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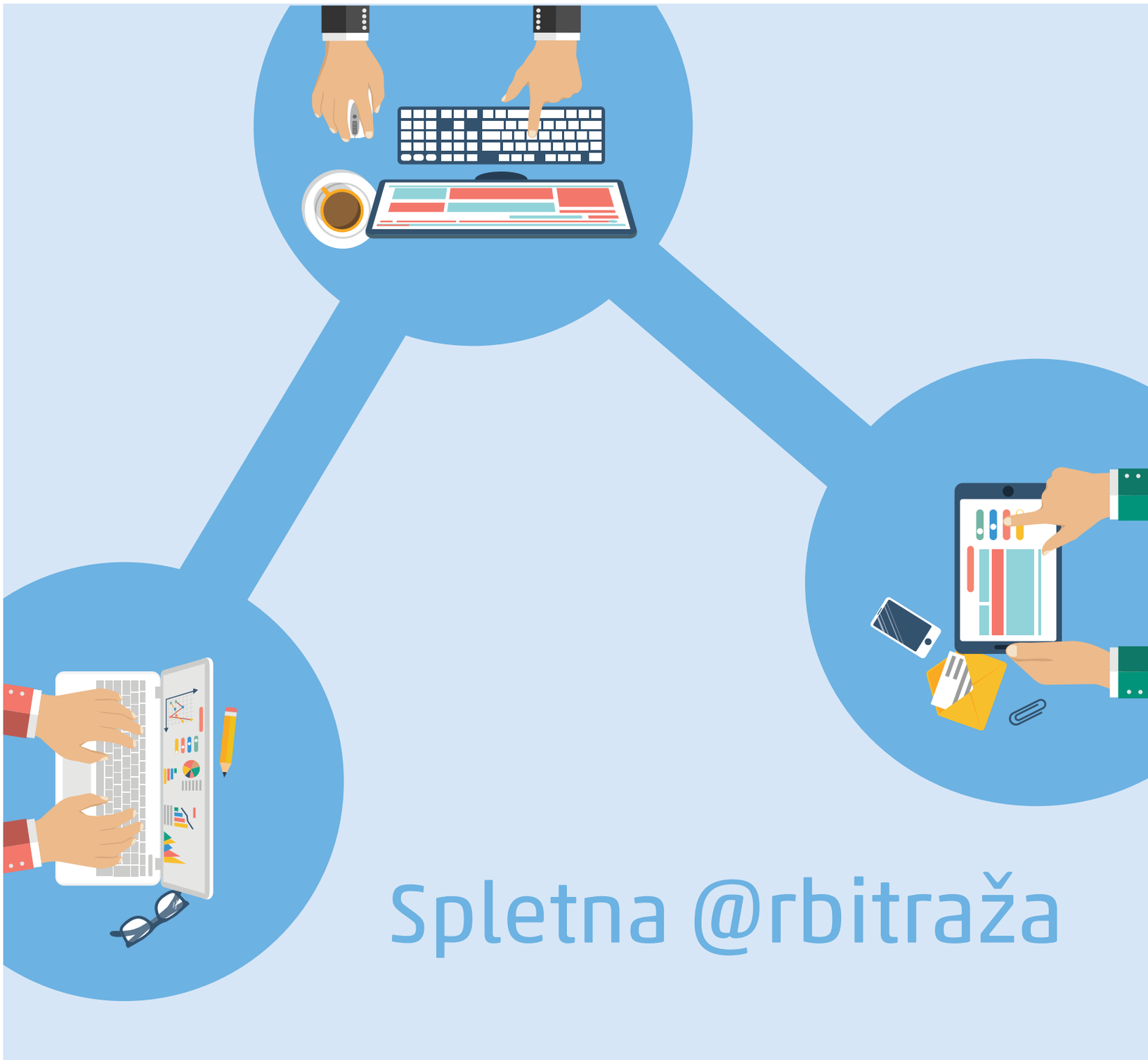

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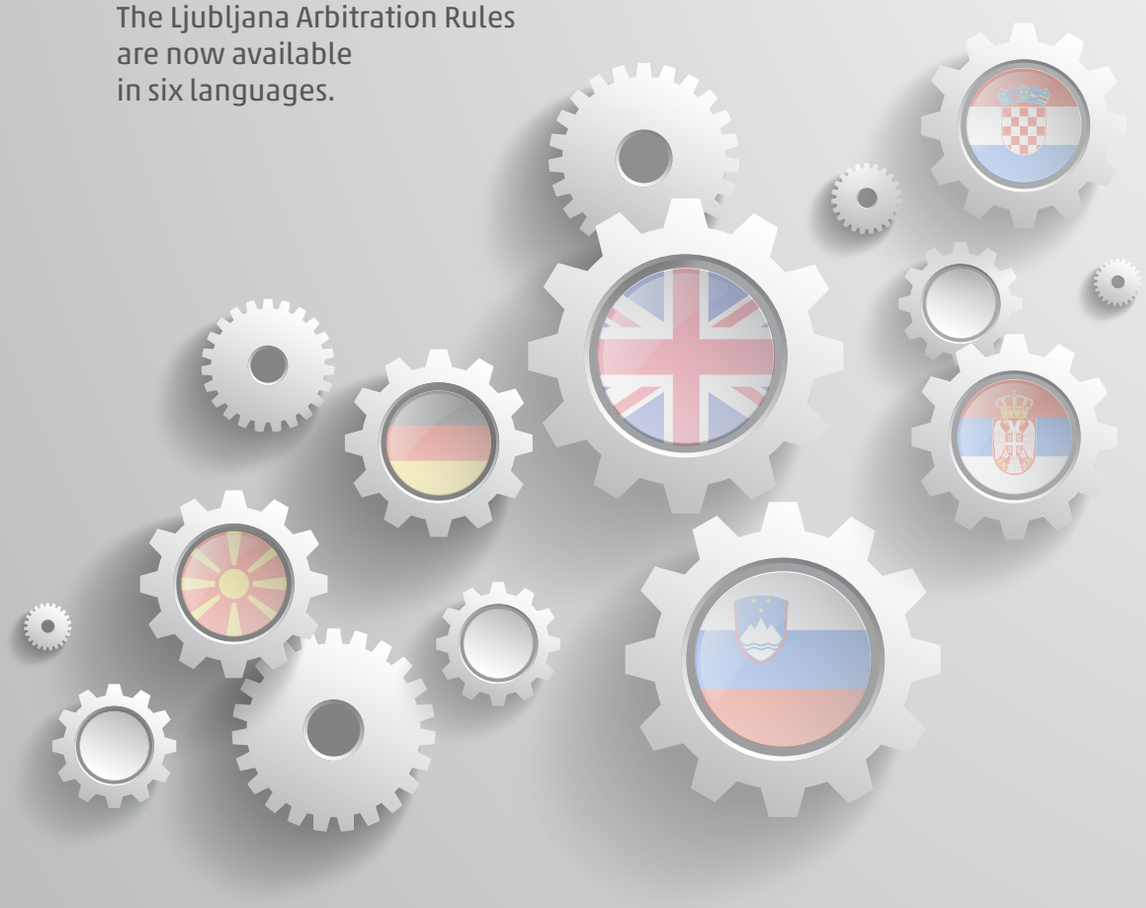

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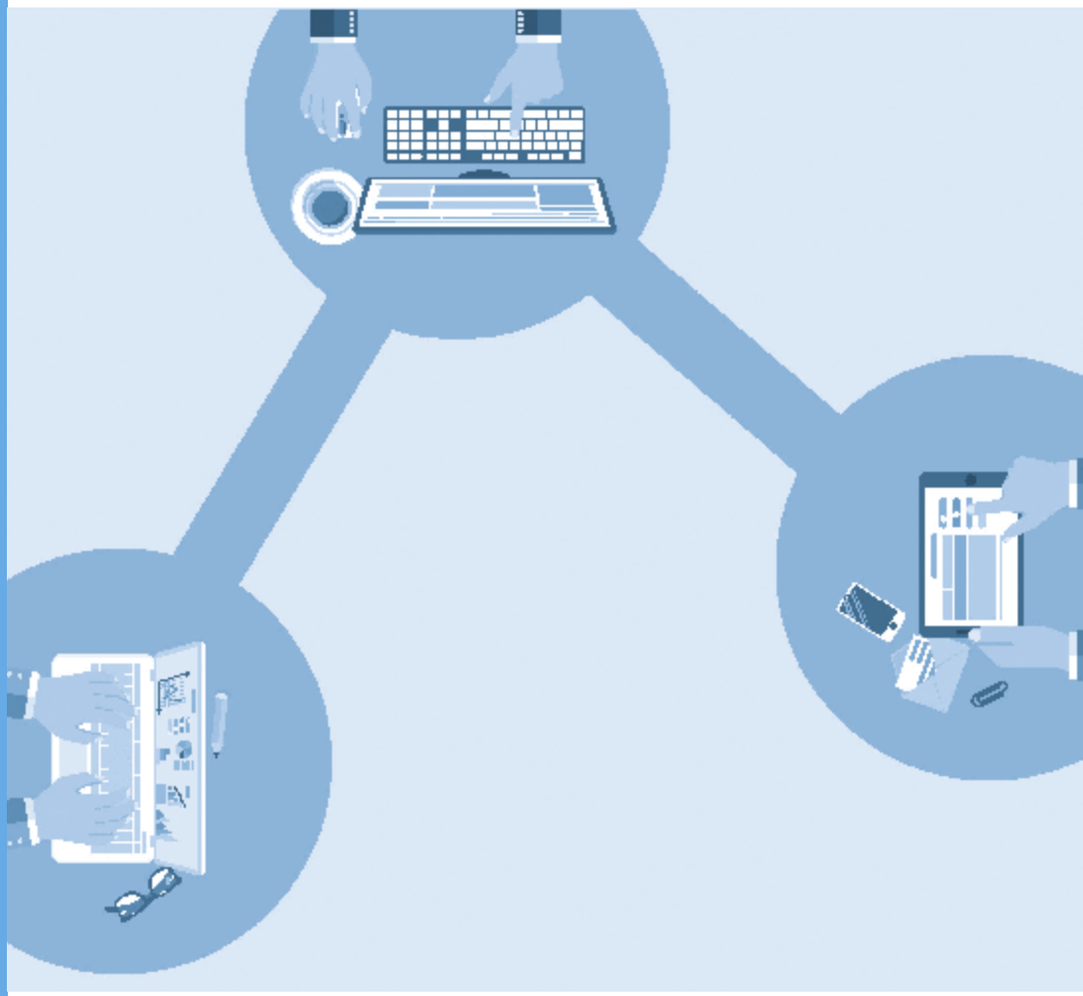

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AKTUALNO

SPOROČILO UREDNIŠTVA

slovenska arbitražna praksa

ISSN 2232-6588

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Ob petinsedemdesetem rojstnem dnevu doc. dr. Konrada Plaštajnerja


vir: Foto Celjan

Osebni jubileji so vedno lepa priložnost, da počastimo dosežke velikih osebnosti, ki tako ali drugače zaznamujejo naše življenje in delo. Letos je ta priložnost še posebej prijetna, saj petinsedemdeseti rojstni dan praznuje predsednik Stalne arbitraže pri Gospodarski zbornici Slovenije doc. dr. Konrad Plaštajner. Strnjen poklon letošnjemu jubilantu je vse prej kot lahko delo za avtorja tega sestavka, saj je poklicna in življenjska pot dr. Plaštajnerja zares izjemna, njegov strokovni opus pa obsežen, zato naj nama bo oproščeno, če sva kaj izpustila.

