je v postopku konciliacije (sploh ob izrecni zahtevi po določenem zastopniku), bo stranka v postopku arbitraže prekludirana glede ugovorov o neizpolnitvi določb o zastopanju in poznega ugovora ne bo mogla opravičiti s pomanjkanjem skrbnosti s strani svojega zastopnika.

Doktrina estoppel[17]

Če ena stranka ni zastopana s strani določene osebe, lahko nasprotna stranka še vedno presodi, da je zastopnik prve stranke vseeno primeren za zastopanje v konciliaciji. V kolikor pa meni, da prva stranka ni pravilno zastopana, mora ugovarjati. Stranka ima dolžnost, da ugovarja pravočasno. Če so ji tekom konciliacije ta dejstva že znana, mora ugovarjati že takrat, sicer bo izgubila pravico do ugovora v postopku arbitraže.[18]

Gre namreč za obliko načela dobre vere, ki omejuje nepošteno ravnanje stranke, katera se poskuša zanesti na neizpolnitev določb večstopenjske klavzule s strani nasprotne stranke. Omenjeno načelo preprečuje primere, v katerih bi stranka skozi predhodne stopnje postopka ves čas dajala nasprotni stranki vtis, da ne pripisuje pomembnosti določbam večstopenjske klavzule, pred tribunalom ali sodiščem pa bi se zanašala na kršitev teh določb. Doktrina *estoppel* tako onemogoča stranki, da bi očitno ravnala v nasprotju s svojim prejšnjim ravnanjem.[19]

V ICC primeru št. 9977 sta stranki v pogodbo vključili večstopenjsko klavzulo za reševanje morebitnih sporov. Na prvi stopnji naj bi stranki reševali spor s pogajanji med višjimi vodstvenimi zastopniki strank, v primeru neuspeha pa bi spor predložili arbitraži. Stranki sta se tako večkrat sestali in pogajali, vendar neuspešno. V postopku arbitraže pa je ena izmed strank ugovarjala, da je bila nasprotna stranka zastopana zgolj s strani zakonitih zastopnikov in ne s strani višjih vodstvenih zastopnikov. Tribunal je odločil, da je ugovor prepozen, saj bi morala stranka ugovor nepravilnega zastopanja podati v času pogajanj.[20]

Nepravilno zastopanje

Predpostavimo, da sta oba zastopnika ravnala skrbno in v dobri veri, pa je vseeno prišlo do nepravilnega zastopanja ene od strank, kar druga stranka ugotovi šele po (sicer neuspešno) zaključeni konciliaciji. V tem primeru lahko stranka zahteva (enako kot pri pogajanjih), ponoven postopek konciliacije. Če se nasprotna stranka ne strinja in namesto tega začne postopek arbitraže, lahko stranka ugovarja nepristojnost arbitraže iz razloga neizpolnitve procesnih predpostavk za arbitražo, ker obvezujoče predhodne stopnje reševanja spora niso bile izčrpane.

13 Vlogo konciliatorja določa 7. člen Konciliacijskih pravil UNCITRAL.

14 Prvi odstavek 263. člena Zakona o gospodarskih družbah (v nadaljevanju ZGD-1), Uradni list RS, št. 65/2009, 33/2011, 91/2011, 32/2012, 57/2012, 44/2013 – odl. US, 82/2013.

15 ICC – International Maritime Bureau (prevod: Ivanka Gasar), Posebno poročilo: Dolžnost vestnega in skrbnega ravnanja, Center Marketing International, Ljubljana, 1995, str. 17.

16 Kršitev načela skrbnosti lahko rezultira v odškodninski odgovornosti v notranjem razmerju med stranko in njenim zastopanikom, ne pa v zunanjem razmerju proti nasprotni stranki. Glej 263. člen ZGD-1.

17 Doktrina *estoppel* je uveljavljena v anglo-saksonskem pravu, gre pa za t.i. načelo, ki je v našem pravnem okolju znano kot načelo *venire contra factum proprium*.

18 Angleško: *"[..] otherwise the party may be estopped from raising the objection [..]".* Povzeto po J. D. M. Lew, L. A. Mistelis, S. M. Kröll, n. d., str. 716; M. Rubino-Sammartano, International Arbitration Law and Practice, Kluwer Law International, Hague, 2001, str. 262.

19 K. P. Berger, Arbitration International, Law and Practice of Escalation Clauses, The Journal of the London Court of International Arbitration, vol. 22, št. 1/2006, str. 15-16.

20 ICC primer št. 9977, končna odločitev z dne 22. 6. 1999. Povzeto po A. Jolles, n. d., str. 334.

Arbitražni tribunal lahko odloči:

1. Procesne predpostavke za arbitražo niso bile izpolnjene, postopek se vrne na stopnjo konciliacije.

V ICC primeru št. 6276 sta stranki določili večstopenjsko klavzulo za reševanje spora, vendar nista izčrpali druge stopnje, tj. predložitev spora v presojo inženirju. Tribunal je odločil, da je predarbitražni proces, ki je natančno določen in vključen prostovoljno s strani strank, zavezujoč zoper stranki. Večstopenjska klavzula ureja njuno ravnanje v primeru spora, zato je zahteva za arbitražo preuranjena (ni izključena v prihodnosti, vendar le, če spor ne bo rešen s predhodnimi stopnjami).[21]

2. Procesne predpostavke so izpolnjene, postopek arbitraže se nadaljuje.

Takšno odločitev bo tribunal sprejel, če bo menil, da je bilo zastopanje v postopku konciliacije vseeno primerno ali pa če bo presodil, da bi bila ponovna konciliacija nesmiselna, ker:

- je stranka vložila zadosten trud, da bi svoje ravnanje uskladila z zahtevami določb o konciliaciji. V ICC primeru št. 8462 je tribunal odločil, da ima pristojnost za odločanje v arbitraži, ker je dovolj indikatorjev, ki kažejo, da se je stranka trudila izpolniti obveznosti, ki izhajajo iz večstopenjske klavzule.[22]

- meni, da zastopanje s strani druge osebe ne bi prineslo drugih rezultatov. Tako je predvsem v primerih, kjer oceni, da je spor preveč kompleksen za reševanje s konciliacijo, saj stranki (ne glede na zastopnike in njihova pooblastila) ne bi dosegli sporazuma (tako tudi oseba z večjim obsegom pooblastil ne bi mogla dati ali sprejeti sprejemljive ponudbe).

Vpliv določbe o zastopanju na tretji stopnji (arbitraža)

Arbitražni postopek je od navedenih najbolj formalen. V predarbitražnem procesu sem poudarila pomembnost določitve korporacijskega zastopnika, saj je zaradi neformalnosti in avtonomije strank na predhodnih stopnjah mogoče prej doseči sporazum glede rešitve spora, če sta zastopnika bolj seznanjena z notranjim delovanjem družbe kot zunanji zastopniki. Zaradi kompleksnosti arbitražnega postopka pa je na tem mestu smotrnejša vključitev zunanjih zastopnikov, pooblaščencev s potrebnim pravnim znanjem in izkušnjami. Razna arbitražna pravila omenjajo zunanjega zastopnika s pravnim znanjem, vendar večina teh pravil strankama vseeno dopušča možnost, da sami presodita, kakšna vrsta zastopanja je zanju najprimernejša v konkretni situaciji.[23]

Večina arbitražnih pravil ne določa dolžnosti tribunala, da bi moral skrbeti za pravilno zastopanje strank v postopku arbitraže. Večinoma vsebujejo le določbo, da ima stranka lahko pooblaščenca.[24] Razna arbitražna pravila glede postopka ponavadi predvsem poudarjajo pravico strank, da se same sporazumejo o pravilih postopka.[25] Stranki pa sta pri oblikovanju postopka vseeno omejeni, saj ne moreta izključiti uporabe nekaterih pravil, ki uveljavljajo temeljna načela civilnega postopka.[26] Ljubljanska arbitražna pravila določajo, da morata zahteva in odgovor na zahtevo za arbitražo vsebovati imena, naslove in kontaktne podatke pooblaščencev.[27] Prav tako Smernice IBA[28] določajo, da se mora zastopnik čimprej oziroma takoj, ko je to mogoče, identificirati pred arbitražnim tribunalom in nasprotno stranko

Večina arbitražnih pravil ne določa dolžnosti tribunala, da bi moral skrbeti za pravilno zastopanje strank v postopku arbitraže. Večinoma vsebujejo le določbo, da ima stranka lahko pooblaščenca

Ljubljanska arbitražna pravila določajo, da morata zahteva in odgovor na zahtevo za arbitražo vsebovati imena, naslove in kontaktne podatke pooblaščencev

21 ICC primer št. 6276, vmesna odločitev z dne 29. 1. 1990. Povzeto po A. Jolles, n. d., str. 333.

22 ICC primer št. 8462, končna odločitev z dne 27. 1. 1997. Povzeto po A. Jolles, n. d., str. 334.

23 Prim. četrti odstavek 26. člena International Chamber of Commerce (ICC) Rules 2012, 20. člen China International Economic and Trade Arbitration Commisison (CIETAC) Rules 2012.

24 Takšna določba je 22. člen Zakona o arbitraži (v nadaljevanju: ZArbit), Uradni list RS, št. 45/08. Vzorčni zakon UNCITRAL o mednarodni trgovinski arbitraži (sprejet leta 1985, spremenjen leta 2006; v nadaljevanju: Vzorčni zakon UNCITRAL) ne vsebuje nobene določbe o zastopanju. Vzorčni zakon UNCITRAL je bil izhodišče za pripravo ZArbit in se po določbi prvega odstavka 2. člena tudi uporablja za razlago določb ZArbit.

25 Prvi odstavek 23. člena ZArbit; prvi odstavek 19. člena Vzorčnega zakona UNCITRAL; prvi odstavek 21. člena Arbitražnih pravil Stalne arbitraže pri Gospodarski zbornici Slovenije (v nadaljevanju: Ljubljanska arbitražna pravila).

26 Obseg procesnega javnega reda je v zakonodajah posameznih držav mogoče ugotoviti bodisi iz določb, ki neposredno zavezujejo k uporabi določenih procesnih institutov, bodisi iz določb o izpodbijanju arbitražnih odločb. Povzeto po L. Ude, Arbitražno pravo, GV Založba, Ljubljana, 2004, str. 139.

27 Točka *i.* prvega odstavka 5. člena in točka *i.* drugega odstavka 7. člena Ljubljanskih arbitražnih pravil. Enako je določeno tudi za postopek pred arbitrom za nujne primere (točka *i.* drugega odstavka 2. člena Dodatka III k Ljubljanskim arbitražnim pravilom).

28 Glej 4. točko Smernic IBA, str. 6. V 18. točki se enako zahteva od zastopnika tudi v razmerju do morebitnih prič ali strokovnjakov.

Smernice IBA določajo, da se mora zastopnik čimprej oziroma takoj, ko je to mogoče, identificirati pred arbitražnim tribunalom in nasprotno stranko in prav tako brez odlašanja vse navedene seznaniti tudi o morebitni spremembi pri zastopanju

in prav tako brez odlašanja vse navedene seznaniti tudi o morebitni spremembi pri zastopanju.

Če stranki vključita v večstopenjsko klavzulo določbo o zastopanju, ki bi bila tekom arbitraže kršena, imata stranki možnost izpodbijanja odločbe, ki bi bila sprejeta v takem postopku. Arbitražna odločba se lahko namreč razveljavi, če arbitražni postopek ni bil izveden v skladu s sporazumom strank.[29] Torej, v kolikor stranka meni, da je bil arbitražni postopek izveden v nasprotju s sporazumom strank, lahko vloži pred pristojnim sodiščem tožbo za razveljavitev arbitražne odločbe, pri čemer je breme dokazovanja na strani tožeče stranke. Tožba za razveljavitev arbitražne odločbe je edino pravno sredstvo, ki ga imata stranki zoper arbitražno odločbo in je po ZArbit vezano na subjektivni rok treh mesecev.[30]

Možnost tožbe za razveljavitev pa ne pomeni, da lahko stranka v vsakem primeru izpodbija arbitražno odločbo zaradi nepravilnega zastopanja oziroma ker arbitražni postopek ni bil v skladu s sporazumom strank. Aktivno ravnanje stranke je namreč temeljno za presojo ali ima stranka pravico ugovarjati ali pa jo je s svojo pasivnostjo izgubila (odpoved pravici ugovarjati).[31]

Odpoved pravici ugovarjati (Waiver rule)

Čeprav stranka ne krši določil večstopenjske klavzule, lahko njena pasivnost povzroči izgubo pravice do ugovora zaradi kršitve nasprotne stranke. Arbitražna pravila urejajo situacijo, kjer je stranki znana kršitev določbe večstopenjske klavzule, pa temu ne ugovarja. Šteje se, da se je v takem primeru stranka s svojo pasivnostjo (neugovarjanjem) odpovedala pravici do ugovora.[32]

Iz navedenega izhaja, da gre za odpoved pravici ugovarjati, kadar so izpolnjene naslednje predpostavke:

- stranki sta določili način reševanja sporov z večstopenjsko klavzulo;
- v postopku ni bila upoštevana določba večstopenjske klavzule (oziroma je bila kršena s strani ene stranke);
- nasprotni stranki je bila kršitev določbe znana[33];
- nasprotna stranka je še naprej sodelovala v postopku, ne da bi ugovarjala.[34]

Pravilo o odpovedi pravici ugovarjati se nanaša tudi na zakonske določbe. Medtem ko se arbitražna pravila ne ukvarjajo z obsegom uporabe na tem področju[35], pa ZArbit izrecno določa, da se pravilo o odpovedi pravici ugovarjati uporablja zgolj za dispozitivne določbe, tj. določbe, ki jih lahko stranki spremenita ali izključita njihovo uporabo.[36] Stranka tako obdrži pravico do ugovora glede kršitve mandatornih določb.

Odpoved pravici ugovarjati ne velja zgolj v postopku arbitraže, ampak je njena uporaba razširjena tudi na pravdo, kadar stranka pred sodiščem izpodbija arbitražno odločbo.[37]

Če bi bilo strankama dovoljeno, da ugovarjata kadar koli do konca vseh postopkov, bi to stranki, ki bi izgubljala, omogočilo zavlačevanje postopkov ter iskanje najmanjših formalnih napak, ki bi povzročile neveljavnost arbitražne odločbe.[38] Namen tega pravila je, da stranka ravna brez nepotrebnega odlašanja, kar omogoča večjo hitrost postopka in večjo trdnost arbitražne

29 Četrta alineja 1. točke drugega odstavka 40. člena ZArbit. ZArbit pri tem strogo sledi vsebini 34. člena Vzorčnega zakona UNCITRAL.

30 Po ZArbit in Vzorčnem zakonu UNCITRAL je ta rok 3 mesece, od dneva, ko je stranka, ki tožbo vlaga, prejela arbitražno odločbo. V kolikor je bila vložena zahteva za popravek ali razlago arbitražne odločbe ali za izdajo dopolnilne odločbe, se rok podaljša največ za 30 dni od prejema odločitve arbitraže o tej zadevi. Tretji odstavek 40. člena ZArbit; tretji odstavek 34. člena Vzorčnega zakona UNCITRAL.

31 M. L. Moses, n. d., str. 195.

32 Glej 7. člen ZArbit; 30. člen Arbitražnih pravil UNCITRAL; 4. člen Vzorčnega zakona UNCITRAL; 36. člen Ljubljanskih arbitražnih pravil.

33 ZArbit ima besedilu "*stranka, ki ji je to znano*" dodano še "*ali bi ji moralo biti znano*". Ta dodatek preprečuje, da bi se stranka uspešno sklicevala na svojo malomarnost tekom postopka. ZArbit pri tej določbi sledi hrvaškem in nemškem zgledu. Povzeto po M. Damjan, B. Jovin Hrastnik, Š. Mežnar, L. Ude, A. Vlahek, A. Zalar, Zakon o alternativnem reševanju sporov (ZARSS) s komentarjem, Zakon o mediaciji v civilnih in gospodarskih zadevah (ZMCGZ) s komentarjem, Zakon o arbitraži (ZArbit) s pojasnili, GV založba, Ljubljana, 2010, str. 162.

34 Po določbi 7. člena ZArbit bi stranka morala ugovarjati brez nepotrebnega odlašanja ali v roku, če je ta za podajo ugovora določen.

35 UNCITRAL Arbitration Rules (2010). Določba se glasi *"[...] katerakoli določba teh pravil [...]".*

36 Glej. 7. člen ZArbit; Vzorčni zakon UNCITRAL. Tu se določba glasi *"[...] določba tega zakona, katere uporabo lahko stranke izključijo [...]".*

37 A. Broches, Commentary on the UNCITRAL Model Law on International Commercial Arbitration, Kluwer, Deventer, Boston, 1990, Article 4.

38 J. Bolta, Stopničaste klavzule, Diplomsko delo, Maribor, 2010, str. 21.

odločbe ter predvsem preprečitev špekulativnega odlašanja z uveljavljanjem ugovorov.[39]

Zaključek

Praksa kaže, da samo dogovor o reševanju sporov ni dovolj, temveč je tudi zastopanje institut v postopku, ki lahko vodi do resnih zapletov, če se mu ne posveti dovolj pozornosti. Pri poslih, glede katerih se stranki dogovorita o ARS, gre pogosto za spore velikih vrednosti in se bosta stranki posluževali vseh mogočih manevrov za dosego ugodnega izida postopka. Zastopanju je treba potrebno mero skrbnosti in znanja s področja ARS posvetiti že v stipulacijski fazi, v samem postopku pa je treba vseskozi paziti, da se dogovor spoštuje in tako nasprotni stranki onemogočati manevrski prostor za ugovore.