Konrad Plaštajner se je rodil leta 1941 v Celju. Po osnovni šoli in I. višji gimnaziji v Celju, je študiral pravo na Pravni fakulteti Univerze v Ljubljani, kjer je diplomiral leta 1965. Svojo poklicno pot je začel na celjskem Komunalnem zavodu za socialno zavarovanje (1965 – 1967) in jo nadaljeval na Okrožnem sodišču v Celju (1967 – 1969). V odvetniške vode se je podal leta 1970, sprva kot odvetnik v Žalcu, leta 1973 pa je prevzel odvetniško pisarno dr. Milka Hrašovca in začel samostojno odvetniško pot. Po 36 letih delovanja v Celju, njegova odvetniška pisarna od leta 2007 posluje v Ljubljani s podružnico v Celju. Poklic odvetnika po 46 letih z veliko zavzetostjo opravlja še danes. Kot odvetnik specialist si je z vztrajnim delom v Sloveniji in širše prislužil sloves nesporne strokovne avtoritete na področju civilnega in gospodarskega prava s poudarkom na investicijskem in pogodbenem pravu, tekstih FIDIC ter pri zastopanju strank pred domačimi in tujimi arbitražami (AAA New York, ICC Pariz, Moskovski arbitražni center, dunajski VIAC, arbitraža v Pragi, Stalna arbitraža pri GZS).

Z enako vnemo kot opravlja odvetniški poklic se je dr. Plaštajner tudi nenehno strokovno izobraževal in izpopolnjeval. Leta 1985 je magistriral na Pravni fakulteti Univerze v Ljubljani iz civilnega prava, leto zatem pridobil diplomo GZS in ljubljanske Pravne Fakultete za področje mednarodnega prava, leta 1990 pa je na Pravni fakulteti Univerze v Ljubljani doktoriral iz civilnega prava pod mentorstvom pokojnega prof. dr. Stojana Cigoja in nato prof. dr. Marka Ilešiča. V letu 1992 mu je bil po sklepu Odvetniške zbornice Slovenije priznan status specialista za civilno in gospodarsko pravo.

Kljub predanosti odvetništvu in kopici delovnih zadolžitev, je jubilant ostal vsestransko družbeno in strokovno aktiven ter prispeval k razvoju slovenskega odvetništva in pravnega sistema. Vseskozi je zasedal vidnejše funkcije, tako v Odvetniški zbornici Slovenije (OZS) kot tudi drugih domačih in mednarodnih institucijah. V letih 1981 – 1987 je bil predsednik Območnega odvetniškega zbora Celje, nato član Upravnega odbora OZS (1990 – 2003), podpredsednik OZS (2000 – 2003), od leta 1999 dalje pa je vodja delegacije OZS pri CCBE (Svetu odvetniških zbornic EU) v Bruslju. Med vidnejšimi funkcijami velja izpostaviti še uvrstitev na listo arbitrov pri

Mednarodnem centru za reševanje investicijskih sporov – ICSID v Washingtonu (2003 – 2009 in za ponoven šestletni mandat v letu 2015), uvrstitev na liste arbitrov številnih tuji arbitražnih institucij, uvrstitev na nacionalno listo presojevalcev po kriterijih FIDIC pri GZS – Združenju za svetovalni inženiring (2011), od leta 2012 dalje pa opravlja funkcijo predsednika Stalne arbitraže pri GZS. Dr. Konrad Plaustajner je bil v letih 1998 – 2004 član uredniškega odbora revije Odvetnik, od leta 2011 je član uredniškega odbora revije Pravnik ter od leta 2012 tudi član uredniškega odbora revije Slovenska arbitražna praksa.

Jubilant tudi nikdar ni pozabil na mlajše generacije pravnikov in je pomemben del svojega življenja posvetil medgeneracijskemu prenosu znanja in izkušenj. Študentje, kolegi juristi in drugi slušatelji ga poznajo kot pronicljivega in neposrednega sogovornika, ki s svojim bogatim znanjem, podkrepljenim s praktičnimi izkušnjami, doprinese dodano vrednost v učni proces. Njegove pedagoške aktivnosti med drugim obsegajo docenturo za civilno in gospodarsko pravo na Pravni fakulteti Univerze v Mariboru v obdobju od 1992 do 2014. Od 1992 do 1996 je bil nosilec in predavatelj predmeta stvarno pravo na mariborski Pravni fakulteti, od 2004 do 2011 pa je na pravnih fakultetah v Ljubljani in Mariboru v okviru predmeta gospodarsko pravo predaval gradbeno pogodbo in investicijsko pravo. Kot predavatelj gospodarskega prava je sodeloval tudi na GEA College (2002 – 2003) in na Delavski univerzi Celje (2004 – 2005). Od leta 2014 je docent na IBS – mednarodni poslovni šoli v Ljubljani. Iz svojega železnega repertoarja tem (gradbena pogodba, investicijsko pravo, FIDIC teksti, arbitraža) tudi redno predava na Odvetniški šoli OZS, Dnevih slovenskih pravnikov v Portorožu ter seminarjih v organizaciji različnih inštitutov in založb.

Bibliografski opus Konrada Plaštajnerja obsega preko 180 strokovnih in znanstvenih člankov, objavljenih v domači in tuji strokovni pravni periodiki. Je tudi soavtor velikega komentarja Ustave RS (redaktor prof. dr. Lovro Šturm), in komentarja Zakona o javno-zasebnem partnerstvu – GV Založba Ljubljana 2009.

Ob vseh njegovih poklicnih in strokovnih dosežkih nikakor ne moremo mimo pečata, ki ga je jubilant pustil na področju arbitraže. Le malokdo ve, da sodi dr. Plaštajner med najzaslužnejše za pravi "preporod" institucionalne arbitraže v Sloveniji po letu 2012. Ko je tega leta sprejel funkcijo predsednika Stalne arbitraže pri GZS, nikakor ni bil "novinec" na slovenskem arbitražnem parketu, saj je že tedaj veljal za uveljavljenega arbitra z bogatimi mednarodnimi izkušnjami. Zato se je dobro zavedal, kako težki izzivi čakajo institucijo na poti od "zaspane" lokalne arbitraže do mednarodno prepoznavne in uveljavljene institucije, ki si jo Slovenija zasluži. Vendar ga to ni odvrnilo od cilja, kvečjemu še dodatno ohrabrilo. S svojim optimizmom je "neozdravljivo okužil" vse, ki z njim sodelujemo. Ves čas je namreč verjel v vizijo Stalne arbitraže pri GZS kot moderne in profesionalne arbitražne institucije s ciljem postati najvplivnejši in najuspešnejši mednarodni arbitražni center zahodnega tipa na področju nekdanje skupne države.

Kako uspešen je pri tem kot predsednik, bodo sodili drugi, dejstvo pa je, da je v štirih letih, odkar vodi institucijo, Stalna arbitraža pri GZS svoj poslovni model dosledno utemeljila na tržnem principu zagotavljanja storitev uporabnikom; jasni poslovni strategiji z definiranim ciljnimi tržišči; razvitih storitvah in ponudbi reševanja sporov, ki se nenehno dograjuje, skladno s potrebami uporabnikov;

upravljanju odnosov s strankami; zagotavljanju najvišjih kvalitativnih standardov storitev za stranke skozi sistem nadzora nad kakovostjo; poudarjeni transparentnosti delovanja; nenehni skrbi za krepitev ugleda blagovne znamke in proaktivni ter opazni vlogi institucije v mednarodni arbitražni skupnosti. Z napori, ki so bili v preteklih štirih letih vloženi v nova Ljubljanska arbitražna pravila (v veljavi od 1. januarja 2014), profesionalizacijo storitev Stalne arbitraže skozi prenos najboljših institucionalnih praks iz tujine, organizacijo odmevnih mednarodnih konferenc (Konferenca slovenske arbitraže, Joint UNCITRAL-LAC Conference on Dispute Settlement), usmerjeno strokovno publiciranje (revija Slovenska arbitražna praksa) in mednarodno promocijo institucije, je Stalna arbitraža pri GZS slovenske odvetnike, arbitre, pravnike iz gospodarstva in druge deležnike aktivno integrirala v mednarodno arbitražno skupnost, Slovenijo pa pričela uveljavljati kot atraktiven sedež arbitraž v regiji. Danes se Stalna arbitraža pri GZS ponaša s prevodi Ljubljanskih arbitražnih pravil v šest jezikov in je edina arbitražna institucija v regiji, ki uporabnikom s področja ex-Yu ponuja svoje storitve v njihovih lokalnih jezikih. Tudi po jubilantovi zaslugi tako danes v Sloveniji premoremo praktično ves "instrumentarij", ki ga imajo "veliki" (beri: arbitražni centri).

In kako jubilanta vidijo (ocenjujejo) drugi?

Njegovi someščani v domačem Celju so mu leta 2015 podelili častitljiv naziv "Naj Celjana" za življenjsko delo. Ko so mu stanovski kolegi – odvetniki istega leta podelili Plaketo dr. Danila Majarona, s katero člani Odvetniške zbornice Slovenije izrekajo čast in zahvalo najboljšim med njimi za njihove izredne zasluge, so ga opisali z besedami "*odličen in sila plodovit ter vsestranski odvetnik s trdno etično držo*". In ne nazadnje, dr. Konrad Plauštajner je prejemnik nagrade Zveze društev pravnikov Slovenije za življenjsko delo v letu 2010.