Zastopanju je treba potrebno mero skrbnosti in znanja s področja ARS posvetiti že v stipulacijski fazi, v samem postopku pa je treba vseskozi paziti, da se dogovor spoštuje in tako nasprotni stranki onemogočati manevrski prostor za ugovore

39 M. Damjan, B. Jovin Hrastnik, Š. Mežnar, L. Ude, A. Vlahek, A. Zalar, n. d., str. 162.

Arbitration Environment in Serbia

Senka Mihaj

Senka Mihaj is a Partner in the Dispute Resolution department of Karanović & Nikolić. Senka advises and represents clients in various types of court proceedings over multiple areas of practice, including commercial litigation, bankruptcy related matters, construction and privatisation, intellectual property, environmental matters, tax and labour related disputes, as well as in criminal proceedings. Senka also maintains a particular focus on commercial and investment arbitrations before the ICSID, ICC and UNCITRAL. She also represents clients before the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce and is actively involved in pioneering the development of the Belgrade Arbitration Centre.

Arbitration Regulations in Serbia

Even though the adoption of the Law on Arbitration meant that all issues dealing with arbitration are to be interpreted in accordance with this law, there are certain provisions of other laws still in force that contradict the Law on Arbitration

Arbitration has taken a long time in finding its place under the sun of Serbian dispute resolution tradition, over which the courts still hold supremacy. Serbia is a small country which was, until recently, under a strict socialist regime which largely affected free trade and therefore the number of potential foreign trade or any kind of international disputes. In that sense, one can say that Serbia took a long time in acknowledging arbitration as a relevant mechanism of dispute resolution and an arbitration law dealing with arbitration with an overall capacity was adopted only recently. The first law governing arbitration proceedings comprehensively, the Serbian Law on Arbitration, was rendered only in 2006 and it is, as in many other countries, based on the UNCITRAL Model Law on International Commercial Arbitration. One could have a long debate on why precisely the UNCITRAL Model Law was used as a template, but in the end, maybe we should all just go along with a notion of one professor of the University of Belgrade who famously stated that the Model law was written in order to "teach us all how to do it".

Before 2006, arbitration in Serbia was regulated by two laws – the Civil Procedure Law which provided procedural rules, and the Law on Resolving Conflict of Laws which regulated the recognition and enforcement of foreign arbitral awards. Arbitration was rather a side institute in these two laws, but that all changed with the adoption of the Law on Arbitration. Even though the adoption of the Law on Arbitration meant that all issues dealing with arbitration are to be interpreted in accordance with this law, there are certain provisions of other laws still in force that contradict the Law on Arbitration.

For instance, the provisions of the Law on Resolving Conflict of Laws, which regulate recognition and enforcement of foreign arbitral awards, are still in force, although these issues are dealt with in detail in the Law on Arbitration. The conditions for recognition of foreign arbitral awards in these two laws are mostly the same, however, the reciprocity, although not required by the Law on Arbitration, is still one of the conditions prescribed by the Law on Resolving Conflict of Laws.

Also, it should be mentioned that former Yugoslavia acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) with two reservations, one concerning reciprocity and the other concerning the subject of dispute. According to the latter, Serbia will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.

Having this in mind, the question is whether Serbian courts should apply reciprocity and economic subject of dispute as an additional condition for recognition and enforcement of foreign arbitral awards, although these conditions are not prescribed by the Law on Arbitration as *lex specialis*?

The author of this text believes that the answer is no. Recent case law in Serbia shows that courts have taken the same stand – after passing of the Law on Arbitration, reciprocity from the Law on Resolving Conflict of Laws is not a condition for recognition and enforcement of foreign arbitral awards any more. Furthermore, the courts are also at the stand that, since the Law on Arbitration (which is completely in compliance with the New York Convention) has come into force, the reservations to the New York Convention have become irrelevant and inapplicable. Having said this, it might be wise for the Serbian Government to consider revoking these reservations to the New York Convention.

To conclude, in Serbia, the only relevant regulation for both the arbitral proceedings and the recognition and enforcement of foreign arbitral awards is the Law on Arbitration. And what is just as important, the courts in Serbia have no doubt about that.

The Law on Arbitration regulates not only the recognition and setting aside but primarily comprises procedural rules. While the parties are free to agree on procedural rules different to those prescribed by the Law on Arbitration, they are not allowed to change conditions concerning the setting aside, recognition and enforcement of arbitral awards, since these provisions are imperative.

In relation to the arbitration agreement, it is worth mentioning that for arbitration agreements concluded under defect of consent, the Law on Arbitration prescribes a different sanction that the one prescribed by the Serbian Law on Obligations. While the Law on Obligations predicts that the agreements concluded under defect of consent are voidable, the Law on Arbitration predicts that such arbitration agreements are null and void, which means that they can be revoked at any time, while voidable agreements can be revoked only within a certain period of time. This is actually quite unorthodox and I am not sure I understand the intention of this different treatment of the arbitration agreements concluded under defect of consent compared to other such agreements. In fact, Serbia is the only country in the region with such a solution since, as far as I am aware, legislations of other former Yugoslav Republics do not predict such a severe consequence for defects of consent in arbitration agreements.

In any event, even with the legislative framework in place, the majority of disputes in Serbia are still resolved before courts. This can be attributed to many factors, but mainly to the lack of practice in agreeing on arbitration and quite frankly, a poor arbitration tradition, which I hope will change in the future. Another reason for not agreeing on arbitration in Serbia is the expensiveness of arbitral proceedings; costs of arbitration are significantly higher than costs of court proceedings. The monetary factor certainly has an impact on the number of arbitration agreements in a transition economy such as Serbia.

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Court Intervention in Arbitration Proceedings

Even though the Serbian Law on Arbitration mostly leaves it to the tribunal to conduct the arbitral proceedings, the courts may still actively be involved in a certain way, but only when this is explicitly prescribed in the Law on Arbitration. For example, if the arbitral tribunal rules on objections regarding its jurisdiction as a preliminary issue with a separate decision, any party may request the court to review the tribunal's decision. In other words, the court is acting as a second instance and may overturn the tribunal's decision. The fact that the court is actually acting as a supervisory body may be the reason why the Law on Arbitration excludes the right to appeal against such court decisions.

Similarly, the Law on Arbitration excludes the possibility of appealing against the court's decisions on appointment of arbitrators (when there is no agreement on this between the parties) and the court's decisions concerning arbitrator's recusal and revocation of arbitrator's appointment. I think that this could potentially lead to many problems in practice, since the first instance court may, for example, appoint an arbitrator apparently inadequate for the case at hand, with no option for this decision to be corrected.

In addition, the court may also assist in the process of taking of evidence and to decide on parties' requests

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for interim measures. This can be done before the arbitration is initiated, or during the arbitration. According to the Law, this can be done even when the arbitration agreement refers to arbitration seated outside of Serbia, however, in our recent practice, a Serbian court rejected to decide on the motion for an interim measure simply because the parties agreed on the seat of arbitration outside of Serbia. By doing that, the court actually took a stand that completely contradicts with the explicit provision of the Law.

Then again, if the parties do not agree otherwise, the arbitral tribunal may, upon the proposal of a party, order an interim measure. However, if a party fails to comply with the interim measure, the problem arises as to how to enforce it. Unlike courts, arbitral tribunals do not have coercive powers. I am of the opinion that the arbitral decisions concerning interim measures should be treated just like arbitral decision on merits and enforced as such. And speaking of enforcement, domestic arbitral awards and recognized foreign arbitral awards can be enforced in the same way as any domestic court decision.

Concerning setting aside, I would also like to mention that in Serbia the main argument parties raise when seeking setting aside is that the award is in conflict with imperative legal provisions and thus in conflict with the public policy

Of course there are still matters in arbitration that fall under the exclusive competence of the courts. These are the setting aside of domestic arbitral awards and the recognition and enforcement of foreign arbitral awards. It is important to note the presumption that arbitral awards are valid and enforceable, and that the opposing party needs to prove otherwise, except for the conditions concerning arbitrability of the dispute and whether the effects of the award are contrary to the public policy, which the court considers *ex officio*.

As regards the setting aside proceedings, there is a case our firm handled worth mentioning. In that case, the domestic arbitral award was set aside by the court of first instance. The court of first instance found that the bilingual arbitration clause was pathological because the English and Russian versions of the clause were not the same, and the parties had not agreed which version would prevail in case of discrepancy. While the English version undoubtedly predicted arbitration as the mechanism of dispute resolution, the Russian version could be interpreted in two different ways; either that the parties had agreed on arbitration or that they had agreed on the jurisdiction of the commercial court. Acting upon our appeal, the second instance court overturned the decision of the court of first instance saying that, according to the Law on Arbitration, a pathological arbitration agreement is not one of the reasons for the setting aside of arbitral awards. The second instance court elaborated that when it is not clear whether the parties agreed on arbitration, the court has to determine what the true will of the contracting parties was. Only if the court determines that there was no consent to arbitration, the award can be annulled because of the lack of arbitration agreement (lack of jurisdiction). This only shows that a second instance is sometimes more than welcome, in fact necessary.

Concerning setting aside, I would also like to mention that in Serbia the main argument parties raise when seeking setting aside is that the award is in conflict with imperative legal provisions and thus in conflict with the public policy. Good news in this regard is that the publicly available case law shows that courts in Serbia are strongly taking the position that the fact that an arbitral award is in conflict with imperative provisions does not by itself mean that it is in conflict with public policy. I believe this stand shows that courts in Serbia support arbitration as a mechanism of dispute resolution.

Also, there is one particular solution in the Law on Arbitration which implies that the intention of the court should be to keep the arbitral award in force instead of annulling it. The court may, at the request of a party, suspend the proceedings for the setting aside and give the arbitral tribunal an opportunity to eliminate reasons that would leave to the setting aside of the award. Although this solution is good and efficient, unfortunately, I am not sure if it has ever been applied in practice.

Arbitration before Serbian and International Forums

In general, any dispute in Serbia can be settled through arbitration, except for disputes that are usually in the exclusive competence of domestic courts, e.g. real estate disputes, family disputes etc. On a related note, any entity may choose to resolve a dispute before arbitration (individuals, companies, even the state, state-owned companies, government institutions and so forth)

In general, any dispute in Serbia can be settled through arbitration, except for disputes that are usually in the exclusive competence of domestic courts, e.g. real estate disputes, family disputes etc. On a related note, any entity may choose to resolve a dispute before arbitration (individuals, companies, even the state, state-owned companies, government institutions and so forth). However, I am confident to say that two individuals in Serbia have never resolved a dispute through arbitration. Arbitration between two domestic companies is very rare, while arbitrations between domestic and foreign companies happen from time to time.

As a consequence of the transition of the Serbian economy, the number of arbitrations involving the state (or state-owned companies and governmental institutions) has increased in the last decade. This is comprehensible, since foreign investors tend to avoid that Serbian courts deciding on disputes involving Serbian governmental institutions. This is most apparent in privatization transactions, where a significant number of foreign investors agree on arbitration. However, even in these cases I am not familiar with a single case involving foreign arbitration, because even when the governmental bodies agree on arbitration, they avoid agreeing on the seat of arbitration outside of Serbia. In this way the government intends to keep the Serbian court involved as much as possible – as stated above, in domestic arbitration Serbian courts may have significant influence on arbitral awards and here I refer not only to the setting aside but also to the possibility for the court to intervene during the course of arbitral proceedings.

As regards arbitration forums, parties traditionally agree on two forums of the Chamber of Commerce and Industry of Serbia, namely the Permanent Court of Arbitration handling domestic disputes and Foreign Trade Court of Arbitration (FTCA) handling international disputes. In 2013, a new arbitration institution was founded – the Belgrade Arbitration Centre (BAC), competent to settle both domestic and foreign disputes. The Permanent Court of Arbitration and the FTCA have already handled numerous cases, but even though BAC is a new forum, it should also be considered when agreeing on arbitration considering the reputation and knowledge of its founders, distinguished arbitration scholars.

BITs between Former Yugoslav Republics

Since 1990, when the first investor-state arbitral award under a modern investment treaty was rendered, there has been an ongoing increase of signed investment treaties and treaty-based disputes. Serbia is no exception to this trend and it has signed multiple bilateral investment treaties (BITs) with, among others, former Yugoslav republics between 1996 and 2002 (Macedonia in 1996, Croatia in 1998, Bosnia and Herzegovina in 2001 and Slovenia in 2002). The bilateral investment treaty with Montenegro was signed in 2009, soon after the disintegration of the State Union of Serbia and Montenegro. All bilateral investment treaties are in force, except the one with Montenegro for which there is no available information as to when and under which conditions these two states will confirm the applicability of the treaty through their legislation.

The idea of signing these treaties is clear – establishing investment protection in a region torn apart by civil wars and trying to give incentive to investors to explore markets in the region.

However, what is not clear is why the authors of these BITs included the courts of a Host State as a possible forum for the resolution of investment disputes. Although all BITs prescribe that disputes between contracting parties will be resolved before an *ad hoc* arbitration, when it comes to disputes between an Investor and the Host State, all of the BITs have an alternative that the dispute may be resolved before a Host State court.

It is rather interesting that a choice of a domestic court is given at all, since it is very hard to imagine that an investor would choose a court of the host State to decide whether the Republic of Serbia has violated the investment protected by the BIT. Up to this date and it has been almost twenty years since the BIT with Macedonia was signed, there has not been a single investment dispute brought before a Serbian court. This only shows this option is needless. Not to mention that it is highly questionable whether a regular Serbian commercial court would have the necessary aptitude in handling such disputes, even if a foreign investor would dare to bring such a dispute before a Serbian court.

Conclusion

Arbitration was construed in an attempt to resolve disputes as effectively as possible. It is undoubtedly the reason why its former and future beneficiaries see it as an adequate and useful alternative to resolving disputes before national courts. More importantly, in the context of international law, one of major assets contributing to popularity of arbitration is its neutrality. Arbitration is far more neutral than a national court.

Nevertheless, arbitration is still not a household name when it comes to dispute resolution in Serbia. Many participants in the market are not even aware of the

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possibility to resolve their disputes before any other forum besides a court. This is one of the main reasons why arbitration is still not a common fixture in Serbia. Even though there are signs of improvement and optimism for the future when it comes to commercial and investment arbitration, it is safe to say that potential use of arbitration in dispute resolution in non-commercial matters in Serbia is still light years away. I believe that the proper way to go would be to raise awareness of the possibility to efficiently resolve disputes outside of a traditional court room. Once people become aware of this option, they will at least consider it when deciding on the mechanism of dispute resolution.

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Davčna obravnava stroškov arbitražnega postopka

mag. Jožo Češnovar

mag. Jožo Češnovar je samostojna odvetnica v Ljubljani. V okviru poklicne poti se je specializirala za področje davčnega prava, sprva v domači revizijski družbi in nato v mednarodni korporaciji KPMG. Od leta 2010 dalje delo na področju davčnega, gospodarskega in delovnega prava nadaljuje v okviru svetovalne in izobraževalne družbe Jerman&Bajuk d.o.o., sprva kot zaposlena v družbi in danes kot partnerica družbe. Decembra 2014 je na Pravni fakulteti Univerze v Mariboru pridobila naziv magister znanosti davčnega prava z magistrsko nalogo Analiza zakonodajnih ukrepov boja proti utajam DDV skozi judikaturo sodišča Evropske unije.

Uvod

Stranki, ki skleneta arbitražni sporazum in rešitev njunega spora prepustita arbitraži, s tem tudi pristaneta na prevzem stroškov arbitražnega postopka. Stroški arbitražnega postopka so stroški strank in stroški arbitraže. V arbitražni praksi je običajno, da stranki s predujmom vnaprej rezervirata sredstva za plačilo stroškov arbitraže. Plačilo stroškov pa se določi v arbitražni odločbi in temu sledi plačilo akterjem arbitražnega postopka. V članku pojasnjujem davčne vidike posameznih vrst stroškov arbitraže. Pri tem izhajam iz Arbitražnih pravil Stalne arbitraže pri Gospodarski zbornici Slovenije – Ljubljanska arbitražna pravila (v nadaljevanju: LAP), ki jih uporablja Stalna arbitraža pri GZS (v nadaljevanju: Stalna arbitraža). V LAP so stroški arbitraže urejeni na način, ki je običajen za arbitražne postopke pred institucionalnimi arbitražami.

Davčna kvalifikacija stroškov arbitraže

Stroški arbitraže so sestavljeni iz plačila za senat, administrativnih stroškov Stalne arbitraže ter stroškov senata in Stalne arbitraže. V končni arbitražni odločbi senat odloči o razporeditvi stroškov arbitraže med stranke. Pri tem izhaja iz načela uspeha strank v postopku in tudi iz drugih relevantnih okoliščin. Temu sledi končni obračun stroškov arbitražnega postopka, s čimer mislim na izdajo končnih računov vseh, ki v okviru postopka opravljajo zaračunljive storitve. To pa so arbitri in Stalna arbitraža.

Najkasneje ob sprejemu arbitražne odločbe je potrebno določiti tudi davčno kvalifikacijo posameznega plačila. Za davčno optimalno izvedbo arbitražnega postopka pa je potrebno o davčni kvalifikaciji plačil razmisliti vnaprej, saj potek postopka in davčni status arbitrov pomembno vplivata na končno stopnjo obdavčitve plačil in s tem tudi na višino stroškov postopka.