Prijatelji in njegovi sotrudniki (člani predsedstva in sekretariata) na Stalni arbitraži pri GZS ga poznamo kot skromnega, neposrednega in iskrenega sogovornika s prefinjenim smislom za humor in polnega mladostne energije. Kot predsednik Stalne arbitraže pri GZS naš dragi jubilant pooseblja avtoriteto, neodvisnost, integriteto in strokovnost, kar so temeljni kamni arbitražne institucije, ki jo vodi. Nemara najbolje pa ga opiše njegova lastna misel, ki jo izrekel na prvi Konferenci slovenske arbitraže leta 2012 glede prihodnosti institucionalne arbitraže v Sloveniji:

"*Današnji svet poganja energija, takšna ali drugačna, zato želimo na področju arbitraže postati subjekt, ki je energijo znanja sposoben izmenjavati. Misli, ustvarjaj, premikaj!*"

mag. Marko Djinović
strokovni urednik

prof. dr. Aleš Galič
odgovorni urednik

Why do businesses in Macedonia decide (not) to use arbitration?

Tatjana Zoroska-Kamilovska, Ph.D., Tatjana Shterjova, LL.M

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Tatjana Shterjova, LL.M Ph.D. candidate, University „Ss. Cyril and Methodius" – Faculty of Law „Iustinianus Primus" in Skopje; Secretariat of the Permanent Court of Arbitration attached to the Economic chamber of Macedonia, e-mail: tsterjova@hotmail.com, tatjana@mchamber.mk

The expansion of arbitration in global dispute resolution marketplace: myth or reality?

There is a widely held opinion that globally speaking, in the past few decades, arbitration has become a backbone in resolving legal disputes, as a viable alternative to litigation. It has already been noted that "during the past 30 years, use of arbitration has expanded both as to the quantity and the nature of the disputes subjected to it".[1] A wide range of contractual and non-contractual claims is referred to arbitration as a fair, effective and less cost binding dispute resolution mechanism. This is primarily when it comes to commercial disputes, especially international ones. For many years, it has become widely accepted that in disputes of international trade, arbitration is the ordinary and normal method of settling disputes.[2] In these cases, arbitration is especially perceived as more convenient dispute resolution mechanism as opposed to state courts, due to the expected lack of national prejudice and the possibilities to bring greater flexibility to the rigid court procedures. In fact, arbitration is much praised primarily for its ability to meet the expectations of parties and counsels coming from different procedural systems, and providing them with an opportunity to feel 'home-based' in the course of the proceedings. Justifiable or not, there is a distrust to national courts, and especially to their qualifications and expertise to resolve disputes arising from certain types of international contracts.[3]

The latest empirical research into arbitration practices and trends worldwide, the 2015 International Arbitration Survey: "Improvements and Innovations in International Arbitration" conducted by the Queen Mary University of London, School of International Arbitration also pointed out that arbitration remains the preferred method of resolving cross-border disputes as "90% of respondents indicate that international arbitration is their preferred dispute resolution mechanism

The latest empirical research into arbitration practices and trends worldwide, the 2015 International Arbitration Survey: "Improvements and Innovations in International Arbitration" conducted by the Queen Mary University of London, School of International Arbitration also pointed out that arbitration remains the preferred method of resolving cross-border disputes as "90% of respondents indicate that international arbitration is their preferred dispute resolution mechanism, either as a stand-alone method (56%) or together with other forms of ADR (34%)".[4] According to this research, the freedom to choose and the opportunity to tailor the process to their ever changing

1 Matthews, J. M.: Consumer Arbitration: Is It Working Now and Will It Work in the Future, in: The Florida Bar Journal, April 2005, Volume 79, No. 4 p. 22.

2 Lalive, P.: Transnational (or truly international) public policy and international arbitration, in: Sanders, P. (ed.), Comparative arbitration practice and public policy in Arbitration: [VIII International arbitration congress, New York, 6-9 May 1986]. – Deventer; Antwerp [etc.] : Kluwer Law and Taxation Publ., cop. 1987, p. 293.

3 Lew, J., Mistelis, L., Kröll, S.: Comparative International Commercial Arbitration, Kluwer Law International, 2003, p. 6.

4 See 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration http://www.arbitration.qmul.ac.uk/docs/164761.pdf (15. 03. 2016).

needs clarify why most business users prefer arbitration when resolving commercial disputes.[5]

Still, it seems that the arbitration literature is not so one-sided. Contrary to aforementioned assertions, some other empirical studies suggest quite different findings. Testing the hypotheses about the frequency of arbitration clauses, one of the studies found surprisingly low frequency of arbitration clauses in the studied sample of contracts, which led to conclusion that the parties perceive preserving access to litigation to be value-enhancing compared to *ex ante* binding arbitration. Based on this finding, the authors of this study suggest that there is a "flight from arbitration".[6] Of course, there are critics to these findings especially that the sample[7] is limited to unusual contracts unlikely to include arbitration clause while excluding more typical contracts that are more likely to provide for arbitration, such as construction contracts, contracts for the sale of goods, and joint venture agreements.[8] Therefore, these opposite commentators suggest that this study reaches conclusions beyond those that their data will support,[9] trying at the same time more reliably to answer the question – "is there a flight from arbitration"?[10]

Apart from this academic confrontation, nowadays we are facing more and more complaints being voiced by arbitration users, particularly that commercial arbitration costs just as much, and takes just as long, as litigation.[11] In fact, arbitration has to fulfil a challenging task – parties who are often bent upon (mis-)using every available procedural and other opportunity to disadvantage one another simultaneously demand rapid, expert and objective results at minimal costs.[12] There is a perception that arbitration is somehow in decline, meaning that its golden age has ended.[13] Besides the reports and studies about the increasing use of arbitration in general, there is a growing scepticism toward arbitration associated with the question: does a decision to arbitrate still make sense?

However, did arbitration actually fail the expectations of business users? Are parties really fleeing arbitration and for what reasons? These are not easy questions to ask, especially in a general context. Therefore, our goal in this paper is more modest. The paper is limited to Macedonia and its dispute resolution marketplace with focus on arbitration and its popularity among businesses. The article does not tend to cover all the aspects of the current situation. For sure, the later needs much more space for elaboration that this contribution can allow. The authors will try to present very tightly their key observations on the subject matter as results of their involvement in promotion of arbitration in Macedonia.

Arbitration in Macedonia – some general facts

In the global commercial community, Macedonia has an image of country that is not entirely arbitration-prone. Although the modern normative framework was (partly) established one decade ago, arbitration in Macedonia is still in its infancy: arbitration is neither well known nor well exploited. Macedonia is far from being an attractive venue for international arbitrations. Furthermore, arbitration has not yet become an issue in courts proceedings, so there have not yet been any viable opportunities for the courts to support arbitration and display a pro-arbitration approach.

In the global commercial community, Macedonia has an image of country that is not entirely arbitration-prone. Although the modern normative framework was (partly) established one decade ago, arbitration in Macedonia is still in its infancy: arbitration is neither well known nor well exploited

5 Ibid. See also Fulbright & Jaworski: U.S. Corporate Counsel Litigation Trends Survey Results 18 (2004); Stipanowich, T. and the College of Commercial Arbitrators, Protocols for Expeditious, Cost-Effective Commercial Arbitration: Key Action Steps for Business Users, Counsel, Arbitrators & Arbitration Provider Institutions, 2010, http://works.bepress.com/thomas_stipanowich/10 (15. 03. 2016).

6 Eisenberg, T., Miller, G.P.: The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in Publicly-Held Companies' Contracts 18-20 (Cornell Legal Studies Research Paper Series, Paper No. 06-023, 2006), available at SSRN: http://ssrn.com/abstract=927423 (15. 03. 2016). Eisenberg and Miller summarized: "We examined over 2,800 contracts filed with the Securities Exchange Commission (SEC) in 2002 by public firms, and coded the presence of contract terms requiring arbitration. We find little evidence that these contracting parties routinely regard arbitration clauses as efficient or otherwise desirable contract terms. The vast majority of contracts did not require arbitration: only about 11 percent of the contracts included binding arbitration clauses". See also Dammann, J. C., Hansmann, H. B.: Globalizing Commercial Litigation, 94 Cornell Law Review, 1 (2008), available at: http://ssrn.com/abstract=1113217 (15. 03. 2016).

7 Eisenberg and Miller's study encompasses thirteen types of contracts: asset sale/purchase, pooling and servicing, bond indentures, securities purchase, credit commitments, security agreements, employment, settlements, licensing, trust agreements, mergers, underwriting and other. See Eisenberg, Miller, op. cit., p. 19.

8 Drahozal, C. R., Ware, S. J.: Why Do Business Use (or Not Use) Arbitration Clauses, in: Ohio State Journal On Dispute Resolution, Vol. 25:2, 2010, p. 436-437.

9 Ibid at p. 470.

10 See Drahozal, C. R., Wittrock, Q. R.: Is there a Flight from Arbitration, in: Hofstra Law Review, Vol. 37, 2008, p. 71-115.

11 See Stipanowich and the College of Commercial Arbitrators, op. cit., p. 1.

12 Born, G.: International Commercial arbitration, Volume I, Wolters Kluwer Law and Business, 2009, p. 68.

13 Richard, C. S.: The End of the Golden Age, Global Arbitration Review, Washington, D.C., ITA-ASIL Conference – Arbitration, 2010, p. 36.

Unlike the contemporary trends in arbitration law, the distinction between domestic and international arbitration still pervades the entire legal framework for arbitration in Macedonia, resulting in two separate laws covering the arbitration

Unlike the contemporary trends in arbitration law, the distinction between domestic and international arbitration still pervades the entire legal framework for arbitration in Macedonia, resulting in two separate laws covering the arbitration.

The current legal framework for international arbitration in Macedonia has been laid down in the Law on International Commercial Arbitration of the Republic of Macedonia, enacted on 21 March 2006

The current legal framework for international arbitration in Macedonia has been laid down in the Law on International Commercial Arbitration of the Republic of Macedonia, enacted on 21 March 2006.[14] It is based on the internationally recognized standards of the UNCITRAL Model Law on International Commercial Arbitration of 1985 and the New York Convention on the Recognition and Enforcement of Foreign Arbitral of 1958. It did not take account of the amendments of the Model Law that took place in 2006 and therefore it calls for further slight revision and fine-tuning.

Domestic arbitration is still under the regime of Law on Civil Procedure based on the old provisions of Federal Law on Civil Procedure of former Yugoslavia of 1976 and is waiting to be updated for a long time

In comparison with the progress in the field of international commercial arbitration, Macedonian legislation on domestic arbitration lagged slightly behind this movement. Domestic arbitration is still under the regime of Law on Civil Procedure[15] based on the old provisions of Federal Law on Civil Procedure of former Yugoslavia of 1976 and is waiting to be updated for a long time.

This duality in the Macedonian regulatory framework for arbitration brings manifold problems – the provisions of the two Laws provide for inconsistencies and differing solutions regarding several issues, including the arbitrability of disputes, challenge and removal of arbitrators, the grounds for setting aside arbitral awards, etc. Additionally, the provisions regulating domestic arbitration are anachronistic and do not reflect the modern trends and developments of arbitration law. This is reflected, for instance, by the terminology used (selected courts) or the possibility for either party to the contract to initiate proceedings requesting the court to announce termination of the validity of the agreement for selected court (art. 448 of the Law on Civil Procedure).

However, even though the modern arbitration-friendly legislation that provides a solid framework and support to arbitration is crucial precondition for building a strong arbitration community, it seems that even current Macedonian legal framework is not an insurmountable obstacle for that process. The underlying concepts and procedural provisions are sufficiently contemporary and accordingly satisfactory for the development of the arbitration.

But what does the practice show?

Statistics available since before and after the introduction of the Macedonian Arbitration Act of 2006 show that in recent decade the number of arbitration proceedings in Macedonia has remained stable or more precisely it has not considerably increased.

The Permanent court of Arbitration attached to the Economic chamber of Macedonia (PCA) has until recently been the only general arbitral institution in the Republic of Macedonia. Until 1993, this institution was competent for the resolution of only domestic (internal) disputes. The Rulebook of the Permanent court (Arbitration) attached to the Economic chamber of Macedonia from 1993 for the first time provided the competence of the PCA to resolve disputes with international elements.

The data on the caseload of the PCA shows that the number of proceedings initiated before this institution is low (not exceeding single digit numbers on a yearly basis). Out of them, the majority (62%) of the proceedings are in disputes having international element. One issue that is notable is that the majority of the proceedings initiated before the PCA for resolving disputes without international element are from recent years, confirming the notion that in Macedonia as well, for a long time arbitration was being perceived as dispute resolution method primarily for settling international commercial disputes.

This data generally suggests that in Macedonian practice, arbitration does not seem to compete actively with state courts. The vast majority of commercial disputes are decided by the state courts, especially the domestic disputes. The number of disputes brought before the PCA in the last 20 years is as a drop in the bucket compared to the commercial disputes that the state courts resolved in the same period, although this number is also in decline. For illustration, on a yearly basis, in the Primary Court Skopje II – Skopje, which is the biggest primary court in the country, the number of proceedings initiated in commercial disputes

14 Official Gazette of the Republic of Macedonia, No. 39/06.

15 Official Gazette of the Republic of Macedonia, No. 79/2005, 110/2008, 83/2009, 116/2010, 124/2015.

has decreased from 7133 proceedings in 2010 down to 626 proceedings in 2015.[16]

Regarding the features of the proceedings initiated before the PCA, it is notable that 84% of the proceedings are concerning disputes arising between two commercial entities, 83% of the disputes are for debt recollection, and the average value of disputes brought before the PCA in the last five years is 6.331.407,40 EUR, or annually as follows:

Year	Arbitration cases	Total value of the disputes
2011	3	9.044.438.00 EUR
2012	3	1.309.508,00 EUR
2013	4	194.683,00 EUR
2014	1	11.511,00 EUR
2015	5	21.096.897,00 EUR

Lastly, the average duration of the proceedings before the PCA (the time frame between the submission of the statement of claim to the Secretariat of the PCA and the rendering of a final decision) is 232 days, or seven and a half months, with the shortest duration of the proceedings of 125 days, or approximately four months, in a dispute with international elements, decided by a sole arbitrator.

Nonetheless, despite this data, and regardless of the fact that Macedonia does not have specialized commercial courts, the existing organization of state courts for the settlement of commercial disputes[17] and the ever-changing procedural provisions in Macedonia seem to meet the expectations of the users and there is no particular incentive to refer to arbitration for domestic commercial disputes.

How often businesses in Macedonia ask the question: to arbitrate or not?

Many studies examine the reasons for which parties have an incentive to enter into arbitration agreements, and their welfare implications.[18] The bulk of these studies suggest that "if a form of alternative dispute resolution, such as binding arbitration, provides greater social benefits than litigation, the dynamics of the process should tend to induce the parties to bargain to the efficient solution".[19] In deciding whether to arbitrate or not two well informed sophisticated parties compare marginal cost with the marginal benefit. If the marginal benefit of arbitration exceeds the marginal cost of arbitration, then they arbitrate.[20] Correspondingly, all the possible reasons for choosing arbitration over litigation fall into two categories: process and outcomes. In their pre-dispute shopping, sophisticated parties drafting their contract may choose arbitration because they expect that it will provide them with a better process than litigation, because they expect that it will provide them with better outcomes than litigation, or both.[21]

In deciding whether to arbitrate or not two well informed sophisticated parties compare marginal cost with the marginal benefit

But are these inferences sustainable in Macedonian context? Are the business users in Macedonia really well informed about arbitration and how often they pose the question: to arbitrate or not?

Although the business community in Macedonia has significantly transformed over the last decade and attaches an ever-increasing importance to the best practices and standards applicable in doing business, it seems that regarding arbitration it is still lagging considerably behind global trends. There are several reasons for this apparent stagnation, but we will focus on some major ones.

Although the business community in Macedonia has significantly transformed over the last decade and attaches an ever-increasing importance to the best practices and standards applicable in doing business, it seems that regarding arbitration it is still lagging considerably behind global trends

There is no particular study dealing with the ways businesses in Macedonia handle conflicts. It is also hard to get good evidence of how widespread arbitration agreements are. Still, the manner in which day-to-day commercial disputes are settling suggests a presumption that most companies do not have at all strategic approach for managing conflicts or have difficulties in designing an appropriate system for resolving disputes. Although some notable exceptions exist, the

16 This is primarily result of the many changes of organizational and functional procedural provisions, leading to increased dejudicialisation of civil justice.

17 According to the Law on courts (Official Gazette of the Republic of Macedonia, No. 58/2006, 62/2006, 35/2008, 150/2010) the primary courts with extended jurisdiction are competent to settle the commercial disputes in first instance. There are 12 primary courts with extended jurisdiction, while the total number of primary courts is 27.

18 See e.g., Hylton, K. N.: Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis, in: Supreme Court Economic Review, 8 (2000), p. 209-263; Benson, B. L.: To Arbitrate or to Litigate: That is the Question, in: European Journal of Law and Economics, September 1999, Vol. Issue 2, p. 91-151; Drahozal and Ware, op. cit.

19 Eisenberg, Miller, op. cit.

20 Drahozal, C. R.: Privatizing Civil Justice: Commercial Arbitration and the Civil Justice System, in: Kansas Journal of Law & Public Policy, 9, 2000, p. 582.

21 Drahozal, Ware, op. cit., p. 451.

Although some notable exceptions exist, the great majority of companies is still reactive and tends to rely on *ad hoc* approaches to the dispute resolution. Therefore, they do not consider arbitration as a part of a systematic approach to conflict management and settling disputes pursuant to clearly defined business goals and priorities

great majority of companies is still reactive and tends to rely on *ad hoc* approaches to the dispute resolution. Therefore, they do not consider arbitration as a part of a systematic approach to conflict management and settling disputes pursuant to clearly defined business goals and priorities. Arbitration is embraced momentarily (there is almost no planning for dispute resolution in material contracts)[22] and basically by larger companies, particularly those operating internationally.

With respect to matters that are referred to arbitration, the great numbers of them are referred to seats abroad, predominantly Paris, London, Vienna and Geneva.[23] In one part, this situation is reminiscent implication of the fact that the PCA has only had competence to resolve disputes with international elements from 1993, thus resulting with the perception of larger Macedonian companies (that have been working on the global market and are willing to conclude arbitration agreements) that arbitration should be conducted abroad, since back in the days it was the only viable option to arbitrate disputes arising from international trade.

With regard to the second key factor, doubtlessly Macedonia is not preferred venue of arbitration, since arbitration issues by Macedonian courts are still approached with caution, and arbitration practice is still not well determined and widely accepted

However, it is also true that Macedonian companies' choice of arbitration institutions and venues generally reflects the position that Macedonian business enterprises have in the negotiation process. Namely, it has already been stated in arbitration literature that:

> "(t)he dispute resolution mechanism that a party can realistically obtain in a particular transaction often depends upon its own negotiating strength and on its counter-party's interests. Like other contracting terms, the dispute resolution clause is a product of bargaining, compromise and drafting ability".[24]

Taking into account the two generally recognized types of negotiation – interest-based negotiation and position-based negotiation – and bringing them in the context of drafting the dispute resolution clause in international contracts where Macedonian companies are parties, we can conclude that position-based negotiation is prevailing. In this type of negotiation, the counter-parties are usually not willing to consider the Macedonian companies' interests or consider them less valuable, which results in taking a position to protect its interests by imposing the arbitration in the venue it finds most appropriate.

Moreover, it is also true that when deciding where to designate the venue of arbitration parties usually have in mind these two key factors: (1) the venue should be in a state that is a party to the New York Convention in order to benefit from the protections of that treaty; and (2) the venue should be in a jurisdiction that has a well-developed body of arbitration law, courts experienced with arbitration issues, and a tradition of supporting and enforcing international arbitration agreements and awards. With regard to the second key factor, doubtlessly Macedonia is not preferred venue of arbitration, since arbitration issues by Macedonian courts are still approached with caution, and arbitration practice is still not well determined and widely accepted.

On the other hand, small and medium-sized companies are rarely using arbitration. Not only they do not have a systematic approach for resolving disputes, but also they almost blind cling to traditional approach "litigation as usual", particularly in domestic commercial disputes. This, notwithstanding that the litigation process often escalates the original conflict, it takes a long time and a lot of money, the parties' relationship deteriorates and none of them are particularly satisfied with the court judgment.