Plačila Stalni arbitraži

Prvi strošek arbitražnega postopka je vpisna taksa, ki jo mora tožeča stranka plačati ob vložitvi zahteve za arbitražo. Vpisna taksa je nepovratna in je vključena v administrativne stroške Stalne arbitraže. To pomeni, da je vpisna taksa že ob plačilu znesek, ki je tudi že strošek arbitražnega postopka, in sicer administrativni strošek Stalne arbitraže.[1] Davčna kvalifikacija vpisne takse ja tako znana že ob vplačilu.

Administrativni stroški Stalne arbitraže[2] so plačilo Stalni arbitraži za njeno delo (storitve), ki ga opravi v vsakem arbitražnem postopku. Čeprav Stalna arbitraža

Najkasneje ob sprejemu arbitražne odločbe je potrebno določiti tudi davčno kvalifikacijo posameznega plačila. Za davčno optimalno izvedbo arbitražnega postopka pa je potrebno o davčni kvalifikaciji plačil razmisliti vnaprej, saj potek postopka in davčni status arbitrov pomembno vplivata na končno stopnjo obdavčitve plačil in s tem tudi na višino stroškov postopka

1 Drugače velja glede predujma.

2 Višina teh stroškov se določi na podlagi tabele B v Dodatku II k LAP.

Stalna arbitraža prejme zahtevo za arbitražo, tožbo, odgovor na tožbo in tudi druga pisanja, presodi glede sprejema zadeve v reševanje po LAP, odloča o združitvi postopkov, ima aktivno vlogo v postopku oblikovanja senata in potrdi arbitre, odloča o zahtevi za izločitev arbitra, kontrolira potek postopka, določi višino predujma, pobere predujem in tudi določi višino stroškov arbitraže

ne posega v samo reševanje spora, saj je to prepuščeno senatu, pa ima vendarle v vsakem postopku določene pristojnosti oziroma naloge. Stalna arbitraža prejme zahtevo za arbitražo, tožbo, odgovor na tožbo in tudi druga pisanja, presodi glede sprejema zadeve v reševanje po LAP, odloča o združitvi postopkov, ima aktivno vlogo v postopku oblikovanja senata in potrdi arbitre, odloča o zahtevi za izločitev arbitra, kontrolira potek postopka, določi višino predujma, pobere predujem in tudi določi višino stroškov arbitraže. Za vse to delo je Stalna arbitraža plačana preko postavke administrativni stroški Stalne arbitraže,[3] ki je zato po svoji davčni kvalifikaciji plačilo za storitev. Zato mora Stalna arbitraža za vpisno takso izdati avansni račun in od prejetega zneska po določbi petega odstavka 33. člena Zakona o davku na dodano vrednost[4] obračunati DDV. Za preostali del administrativnih stroškov Stalna arbitraža račun izda po zaključku arbitražnega postopka in izdani arbitražni odločbi, in sicer stranki, ki je po odločbi dolžna kriti stroške arbitražnega postopka.[5]

Za razliko od vpisne takse, pa predujem, ki ga določi Stalna arbitraža in tudi pozove stranki na njegovo vplačilo, še ni plačilo stroškov arbitraže. Predujem je znesek, ki je namenjen kritju bodočih stroškov arbitraže, ki bodo šele nastajali. S pravnega vidika so sredstva predujma še vedno denarna sredstva strank, ki pa so na posebnem računu Stalne arbitraže rezervirana za stroške postopka. Ker predujem ni avans za bodočo že dogovorjeno storitev, se ob nakazilu DDV ne obračuna. Takšna razlaga DDV zakonodaje izhaja tudi iz sodne prakse Sodišča Evropske Unije (v nadaljevanju Sodišče EU),[6] kateri so po načelu lojalnosti[7] dolžni slediti tudi slovenski davčni organ in sodišča.

Postavlja se vprašanje, ali oziroma kdaj se mora arbiter – fizična oseba identificirati za DDV?

Ostale stroške Stalna arbitraža zaračuna v primeru, če tekom arbitražnega postopka prevzame naloge tehnične organizacije postopka. Ker so za organizacijo postopka odgovorni arbitri in ne Stalna arbitraža, ti stroški praviloma nastajajo kot stroški arbitrov, lahko tudi kot stroški strank. Stalna arbitraža jim pri tem lahko pomaga kot izvajalec določenih storitev v okviru organizacije postopka. Davčna kvalifikacija stroška je odvisna od vrste storitve oziroma dobave, ki jo Stalna arbitraža opravi v okviru tehnične organizacije postopka.

Plačila arbitrom

Plačila arbitrom so lahko obdavčena s prometnim davkom (DDV), vedno pa so obdavčena z neposrednimi davki.

Plačila arbitrom in prometni davek (DDV)

Plačilo arbitrov je sestavljeno iz nagrade in povračila stroškov.[8] Tako določeno plačilo je skupni znesek, ki ga arbiter prejme za opravljeno delo (storitev).

Obveznost identifikacije za DDV

Arbiter, ki dejavnost opravlja v okviru samostojnega podjetja ali preko gospodarske družbe, je davčni zavezanec za DDV. Kljub temu je po prvem odstavku 94. člena ZDDV-1 oproščen obračunavanja DDV, če v obdobju zadnjih 12 mesecev ni presegel oziroma ni verjetno, da bi presegel znesek 50.000,00 EUR obdavčljivega prometa.[9]

Postavlja se vprašanje, ali oziroma kdaj se mora arbiter – fizična oseba identificirati za DDV? Ker arbiter dela ne opravlja v odvisnem razmerju, njegova dejavnost načelno sodi v obseg "ekonomske dejavnosti", kot jo definira 5. člen ZDDV-1. Vse transakcije (dobave blaga in storitev), ki se odvijajo v okviru te ekonomske dejavnosti, pa so po 3. členu ZDDV-1 tudi predmet obdavčitve z DDV. Izjemi sta zgolj dve:

- ko dohodki iz dejavnosti ne dosegajo 50.000,00 EUR letno[10];
- če je arbitrova "ekonomska dejavnost" zgolj priložnostna in ne trajna. Pogoj trajnosti, da se dejavnost šteje za ekonomsko dejavnost v smislu drugega

3 Glej 3. člen Dodatka II k LAP.

4 Ur. l. RS, št. 117/2006 in naslednji – v nadaljevanju ZDDV-1.

5 Če tožečo stranko ti stroški ne bremenijo niti v višini že vplačane vpisne takse, mora Stalna arbitraža popraviti račun za vpisno takso in ga izdati stranki, ki je končni dejanski plačnik teh stroškov.

6 Sodišče EU je v zadevi Bupa Hospitals in Goldsborough Developments, C – 419/02 pojasnilo, da plačila na račun, izvršena za dobave blaga ali za storitve, ki še niso jasno opredeljene, ne morejo biti predmet DDV.

7 Glej 4. člen Pogodbe o Evropski Uniji.

8 Nagrado določa alineja *i.* 1. točke 45. člena LAP, povračilo stroškov pa alineja *iii.* iste določbe.

9 Tudi v tem primeru se lahko odloči za identifikacijo za DDV in obračunavanje DDV, s čimer pridobi pravico do odbitka vstopnega DDV od nabav blaga in storitev, ki jih potrebuje za opravljanje svoje DDV obdavčene dejavnosti.

10 In se arbiter prostovoljno ne identificira za DDV.

odstavka 5. člena ZDDV-1, je v tem členu sicer zapisan zgolj v drugem stavku drugega odstavka 5. člena ZDDV-1, to je glede izkoriščanja premoženja in premoženjskih pravic. Kljub temu pogoj trajnosti ni sporen, saj izhaja že iz samega pojma dejavnosti, kot "sklopa aktivnosti, namenjenih trajnemu doseganju dohodka".[11] Navedeno potrjuje tudi praksa Sodišča EU, ki kot bistveni merili za ekonomsko dejavnost določa njeno trajnost in prejem plačila. Če ta dva pogoja nista izpolnjena, po mnenju Sodišča EU ne moremo govoriti o ekonomski dejavnosti iz področja uporabe DDV zakonodaje EU.[12]

Če arbiter v enem ali v manjšem številu postopkov preseže letni promet 50.000,00 EUR je, po mojem mnenju, zelo težko jasno ločiti med situacijami, ko gre zgolj za priložnostno dejavnost, od situacije, ko je majhno število postopkov posledica dejstva, da arbiter v tistem letu ni bil imenovan v več postopkih. Jasnih razmejitvenih kriterijev namreč v zakonodaji in v praksi ni. Menim, da je že v situaciji, ko je arbiter imenovan v dveh postopkih na leto, težko govoriti o priložnostni dejavnosti. Prav tako je težko govoriti o priložnostni dejavnosti, če je arbiter imenovan na stalno listo arbitrov pri posamezni arbitraži. Ker DDV običajno za stranke ni strošek, saj si ga lahko preko pravice do odbitka vstopnega DDV povrnejo, v situaciji, ko arbiter preseže letni promet 50.000,00 EUR, ne vidim resnega razloga za to, da se arbiter ne bi identificiral za DDV in obračunal DDV od svoje storitve. Če pa bi posamezni arbiter v razlogu priložnostnega opravljanja dejavnosti videl argument za neidentifikacijo za DDV, potem je treba to izjemo od obveznosti za identifikacijo v sistem DDV razlagati ozko.

Enotnost arbitrove storitve

Z vidika DDV se je potrebno v situaciji, ko je plačilo sestavljeno iz več postavk, vprašati, ali gre za več samostojnih dobav (storitev in/ali blaga) ali pa gre za enotno dobavo (storitev), katere cena se določi na osnovi več elementov. Glede vprašanja enotnosti oziroma deljivosti transakcij nam je ponovno v pomoč razlaga Sodišča EU, katerega že ustaljena razlaga je naslednja:[13]

- transakcij, ki z gospodarskega vidika obsegajo eno samo storitev, se ne sme umetno razdeliti, da se ne bi izkrivilo delovanje sistema DDV;

- v nekaterih okoliščinah je potrebno več formalno ločenih transakcij obravnavati kot enotno transakcijo, če transakcije niso samostojne. Tako je takrat, ko je treba šteti, da eden ali več elementov sestavljajo glavno storitev, za druge elemente pa je treba šteti, da so ena ali več pomožnih storitev, ki so davčno obravnavane enako kot glavna storitev. Storitev je še posebej treba šteti za pomožno storitev h glavni storitvi, če sama za stranko nima lastnega namena, ampak je sredstvo, da ta lahko uporablja glavno storitev ponudnika pod boljšimi pogoji.

Običajni stroški arbitra so potni stroški, stroški nastanitev in stroški v zvezi s tehnično organizacijo postopka. Očitno je, da ti stroški za stranke nimajo nobenega lastnega pomena, s čimer želim povedati, da stranke teh stroškov ne bi prevzele, če ne bi bili povezani s storitvijo arbitriranja. Odločanje o sporu je torej glavna funkcija in storitev arbitra, medtem ko so naloge v zvezi s tehnično organizacijo arbitraže pomožne naloge v funkciji glavne. Zato je potrebno celotno plačilo arbitru (nagrado in povračilo stroškov) v večini primerov davčno obravnavati kot enotno plačilo za storitev arbitriranja. To dejstvo poenostavi račun arbitra, ki lahko vsebuje zgolj eno postavko za plačilo.[14] Izjema bi lahko bile zgolj posamezne konkretne situacije, kjer bi nek strošek oziroma dobava za stranko imel samostojen pomen, ki ne bi bil vezan na izvedbo storitve arbitriranja.

Ob izdaji računa je potrebno ugotoviti tudi kraj opravljanja storitve z vidika določb ZDDV-1, saj je od tega vprašanja odvisno, ali se od storitve plača slovenski DDV ali morda DDV katere druge države. Nadalje je potrebno ugotoviti tudi, kdo je plačnik davka (izdajatelj računa ali prejemnik računa po sistemu obrnjene

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11 M. Vraničar, N. Beč, Zakon o davku na dodano vrednost s komentarjem, GV Založba, 2007, stran 102.

12 Sodba Sodišča ES v zadevi Landesanstalt für Landwirtschaft proti Franzu Gőtzu, C – 408/06. Enako stališče je zavzela tudi davčna uprava v pojasnilu v zvezi z vprašanjem ali se je fizična oseba dolžna identificirati za DDV, če je dohodek nad 25.000,00 EUR (takratni prag za vstop v sistem DDV) dosegla z enkratnim pravnim poslom ter pojasnilu glede izpolnjevanja statusa davčnega zavezanca ob prodaji nepremičnin.

13 Tako Sodišče EU v zadevah Everything Everywhere, C-276/09, Swiss Re Germany Holding, C-242, Levob Verzekeringen in OV Bank, C-41/04.

14 Seveda pa je podrobnejša specifikacija plačila lahko priloga k računu arbitra.

davčne obveznosti. Ta vprašanja so odvisna od DDV davčnega statusa izdajatelja in prejemnika računa (ali gre za davčne zavezance za DDV, t.i. male davčne zavezance ali davčne nezavezance) in od sedeža izdajatelja in prejemnika računa. Pravilna določitev kraja opravljanja storitve je pogoj za pravilen obračun DDV in napaka zvišuje stroške arbitražnega postopka. DDV mora namreč plačati vsaka oseba, ki ga na računu izkaže (čeprav gre za zmoten obračun, kar določa 9. točka prvega odstavka 76. člena ZDDV-1), medtem ko davčni zavezanec, ki prejme račun, na katerem je izkazan višji znesek DDV, kot bi moral biti po zakonu, po petem odstavku 67. člena ZDDV-1 tega DDV ne sme uveljavljati preko pravice do odbitka vstopnega DDV.

Plačila arbitrom in neposredni davki

Davčne obremenitve plačila arbitru so odvisne od tega, v kakšni obliki organiziranosti arbiter opravlja storitev. Obstajajo tri možnosti, katerih davčne obremenitve so pomembno različne

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Arbiter kot fizična oseba

Arbiter, ki ne deluje preko podjetja (v nadaljevanju: arbiter kot fizična oseba), bo delo opravil na podlagi civilnopravne pogodbe, ki jo sklene s strankami postopka

Arbiter, ki ne deluje preko podjetja (v nadaljevanju: arbiter kot fizična oseba), bo delo opravil na podlagi civilnopravne pogodbe,[15] ki jo sklene s strankami postopka.[16] Prejeto plačilo se kot dohodek iz zaposlitve (t.i. dohodek iz drugega pogodbenega razmerja, kot to določa 38. člen Zakona o dohodnini[17]) obdavči z dohodnino in ustreznimi prispevki za socialno varnost. Čeprav razmerje med arbitrom in strankami ni odvisno razmerje, takšna davčna kvalifikacija dohodka arbitra – fizične osebe v davčni praksi ni sporna.[18]

Plačilo arbitru – fizični osebi je po tretjem odstavku 3. člena Zakona o posebnem davku na določene prejemke oproščeno davka na posebne prejemke.[19]

Davčno obremenitev prejemka arbitra, ki delo opravlja kot fizična oseba, pomembno zvišujeta dve okoliščini. Prva je dejstvo, da se v davčno osnovo po določbi četrtega odstavka 38. člena ZDoh-2 vključujejo tudi vsi stroški arbitra z izjemo 10% normiranih stroškov in dejanskih stroškov prevoza in nočitve.[20] Iz tega razloga ta oblika opravljanja dela ni davčno optimalna za kompleksnejše arbitražne postopke z visokimi stroški v zvezi s tehnično organizacijo postopka. Druga je v višini prispevkov za socialno varnost, zlasti če arbiter ni drugače vključen v sistem obveznega socialnega zavarovanja, zaradi česar se mora po 18. členu Zakona o pokojninskem in invalidskem zavarovanju[21] na osnovi tega razmerja vključiti v sistem in plačati "polne" prispevke.[22]

Akontacijo dohodnine in prispevke za socialno varnost ob nakazilu plačila odvede Stalna arbitraža,[23] ki tudi poroča davčnemu organu o izplačilu prejemka. Dajatve se odvedejo tudi v primeru, če arbiter ni davčni rezident Slovenije, saj tudi nerezidenti v Sloveniji plačujejo dajatve od dohodkov z virom v Sloveniji.[24]

15 Pogodba se ne sklepa v pisni obliki. LAP so s pravnega vidika ponudba strankam, da svoje spore rešijo v okviru arbitraže po pravilih LAP. Pogodbeno razmerje med arbitri in strankami je dogovorjeno z imenovanjem arbitra, pri čemer se arbiter in stranke v postopku imenovanja dogovorijo tudi o pravno organizacijski obliki, preko katere bo storitev arbitriranja opravljena.

16 Stranka postopka pa seveda ni Stalna arbitraža.

17 Ur. l. RS, št. 117/2006 in naslednji – ZDoh-2.

18 Dohodek iz drugega pogodbenega razmerja je ena od vrst dohodka iz zaposlitve. Pravni temelj za zaposlitev in doseganje dohodkov iz zaposlitve je po drugem odstavku 35. člena ZDoh-2 odvisno pogodbeno razmerje. Odvisno pogodbeno razmerje je, poleg delovnega razmerja, tudi vsako drugo pogodbeno razmerje, ki je glede nadzora in navodil, načina opravljanja, dela, plačila, zagotavljanja sredstev in pogojev za delo ter odgovornosti podobno delovnemu razmerju. Razmerje med strankami in arbitrom ni odvisno razmerje, saj v tem razmerju ni naštetih elementov delovnega razmerja. Kljub temu v davčni praksi ni sporno, da se prejemki arbitra kot fizične osebe davčno okvalificirajo kot te vrste dohodek, in sicer iz preprostega razloga, ker je tovrstni dohodek najbolj podoben dohodku arbitra in ker v dohodninski zakonodaji velja pravilo široke davčne osnove, po kateri je vsak dohodek obdavčen, če ni izrecno z zakonom določeno drugače.

19 Ur. l. RS, št. 72/93 in naslednji.

20 Ki jih arbiter uveljavlja v ugovoru zoper informativni izračun, in sicer v višini Uredbe in na podlagi njemu izdanih računov.

21 Ur. l. RS, št. 96/12 in naslednji.

22 Glede prispevkov za socialno varnost je razlika, ali je arbiter že na podlagi kakšnega drugega pravnega razmerja (npr. delovnega razmerja) vključen v sistem obveznega socialnega zavarovanja. V tem primeru se, po trenutno veljavni ureditvi, odvedejo prispevek za pokojninsko in invalidsko zavarovanje delodajalca v višini 8,85 % celotnega plačila in prispevki za zdravstveno varstvo v višini 0,53 % in 6,36 % od celotnega plačila. Če arbiter ni v sistemu obveznega socialnega zavarovanja, se v sistem vključi na osnovi tega pogodbenega razmerja, zaradi česar se, poleg prej naštetih prispevkov, odvede še 15,50 % prispevek zavarovanca za pokojninsko in invalidsko zavarovanje.

23 Stalna arbitraža je plačnik davka po 8. točki 58. člena Zakona o davčnem postopku, ki določa, da je plačnik davka tudi druga oseba, ki za tuj račun prejme dohodek, od katerega se v skladu s tem zakonom ali zakonom o obdavčenju izračunava, odteguje in plačuje davčni odtegljaj, ko oseba, ki jo tak dohodek bremeni, ne pozna in glede na okoliščine primera ne more poznati upravičenca do dohodka, če tako predpiše minister za finance.

24 Izjema od tega velja za situacije, kjer dohodek arbitra po 9. in 10. členu ZDoh-2 ni dohodek z virom v Sloveniji ali je izpolnjen pogoj za izjemo po bilateralnem sporazumu o izogibanju dvojnemu obdavčevanju dohodkov in premoženja.

Arbiter kot samostojni podjetnik

Druga možnost je, da arbiter dejavnost arbitriranja opravi kot samostojni podjetnik. V tem primeru se dohodek davčno kvalificira kot dohodek iz dejavnosti po 2. točki prvega odstavka 18. člena ZDoh-2. Dohodnina se samostojnemu podjetniku odmeri od ustvarjenega dobička, ki je enak razliki med prihodki in odhodki samostojnega podjetnika, upoštevajoč določene posebnosti, kot jih določa 3. točka III. poglavja ZDoh-2. Lahko pa se davčna osnova samostojnega podjetnika ugotavlja na podlagi normiranih odhodkov, ki trenutno po 59. členu ZDoh-2 znašajo 80% prihodkov. Storitvene dejavnosti, kakršna je tudi arbitriranje, imajo običajno visoko dodano vrednost, zato je obdavčitev po normiranih odhodkih zelo ugodna. K nizki obremenitvi z dohodnino, poleg nizke davčne osnove,[25] prispeva tudi cedularna obdavčitev, po kateri se dobiček obdavči z 20 % davčno stopnjo, ki se po 135a členu ZDoh-2 šteje za dokončni davek. Trenutni pogoj za obračunavanje dohodnine na temelju normiranih odhodkov je letni znesek prometa do 50.000,00 EUR ali letni znesek prometa do 100.000,00 EUR, če je pri samostojnem podjetniku za polni delovni čas obvezno socialno zavarovana vsaj ena oseba, neprekinjeno najmanj 5 mesecev.[26] Ugotavljanje davčne osnove z upoštevanjem normiranih odhodkov je potrebno davčnemu organu ustrezno in pravočasno prijaviti, kot to določa 308. člen Zakona o davčnem postopku.[27]

Dejavnost arbitriranja preko gospodarske družbe

Dejavnost arbitriranja pa se lahko opravlja tudi preko gospodarske družbe. Kljub specifikam arbitraže, ki je zlasti v dejstvu, da ima arbitražna odločba učinek pravnomočne sodbe med strankama, je arbitriranje vendarle "zgolj" dejavnost, ki se izvaja na trgu. Zato je kot dejavnost uvrščena tudi v standardno klasifikacijo dejavnosti.[28] V tem primeru se vse aktivnosti (storitve), ki jih zahteva storitev arbitriranja v konkretnem postopku, opravijo v okviru podjetja te gospodarske družbe.[29] Imenovani arbiter bo svojo funkcijo opravil kot zaposleni delavec v tej družbi, v preostale potrebne aktivnosti (predvsem vse potrebno v zvezi s tehnično organizacijo arbitraže) pa se lahko vključuje tudi ostalo osebje podjetja gospodarske družbe. Takšen način izvedbe storitev bo lahko celo edino možen za arbitra, ki je polno zaposlen in bo naročilo za storitev arbitriranja pripravljen prevzeti zgolj v okviru tega razmerja. Obenem je lahko ekonomičen, saj lahko arbiter uporabi kapacitete in sredstva podjetja gospodarske družbe. Za arbitre so pogosto imenovani odvetniki. Le ti že delujejo v okviru podjetja, in sicer kot samostojni podjetniki, kot odvetniki v odvetniški družbi ali kot zaposleni odvetniki. Zato odvetniku pogosto ne bo smiselno zgolj za potrebe arbitraže ustanavljati drugega podjetja[30] oziroma gospodarske družbe. Dejavnost arbitriranja tudi ni nezdružljiva z odvetniško dejavnostjo, zaradi česar jo odvetniki tudi po Zakonu o odvetništvu[31] lahko opravljajo v vseh pojavnih oblikah, v katerih opravljajo odvetniško dejavnost

Stališče FURS in Ministrstva za finance in spornost tega stališča

Stališču, da se dejavnost arbitriranja lahko opravlja preko gospodarske družbe, posredno nasprotujeta Ministrstvo za finance in Finančna uprava Republike Slovenije. Organa namreč v tem trenutku zagovarjata stališče, da je plačilo storitve arbitriranja davčno dohodek fizične osebe in ga je kot takšnega potrebno tudi obdavčiti, četudi je izplačan gospodarski družbi.[32] To pa pomeni, da davčni organ zahteva, da Stalna arbitraža ob plačilu nagrade za arbitriranje po računu gospodarske družbe, odvede enake dajatve, kot se odvedejo arbitru – fizični osebi in zgolj neto znesek nakaže gospodarski družbi. Nakazilo gospodarski družbi bi bilo nato kot prihodek gospodarske družbe ponovno vključeno v davčno osnovo za davek od dohodka pravnih oseb. Takšna davčna kvalifikacija plačila storitve

Druga možnost je, da arbiter dejavnost arbitriranja opravi kot samostojni podjetnik. V tem primeru se dohodek davčno kvalificira kot dohodek iz dejavnosti po 2. točki prvega odstavka 18. člena ZDoh-2

Dejavnost arbitriranja pa se lahko opravlja tudi preko gospodarske družbe. Kljub specifikam arbitraže, ki je zlasti v dejstvu, da ima arbitražna odločba učinek pravnomočne sodbe med strankama, je arbitriranje vendarle "zgolj" dejavnost, ki se izvaja na trgu

25 Ki se uporablja za dohodnino in prispevke za socialno varnost.

26 Pri čemer je ta oseba lahko tudi podjetnik sam, kar izhaja tudi iz Pojasnila davčnega organa, dostopnega na http://www.durs.gov.si/si/davki_predpisi_in_pojasnila/davek_od_dohodkov_pravnih_oseb_pojasnila/posebna_ureditev_za_ugotavljanje_davcne_osnove_z_upostevanjem_normiranih_odhodkov/vprasanja_in_odgovori_v_zvezi_z_opredelitvijo_pogojev_za_ugotavljanje_davcne_osnove_z_upostevanjem_normiranih_odhodkov_novela_zddpo_2k/ (17. 3. 2015).

27 Ur. l. RS, št. 117/2006 in naslednji (v nadaljevanju: ZDavP-2).

28 Po SKD je dejavnost arbitra ena od dejavnosti v okviru pravnega svetovanja – 69.103.

29 Enako velja tudi za podjetje samostojnega podjetnika.

30 Pri čemer se postavlja dilema, ali samostojni odvetnik sploh lahko odpre še drugo samostojno podjetje, saj ima dejavnost že registrirano v AJPES-u.

31 Ur. l. RS, št. 18/1993 in naslednji.

32 Stališče glede davčne obravnave dohodka arbitrov je enako tistemu, ki ga davčni organ zagovarja tudi za mediatorje in sodne tolmače in je objavljeno na http://www.durs.gov.si/si/davki_predpisi_in_pojasnila/dohodnina_pojasnila/dohodek_iz_zaposlitve/dohodek_iz_drugega_pogodbenega_razmerja/davcna_obravnava_nagrad_in_povracil_stroskov_upraviteljev_sodnih_izvedencev_cenilcev_tolmacev_in_mediatorjev/ (17. 3. 2015).

arbitriranja dejansko preprečuje opravljanje teh storitev preko gospodarskih družb, saj privede do nerazumnih davčnih obremenitev. Menim, da gre za napačno davčno kvalifikacijo, ki ima za posledico nezakonito omejevanje načina izvajanja dejavnosti arbitrov.

Ministrstvo za finance in Finančna uprava Republike Slovenije svoje stališča opirata na trditev, da je zgolj fizična oseba lahko imenovana za arbitra, zaradi česar je plačilo za storitev arbitriranja vedno dohodek fizične osebe (četudi je izplačan pravni osebi). Menim, da organa pri tej trditvi spregledata številne okoliščine. Prva je, da je celotna storitev arbitra širša od "zgolj" sprejema odločitve glede spora strank in zajema vsaj še tehnično organizacijo postopka. Omejitev za opravljanje storitev arbitriranja kot gospodarske dejavnosti ne določa niti Zakon o arbitraži[33] niti Zakon o gospodarskih družbah[34], ki sta *sedes materiae* tega področja. Glede načina opravljanja dejavnosti ministrstvo in davčni organ tudi nista dosledna, saj dopuščata to dejavnost izvajati v okviru samostojnega podjetja, ne pa tudi preko gospodarske družbe, kar je razlikovanje, za katerega statusnopravna zakonodaja ne daje podlage.

Omejitev za opravljanje storitev arbitriranja kot gospodarske dejavnosti ne določa niti Zakon o arbitraži niti Zakon o gospodarskih družbah, ki sta *sedes materiae* tega področja

Če se storitev arbitriranja opravlja preko gospodarske družbe, je pogodbeni izvajalec storitve sama družba, pri čemer storitev v delu samega odločanja izvede imenovani arbiter, ki je zaposlen v družbi. V poslovni praksi ni v ničemer neobičajen dogovor v pogodbi o opravljanju dela ali v mandatni pogodbi, kdo od zaposlenih pri izvajalcu bo določeno storitev opravil. Davčna praksa v teh primerih ne šteje, da bi bilo plačilo računa gospodarske družbe dohodek fizične osebe.

Če se storitev arbitriranja opravlja preko gospodarske družbe, je pogodbeni izvajalec storitve sama družba, pri čemer storitev v delu samega odločanja izvede imenovani arbiter, ki je zaposlen v družbi

Zdi se, da davčni organ "argument fizične osebe" uporablja pod vplivom dilem davčne prakse v zvezi z davčno kvalifikacijo plačila za poslovodenje, ki je bila aktualna pred sprejetjem Zakona o dohodnini.[35] Pred tem se je namreč v zvezi s poslovodskimi storitvami razširila poslovna praksa sklepanja storitvenih pogodb z družbami, preko katerih so delovali poslovodje, ki so bili na poslovodno funkcijo imenovani v drugi družbi – naročnici poslovodnih storitev. V posledici teh dilem je bila v ZDoh-1 sprejeta določba 1. točke drugega odstavka 25. člena ZDoh-1, po kateri se za dohodek iz delovnega razmerja štejejo tudi dohodki, prejeti za vodenje poslovnega subjekta, ki je pravna oseba, na podlagi poslovnega razmerja. Primerljive določbe za arbitra dohodninska zakonodaja nima. Položaj poslovodje iz več razlogov namreč ni primerljiv s položajem arbitra. V sodnih odločbah, kjer se je vzpostavila praksa, da so dohodki poslovodje šteli za dohodke fizične osebe,[36] je ključni argument, da je poslovodja (kot izvajalec storitve) v pravnem (in sicer v korporacijskem razmerju) z družbo, v kateri opravlja funkcijo poslovodje in da na podlagi tega korporacijskega razmerja prejema tudi plačilo za opravljanje funkcije. Poslovodja je torej dejansko v pravnem razmerju z družbo "naročnico" njegovih storitev in to pravno razmerje je tudi podlaga za plačilo njegovega dela. Takšna ugotovitev pa ne velja za arbitra. V arbitraži, ki teče po LAP, ni ovire za pogodbeni dogovor med strankami in arbitrom, da arbiter svoje delo opravi preko gospodarske družbe, zaradi česar se pogodba o izvedbi storitve arbitriranja sklene z gospodarsko družbo.

Arbitri svoje storitve opravljajo kot dejavnost na trgu, zato morajo biti dohodki iz te dejavnosti obdavčeni na enak način, kot to velja za druge dejavnosti. Stroški, ki jim pri opravljanju funkcije nastajajo, so njihovi stroški, ki jih tekom arbitražnega postopka tudi bremenijo. Povračilo teh stroškov je arbitru zagotovljeno preko plačila za opravljeno storitev arbitriranja

Poslovodje pri opravljanju svojega dela niso v takšnem smislu v neodvisnem razmerju z družbo "naročnico" njihovih storitev, kot to velja za arbitre. Poslovodje so pri opravljanju funkcije del podjetja družbe, svoje delo opravljajo v okviru delovnega procesa družbe in na sredstvih družbe. Poslovodje se od "običajnega" delavca razlikujejo predvsem v tem, da kot organ vodenja družbe niso pod neposrednim nadzorom nobenega vodje v podjetju družbe, temveč so izključno pod nadzorom nadzornega organa družbe oziroma lastnika družbe. Z opravljanjem funkcije družbi povzročajo tudi davčno priznane stroške. Vse to so okoliščine, ki opravičujejo davčno ureditev, na osnovi katere so kljub svoji samostojnosti davčno obravnavani kot delavci v odvisnem delovnem razmerju. Arbitri pa svoje delo opravljajo povsem neodvisno in v ničemer niso vključeni v podjetje in delovne procese strank. Arbitri svoje storitve opravljajo kot dejavnost na trgu, zato morajo biti dohodki iz te dejavnosti obdavčeni na enak način, kot to velja za druge dejavnosti. Stroški, ki jim pri opravljanju funkcije nastajajo, so njihovi stroški, ki jih tekom arbitražnega postopka tudi bremenijo. Povračilo teh stroškov je arbitru zagotovljeno preko plačila za opravljeno storitev arbitriranja (v delu plačila, ki zagotavlja povračilo dejansko nastalih in upravičenih stroškov), kar je situacija, ki je tipična za izvajalce storitev na trgu. Morebitne omejitve glede načina izvajanja

33 Ur. l. RS, št. 45/08 (v nadaljevanju: ZArbit).

34 Ur. l. RS, št. 42/2006 in naslednji (v nadaljevanju: ZGD-1).

35 Ur. l. RS, št. 17/05 (v nadaljevanju: ZDoh-1).

36 Npr. sodbe Vrhovnega sodišča RS v zadevah X Ips 973/2006, X Ips 663/2008 in oziroma X Ips 272/2009.

dejavnosti lahko določi samo področna zakonodaja,[37] česar pa ZArbit ali ZGD-1 ne določata. Zato teh omejitev tudi ne more določati davčni organ preko (nepravilne) razlage davčne zakonodaje.

Čeprav ima arbitražna odločba učinek pravnomočne sodbe med strankama,[38] pa delo arbitra ni primerljivo s funkcijo sodnika državnega sodišča, katerega dohodek se davčno prav tako šteje za dohodek iz delovnega razmerja. Dejstvo, da ima arbitražna odločba učinek pravnomočne sodne odločbe, torej ni tista okoliščina, zaradi katere bi morali biti dohodki sodnika in arbitra davčno enako obravnavani. Za davčne potrebe je ključen način izvajanja dela arbitra in sodnika. Glede tega vprašanja pa je položaj sodnika bolj primerljiv položaju poslovodje kot pa položaju arbitra. Tako kot poslovodja, tudi sodnik svojo sodno funkcijo opravlja v okviru "podjetja" sodišča, kjer opravlja svoje delo. Arbiter pa svoje delo opravlja v poljubni pravnoorganizacijski obliki, ki jih delovnopravna in statusnopravna zakonodaja dajeta na voljo.