Of course, the small extent to which arbitration is used in the context of a systematic approach for resolving disputes cannot be attributed solely to leading executives, who are mainly focused on business operations and strategies. Conversely, the transactional lawyers are those who negotiate and draft contracts and establish the template for resolving business conflicts.[25] The majority of transactional lawyers have little or no experience in arbitration, so they usually neglect the

22 On the necessity of planning for dispute resolution in international contracts see Born, G.: International Arbitration and Forum Selection Agreements: Drafting and Enforcing, third edition, Kluwer Law International, 2010, p. 13-15. See also Stipanowich, T. J.: Arbitration and Choice: Taking Charge of the "New Litigation" (Symposium Keynote Presentation), in: DePaul Business & Commercial Law Journal, Vol. 7, 2009, p. 406 et seq.

23 In the last decade, several Macedonian companies were parties in some remarkable international arbitration disputes, which offered the Macedonian advocates first-hand experience in high-priced arbitrations. However, this primarily concerns the advocates or law firms, which are well connected to the network of international law firms. Still, the number of advocates that are practicing arbitration is rather low.

24 Born, 2010, op. cit., p. 13.

25 Stipanowich, 2009, op. cit., p. 407.

arbitration in a forum clause, or put it by default without full awareness of what is at stake and the inherent risks.

It is not far from the truth that the transactional lawyers indeed are not well informed about arbitration. They do not sufficiently know neither the peculiar characteristics of arbitration mechanism, nor its advantages and shortcomings. There is a lack of knowledge or/and uncertainty regarding many questions of arbitration process starring from can the dispute be considered "arbitrable" – to does the arbitral award have binding effect? Whether or not arbitration would be judicially reviewed and to what extent is another area of uncertainty for transactional lawyers etc.

Although the decision to include (or not include) an arbitration clause in a contract is one of the most far-reaching decisions the transactional lawyers can make, many contract drafters make this decision without giving consideration it deserves. Some of them, of course, consult advocates but majority of them just ignore its drafting. It results with defective or overly complicated dispute resolution clause or, contrarily, the lack of one. Perhaps ironically, but it seems that the state of awareness of transactional lawyers (and majority of advocates also)[26] for arbitration matches that from the middle of the last century, as the Sylvan Gotshal noted that:

"There was a time when many lawyers, if not most, were inclined to see in the practice of arbitration a danger which threatened to rob courts of their own jurisdiction, lawyers of their functions and client of their right to justice".[27]

Further steps: how to encourage companies to use arbitration

Notwithstanding the serious efforts that have been undertaken in a last several years to promote arbitration in Macedonia,[28] having in mind the above-mentioned state of affairs, doubtlessly much still needs to be done in order to develop arbitration culture among businesses.

Notwithstanding the serious efforts that have been undertaken in a last several years to promote arbitration in Macedonia, having in mind the above-mentioned state of affairs, doubtlessly much still needs to be done in order to develop arbitration culture among businesses

The first step that has to be made is to learn well the lesson about the necessity of anticipating disputes in commercial transactions (both international and domestic) and to plan their resolution and in that context to find why the arbitration agreement matters.

As an alternative to "litigation as usual", arbitration requires a significant change of mind set and attitude towards dispute resolution. It is well known that dispute resolution is a part of every society's culture, and in each society, some methods are favoured over others. As for Macedonian society culture, it seems that many people criticize arbitration as a big business using private judges to reduce the liability and see it as just as costly and lengthy as litigation.

When it comes to resolution of commercial disputes, there is no recipe to ensure that arbitration will produce general satisfaction among all business users, but still, it is worth to change the business mind set towards arbitration and to try to establish arbitration as a part of philosophy of doing business. Even with some apparent disadvantages (for e.g. costs, no meaningful right of appeal, etc.), as a method of dispute resolution, arbitration yet offers many important and comprehensible advantages: speed, specialization, the freedom to choose the number of arbitrators and the language of the procedure, the opportunity to tailor the procedure to business goals and priorities, total confidentiality, and potential to maintain the commercial relations between the parties throughout and after the process.

Therefore, future activities should be directed towards highlighting the necessity of legal risk management and taking pro-active approach on having a systematic approach for resolving disputes by businesses in Macedonia. The PCA will continue its activities towards education on arbitration issues, and simultaneously, highlighting the positive examples and success stories of companies that have decided to use arbitration before the PCA as a method for resolving their disputes. We hope that arbitration in Macedonia will be growing in popularity and dynamism in the years to come.

Therefore, future activities should be directed towards highlighting the necessity of legal risk management and taking pro-active approach on having a systematic approach for resolving disputes by businesses in Macedonia

26 See supra note 15.

27 Gotshal, S.: Arbitration and the Lawyer's Place in the Business Community, The Business Lawyer Vol. 11, No. 3, April 1956, p. 52.

28 Since 2011, when the new structure of the PCA has been established, a lot of energy and time has been devoted to encourage the use of arbitration in Macedonia, focusing on raising the awareness, understanding and publicity to the process (forums, seminars and conferences, etc.) and principally highlighting the advantages of referring to PCA the commercial disputes where the Macedonian companies are parties of.

Commercial Arbitration in Kosovo

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The current state of play

Arbitration is a relatively old mechanism of dispute resolution and as such, it is rooted in different legal systems and in numerous states for a long time. Nowadays, as far as commercial transactions are concerned, arbitration clauses sit as a contract's key negotiating point, which consecutively end-up inserted in both international and domestic contracts. With the support of national arbitration legislation and international treaties and conventions relevant to this field, commercial arbitration has emerged as the preferred method of dispute resolution.

Nevertheless, courts have not yet had the chance to decide on a setting aside request, due to matters of arbitrability – while *lex arbitri* has served only to the extent of proper conduct of arbitral proceedings

Although relatively late, nonetheless dynamically, Kosovo has gathered its efforts towards joining the international arena of the ever-growing preference for out-of-court dispute resolution of commercial disputes

The possibility of arbitrating commercial disputes and the conduct of arbitral proceedings is granted by the Arbitration Law of 2007

Although relatively late, nonetheless dynamically, Kosovo has gathered its efforts towards joining the international arena of the ever-growing preference for out-of-court dispute resolution of commercial disputes. While still being considered as a novelty within the rule of law and the justice system in the country, commercial arbitration continues to take shape. The possibility of arbitrating commercial disputes and the conduct of arbitral proceedings is granted by the Arbitration Law of 2007.[1] The law extends the boundaries of arbitrability to all "civil judicial and economic-judicial matters",[2] unless specifically prohibited by law. The now almost a decade old piece of legislation, has been put into practice only in the late 2011, when, through the establishment of two arbitral centers, institutional arbitration became available to businesses. Nevertheless, courts have not yet had the chance to decide on a setting aside request, due to matters of arbitrability – while *lex arbitri* has served only to the extent of proper conduct of arbitral proceedings.

One can safely claim that the development of arbitration in Kosovo, in its many dimensions, has been happening solely for the last five years. The efforts have been supported and welcomed by foreign investors, in particular by foreign companies established in the country. This is most likely because these parties have traditionally rejected the option of litigation through the criticized national court system, by aiming to circumvent undergoing possible inefficiencies that might emerge. According to the current institutional caseload, around 80% of cases include a foreign company established in Kosovo.

Considering that arbitration, as a form of private justice, did not present a priority for the state, advocacy efforts have been the main objective and the burden on arbitral institutions. The two existing arbitral institutions have been established in 2011. The Arbitration Center operates within the American Chamber of

1 Arbitration Law, Jan. 26, 2007, No.02/L-75 (Kosovo), hereinafter Kosovo Arbitration Law.

2 Kosovo Arbitration Law, Art. 5 para 2.

Commerce in Kosovo, and the Permanent Tribunal of Arbitration operates within the Kosovo Chamber of Commerce.[3] Both institutions have pledged to provide premier arbitration services to parties interested to contract institutional arbitration in Kosovo.

The procedural rules, which for the most part remain the same for both institutions,[4] are mainly based on UNCITRAL Arbitration Rules. In addition to the creation of a reliable procedural framework as well as advocacy efforts, AmCham Arbitration Center has invested in capacity building, this way contributing to the creation of a pool of arbitration practitioners, which are supporting this ADR mechanism.

For academic and practical honesty, it must be noted that, commercial arbitration in Kosovo is still perceived as relatively theoretical, as the domestic business community remains to acknowledge it as a reliable alternative dispute resolution mechanism. This inevitably brings about the fact that there is not enough court practice in matters related to arbitration.

Notwithstanding the above, because of the well-established arbitration legislation and the pro-arbitration stance of courts, especially towards recognition and enforcement of arbitral awards, the country has the potential of becoming an attractive venue for arbitration proceedings. The paragraphs below provide an overview of the arbitration legislation, while highlighting the role of courts, their stance, and the level of intervention.

Structure of the Arbitration Law

Until the adoption of the Law on Arbitration Law in 2007, arbitration proceedings were within the framework of the Law on Contested Procedure. This separate piece of legislation addresses all stages of arbitration proceedings, including the post-proceeding stages of recognition and enforcement of awards. While Kosovo is soon to start drafting the first civil code, the working groups have decided to leave the provisions on arbitration out of the civil code.

The law contains provisions of both international commercial arbitration and domestic arbitration, whereby its preamble pleads to abide with and ensure the uniformity of its provisions with international general principles of arbitration. The drafters of the law have taken into consideration a number of already tested provisions of foreign arbitration legislation such as those of the German and Austrian acts. In addition, although with several modifications, the law also embraced to a large extent the provisions of the first version of the Model Law on International Commercial Arbitration,[5] as well as included the provisions of the New York Convention on Recognition and Enforcement of Arbitral Awards.[6] By embracing these instruments, the drafters' intention was to produce a law, which would contain elements of a modern and arbitration-friendly act.

For academic and practical honesty, it must be noted that, commercial arbitration in Kosovo is still perceived as relatively theoretical, as the domestic business community remains to acknowledge it as a reliable alternative dispute resolution mechanism

The role of Kosovo courts in arbitration proceedings

The role of courts in principle is relatively limited, posing no red lights to potentially extensive roles in arbitral proceedings. As it will be discussed in details below, the Kosovo Law on Arbitration, similar to the Slovenian Arbitration Act,[7] limits the extent of court intervention in arbitral proceedings, unless such intervention is provided or required by law.[8] The following paragraphs offer an overview of the role of courts in the assessment of jurisdiction, their assistance during arbitral proceedings including interim measures, as well as their powers in post-arbitration stage.