Nenazadnje je stališče ministrstva in davčnega organa sporno tudi z vidika ustavnega načela enakosti pred zakonom. Po drugem odstavku 117. člena Zakona o finančnem poslovanju in postopkih zaradi insolventnosti in prisilnem prenehanju[39] velja, da če stečajni upravitelj opravlja pristojnosti in naloge upravitelja prek pravnoorganizacijske oblike podjetnika, zasebnika ali gospodarske družbe, se v sklepu o imenovanju navede tudi ta pravnoorganizacijska oblika. Na osnovi te določbe pri stečajnih upraviteljih v davčni praksi ni (več) sporno, da so prihodki iz njihove dejavnosti lahko prihodki pravne osebe, čeprav prvi odstavek 117. člena ZFPPIPP določa, da se upravitelj imenuje kot fizična oseba. Ob tem pa bi bilo napačno sklepanje, da bi enak davčni položaj veljal za arbitre le, če bi ZArbit imel določbo primerljivo 117. členu ZFPPIPP. Pravilno sklepanje je, da ker veljata ustavni načeli enakosti pred zakonom in svobodne gospodarske pobude, je omejevanje teh načel dopustno le, če je v skladu z ustavo in predvsem zgolj na podlagi izrecne ureditve v zakonodaji. Način izvajanja dejavnosti arbitrov pa ni omejen, zato velja splošna ureditev po ZGD-1, ki dopušča, da se gospodarska dejavnost izvaja preko gospodarskih družb in so prihodki od te dejavnosti tudi davčno prihodki družbe.

Stroški strank

Med postopkom pa strankam nastajajo t.i. stroški strank.[40] V končni arbitražni odločbi senat odloči o povrnitvi razumnih stroškov s strani stranke, ki v sporu ni uspela. Za povračilo teh stroškov stranki ni potrebno izdajati nobenega računa, saj je pravni temelj za povračilo arbitražna odločba. Povračilo stroškov nasprotni stranki ni plačilo za opravljeno dobavo blaga ali storitev, zato ni predmet obdavčitve z DDV.

Zaključek

V zaključku prispevka lahko ugotovim, da so pravna razmerja, ki se v arbitražnem postopku oblikujejo med arbitri, strankami in institucionalno arbitražo, številna. Vsakemu od teh razmerij je potrebno določiti tudi davčno kvalifikacijo, kar zahteva dobro poznavanje davčne zakonodaje tako na področju prometnih davkov kot tudi na področju neposredne obdavčitve. Konkreten postopek bo potekal davčno optimalno, če bodo akterji postopka davčne posledice postopka predvideli vnaprej. Pri tem pa jim je lahko v veliko pomoč dobro organizirana in poučena institucionalna arbitraža.

Morebitne omejitve glede načina izvajanja dejavnosti lahko določi samo področna zakonodaja, česar pa ZArbit ali ZGD-1 ne določata. Zato teh omejitev tudi ne more določati davčni organ preko (nepravilne) razlage davčne zakonodaje

Konkreten postopek bo potekal davčno optimalno, če bodo akterji postopka davčne posledice postopka predvideli vnaprej. Pri tem pa jim je lahko v veliko pomoč dobro organizirana in poučena institucionalna arbitraža

37 Kot npr. Zakon o izvršbi in zavarovanju v 280. členu za izvršitelje določa, da službo izvršitelja opravljajo izvršitelji kot samostojno zasebno dejavnost, zaradi česar so vsi izvršitelji davčno v položaju samostojnih podjetnikov. Vendar pa to omejitev glede načina opravljanja dejavnosti za izvršitelje ureja Zakon o izvršbi in zavarovanju, ki je *sedes materiae* za dejavnost izvršiteljev.

38 Pravni sistem torej dopušča strankam, da v okviru alternativnih oblik reševanja sporov namesto sodni veji oblasti prepustijo sprejem odločitve glede njunega spora katerikoli tretji osebi, ki jo ti dve stranki imenujeta za arbitra, pri čemer sta stranki svobodno sprejeli posledico, da bo ta odločitev imela moč pravnomočne sodne odločbe. Pri tem pa je arbiter lahko katerakoli polnoletna in poslovno sposobna oseba.

39 Ur. l. RS 126/07 in naslednji (v nadaljevanju: ZFPPIPP).

40 Gre za stroške, ki so jih stranke imele zaradi arbitražnega postopka, vključno s stroški pravnega zastopanja (46. člen LAP).

Odvetniška tarifa "le" kot pomožni kriterij

Stalna arbitraža pri GZS

V mednarodni arbitražni praksi je splošno sprejeto stališče, da arbitražni senati, ko presojajo razumnost priglašenih stroškov zastopanja in odločajo njihovem povračilu (za razliko od državnih sodišč) niso vezani na uporabo državnih ali lokalnih odvetniških tarif

V mednarodni arbitražni praksi je splošno sprejeto stališče, da arbitražni senati, ko presojajo razumnost priglašenih stroškov zastopanja in odločajo njihovem povračilu (za razliko od državnih sodišč) niso vezani na uporabo državnih ali lokalnih odvetniških tarif. Prav tako arbitražni senati niso vezani na odvetniške tarife, ki veljajo v kraju sedeža arbitraže ali kraju sedeža zastopnika oziroma njegovega domicila. To pomeni, da ne glede na kraj sedeža arbitraže ali obstoj domačega (spor med strankami s sedežem v Sloveniji) ali mednarodnega elementa (spor med strankami, kjer ima vsaj ena stranka sedež zunaj Slovenije), arbitražni senati pri presojanju razumnosti s strani strank priglašenih stroškov zastopanja, niso vezani oziroma omejeni s pravili odvetniških tarif. Zaključimo lahko, da tudi v arbitraži s sedežem v Sloveniji med dvema slovenskima strankama, arbitražni senat ni vezan na Zakon o odvetniški tarifi[1] in Odvetniško tarifo[2], ki so ju v primeru sodnega spora dolžna spoštovati slovenska sodišča in drugi organi.[3] Arbitražni senat seveda lahko (in tudi) uporablja takšno tarifo kot pomožni kriterij oziroma referenco za presojanje razumnosti priglašenih stroškov zastopanja, ni pa nanjo vezan.[4] V arbitraži, kot zasebnem in poslovnem mehanizmu reševanja sporov tako ni ovir, da senat od odvetniške tarife odstopi in prizna višino nagrade ter metodo njenega izračuna, kot jo je odvetnik dogovoril s stranko – v kolikor je višina nagrade razumna in upravičena.

Tudi v arbitraži s sedežem v Sloveniji med dvema slovenskima strankama, arbitražni senat ni vezan na Zakon o odvetniški tarifi in Odvetniško tarifo, ki so ju v primeru sodnega spora dolžna spoštovati slovenska sodišča in drugi organi

Vidik nevezanosti arbitražnega senata na odvetniško tarifo je prikazan v arbitražni odločbi Stalne arbitraže pri Gospodarski zbornici Slovenije iz leta 2012, ki je objavljena v nadaljevanju. V tej odločbi je senat zavzel jasno stališče, da pri odločanju o razumnosti priglašenih stroškov zastopanja ni vezan na odvetniško tarifo, ki velja v sedežu arbitraže (v konkretnem primeru je to Madžarska) in da omenjena tarifa senatu lahko služi le kot pomožni kriterij za odločanje o razumnosti stroškov.[5]

1 Ur. l. RS, št. 67/2008.

2 Ur. l. RS, št. 2/2015.

3 Pod besedo "drugi organi" iz četrtega odstavka 4. člena Zakona o odvetniški tarifi seveda ne smemo razumeti arbitraže oziroma arbitražnega senata. Arbitraža je privatni mehanizem reševanja sporov.

4 Glej Bühler, M.: Awarding costs in International Commercial Arbitration: An Overview, v: ASA Bulletin 22, št. 2, 2004, str. 272.

5 V predstavljeni arbitražni odločbi sta si nasproti stali stranki iz Madžarske in Slovenije.

ARBITRAL AWARD

Case No.: SA 5.6-X/2012

Claimant: [...]

Respondent: [...]

The Arbitral Award is issued in accordance with the Rules of Arbitration of the Permanent Court of Arbitration attached to the Chamber of Commerce and Industry of Slovenia (Official Gazette of the Republic of Slovenia, No. 49/00, Changes No. 66/03).

The Arbitral Tribunal composed of:

[...], *Chairman*

[...], *Co-arbitrator*

[...], *Co-arbitrator*

The Arbitral Award is issued in seven equivalent copies; one copy for each party, three copies of the Arbitral tribunal and two copies for the Permanent Court of Arbitration attached to the Chamber of Commerce and Industry of Slovenia.

In the matter of the arbitration between [...], *Hungary, represented by* [...] *(hereinafter: the claimant) and* [...], *Slovenia, represented by* [...] *and by* [...] *(hereinafter: the respondent)*

the Arbitration Tribunal composed of [...] *as the Chairman; and* [...] *and* [...] *as co-arbitrators,*

after an oral hearing, held in Ljubljana on [...], *unanimously reached the following:*

FINAL AWARD

1. *The Respondent shall pay the amount of EUR 697.926,51 to the Claimant within 30 days (principal claim).*

2. *The Respondent shall pay the amount of EUR 3.626,93 (capitalized default interest for late payments).*

3. *The Respondent shall pay the default interests at a rate of the 12-month EURIBOR interest rate, effective in the month when the respective invoice became due + 2 %*

   - *from the amount of EUR 14.044,14 for the period between January 20, 2011 until January 31, 2012;*
   - *from the amount of EUR 28.110,66 for the period between January 21, 2011 until January 31, 2012;*
   - *from the amount of EUR 25.182,90 for the period between January 21, 2011 until March 27, 2012;*
   - *from the amount of EUR 2.927,76 for the period between January 21, 2011 until May 21, 2012;*
   - *from the amount of EUR 15.232,44 for the period between February 1, 2011 until May 21, 2012;*
   - *from the amount of EUR 85,56 for the period between February 1, 2011 until July 25, 2012;*
   - *from the amount of EUR 16.378,20 for the period between January 24, 2011 until July 25, 2012;*
   - *from the amount of EUR 15.827,40 for the period between January 24, 2011 until September 26, 2012;*
   - *from the amount of EUR 7.857,00 for the period between January 24, 2011 until November 19, 2012;*
   - *from the amount of EUR 7.905,60 for the period between January 24, 2011 until December 18, 2012;*
   - *from the amount of EUR 9.112,50 for the period between January 24, 2011 until January 15, 2013;*
   - *from the amount of EUR 8.035,20 for the period between January 24, 2011 until February 26, 2013;*
   - *from the amount of EUR 52.618,53 for the period between January 26, 2011 until actual repayment;*
   - *from the amount of EUR 13.841,28 for the period between January 26, 2011 until actual repayment;*
   - *from the amount of EUR 55.279,68 for the period between January 28, 2011 until actual repayment;*
   - *from the amount of EUR 55.167,54 for the period between January 28, 2011 until actual repayment;*
   - *from the amount of EUR 55.413,18 for the period between January 31, 2011 until actual repayment;*
   - *from the amount of EUR 13.803,90 for the period between January 31, 2011 until actual repayment;*
   - *from the amount of EUR 23.082,00 for the period between February 1, 2011 until actual repayment;*
   - *from the amount of EUR 54.222,00 for the period between February 2, 2011 until actual repayment;*
   - *from the amount of EUR 61.764,00 for the period between February 3, 2011 until actual repayment;*

- *from the amount of EUR 76.782,00 for the period between February 4, 2011 until actual repayment;*
- *from the amount of EUR 46.194,00 for the period between February 7, 2011 until actual repayment;*
- *from the amount of EUR 14.375,20 for the period between February 7, 2011 until actual repayment;*
- *from the amount of EUR 21.431,20 for the period between February 7, 2011 until actual repayment;*
- *from the amount of EUR 23.088,00 for the period between February 8, 2011 until actual repayment;*
- *from the amount of EUR 15.555,80 for the period between February 8, 2011 until actual repayment;*
- *from the amount of EUR 21.655,20 for the period between February 9, 2011 until actual repayment;*
- *from the amount of EUR 28.946,40 for the period between February 10, 2011 until actual repayment;*
- *from the amount of EUR 14.414,40 for the period between February 11, 2011 until actual repayment;*
- *from the amount of EUR 21.649,60 for the period between February 14, 2011 until actual repayment;*
- *from the amount of EUR 21.873,60 for the period between February 14, 2011 until actual repayment;*
- *from the amount of EUR 1.694,00 for the period between May 12, 2011 until actual repayment;*
- *from the amount of EUR 2.076,40 for the period between June 24, 2011 until actual repayment;*
- *from the amount of EUR 2.372,20 for the period between June 27, 2011 until actual repayment;*
- *from the amount of EUR 626,40 for the period between June 30, 2011 until actual repayment.*

4. *The Respondent shall reimburse the Claimant costs of the arbitration procedure in the amount of EUR 26.996,54.*

5. *The Respondent shall reimburse the Claimant the attorney's fees in the amount of EUR 15.000,00.*

6. *As far as the main and lateral claims exceed amounts referred to in the paragraph 1 to 5, the claim is dismissed.*

REASONS:

1. Claims and Defenses

The claimant is a company, organized and existing under the laws of Hungary and seated in Hungary. In the claim, it alleges to have concluded with the respondent supply agreements on the delivery of fertilizers [...], *where the claimant was the supplier and the respondent was the buyer. The conclusion of supply agreements occurred by virtue of the respondent sending the orders by fax and the claimant confirming it in the same manner. The respondent was obliged to pay for the* [...] *within either 15 or 30 days depending on the payment term, duly in accordance with issued invoices. Starting from January 2011 the respondent started omitting or postponing payments, so due payment notices have been sent. As the respondent informed the claimant of its liquidity difficulties, however also of the pressing need of continuous supply, parties agreed to negotiate rearrangement of debt and payment in installments. The respondent indeed sent a proposal for such a rearrangement of debt. However this offer was, allegedly, not accepted by the claimant. Instead, the claimant argues that it sent a counter-proposal which substantially differed from*

the original proposal as it included, inter alia, provisions concerning liability to pay default interest. After this unsuccessful attempt the respondent paid only first two installments.

Certain amount of debt has subsequently extinguished by virtue of set-off (compensation) on the basis of counter-deliveries of the respondent to the claimant. The claimant argues that it sent compensation letters on every such occasion. From these letters it can be, pursuant to the claimant, seen that invoices issued by him (receivables) have been compensated by the invoices issued by the respondent (payables). The claimant also refers to the respondent's letter dated January 5, 2012, which includes an up-dated status of all receivables and payables. According to this schedule the respondent's payables amount to EUR 850.295,14. The claimant argues that in this manner the respondent (at that time) unambiguously recognized its debt in the (then) given amount. The outstanding debt in the time of filing of the claim was, pursuant to the claimant's calculation, EUR 806.385,51. In its petition dated August 7, 2012 the claimant partially withdrew the claim (due to further compensations) to the amount of EUR 763.042,41. On account on further compensations, the claimant further relinquished a part of the principal claim, hence reducing it to EUR 697.926,51. As a legal ground the claimant relies on the provisions of the contract (the General Conditions of Sale). In addition UN Convention on Contracts for the International Sale of Goods (done in Vienna on April 11, 1980) – hereinafter: CISG is applicable and otherwise the Hungarian law (in accordance with Art. 4/1 (a) of the Rome I Regulation.

As from the moment of (allegedly) unsuccessful negotiations between the parties concerning rescheduling of the debt, the claimant only delivered [...] *to the respondent subject to prior payment. However the claimant also asserts that it has in this respect always overdelivered, which is, allegedly, evident from the corresponding documents. Pursuant to the contracts No.* [...], [...], [...] *and* [...] *the amount of overdeliveries was (in kg) 24660. The difference between the advance payment and the price of the total shipment is the basis of the overdelivery claim (EUR 6.767,00).*

The claimant also invokes the default interest both for the payments (set-offs) which were effected in default as well as for payments which are still outstanding.

The respondent is a company organized and existing under the laws of Slovenia, seated in Slovenia. In its defense plea the respondent confirmed that there was a long lasting and well established trade relationship between them regarding the supply of [...] *and the claimant admitted that there were outstanding debts as of 2011. This was due to economic depression and serious liquidity problems of the respondent. The respondent argues that it does endeavour to repay its obligations towards the claimant as well as other potential creditors. The respondent argues that for that reason precisely, the parties have concluded a written agreement as of 31 March 2011 and later oral agreements concerning the postponement of payments and payment in installments and free of interest. It further argued that the existence of such an agreement has conclusively acknowledged by the claimant also in this arbitration as the claim refers to "respondent (having) paid the amounts of the agreed installments". In such manner the parties have agreed on the modality of existing obligations, whereby they caused the existing obligations to cease and to enter new obligations in their place. The respondent maintains that the claim has thus not yet become due and is therefore requested prematurely and unfoundedly. Concerning subsequent deliveries (made after the alleged agreement), the respondent has, allegedly, always paid in advance so no outstanding debts exist in this regard. It also invoked certain set-offs - compensation (on account of counter-deliveries), which were supposedly not yet included in the claimant's calculation of the outstanding debts. As the respondent relies*

on the alleged agreement, it also contests the claim for default interest. The respondent also states that it has invited the claimant to repay the debt by virtue of converting claims to its share capital, but such negotiations have been halted.

2. Procedural issues

2.1 Nomination of the Arbitral Tribunal

Pursuant to the Art. 18/2 of the Rules of Arbitration of the Permanent Court of Arbitration attached to the Chamber of Commerce and Industry of Slovenia (hereinafter: the Rules) the claimant shall appoint an arbitrator in its statement of claim and the respondent shall appoint an arbitrator not later than in its statement of defense. In its statement of claim the claimant appointed [...] *(professor of law,* [...]**,** *Budapest, Hungary) as arbitrator. In its statement of defense, the respondent appointed* [...] *(attorney at law, Ljubljana, Slovenia) as arbitrator. Both arbitrators then agreed that* [...] *(professor of law, Ljubljana, Slovenia) is to be appointed as the chairman of the arbitral tribunal.*

No objections as to the composition of the arbitral tribunal were made in this arbitration.