First and foremost, this limitation includes the non-intervention rule towards arbitral tribunals executing

3 Although Kosovo Chamber of Commerce had the arbitration component even before the 1999, the current setup of the Kosovo Permanent Tribunal of Arbitration has been affected at the same period with the Arbitration Center at AmCham Kosovo, with the help of United States Agency for International Development (USAID Kosovo).

4 Arbitration Rules 2011 of the Arbitration Center at AmCham Kosovo, available at http://www.adr-ks.org/site/shenimet/files/5894/compilation_of_arbitration_rules-1.pdf (30. 8. 2016), and Permanent Tribunal of Arbitration at Kosovo Chamber of Commerce Arbitration Rules 2011, available at http://www.kosovo-arbitration.com/uploads/files/Arbitration%20Rules%20KCC%20PTA%20June%202011.pdf (30. 8. 2016).

5 See the original version of the UNCITRAL Model Law, available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf (30. 8. 2016).

6 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (1958) available at http://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf (30. 8. 2016).

7 Slovenian Arbitration Act, adopted on Apr. 25, 2008 and published May 9, 2008 (Slovenia), Art. 8.

8 Kosovo Arbitration Law, Art. 3.

their right of *competence-competence*.[9] In substantive claims before local courts, the respondent bears the burden of proving the existence of the arbitration agreement in seeking court's declaration of inadmissibility.[10]

Local courts, to date, although faced only with a moderate number of cases, have followed the pro-arbitration trend

Local courts, to date, although faced only with a moderate number of cases, have followed the pro-arbitration trend. In a rather interesting case of 2011,[11] first instance court assessed the existence of court's jurisdiction. In this case, claimant appealed the decision of inadmissibility of the first instance court, a decision, which was based on the already existing arbitration clause within a FIDIC contract. Further, the second instance court continued the proceedings whereby it upheld the decision. As the procedure continued, the Supreme Court later on approved the decision of the second instance court. The case above is the only instance where the parties undertook to appeal the decision on inadmissibility all the way up to the Supreme Court.

Another instance of court interventions or rather referred to, as requests for court assistance are issuance of interim measures. Courts and arbitral tribunals have competing powers in issuing interim measures. These measures may be issued by local courts regardless of the status of arbitral proceedings, under the condition that the requesting party proves that it may suffer immediate or irreparable damage or loss, if such measure is not granted.[12] The power of arbitral tribunal to order these measures may be excluded, as it is under the parties' discretion.[13] At the request of a party, courts may allow the enforcement of an interim measure, unless the party has not sought an interim measure before the court.[14] As previously stated, the law is based on the first version of the Model Law, thereby not reflecting the updated provisions regarding interim measures as contained in the 2006 version of the Model Law.[15]

In terms of the role of courts towards the composition of the arbitral tribunals, an important function consists of their role as an appointing authority, although the most likely situations to give rise to this default provision are *ad hoc* arbitrations. Such role becomes relevant only in circumstances where "a party fails to appoint the arbitrator within thirty days of the receipt of a request to do so, or if the two appointed arbitrators fail to agree on the third arbitrator within thirty days of their appointment. In such instances the relevant appointment shall be made by the Court upon the request of a party".[16] In this specific matter, just as in all related court actions, the law refers to the jurisdiction of the Economic Court. In this regard, it must be noted that the court structure in Kosovo has undergone through a complete restructuring in 2012, whereas the economic court has ceased to exist. The competences of the Economic Court have been taken over by the Commercial Department, which operates within the Basic Court of Pristina. The Law on Courts[17] has introduced a centralized jurisdiction of the latter, with regards to the entire territory of Kosovo. To date, the provision of the court acting as an appointing authority has not yet been tested. However, it can be safely assumed that the function of the appointing authority is not given to the full competent court, but rather to the president of the Commercial Department within the Basic Court in Pristina.

In addition to the above, the role of the local court in an arbitrator's challenge procedure is almost identical to the relevant provisions of the Slovenian Arbitration Act, with one distinction. A party may request to overturn the decision of the arbitral tribunal on rejection of the challenge before the local court, within 15 days after the receipt of the notification,[18] as opposed to the Slovenian Arbitration Act, which sets double the period, namely a 30-day timeframe.[19]

Another momentum of court assistance during arbitral proceedings arises on the occasion of difficulties in gathering or obtaining evidences. In these scenarios, both the arbitral tribunal and the parties to the arbitral proceedings following approval of the arbitral tribunal

9 Ibid., Art. 14, para 1.

10 Ibid., Art. 7.

11 District Economic Court, Decision No. IV.C 164/11.

12 Kosovo Arbitration Law, Art. 8.

13 Kosovo Arbitration Law, Art. 15, para 1.

14 Ibid., Art. 15, para 2.

15 UNCITRAL Model Law, as amended 2006, Chapter IV(A), provisions on interim measures and preliminary orders.

16 Kosovo Arbitration Law, Art. 9, para 4.

17 Kosovo Law on Courts, July 22, 2010, No. 03/L-199.

18 Kosovo Arbitration Law, Art. 11, para 4.

19 Slovenia Arbitration Law, Art. 16, para 3.

may address the local court for assistance pursuant to collection of evidence rules.[20]

Apart from the role of the courts during the conduct of arbitral proceedings, such role becomes of extreme importance in the enforcement and setting aside proceedings. Due to the debatable statehood status in the international community, Kosovo is not yet eligible to become a contracting state to the Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). This status *quo* is ambiguous, whereby it continues to be debated and is perceived so as to introduce legal obstacles to the recognition and enforcement of the arbitration awards rendered in Kosovo. A comparative study conducted in 2016 discussed, from a practical viewpoint, the fact whether the absence of Kosovo to the New York Convention signatory list presents a tangible problem for choosing the country as a seat of arbitration.[21] The study analyzes the relevant legislation of thirteen states (twelve of them being EU member states). It concludes that the answer is not a yes-no answer, considering that countries address the recognition and enforcement of non-convention awards differently. Nevertheless, the author states that the "signatories that apply the reciprocity reservation, offer a parallel legal regimen for recognition and enforcement of non-convention awards within their respective national legislation. For countries applying an opt-out of such reciprocity thereof, the convention is applicable to the Kosovo made awards equally to other foreign arbitral awards. In consideration of the above options, the idea of arbitrating in Kosovo should not be perceived wrongly, therefore, as uncertain with regards to enforcement of arbitral awards abroad. This being accurate for the main Kosovo trading partners, at the very least."[22]

Thus, in business transactions between Kosovo and Slovenia, in theory, there seems to be no risk related to recognition and enforcement of Kosovo made awards in Slovenia. As of 2008, Slovenia withdrew the reciprocity clause reservation. The Slovenian Arbitration Act makes direct reference to the New York Convention for the purposes of recognition and enforcement of arbitral awards.[23] However, because Slovenia opted out of reciprocity, the provisions on recognition and enforcement apply equally to all foreign arbitral awards, regardless of their origin.[24]

Kosovo Arbitration Law does not provide a definition of foreign arbitral awards, while each award made outside the territory of Kosovo is considered as a foreign arbitral award.[25] According to the law, Kosovo courts shall recognize arbitral awards made outside of Kosovo as effective and enforce them if such awards are recognized and are published as enforced, according to requirements of the law.[26] In this regard, Kosovo has provided assurance to recognition of all foreign arbitral awards, to the extent of them being considered as a *de facto reciprocity clause*.[27] To this end, any foreign award, including Slovenian made arbitral awards, will be recognized and enforced provided the grounds for dismissal are not satisfied.[28]

The party in possession of an arbitration award and seeking its enforcement thereof shall file the request for recognition and enforcement before the competent court, namely the Commercial Department within Pristina Basic Court. In the similar, if not exact language with the requirements of the New York Convention[29], the party shall be able to present to the court the authenticated original award (or a duly certified copy), the original arbitration agreement (or a duly certified copy) and should the language of either of the above not be in an official language of Kosovo, a translation thereof. Similar to the approach taken on the so-to-say technical requirements, paragraph 4 of Article 39 is a copy of Article V of the New York Convention.

Due to the debatable statehood status in the international community, Kosovo is not yet eligible to become a contracting state to the Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

This status *quo* is ambiguous, whereby it continues to be debated and is perceived so as to introduce legal obstacles to the recognition and enforcement of the arbitration awards rendered in Kosovo

20 Kosovo Arbitration Law, Art. 28, para 1.

21 *See generally* Gojani, Anjezë: Recognition and Enforcement of Kosovo made Arbitral Awards in New York Convention countries: A Comparative Study, Journal of Alternative Dispute Resolution in Kosovo (June 2016), Vol. II. pp. 68-83.

22 Gojani, A.: Recognition and Enforcement of Kosovo made Arbitral Awards in New York Convention countries: A Comparative Study, Journal of Alternative Dispute Resolution in Kosovo (June 2016), Vol. II. p. 83.

23 Slovenian Arbitration Act (2008), Art. 42 para 2.

24 *See generally* Galič, A.: Recognition and Enforcement of Domestic and Foreign Arbitral Awards in Slovenia, Zbornik znanstvenih razprav – LXXIII. letnik, 2013, pp. 131-134, available at http://www.pf.uni-lj.si/media/04.galic.sum.eng_2013.pdf (30. 8. 2016).

25 Kosovo Arbitration Law, Art. 39.

26 Ibid.

27 Ibid. at 21.

28 Ibid. at 22.

29 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, Art. IV.

Final remarks

Due to the fact that commercial arbitration is a new component of the legal industry in Kosovo and yet not entirely tested in practice, the foreign legal and business community sometimes perceives it as a road less travelled

Due to the fact that commercial arbitration is a new component of the legal industry in Kosovo and yet not entirely tested in practice, the foreign legal and business community sometimes perceives it as a road less travelled. However, for as much as ticking the boxes of an arbitration-friendly forum is a necessity, the country has done so. The arbitration law does not extend the role of courts further than the already reliable foreign arbitral acts, whereas through the one sided adoption of the New York Convention, the arbitral awards rendered abroad are recognized and enforced in Kosovo, undergoing the requirements of the convention. With the above continuously being applied in practice, businesses in central and southeastern Europe have been provided with a new forum for dispute resolution.