2.2 Arbitration agreement

The claimant invoked the arbitration agreement, included in the "General Conditions of Sale", which in Art. 10 states:

(...)

A. In case of dispute and/or actions that may be brought by the seller against the buyer the parties submit the judgment of the case to the exclusive competence of a Court of Arbitration residing in the capital/domicile of the buyer. For the proceedings the law of the buyer's country is authoritative.

(...)

In its statement of defense the respondent, while entering proceedings on the merits, did not raise a plea of lack of jurisdiction. As a result, the arbitration agreement conclusively needs to be deemed valid already for this reason alone (Art. 10/6 of the Slovenian Arbitration Act).

2.3 Seat and language of arbitration

In its procedural order No. 1 (dated July 13, 2012) the tribunal declared that the seat of Arbitration is Ljubljana, per arbitration clause. In the same order the tribunal decided that the language of arbitration would be English.

2.4 Conduct of proceedings

After having filed the claim (February 13, 2012) and the defense plea (March 23, 2012, translated in English on September 17, 2012), respectively, the tribunal invited the parties to make two further written

briefs each (procedural order No. 2). The claimant filed further briefs on August 7, 2012 and October 30, 2012, whereas the respondent filed a brief on October 15, 2012). In the aforementioned procedural order, the parties were instructed that no written submissions and pleadings shall be admitted at later stage, unless requested so by the Tribunal and that no new facts and evidence shall be submitted at later stages of procedure, unless the Tribunal is satisfied that the party has shown justified reasons for such submission. The tribunal also invited parties to exchange written witness or expert-witness statements. The claimant presented a written statement of [...] *(the manager of its Foreign Trade Department) on December 28, 2012.*

An oral hearing was, upon the request of both parties, held on February 21, 2013. Upon joint request of both parties the tribunal agreed to postpone the rendering of award until March 31, 2013 as the parties suggested that they would again try settlement negotiations.

In petition dated April 4, 2013 the claimant informed the tribunal that no settlement was reached. It asked for an extension of time limit (until April 30, 2013) in order to reduce the claim on account of some further compensations. As instructed by the tribunal the claimant filed a further brief on May 13, 2013 in which it reduced its principal claim. As instructed by the tribunal both parties also filed their claims for reimbursement of costs of arbitration (the claimant on May 13, 2013, the respondent on May 7, 2013). The tribunal enabled both parties to comment on respective claims for cost reimbursement. The respondent filed its comments on May 29, 2013. The claimant filed another brief (concerning on the respondent's comments as to the claimant's request concerning the costs of arbitration) on June 26, 2013. It was disregarded by the tribunal as it was clearly inadmissible since the tribunal previously instructed the parties that it would not accept any further briefs and submissions except as stated above.

During the whole course of proceedings the tribunal fully respected the parties' right to be heard. All written briefs of the parties were served upon the opponent and a right to respond and comment was guaranteed. Such approach however was not necessary in regard to the claimant's post-hearing (and post-failed settlement attempt) petition dated May 13, 2013 insofar as it only related to the reduction (partial relinquishment) of the principal claim (from 763.042,41 EUR to 697.926,51 EUR). Nevertheless this petition was served to the respondent as well. Reduction of the claim is not a procedural act, which could in any way adversely affect the respondent's interests or rights (it should be noted that during the oral hearing the respondent acknowledged the principal debt in amount of 704.999,20 EUR). Hence, although the claimant's final calculation of the principal claim relates on new compensations, previously not yet taken into account, this must, for the purposes of this arbitration, be considered solely as a reduction (partial relinquishment) of the principal claim, effected – with a permission of the tribunal – after the oral hearing. It does not amount to the tribunal's reopening of proceedings in order to establish the new amount of outstanding debt. Consequently this is also not a conclusive finding that no other counter-deliveries or payments were made by the respondent at a later stage. The oral hearing was the last opportunity of both parties to rely on (with permission of the tribunal, for justified reasons) new facts and evidence (to support their case) in this arbitration proceedings. As there was no subsequent opportunity to state new facts and evidence, the respondent is of course not precluded from asserting e.g. payments or compensations, effected in time after the oral hearing, in other proceedings, if applicable.

3. Assessment as to the merits

3.1 Applicable law

Article 32 of the Slovenian Arbitration Act (Zakon o arbitraži, Official Gazette of the Republic of Slovenia, No. 45/2008) determines:

> *("Rules applicable to substance of dispute")*
>
> *(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.* [...]
>
> *(2) Failing any designation by the parties, the arbitral tribunal shall apply the law which it considers appropriate.*
>
> *(3)* [...]
>
> *(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.*

In the given case the parties haven't designated law applicable to the substance. The Tribunal considers it appropriate to apply the UN Convention on Contracts for the International Sale of Goods (done in Vienna on April 11, 1980) insofar the merits relate to international sale of goods. The parties haven't excluded the application of the CISG and the states, where both parties as commercial companies are seated (Hungary, Slovenia), are parties to this Convention. For other issues the Tribunal considers it appropriate to apply the laws of Hungary. Claims and defenses are contractual in nature. The Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) is thus relevant. In general, it follows from Art. 4 of this Regulation that to the extent that the law applicable to the contract has not been chosen by the parties, the law governing the contract shall be the law of the country where the party, required to effect the characteristic performance, has habitual residence. In the given case, this is Hungary. The arbitral tribunal is not directly bound to apply the Rome I Regulation, it however considers the application of Hungarian law to be appropriate in this arbitration.

3.2 Main claim

3.2.1 The existence and amount of unsettled invoices

It has never been in dispute in this arbitration that there existed a business relationship between the claimant as a seller and the respondent as a buyer of [...] *and that as of early 2011 there were outstanding debts for accomplished deliveries, in accordance with the submitted invoices. The claimant has submitted extensive documentary evidence in support of his allegations as to the overall amount of debt and time, when invoices relating to that debt became due. In addition it has extensively commented on legal grounds of the claim, referring to contractual terms (General conditions of sale), the CISG and Hungarian law. It is however not necessary to examine the aforementioned evidence in detail and neither is it necessary to*

elaborate on legal grounds concerning the principal claim. This goes on account of the fact that during the oral hearing the respondent has explicitly stated that the principal debt of 704.999,20 EUR – in context of assessment of unsettled invoices - was not in dispute (Page 3 of the Record of the hearing dated February 21, 2013).

The tribunal therefore concludes that the principal claim in amount of 704.999,20 (relating to unsettled invoices) is admitted in this arbitration. In addition, the detailed schedule concerning the question, when parts of this overall amount originally became due, is not in dispute and the claimant's allegations in this regard are thus considered as true.

It should be noted that the claimant has after the oral hearing reduced its claim concerning the unsettled invoices for further EUR 65.115,90, bringing it to 691.159,51 (the whole principal of EUR 697.926,51 includes also the payment for "overdeliveries" in amount of EUR 6.767,00 – which is discussed separately). The calculation of this reduction goes on account on recent compensations – but only one of these has actually been asserted to be made after the oral hearing (EUR 8.035,00 on February 26, 2013). It can therefore be concluded that the respondent indeed validly acknowledged the debt (concerning the unsettled invoices), as asserted by the claimant.

Recognition of monetary debt is not regulated by CISG, so Hungarian substantive law is relevant in this regard. Pursuant to subsection (1) of Section 242 of Civil Code (which the claimant relied on in his pleadings) the recognition shall be deemed to be an acknowledgment of debt and it is a valid legal basis for the decision on this part of the principal claim.

3.2.2 The issue of overdeliveries

The principal claim includes also the claim for payment of overdeliveries. The claimant asserts that following the liquidity problems of the respondent, it still delivered the product, however only upon prior payment. Supposedly however, the quantity of goods actually delivered has always exceeded the quantity agreed and paid for – in overall amount of EUR 6.767,00. During the oral hearing in this arbitration the respondent explicitly acknowledged the debt for overdeliveries, so this part of the principal claim is not in dispute either. As above the recognition of debt is a valid legal ground (subsection (1) of Section 242 of Hungarian Civil Code) for the decision on this part of the principal claim.

3.2.3 The issue of alleged subsequent agreement on postponement of payment and waiver of the right to claim default interest

The respondent did not object the claimant's calculation relating to dates, when relevant invoices originally (initially) became due. This set of facts can thus be considered as admitted in this arbitration. The claimant's calculation is evident from the claimant's request for default interest and, substantially, from the Para. 3 of the tenor of this arbitral award.

Whereas not objecting to the time when relevant invoices originally became due, the respondent invoked a separate objection. It alleges that an agreement has been reached between the parties, pursuant to which the debt was rearranged. It was, allegedly, agreed that the debt would be paid in installments and that no default interest shall be due. On the other hand, the claimant contests this allegation. It stated that the

parties indeed engaged in negotiations and that the respondent sent to the claimant a proposal for such an agreement, signed by the authorized representative of the respondent. The claimant however asserts that this agreement was rejected and it has never been signed by the claimant. The claimant has rather sent a counter-proposal, which substantially differed from the original proposal (default interest, applicable law, forum for resolution of disputes) and should thus be considered as a rejection of the original proposal. This counter-proposal however was, allegedly, never accepted by the respondent. So, the claimant's position is that there was no agreement on the postponement of the respondent's payment obligations and on payment in installments).

The tribunal examined the submitted documentary evidence (the respondent's contract proposal dated March 31, 2011; e-mail of Mrs. [...] *to Mr.* [...] *of the same day, the claimant's counter-proposal dated April 13, 2011 and e-mail of Mr.* [...] *to Mrs.* [...] *of the same day).*

Based on this evidence it came to the following conclusions: It is beyond doubt that the respondent's contract proposal was signed only by his authorized representative, but remained unsigned by the claimant. It was referred to as a "contract proposal" by the respondent's staff. It is also beyond doubt that the claimant sent to the respondent a counter-proposal, which substantially differs from the original proposal. Foremost, it includes the obligation to pay default interest. In addition, it provides for different applicable law (Hungarian instead of Swiss) and for different dispute resolution mechanism (Veszprem Town Court instead of ICC Arbitration) as the original proposal.

It is thus necessary to conclude that the respondent's proposal was unambiguously rejected by the claimant and that it never became a contract. Another question however is whether the claimant's counter-proposal, which must be construed as a new offer, was then accepted by the respondent. This counter-proposal namely also provides for payment in installments. As the respondent has indeed paid the first two of them, the question may be put whether in such manner the respondent has tacitly (by virtue of implied will) accepted the claimant's counter-proposal. This conclusion might be quite plausible especially as there is evidence in the file that even the claimant has subsequently referred to these payments in installments as "based on the agreement". However the possibility for such a conclusion was explicitly rejected by the respondent in the oral hearing. The respondent argued that he paid the first two installments pursuant to his original proposal and not pursuant to the claimant's counter-proposal (page 3 and 4 of the Record of oral hearing). As the respondent does not assert a fact that the claimant's counter-proposal was accepted (moreover: it denies it and insists that the agreement which was reached in the case was based on his original proposal), there is no basis for the tribunal further to examine this matter.

In conclusion, neither the respondent's proposal nor the claimant's counter-proposal for postponement of payments in installments were accepted, thus there was no agreement to alter the original contractual relationship and obligations deriving from it.

The respondent also alleged that there were subsequent oral agreements between the parties concerning the postponement of payment obligations. It however offered no evidence in this regard, so this factual assertion cannot be considered proven.

3.3 Lateral claims

3.3.1 Default interest (Para. 3 of the Tenor)

Unlike the principal claim, the claim for default interest is in dispute in this arbitration. The respondent denies the obligation to pay any default interest. This is in line with his position that there was an agreement concluded subsequently between the parties, which – beside the postponement of payments and payments in installments – does not include an obligation to pay any default interest. However, as explained above, this was merely an agreement-proposal which has not been accepted by the other party. Hence, the original contractual relationship remains in force and concerning the latter, the respondent did not state any objections as to liability for default interest. Art. 78 of the CISG provides that in case a party fails to pay the price or any other sum that is in arrears the other party is entitled to interest on it. The claim for default interest is thus well founded in substantive law.

The claimant presented a detailed schedule, referring to invoices for particular deliveries and containing data, when these invoices (and thus payments) became due. The respondent has not objected to the claimant's calculation as to when originally the relevant payments for particular deliveries became due (on basis of presented invoices). In this regard as well, he merely relied on the alleged subsequent agreement, which supposedly provided for postponement of payments (and thus postponement of default). However, as explained above, this "agreement" has never become binding upon the parties, so it remains relevant when obligations became due in original contractual relationship. As in this regard the respondent has not contested the claimant's calculation, the latter must be considered as admitted.

Neither the obligation to pay default interest nor the time, when default interest starts running for parts of the overall amount of the outstanding debt can be questioned any more. The only remaining issue in this regard remains the calculation of the applicable interest rate. The claimant claims the interest rate of 12 months EURIBOR + 2 %. The respondent (while denying obligation to pay any default interest) also contests the applicable interest rate should he be found liable to pay default interest. He would be willing to accept the rate of 12 months EURIBOR + 0,5 %. The CISG does not include provisions concerning the default interest rate. Hungarian law is not an immediate reference either as it provides only for the rate of default interest for Hungarian Forint (central bank base rate + 7%), whereas the present case relates to the debt in Euro. The claimant asserts that the Hungarian practice usually applies the above calculation for such cases. As there is no immediate legal ground in applicable Hungarian law for default interest rate for debts in EURO, the tribunal is of the opinion that applying a standard of a reasonable default interest rate, in light of general purpose of this legal instrument, would be adequate. The tribunal finds that the claimed interest rate of 12 months EURIBOR (which, in the relevant period is around 1,5-1,7%) + 2% is reasonable. In this regard it might be relevant to recall that the applicable default interest rate pursuant to the Slovenian law would be much higher (between 8-9% in the relevant period).

3.3.2 Default interest for the part of debt, extinguished by virtue of late compensations (between July 25, 2012 – February 26, 2013).

As explained above, the claimant (in its petition, dated May 13, 2013) partially relinquished its principal claim on the basis of acknowledgment of counter-deliveries and the set-off (compensation) on that basis. As the cumulative amount of this acknowledged value of counter-deliveries was EUR 65.115,90, this was set-off against the oldest outstanding unsettled invoice – relating to the Contract No. 42021097, due January 24, 2011, in amount of 68.421,42. Partial repayments (as acknowledged by the claimant to its

own burden) were made on 25.07.2012 (EUR 16.378,20), 26.09.2012 (EUR 15.827,40), 19.11.2012 (EUR 7.857,00), 18.12.2012 (EUR 7.905,60), 15.01.2013 (EUR 9.112,50) and 26.2.2013 (EUR 8.035,20).

As explained above, there was no obstacle in accepting the reduction of the principal claim after the completion of oral hearing – as this only goes to the burden of the claimant and to the benefit of the respondent. The reduction of principal claim however also had an impact on the claim for default interest. Logically, this should be reduced as well (referring to the final date of actual set-off and not "until the actual repayment"). In this regard and concerning the relevant amount, the calculation of the claimant – reflected also in the claim for default interest - was the following:

- *from the amount of EUR 68.421,42 for the period between January 24, 2011 until July 25, 2012 (EUR 3.728,10,-);*
- *from the amount of EUR 52.128,78 for the period between January 24, 2011 until September 26, 2012 (EUR 3.167,49,-);*
- *from the amount of EUR 36.301,38 for the period between January 24, 2011 until November 19, 2012 (EUR 2.401,04,-);*
- *from the amount of EUR 28.444,38 for the period between January 24, 2011 until December 18, 2012 (EUR 1.963,53,-);*
- *from the amount of EUR 20.538,78 for the period between January 24, 2011 until January 15, 2013 (EUR 1.475,09,-);*
- *from the amount of EUR 11.426,28 for the period between January 24, 2011 until February 26, 2013 (EUR 868,43,-).*

However, this calculation is clearly wrong. Since the whole amount (EUR 68.421,00) was due on January 24, 2011 and the claimant claims the default interest for this whole amount running from January 24, 2011 until the first partial extinguishment by virtue of set-off (16.378,20 EUR on July 25, 2012), the further default interest for the remaining debt from that moment on (EUR 52.128,78) cannot again be claimed from January 24, 2011 but only from July 24, 2012. It cannot be disregarded that the amount of 52.128,78 EUR is already included in the overall amount of 68.421,42 – for which the default interest has already been claimed from the moment, when the debt became due. The same finding applies also for claim for default interest for all remaining outstanding debts after partial set-offs were effected. In the described manner the claimant actually increased the default interest claim relating to the principal of 68.421,42 EUR. Increasing the claim amounts to its amendment and must thus be disregarded already for the reason that it is belated. Pursuant to Art. 32 of the Rules amendment of the claim can be accepted only if it is effected before the completion of oral hearing. For this reason the tribunal disregarded this part of the amended default interest claim and proceeded with the claim as it was framed before – that is default interest from the amount of EUR 68.421,00 from January 24 until actual repayment. However as the claimant itself acknowledged that this amount has nearly completely been repaid by virtue of partial set-offs, effected between July 25, 2012 - February 26, 2013 (see the frame above), the tribunal consequently acknowledged that when determining default interest from the relevant part of the principal claim (Para. 3, indent 7-13 of the Tenor of this Award).