Enforcement of Cross-Border Online Arbitral Awards and Online Arbitration Agreements in National Courts*

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Introduction

When a traditional arbitral award is rendered, the losing party shall comply with the outcome of the award voluntarily, otherwise, the winning party has the right to resort to a national court in the country in which the losing party has assets in order to recognise and enforce the award against the losing party under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ('the NYC'), as well as under pertinent national laws. In the case of an e-arbitral award, the questions that might be raised regarding (A) whether a national court will accept an action made by the winning party for the recognition and enforcement of an online arbitral award ('e-arbitral award') arising out of cross-border e-commerce disputes, (B) what is the legal basis on which the court will rely for the enforcement of such an award. (C) will the court enforce online arbitration agreements ('e-arbitration agreements') in the same manner and to the same effect as traditional arbitration agreements, and (D) what is the legal basis on which the court will rely for such enforcement.

In this article, I will deal with the judicial enforcement of e-arbitral awards, and also with the enforcement of e-arbitration agreements, focusing on how national courts apply the provisions of the NYC when dealing with the enforcement of both e-arbitral awards and e-arbitration agreements.

Arbitral awards arising out of business-to-consumer ('B2C') contracts are excluded from the scope of the NYC on the grounds that the convention is mainly applicable to disputes between businesses. According to some commentators, one of the central purposes of the commercial reservation contained in Article I (3) of the NYC was to prevent the mandatory enforcement of pre-dispute arbitration clauses when one of the parties is a consumer.[1] However, not all of the states that have adopted the NYC have made this commercial reservation.[2] In addition, arbitration as a technique for solving disputes is not deemed the first choice in both traditional B2C contracts or in online B2C

In this article, I will deal with the judicial enforcement of e-arbitral awards, and also with the enforcement of e-arbitration agreements, focusing on how national courts apply the provisions of the NYC when dealing with the enforcement of both e-arbitral awards and e-arbitration agreements

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1 *See* Keran, S., Joseph, M.: Online Arbitration of Cross-Border, Business to Consumer Disputes, University of Miami Law Review, Vol. 56/2002, pp. 9. The authors referred to Morrison & Foerster, "Legal Obstacles to ADR in European Business-to-Consumer Electronic Commerce", which was available as from March 1, 2012 at http://www.kuner.com/data/pay/adr.pdf (27. 8. 2016).

2 On the list of countries, which made the commercial reservation, see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NY-Convention_status.html (27. 8. 2016).

contracts in most jurisdictions. This is attributed to the imbalance power between the contracting parties in such contracts, and also because of public policy considerations. That is, a pre-dispute arbitration clause in B2C contracts is often included in the main contract, and also concluded before the dispute arises where the consumer in most cases cannot negotiate such unfair terms. On this matter, the EU Directive No. 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes restricts consumers' ability to waive their rights to resort to courts, rather, the above Directive provides in Article 10 (1) that any agreement between a consumer and a trader to submit a complaint to ADR and waive the right to go to court is not binding on the consumer if it was concluded before the dispute arose, and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.[3] In the United States, however, arbitral awards rendered out of B2C disputes can be recognised and enforced in the same manner and to the same effect as arbitral awards rendered out of business-to- business ('B2B') disputes under the Federal Arbitration Act (hereafter "the FAA").[4]

Finally, this article shall exclude the enforcement of e-arbitral awards based on self-enforcement mechanisms such as the enforcement made by means of technological code widely used in the context of ICANN's UDRP that is because the decisions made by ICANN's UDRP are not enforceable in national courts.[5]

Unlike the NYC, the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006 includes liberal provisions relating to arbitration agreements concluded online

Mechanisms for the Review of E-Arbitral Awards under the New York Convention of 1958

As a general rule, cross-border e-arbitral awards may be recognised and enforced in the same manner and to the same effect as traditional arbitral awards because no specific rules governing recognition and enforcement of online arbitral awards have been promulgated yet

As a general rule, cross-border e-arbitral awards may be recognised and enforced in the same manner and to the same effect as traditional arbitral awards because no specific rules governing recognition and enforcement of online arbitral awards have been promulgated yet. On that basis, the winning party may rely on the NYC when making an application in a national court seeking recognition and enforcement of an e-award, as we will see in detail below.[6] Of course, the winning party may also rely on national laws of arbitration in the country of enforcement as the more-favourable-right provision of Article VII of the NYC. Apart from that, the winning party may rely on national laws regulating e-commerce transactions based on the above provision. These may include, *inter alia*, national laws on e-commerce, national laws on e-signatures, and national laws on e-communications and e-commerce transactions.

As a precondition for the enforcement of an e-arbitral award, a national court must first examine the validity of an e-arbitration agreement, either as to form or as to substance. That is because invalidity of an arbitration agreement may be used as one of the grounds for refusing recognition and enforcement pursuant to Article V (1) (a) of the NYC. Of course, a national court can exercise a discretionary power on ruling whether exchange of letters or telegrams of Article II (2) of the NYC includes e-communications, as we will see below.[7]

Unlike the NYC, the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006 includes liberal provisions relating to arbitration agreements concluded online. This would certainly assist the winning party, especially if the enforcing country is a Model Law country. In Article 7 (4), entitled *Definition and Form of Arbitration Agreement*, the Model Law clearly indicates that the requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference. The same article further defines "electronic communication" as any communication that the parties make by means of data messages. A "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.[8]

3 http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX-:32013L0011 (29. 8. 2016).

4 *See* Amy, J. S.: American Exceptionalism in Consumer Contracts, Loyola University Chicago International Law Review, Vol. 10, Issue 1/2012, pp. 81-103.

5 On self-enforcement and UDRP procedure, see Kaufmann-Kohler, G. and Schultz, T.: Online Dispute Resolution: Challenges for Contemporary Justice, Kluwer Law International, Netherlands. 2004, pp. 222-223.

6 The enforcement of foreign arbitral awards is easier at the international level than the enforcement of foreign courts' judgments because no international convention regulating the enforcement of foreign courts' judgments has been promulgated yet.

7 *See infra* fn. 35, and fn. 36.

8 *See* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (27. 8. 2016).

Once an application for recognition and enforcement of an award is made before a national court, the court shall begin a review process of that award based on the provisions of the NYC, as well as based on any other related provisions, as stated above. In doing so, the court often reviews the procedural aspects of an arbitral award since the grounds for refusing recognition and enforcement of an award are procedural in nature, and no review – as a general prohibition – on the merits is available in enforcement proceedings.[9] Nevertheless, a national court may review the merits of the case, as an exception to the general prohibition, when it finds that such review is necessary for the verification of the grounds for the refusal of recognition and enforcement, especially in case of allegations pertaining to the public policy ground, which is deemed – to some extent – a substantive ground.

To conclude, the NYC gives a national court the right to ascertain whether an arbitral award meets the requirements for enforcement before enforcing it in its own territory. Additionally, national arbitration laws grant courts the right to review the arbitral award in order to ensure that it meets the requirements for enforcement. Such judicial review differs from state to state and even from one court to another within the same state. For a more liberal judicial review of e-awards, a national court may consider, aside from the provisions of the NYC and national laws of arbitration, the Model Law on International Commercial Arbitration as amended in 2006, national laws regulating e-commerce, including those relating to e-signature and e-communications, international conventions, and model laws regulating e-commerce and e-signatures.

In the following paragraphs, I shall deal with the enforcement of cross-border e-arbitral awards and e-arbitration agreements under the NYC, which has been described by some commentators as the main pillar in the edifice of international commercial arbitration.

Enforcement of Cross-Border E-Arbitral Awards under the New York Convention of 1958

Dealing with e-arbitration will not be fruitful if an arbitral award cannot be enforced under the NYC as international legal mechanism governing recognition and enforcement of foreign arbitral awards. The question that will always be raised by commentators is whether an e-arbitral award made and signed electronically meets the conditions for the enforcement set out in the NYC, especially under articles III and V (1) (e), which state that only binding arbitral awards can be recognised and enforced in national courts of the Contracting States. Apart from that, Article IV of the NYC that deals with the formality issues may raise many questions when online awards are at issue, as we will note below.

Dealing with e-arbitration will not be fruitful if an arbitral award cannot be enforced under the NYC as international legal mechanism governing recognition and enforcement of foreign arbitral awards

To answer the above question, it should be referred first to Article III of the NYC, which provides that: "Each Contracting State shall recognise arbitral awards as binding [...]". Moreover, this article requires the Contracting State to enforce the arbitral awards in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. On the one hand, this article reflects the diversity of legislations in the Contracting States. On the other hand, this article represents the disparity of the procedural application of the NYC inside the Contracting States.[10] This provision may constitute a supportive provision in favour of recognition and enforcement of e-arbitral awards in national courts of the NYC's states, especially in those countries whose laws regulate the matters pertaining to e-documents, including e-arbitration agreements and e-arbitral awards, liberally. In particular, a national law of arbitration in each Contracting State regulates the procedures governing recognition and enforcement of foreign awards. This kind of liberty granted by the NYC to the Contracting States is known as "The

9 This doctrine, prohibition of the review of the arbitral award on the merits, is widely recognised in both common law and civil law countries. In the United States, for example, Section 10 of chapter 1 of the FAA that relates to the grounds for vacating of an arbitral award does not provide for such review. In the United Kingdom, the 1996 Act allows parties to agree to review an arbitral award for legal errors. Under Section 69(1), a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. In France, Article 1520 of the NCCP does not provide for such review, and the review of an award never concerns errors made by the arbitrator or the arbitrator's possibly erroneous interpretation of law. For practical examples on this doctrine from the above jurisdictions see Amro, I.: Recognition and Enforcement of Foreign Arbitral Awards in Theory and in Practice: A Comparative Study in Common Law and Civil Law Countries, Cambridge Scholars Publishing, United Kingdom. 2014, pp. 136-138.