3.3.3 Discrepancy between the principal claimed and the calculation of the principal, from which the default interest is sought for not-yet accomplished repayments

The principal claim, claimed and accepted in this arbitration, is EUR 697.926,51. Consequently, the overall amount of principal, from which the default interest is claimed until the actual repayment, which has not yet been accomplished cannot be higher than this amount. The sum of claimant's request for default interest for not yet accomplished repayments in this arbitration however relates to the principal of EUR 703.733,10, thus making the difference of EUR 5.806,59. Although this is rather a minor discrepancy, possibly a result of a simple miscalculation, it cannot be disregarded. The miscalculation should be attributed to the claimant. As it cannot exactly be determined in which part of the overall claim it is based, the tribunal decided to deduct the interest from the two oldest outstanding invoices. From the invoice No. 90149494 (due January 24, 2011) there was still an outstanding debt of EUR 3.391,08. The remaining 2.115,51 is to be deducted from the interest claim relating to the amount of 55.034,04 (due January 26, 2011), thus reducing the principal, from which the default interest is due, to EUR 52.918,53 (Para 3, indent 14 of the Tenor of this Award).

3.3.4 Capitalized default interest for the late payments in installments (Para. 2 of the Tenor)

The claimant also requests the payment of a capitalized default interest for late payments (two installments paid on May 4, 2011 and June 1, 2011 in overall amount of EUR 134.663,62). As these were relating to obligations, which became due between May 4, 2011 and June 1, 2011, the respondent is obliged to pay the default interest for this part as well (EUR 3626,93 – Para. 2 of the tenor of this award). As explained above, the respondent's argument that an agreement was subsequently reached and thus these payments in two installments were not belated, was rejected. The respondent however did not object the claimant's calculation concerning time when the original invoices became due, time when the installments were paid and what the default interest rate, initially applicable to relevant invoices, was, it is not necessary to give more extensive reasons concerning this part of the claim. Art. 78 of the CISG provides that in case a party fails to pay the price or any other sum that is in arrears the other party is entitled to interest on it. The claim for default interest is thus well founded in substantive law.

3.3.5 Costs (Para. 4 and 5 of the Tenor)

Pursuant to Article 39 of the Slovenian Arbitration Act and unless the parties have agreed otherwise, the arbitration tribunal shall upon a request of party allocate costs in the final award. It shall decide, which party must, and to what amount, reimburse costs of other party, including her expenses of legal representation and of arbitrator's fees. Pursuant to Art. 44 of the Rules, the arbitral tribunal shall determine in the arbitral award, which party shall reimburse to the other party the costs of arbitral proceedings and to what extent, taking into account the respective success of the parties in the proceedings and other relevant circumstances. The main rule is that the costs follow the event: the prevailing party has a right to have costs reimbursed from the losing party. In the given case the claimant prevailed entirely with its principal claim as well as practically entirely with the lateral claims, True, the claim in this arbitration initially related to a higher amount in controversy (EUR 806.385,51 + EUR 3.626,93) and was subsequently reduced to EUR 697.926,51 (+ EUR 3.626,93). But even if calculating the degree of success of the parties on the basis of initial claim, the degree of success of the respondent would be negligible and can thus be disregarded for the purpose of distribution of costs. Therefore, the respondent must reimburse relevant costs

of the claimant, properly claimed. These costs include the claimant's advance payment for arbitrators' fees and advance on costs (EUR 21.996,54). Besides, the claimant is entitled to have reimbursed the costs for the representation through an attorney of law (in casu: a law firm). At deciding which costs are to be refunded, the court takes into account only the expenses which were necessary for the arbitration.

The claimant requests the reimbursement of costs for legal representation in the amount of EUR 24.191,56. This, allegedly, corresponds to 3% of the amount in controversy in this arbitration and, allegedly, the Hungarian law (Decree No. 32/2003 of the Department of Justice) and practice provides for such a method of calculation of reimbursable attorneys' fees. The claimant also suggests that what should be taken into account is also his preparatory work for submitting any and all relevant documents and evidence and drafting comprehensive petitions and the effort invested in studying Slovenian procedural law.

The respondent contested the claimant's request for the reimbursement of costs, relating to legal representation. It argues that the Slovenian law is applicable and thus Art. 4 of the Attorney's Fee Act (Zakon o odvetniški tarifi, Official Gazette of the Republic of Slovenia, No. 67/2008) should be complied with. It suggests that the tribunal should dismiss the claim for reimbursement of costs of legal representation insofar it is based on the "Hungarian legal practice".

The (Slovenian) attorneys' tariff, referred to by the respondent, binds Slovenian courts of law and other organs ("organi"), when deciding on reimbursement of attorneys' fees (Art. 4/3). Arbitration however is not an "organ". Arbitration is a private mechanism, unlike the procedure in courts of law. Legal representation is not restricted to attorneys, authorized to practice in jurisdiction of the seat of arbitration, again unlike in courts of law. It is thus understandable that arbitration tribunal is not bound by national Attorneys' tariff (applicable in jurisdiction, where the seat of arbitration is situated – in *casu: Slovenia) when calculating reimbursable attorneys' fees (of course, neither is the Hungarian lawyers' tariff binding upon the tribunal in this case). This finding would apply also in case if the party, represented by the Slovenian attorney would prevail in this case. In such case as well, the tribunal would not be bound by the Slovenian lawyers' tariff when determining reimbursable attorneys' fees. Pursuant to Art. 4 of the Slovenian Attorney's fee the lawyer may agree with his client to a remuneration which departs from the Attorney's fee, however such an agreement must be disregarded by the court of law, when deciding upon the reimbursement of costs claim. As explained however, this law does not bind arbitral tribunal (and certainly does not form a part of a public policy) and there is no reason why the arbitral tribunal could not acknowledge the fee and method of its calculation agreed between the lawyer and the client – as long as the amount of fee remains reasonable and justifiable.*

What the tribunal thus needs to assess is what are reasonable attorneys' fees and costs in the case and can thus be made reimbursable to the burden of the losing party in arbitration. In this context, the respective lawyers' tariffs may merely serve as an auxiliary indicator and so does the general economic environment in relevant countries (in casu: Hungary and Slovenia). In the given case, the amount of controversy was (in the time of rendering of the award) cca. 700.000,00 EUR. The preparation of the case required a diligent and thorough preparation of the claimant's attorneys. The preparation of the case binder must have requested a substantial amount of time and so did the legal analysis – which is as well duly included and elaborated in the claim and subsequent pleadings. True, the respondent has admitted the liability for principal claim, but not earlier than in the oral hearing, thus after nearly all the preparation for this arbitration has already been accomplished. Moreover, the claimant's attorney needed to attend the oral

hearing in Ljubljana, whereby it should be noted that no separate costs (e.g. travel costs and per diem) were claimed in that regard. Neither did they claim the VAT on the top of the fee. Taking into account all the aforementioned elements, the tribunal finds that reasonable reimbursable claimant's attorneys' fees and costs amount to EUR 15.000,00.

Ljubljana, July 1, 2013

For the Arbitral tribunal
Chairman
[...]
_____

Co-arbitrator
[...]
_____

Co-arbitrator
[...]
_____

Joint UNCITRAL-LAC Conference on Dispute Settlement, Ljubljana, 24 March 2015

Conference Report

Ying Zhao, UNCITRAL

The Joint UNCITRAL-LAC conference discussions commenced after welcome speeches addressed by **Dr. Plaustajner** representing the LAC and **Mr. Lee** from the UNCITRAL Secretariat.

The panel for the first session, consisted of proactive arbitration practitioners from various legal backgrounds, discussed the identified trends of UNCITRAL Notes on Organizing Arbitral Proceedings. As a regular observer at UNCITRAL sessions, **Mr. Greenberg** began the discussion by presenting salient features of UNCITRAL revision project, ranging from the acceptance of electronic means of sending documents to the increased complexity in the context of a multi-party arbitration, such as the appointment of arbitrators.

Dr. Menard, together with **Mr. Murphy**, followed up the topic by giving insights on the choice of language and the place of arbitration. Remarks were made not only on legal considerations influencing the choice of the seat of arbitration, like local court's intervention on constitution of the tribunal, but also on practical considerations such as client's perception of seat as fair and appropriate. Based on experience, they further stressed factors, in particular, the language of evidence and witness, to be taken into consideration when it comes to choosing the language of arbitration.

Mr. Vesel then set out a roadmap for what to address and when in case management conferences, explaining advices from UNCITRAL Notes proposals and ICC Commission. In conclusion, he suggested that the overall scope, rules and principals should be discussed in the beginning, whereas cost submission should be considered at the post-hearing conference.

Lastly, **Dr. Keller** drew participant's attention to the role that an arbitral tribunal plays in relation to settlement. He noted both the UNCITRAL perspective and the Austrian solution on the matter. Although the trend is that, an arbitral tribunal – under appropriate circumstances and with the express consent of both parties – may raise the possibility of a settlement by guiding and assisting parties in the process, "concerns such as preliminary views on merits of the case were hard to overlook in this context", indicated Dr. Keller.

After a short coffee break, the conference continued by moving towards to the panel on the interpretation and application of the New York Convention. A detailed introduction was firstly made, by **Ms. Schuch** and **Ms. Zhao**, on the UNCITRAL Secretariat Guide on the New York Convention, followed by practical researching tips on the relevant online platform (www.newyorkconvention1985.org). Positive reflections towards such a reference tool were noticed among panelists and participants.

In the same vein, **Dr. Wolff** focused his presentation on main trends embodied in the UNCITRAL Secretariat Guide. At the very beginning, he underlined that the trends should be more precisely conceived as "diverted solutions" in connection with the interpretation of the New York Convention, while he noted with pleasure an undeniable pre-recognition trend. Then, he went on illustrating identified features in interpreting the New York Convention, article by article.

Dr. Shaughnessy, taking the perspective of soft law as instruments of interpretation of international conventions, revealed the complexity of the international commercial arbitration by describing it vividly as "Alice's wonderland". In connection with the complexity, she explained that it is hard to define what can be regarded as soft law in the field of international commercial arbitration. Moreover, she urged that counsels are better placed to help judges to understand soft law instruments in applying the New York Convention.

The panel ended with remarks of **Ms. Kirby's** inquisition on a "transnational public policy". According to Ms. Kirby, despite the fact that more cases are showing courts' inclination on making reference to other jurisdictions in interpreting "public policy", it is yet not possible to identify a transnational trend of public policy. It can be explained not only by different legal systems on which the practice is based, but also by contradictory application spotted in Russian cases, in defending the very national interests.

The last panel addressed issues in Investor-State arbitration, covering current proceedings and outlooks for possible reforms. The session was kicked off by **Mr. Gaukrodger's** presentation on reflective loss and concurrent proceedings in investment arbitration. In the following 30 minutes, he analysed difficulties such as policy contexts, procedural considerations and existence of the reflective loss principle, found in different patterns of claims.

Dr. Karl from UNCTAD then joint the penal by teleconference. In his presentation, Dr. Karl shared with participants latest statistics under UNCTAD surveys and furthermore remarked the increased transparency in ISDS.

Standing from an NGO point of view, **Mr. Zhang** continued the session by thoroughly interpreting UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. Mr. Zhang highly appraised UNCITRAL's effort in promoting transparency in aspects of submission of documents and public hearings, but he suggested in the end that an expanded scope of application should be envisaged as for future reform.

Last but not least, **Ms. Nappert** and **Professor Rooney**, provided participants with update information on EU debates on ISDS. Ms. Nappert first introduced CETA's innovations such as including mediation and potential appellate mechanism, then she pointed out that confusing provisions still exist in CETA, for example Article X.20. Professor Rooney, taking an US perspective, highlighted the major criticisms on the ISDS by addressing the potential impact of ISDS rulings on the ability of governments to regulate.

The Ljubljana Willem C. Vis Pre-Moot, 25 March 2015

An Insight by a Participating Team (University of Salzburg)

Tobias Kunz

Tobias Kunz (Mag.iur., BA) studied law and political science in Salzburg. Currently he works as a research assistant at the Private Law Department of the University of Salzburg, where he is mainly concerned with national and international civil procedure law. At the same time, he is a doctoral student. This year he acted as a coach in the Vis Moot for the first time.

Since 1993/94 the annual Willem C. Vis International Commercial Arbitration Moot has been offering students a unique opportunity to expand their knowledge in international arbitration and commercial law. Therefore, every year – shortly before Easter – students from all over the world meet in Vienna to dispute the annual Problem. Each year the Problem involves two parties located in contracting states of the United Nations Convention on Contracts for the International Sale of Goods (CISG). Thus, both, the CISG and other internationally widespread legal instruments – such as the UNCITRAL Model Law on International Commercial Arbitration – are applicable.

This year's Problem[1] dealt with a coltan purchase contract concluded by Claimant (buyer) and Respondent (seller) and "endorsed" by Claimant's mother company. On the merits of the case participating students had to elaborate whether Respondent avoided the purchase contract rightfully. The basis for this evaluation is the CISG, especially Article 25 – in connection with Article 64 –, which determines the requirements for a fundamental breach. The procedural issues of the case referred to the questions whether an order of the Emergency Arbitrator should be lifted and whether the Tribunal has jurisdiction over the parent company of Claimant. Both subjects were *inter alia* governed by the ICC Rules 2012. The main discussions on the procedural issues were whether the parties effectively opted out of the Emergency Arbitrator's provisions and whether Claimant's mother company was bound by the arbitration agreement by its "endorsement". However, there is only one case known in which the term "endorsement" has been used.[2] Alternatively, the parent company could be bound by the Groups of Companies doctrine or by good faith considerations.

In order to allow students to practice their pleadings for the final competition in Vienna, many Pre-Moots have been established all over the world. On March 25th, 2015 – three days before the start of the Moot Court in Vienna – the Ljubljana Willem C. Vis Pre-Moot took place. On the evening before most of the teams and arbitrators met at the Opera Bar for a pleasant welcome meeting. The Pre-Moot in Ljubljana provided a great opportunity to finally prepare for Vienna. Each team pleaded three times a day. Accordingly, there were three opportunities for evaluating arguments and getting feedback for the performance from professional arbitrators, who were mainly practitioners working in the field of international arbitration day by day. Additionally, the Pre-Moot offered an opportunity to meet people from all over the world, since teams and arbitrators from four continents – Asia, North and South America and Europe – participated in the Ljubljana Willem C. Vis Pre-Moot. Last but not least the Pre-Moot setting at the Ljubljana Arbitration Centre at the Slovenian Chamber of Commerce and Industry contributed to another great experience.

In conclusion, the Ljubljana Willem C. Vis Pre-Moot was excellently organised and provided a perfect opportunity for the final practice before the Moot Court in Vienna as well as a pleasant time for everyone involved in the Pre-Moot. And this is not only our opinion as the fortunate winning team, but was also "endorsed" by other participating teams and arbitrators. The success of our moot-team from Salzburg was even awarded with a current edition of *Gary Born's International Commercial Arbitration (2014)*.

On March 25th, 2015 – three days before the start of the Moot Court in Vienna – the Ljubljana Willem C. Vis Pre-Moot took place

The Pre-Moot in Ljubljana provided a great opportunity to finally prepare for Vienna

1 This year's Problem is available at https://vismoot.pace.edu/media/site/22nd-vis-moot/10NovCorrected22VisMootProblem.pdf (5 April 2015).

2 EWHC, *Stellar Shipping Co Llc v Hudson Shipping Lines*, Judgement of 18 November 2010, Case No. 2010-946, available at http://www.bailii.org/ew/cases/EWHC/QB/2010/2985.html (9 April 2015).

IV. državno tekmovanje študentov prava – Prav(n)a rešitev

Neli Okretič

Neli Okretič je diplomirala *cum laude* na Pravni fakulteti Univerze v Ljubljani, trenutno pa obiskuje drugostopenjski magistrski študijski program. V okviru Ženevskega kluba sodeluje predvsem pri organizaciji državnega študentskega tekmovanja Prav(n)a rešitev in strokovnega seminarja Pravo in Startupi. Ob študiju se je udeleževala različnih tekmovanj in seminarjev, praktične izkušnje pa je pridobila v odvetniški pisarni in občinski pravni službi. Je soavtorica članka Arbiter za nujne primere po novih Ljubljanskih arbitražnih pravilih. V prihodnosti se želi usmeriti predvsem na področje gospodarskega prava.

Teoria sine praxis, sicut rota sine axis.[1] S temi besedami se je začelo IV. državno tekmovanje Prav(n)a rešitev, ki je potekalo 27. in 28. februarja 2015 na Pravni fakulteti v Ljubljani in Gospodarski zbornici Slovenije[2]. Gre za tekmovanje študentov višjih letnikov pravnih fakultet iz Slovenije, na katerem se tekmovalci srečajo s pravnimi problemi in pokažejo svoje znanje pred uglednimi odvetniškimi pisarnami. S tekmovanjem se želi študentom omogočiti, da že tekom študija pridobijo nekaj praktičnih izkušenj, uporabijo pridobljeno teoretično znanje in tako naredijo prve korake v karieri.

S tekmovanjem se želi študentom omogočiti, da že tekom študija pridobijo nekaj praktičnih izkušenj, uporabijo pridobljeno teoretično znanje in tako naredijo prve korake v karieri

Idejo, iz katere se je razvilo tekmovanje Prav(n)a rešitev, sta dobili bivši študentki ljubljanske Pravne fakultete, Urša Horvat in Adriana Glažar, ki sta želeli med študente vpeljati tudi praktično znanje in tako vzpostaviti most med teorijo in prakso. Glede na letošnjo rekordno udeležbo na tekmovanju, je most trdno postavljen.

Organizator tekmovanja je Ženevski klub, vsakokratni organizacijski odbor pa skrbi za dejansko realizacijo. V letošnjem letu s(m)o bili člani organizacijskega odbora Neli Okretič, Manuela Hervatich, Anže Skodlar in Lenart Kmetič; v zadnji fazi pa nam je na pomoč priskočil tudi Luka Pregelj.

Letošnje tekmovanje je bilo med vsemi dosedanjimi najuspešnejše, saj se je nanj prijavilo skoraj 120 študentov iz vseh treh pravnih fakultet, z nami pa je sodelovalo kar pet uglednih odvetniških pisarn in sicer Odvetniki Šelih & partnerji, o.p., d.o.o., Odvetniška družba Ilić o.p., d.o.o., Odvetniška družba Rojs, Peljhan, Prelesnik & partnerji o.p., d.o.o., Odvetniška pisarna Jadek & Pensa d.o.o. in Odvetniška pisarna Ulčar & partnerji d.o.o.

Zaradi izjemne udeležbe je bilo izpeljano predtekmovanje, ki je bilo sestavljeno iz krajših primerov, podanih s strani odvetniških pisarn. S tem se je omogočilo stik s praktičnimi primeri iz odvetniške prakse tudi tekmovalcem, ki se finala niso udeležili.

V finalni del tekmovanja se je uvrstilo petnajst ekip, na vsako odvetniško pisarno tri ekipe, sestavljene iz treh tekmovalcev. Vsaka ekipa je dobila tekmovalni primer odvetniške pisarne, kateri je bila naključno dodeljena. Tekmovalci so morali oddati pisni memorandum, kateremu so sledili ustni zagovori pred tričlansko strokovno komisijo iz vrst odvetnikov. Najuspešnejši tekmovalci so si prislužili zavidljivo nagrado – enomesečno plačano prakso v odvetniški pisarni, katere primer so reševali.

1 "Teorija brez prakse je kot voz brez kolesa." (Latinski pregovor).

2 Zahvala gre Stalni arbitraži pri GZS, še posebej g. Marku Djinoviću, za pomoč pri pridobitvi prostorov.

Tekmovalni primeri[3]

Tekmovalci so se ukvarjali z aktualnimi problemi, katere rešujejo odvetniške pisarne pri vsakodnevnem delu. Rešitve niso bile enostavne, terjale so veliko pravnega znanja in kreativnosti. Na splošno so bile odvetniške pisarne zelo zadovoljne z dobljenimi izdelki in ustnimi zagovori, saj so tekmovalci pokazali svoj potencial.

Odvetniška družba Ilić o.p., d.o.o. je za tekmovanje pripravila simulacijo sodnega spora, ki je temeljil na primeru iz prakse pisarne, in je vključeval vprašanja gospodarskega statusnega, obligacijskega ter civilnega procesnega prava. Ekipe so morale pripraviti odgovor na tožbo, s katero je tožnik od njihove stranke zahteval sklenitev glavne kupoprodajne pogodbe za nakup poslovnih deležev v družbi. Posebnost primera sta bili med pravdnima strankama sklenjeni predpogodba o nakupu poslovnih deležev in s strani tožnika neizpolnjena posojilna pogodba, na podlagi katere se je tožnik tožencu zavezal posoditi denar za (začasen) nakup poslovnih deležev. Tričlanska komisija je bila pri pregledu odgovorov na tožbo tekmovalcev pozorna predvsem na vključitev najmočnejših argumentov obrambe. Tekmovalci so bili že v samih navodilih za reševanje primera napoteni na analizo izpolnitve pogojev za prenos poslovnih deležev, morebitnega obstoja predkupne pravice na poslovnih deležih, vpliva neizpolnitve obveznosti iz posojilne pogodbe na utemeljenost tožbenega zahtevka ter pravil obligacijskega zakonika glede veljavnosti predpogodb in pogodb.

Komisija je bila izredno pozitivno presenečena nad vsemi odgovori na tožbo, ki bi bili dovolj kvalitetni za uporabo v resničnem sodnem postopku.

Tekmovalni primer, podan s strani **Odvetniške pisarne Jadek & Pensa d.o.o.** je obravnaval povečanje osnovnega kapitala banke z izdajo novih delnic in izključitvijo prednostne pravice obstoječih delničarjev po vnaprej nedoločeni emisijski ceni. Tekmovalci so morali napisati pravilen sklep o povečanju osnovnega kapitala in pri tem upoštevati, da se v njem določi samo najnižja emisijska cena (in ne fiksna emisijska cena), končna cena pa se določi po izvedenem postopku zbiranja interesa s strani vlagateljev ("avkcijski način"). Pri vprašanju pravilnosti izdaje in dodelitve delnic s strani banke, so tekmovalci morali ugotoviti, da lahko vpisnik delnic svoj vpis omeji s pogoji in da mora družba dopustne pogoje pri dodelitvi delnic tudi upoštevati. Pomembno je bilo tudi zaznati razliko med izdajo delnic, kot vrednostnih papirjev in dodelitvijo delnic, kot dejanjem uprave banke, s katerim sprejme ponudbo posameznih vpisnikov za vpis delnic. Največji izziv so predstavljale sestava pravilnega zaporedja vseh pravnih opravil, ki se deloma lahko prekrivajo, presoja ali gre za ponudbo delnic javnosti (potrebno dovoljenje ATVP in objava prospekta) ali za izjemo ter presoja, kdo od vlagateljev je dolžan pridobiti dovoljenje Banke Slovenije za pridobitev kvalificiranega deleža v banki.

S primerom so želeli tekmovalcem na splošno prikazati, da se pri poslih kapitalskih trgov prepletajo različna pravna področja in kakšno je eno od tipičnih del pravnikov v odvetniški pisarni, ki se ukvarja s svetovanjem pri tovrstnih poslih.

Odvetniki Šelih & partnerji, o.p., d.o.o. se pogosto srečujejo s poizvedovanji tujih strank o možnostih opravljanja različnih poslov v Sloveniji, zato so se odločili takšen primer predstaviti tudi tekmovalcem. Njihova naloga je bila pripraviti odgovor na dopis potencialne stranke, proizvajalca kozmetičnih izdelkov iz Britanskih Deviških otokov, ki bi želel v Sloveniji neposredno prodajati svoje izdelke oziroma ustanoviti podružnico ali hčerinsko družbo. V dopisu je stranka navedla tudi, da si želi, da bi njene izdelke v Sloveniji promovirali kar njeni kupci, in sicer brez plačila, bi pa v zameno za uspeh pri promociji in posredovanju novih naročil prejeli nekaj izdelkov. Da bi podjetje lažje vstopilo na slovenski trg, si je stranka zamislila nagradno tekmovanje, v katerem bi se kupci izdelkov potegovali za tri tedensko potovanje po Karibskih otokih, v Sloveniji pa bi posneli tudi oglas, v katerem bi nevaren gorski teren premagoval sedemletni otrok v družbi krotke koze. Tekmovalci so se tako morali soočiti z več različnimi pravnimi problemi, od verjetno največje težave, ki so jo povzročali Britanski Deviški otoki in neposredno opravljanje storitev na trgu Evropske unije, do vprašanj glede dela na črno, pogojev za ustanovitev gospodarske družbe, obvezne uporabe slovenskega jezika, nelojalne konkurence, prikazovanja otrok v oglasih in zaščite živali.

Tekmovalne ekipe so se pri reševanju vseh strokovnih problemov zelo izkazale, napisano pa še podkrepile s prepričljivimi govornimi nastopi. Tekmovalci so

Tekmovalci so se ukvarjali z aktualnimi problemi, katere rešujejo odvetniške pisarne pri vsakodnevnem delu

3 Zahvaljujem se predstavnikom odvetniških pisarn za posredovane krajše sestavke o tekmovalnih primerih.

pokazali veliko mero znanja iz različnih pravnih področij, iznajdljivost pri iskanju možnih rešitev in hkrati sposobnost opraviti delo kakovostno, četudi pod velikim časovnim pritiskom. Reševanje naloge, ki zajema več problemskih sklopov, od ekipe zahteva tudi dobro organiziranost in timski pristop, pri čemer so se ekipe nedvomno odlično odrezale.

Glede na to, da se študentje prava pri predmetnem izboru na fakulteti nimajo možnosti podrobno seznaniti s praktičnimi problemi prevzemov in združitev, so se pri **Odvetniški družbi Rojs, Peljhan, Prelesnik & partnerji o.p., d.o.o.** odločili tekmovalni primer sestaviti na način, ki bi od tekmovalcev zahteval razmišljanje izven okvirov in bi jih prisilil v iskanje praktičnih rešitev znotraj osnovnih konceptov korporacijskega prava. Dejansko stanje tekmovalnega primera je temeljilo na prevzemu slovenske pivovarne, pri čemer so bili tekmovalci soočeni s praktičnimi dilemami od samega začetka postopka (skrbni pravni pregled ciljne družbe), z dilemami prevzemne zakonodaje vezanimi na samo strukturo transakcije (postopki menjave članov organov vodenja in nadzora, zaveze prodajalca v vmesnem obdobju med podpisom pogodbe in zaključkom transakcije), do konkurenčno pravnih problemov in na koncu še koncepta izključitve manjšinskih delničarjev iz družbe. Od tekmovalcev se je pričakovalo, da bodo, poleg poznavanja materialnopravne ureditve navedenih problemskih sklopov, prepoznali in razumeli vpliv sprejemanja odločitev pri svetovanju stranki v takšni transakciji ter izkazali poznavanje aktualnih dogodkov v slovenskem gospodarstvu, ki jih je mogoče razbrati iz dnevnega časopisja. Tako so morali pri sklopu, ki se je nanašal na skrbni pravni pregled družbe, poudariti dolžnost uprave, da v razmerju do delničarjev omogoči maksimizacijo prodajne cene. Nadalje so morali pri menjavi članov organov vodenja in nadzora in zavezah prodajalca v vmesnem obdobju poudariti povezave med korporacijsko in prevzemno zakonodajo (kdaj nastopi obveznost prevzemne ponudbe) ter ne nazadnje tudi povezavo s stališči Agencije za trg z vrednostnimi papirji. Končno pa so morali tekmovalci ponuditi še praktično rešitev problema, ki lahko nastane pri prepletanju "*top-up*" klavzule v pogodbi o nakupu in prodaji vrednostnih papirjev ter pravice manjšinskih delničarjev do izstopa družbe.

Odvetniška pisarna Ulčar & partnerji d.o.o. je za izhodišče naloge uporabila gospodarski spor med izvajalcem in podizvajalcem gradbenih del. Izpostavljena so bila vprašanja razmerij po gradbeni pogodbi (stranki sta se dogovorili za uporabo Splošnih določil za gradbene pogodbe FIDIC), pričakovane neizpolnitve pogodbe, odstopa od pogodbe in uveljavljanja zahtevkov obeh strank zaradi odstopa od pogodbe, vključno s pogodbeno kaznijo in odškodnino. Od udeležencev so pričakovali predvsem identifikacijo materialno pravne podlage zahtevkov obeh strank in načina njihovega uveljavljanja, prikaz možnih argumentov obeh strank in njihovo analizo ter opredelitev do možnosti strank v postopku. Vse tudi upoštevaje dejstvo, da je šlo v osnovi za spor o uporabi gradbenih proizvodov, ki so bili kupljeni v drugi državi Evropske unije v skladu z njenimi standardi, ni pa podizvajalec izkazal listine za promet s proizvodi po slovenskih predpisih, ampak se je skliceval na skladnost proizvodov s standardi na ravni Evropske unije. Tekmovalci so se tako soočili tudi z vprašanjem načela prostega pretoka blaga kot ene temeljnih svoboščin prava Evropske unije.

Zaključek

Vsaka dejavnost, v katero vlagamo trud in predanost, bo pustila trajne sledove

Vsaka dejavnost, v katero vlagamo trud in predanost, bo pustila trajne sledove. Člani organizacijskega odbora se vsem sodelujočim zahvaljujemo za sodelovanje. Z veseljem že razmišljamo o pripravi V. državnega tekmovanja Prav(n)a rešitev.

Veseli nas, da je tekmovanje prineslo toliko pozitivnih izkušenj, zato je na mestu, da zaključim kar z vtisi odvetniških pisarn o tekmovanju.

Vtisi o tekmovanju …

Odvetniška družba Ilić:

"Veseli nas, da smo lahko sodelovali pri najuspešnejši izvedbi Prav(n)e rešitve v njeni štiriletni zgodovini ter upamo, da bo v prihodnosti čim več potencialnih tekmovalcev prepoznalo dodano vrednost, ki jo izkušnje na takšnem tekmovanju lahko doprinesejo njihovi karieri ter strokovnem razvoju."

Odvetniki Šelih & partnerji:

"Odločitev o zmagovalni ekipi je bila zaradi izenačenosti vseh treh ekip še posebej težka, vendar pa je prava vrednost Prav(n)e rešitve gotovo v tem, da se študentje srečajo z delom na dejanskih primerih in zato si želimo, da bi se za sodelovanje na tem tekmovanju v prihodnje odločilo čim več študentov."

Odvetniška pisarna Jadek & Pensa:

"Veselilo nas je, da smo lahko na odlično organiziranem tekmovanju znanja spoznali ambiciozne bodoče pravnike, ki jih zanima, kako se pravo uporablja v odvetniški praksi."

Odvetniška družba Rojs, Peljhan, Prelesnik & partnerji:

"Državno tekmovanje Prav(n)a rešitev je odlično zasnovano tekmovanje, ki daje študentom prava priložnost, da svoje znanje predstavijo tudi izven akademskih okvirov. Vsi tekmovalci so pokazali izjemno visoko raven zanimanja za problematiko tekmovalnega primera, zmagovalna ekipa pa je nadvse presegla naša pričakovanja tako glede materialnopravnega znanja kot tudi glede praktičnega razmišljanja ter poznavanja aktualnih dogodkov v domačem gospodarstvu."

Odvetniška pisarna Ulčar & partnerji:

"Tekmovanje je po zaslugi marljivih organizatorjev doživelo nadaljnjo nadgradnjo in je lahko študentom samo v ponos, enako pa velja tudi za tekmovalce, ki so pokazali zavidljivo raven znanja. Na podlagi dosedanjih izkušenj lahko rečemo, da gre za izjemno pozitiven doprinos povezovanju študija in prakse. Zato si projekt zasluži nadaljnjo podporo vseh deležnikov."

Navodila avtorjem za oblikovanje prispevkov

Uredništvo

Slovenska arbitražna praksa je specializirana strokovna revija o arbitraži. Namenjena je odvetnikom, pravnikom iz gospodarstva, arbitrom, sodnikom ter vsem, ki se pri svojem delu ali študiju srečujete z arbitražo. V reviji so objavljani aktualni problemski strokovni prispevki s področja gospodarske arbitraže.

Kaj objavljamo

Objavljamo prispevke v slovenskem, angleškem, nemškem, francoskem, hrvaškem in srbskem jeziku, ki še niso bili objavljeni ali poslani v objavo drugi reviji. Pisec je odgovoren za vse morebitne kršitve avtorskih pravic. Če je bil prispevek že natisnjen drugje, poslan v objavo ali predstavljen na strokovni konferenci, mora to avtor sporočiti uredništvu in pridobiti soglasje založnika ter navesti razloge za ponovno objavo.

Dolžina prispevka

Prispevki naj obsegajo najmanj 15.000 znakov skupaj s presledki in največ 30.000 znakov skupaj s presledki (avtorska pola). Odstopanja se upoštevajo izjemoma.

Recenzija

Prispevki se recenzirajo. Recenzija je anonimna. Pripombe recenzentov avtor vnese v prispevek.

Povzetek

Prispevku mora biti dodan povzetek, ki obsega največ 1.200 znakov skupaj s presledki. Povzetek naj na kratko opredeli temo prispevka, predvsem naj povzame rezultate in ugotovitve. Splošne ugotovitve in misli ne spadajo v povzetek.

Kratka predstavitev avtorjev

Avtorji morajo pripraviti kratko predstavitev svojih strokovnih, poklicnih in znanstvenih referenc. Predstavitev naj ne presega 600 znakov skupaj s presledki. Če je avtorjev prispevka več, se predstavi vsak avtor posebej.

Opombe pod črto

Literatura se navaja z opombami pod črto.

a) knjiga:
Priimek, začetnica imena.: Naslov dela (pri večkratnih izdajah tudi označba številke izdaje), Založba, Kraj, letnica, stran.
Na primer: Ude, L.: Arbitražno pravo, GV Založba, Ljubljana. 2004, str. 1.

b) zbirka, zbornik:
Dodati je treba naslov zbirke/zbornika oziroma knjige ter priimke in prve črke imen avtorjev ter morebitnih redaktorjev.

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Dodati je treba naslov revije z navedbo letnika, leta izdaje in številke ter strani navedenega članka.
Na primer: Galič, A.: Ustavne procesne garancije u arbitražnom postupku, v: Pravo u gospodarstvu, Zagreb, št. 2/2000, str. 241-260.

d) spletne strani
Navedba spletne strani s popolnim naslovom in z datumom zadnjega dostopa.
Na primer: http://sloarbitration.eu/sl/slovenska-arbitrazna-praksa (5. 11. 2012).

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b) collection of articles:
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The title of the journal, the year, the volume number and the cited page number should be added.
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