10 The non–unification of the procedural application of the NYC forms an obstacle for the winning party seeking recognition and enforcement of a foreign award in different Contracting States, especially if the state restricts the foreign investment based on the doctrine of state sovereignty.

principle of procedural liberty".[11] This procedural liberty differs from one state to another as follows:

- In some countries, recognition and enforcement of a foreign award is regulated by specific rules enacted for this purpose.
- When the state has no specific rules of procedure, the same rules applicable to the enforcement of the domestic awards might be considered.[12]
- Through the same rules of procedure applicable to the enforcement of courts' judgments as in England.[13]

Overall, each state is free to determine the procedural provisions for recognition and enforcement of cross-border (foreign) arbitral awards in its own territory. However, it does not necessarily mean that the applicable procedures for the recognition and enforcement of foreign awards shall be the same as those applicable to the enforcement of domestic awards.[14]

The more-favourable-right provision includes the provisions of the law of the country of enforcement, or any other multilateral or bilateral treaties that have been signed or ratified by the enforcing state, including the NYC

Also, in order find an answer to the above question, I must refer to Article VII of the NYC, which reads:

> *"The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."*

Online arbitral awards rendered and signed electronically can be recognised and enforced in national courts under the NYC, particularly based on the principle of procedural liberty contained in Article III, and also based on the more favourable-right-provision contained in Article VII of the NYC

The above article requires the competent court to apply the more-favourable-right provision in regards to recognition and enforcement of foreign arbitral awards. The more-favourable-right provision includes the provisions of the law of the country of enforcement, or any other multilateral or bilateral treaties that have been signed or ratified by the enforcing state, including the NYC. The more-favourable-right provision might also be applicable to the enforcement of foreign arbitration agreements, as we will see below. In that, the UNCITRAL recommends that article VII, Paragraph 1, of the NYC should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek the validity of such an arbitration agreement.[15] In practice, the competent courts of the NYC Contracting States permit the enforcement of foreign awards based on Article VII of the NYC if such enforcement is permitted under the domestic law of the country of enforcement.[16] Consequently, the courts preserve the party seeking enforcement of an arbitral award all the rights under the domestic law of the country of enforcement.[17]

Based on the above analysis, online arbitral awards rendered and signed electronically can be recognised and enforced in national courts under the NYC, particularly based on the principle of procedural liberty contained in Article III, and also based on the more favourable-right-provision contained in Article VII of the NYC. In other words, the winning party in the online arbitration may rely either on international conventions or on national laws of the country in which recognition and enforcement is sought as long as a national law deals with the formality issues contained in Article IV of the NYC, and with the issues relating to e-commerce and e-documents liberally. However, it is desirable that the party seeking recognition and enforcement of an e-arbitral award provides the court in the enforcing county a printed copy of an arbitral award signed by the arbitrator(s) to ensure that it will not be denied enforceability.

11 In some civil countries, including France and Germany, the Code of Civil Procedure regulates the process of recognition and enforcement of foreign awards.

12 In some Contracting States, the rules of procedure for the enforcement of a foreign arbitral award differ from those applicable to domestic awards.

13 Regarding this issue *see* Goldman / Gaillard / Fouchard on International Commercial Arbitration, Kluwer Law International, The Hague/Boston/London.1999, pp. 968.

14 For a comparison between the enforcement of domestic awards and the recognition and enforcement of foreign awards see Lew, J. D. M., Mistelis, L. A., Kroll, S. M.: Comparative International Commercial Arbitration, Kluwer Law International, The Hague/London/New York. 2003, pp. 691-693.

15 *See* "Recommendation regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards", adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session", searchable at http://www.uncitral.org (27. 8. 2016).

16 *See* Sampliner, G.: Enforcement of Nullified Foreign Arbitral Awards, Journal of International Arbitration, Vol. 14, No 3/1997, pp. 142.

17 *See* Leahy, E. R., Bianchi, C. J.: The Changing Face of International Arbitration, Journal of International Arbitration, Vol.17, No 4/ 2000, pp. 32.

To give an example of national laws, the party seeking the enforcement of an arbitral award in Germany must produce only the award or a certified copy of it according to Section 1064 (3) ZPO. That is, the German Arbitration Law contained in the ZPO does not require providing a copy of an arbitration agreement,[18] while the NYC requires in Article IV the party seeking recognition and enforcement to provide the original arbitration agreement, or a duly certified copy of it. German courts deal in a liberal manner with the formalities required for recognition and enforcement of an arbitral award based on the above Section of ZPO. In this, German courts rely on Section 1064 (1) and (3) ZPO as a more-favourable-right provision, which allows the party seeking recognition and enforcement in Germany to supply only the original arbitral award or a certified copy thereof. To put this into a practical context, the Munich Court of Appeal decided in a decision dated 23 February 2007 to enforce an arbitral award based on the less strict requirement of the German law, rather than Article IV of the NYC, holding:

> *"The request for enforcement is admissible ... to the extent that Art. IV Convention requires further documents and a translation and sets requirements for their form, and those requirements are not contained in Sect. 1064 (1) and (3) ZPO, the more-favourable-right principle applies pursuant to Art. VII (1) Convention. German law, which is more favourable to recognition, mandates, also for foreign arbitral awards, that only the original arbitral award or a certified copy thereof be submitted... the claimant has met these requirements, since it supplied a copy of the arbitral award of 26 June 2006, certified by a notary public."*[19]

A national law may impliedly allow, in some circumstances, the recognition and enforcement of an award rendered in an electronic form. Some national laws have broadened the concept of an arbitral award, including the English Arbitration Act of 1996 and the Swiss Code on Private International Law. According to Section 52 of the English Arbitration Act and to Article 189 (1) of the Swiss Code on Private International Law, parties are free to agree on the form of an award. This means that both the English Arbitration Act and the Swiss Code on Private International Law do not require an award to be in a specific form. Consequently, an e-arbitral award shall be recognised and enforced in both jurisdictions in the same manner and to the same effect as a traditional award, noting that the NYC does not deal directly with the form of an arbitral award. However, it is desirable that arbitrators issue a hard copy of an e-award in order to meet the formality requirements of Article IV of the NYC, especially in those countries whose national arbitration laws require that an arbitral award be in writing and signed by the arbitrators. On this matter, some commentators suggest, if in some states of the USA or countries the enforcement of an arbitration award depends upon a court's review of the arbitration proceeding and a stamp of approval over fundamental procedural rights, then extreme care must be taken to draft the arbitration agreement clearly, follow the terms of the agreement, and do whatever is possible to record all transactions in getting to and presenting in front of the arbitrators. All computer-based correspondence or conferencing should, to the extent possible, be recorded in hard copy.[20]

Besides this, the winning party may rely on national laws regulating e-commerce transactions, including those relating to e-signature, based on the wording of Article VII of the NYC. That is, an e-signature of the arbitral award shall have the same legal validity as a handwritten signature in enforcement proceedings. To give an example of such validity from a common law country, the Electronic Communication Act of 2000 in England provides in Section 7 (1) of Part II, entitled "*Facilitation of electronic commerce, data storage, etc.*":

> *"In any legal proceedings: (a) an electronic signature incorporated into or logically associated with a particular electronic communication or particular electronic data, and (b) the certification by any person of such a signature, shall each be admissible in evidence in relation to any question as to the authenticity of the communication or data or as to the integrity of the communication or data.*

A national law may impliedly allow, in some circumstances, the recognition and enforcement of an award rendered in an electronic form. Some national laws have broadened the concept of an arbitral award, including the English Arbitration Act of 1996 and the Swiss Code on Private International Law

18 ZPO, §1064 (1). This paragraph is similar to Art. 35(2) of the Model Law of 1985.

19 On this decision *see* http://www.dis-arb.de (27. 8. 2016), *cited in* YB, Vol. XXXIII-2008 (Germany, no. 111), pp. 521-522.

20 *See* Berlin, C.: Online Arbitration for Online Coverage Disputes: Arbitrating a Coverage Dispute over the Internet, Journal of Insurance Coverage, Vol. 5, Issue 1/2002, p. 57.

(2) For the purposes of this section an electronic signature is so much of anything in electronic form as: (a) is incorporated into or otherwise logically associated with any electronic communication or electronic data; and (b) purports to be so incorporated or associated for the purpose of being used in establishing the authenticity of the communication or data, the integrity of the communication or data, or both.

(3) For the purposes of this section an electronic signature incorporated into or associated with a particular electronic communication or particular electronic data is certified by any person if that person (whether before or after the making of the communication) has made a statement confirming that: (a) the signature (b) a means of producing, communicating or verifying the signature, or (c) a procedure applied to the signature is (either alone or in combination with other factors) a valid means of establishing the authenticity of the communication or data, the integrity of the communication or data, or both."[21]

Most common law and civil law countries including, but not limited to, the USA, the UK, France and Germany have enacted laws that regulate the use of e-signatures in e-commerce transactions. In these countries, e-signatures of the arbitrators on an arbitral award, and those of the parties, may be admissible and have the same evidential value as handwritten signatures as *prima facie* evidence in national courts

To give another example from a civil law country, the Law on E-Signature in Germany has recognised in Article 23 the validity of a foreign e-signature although the same article distinguishes between electronic signatures originating in EU member states or states of the European Free Trade Association (EFTA), and electronic signatures originating in third countries.[22]

As such, an e-arbitral award might be deemed original as stipulated under the NYC in some jurisdictions, and an e-signature may suffice for the purposes of authenticity requirement as equivalent to handwritten signature, which is deemed a precondition for recognition and enforcement of an arbitration agreement and an arbitral award under the NYC. This means that the traditional handwritten signature is replaced by an electronic signature "a signature certificate", which can be obtained online from any electronic signature provider, also known as "certification service provider".[23]

This kind of certificate provides secure web communications and increased trust for users involved in e-commerce transactions since it helps arbitrators and parties to ascertain that the signature originates from the party which uses it. Otherwise, arbitrators may sign a printed copy of an e-award at the place of arbitration that has been determined according to the parties' agreement, and post it to the parties and to the online arbitration institution, under its own rules by which the e-arbitration agreement has been concluded, the e-arbitral process has been conducted, and the e-award has been rendered, if institutional e-arbitration is applicable. Most common law and civil law countries including, but not limited to, the USA, the UK, France and Germany have enacted laws that regulate the use of e-signatures in e-commerce transactions. In these countries, e-signatures of the arbitrators on an arbitral award, and those of the parties, may be admissible and have the same evidential value as handwritten signatures as *prima facie* evidence in national courts. In very few countries, however, there are some challenges facing the use e-signatures in cross-border commercial arbitration such as business and technological challenges, aside from challenges that relate to the use of an e-signature as evidence in national courts in these countries.

Finally, and maybe most importantly, some national laws, especially in civil law countries, allow filing of cases, submission of documents, and production of evidence through a unified online information system. By analogy, this may also be applicable to the submission of cases pertaining to the enforcement of cross-border arbitral awards rendered online. For example, in Brazil, a civil law country, there is an extensive use of e-procedure under the new code of civil procedure as amended in 2015, which includes

21 On this Section, *see* http://www.legislation.gov.uk/ukpga/2000/7/part/II (27. 8. 2016).

22 *See* Bierekoven, C., Bazin, P., Kozlowski, K.: Electronic Signatures in Germany, French and Polish Law Perspective, Digital Evidence and Electronic Signature Law Review, pp. 7-13, available at: http://sas-space.sas.ac.uk/5381/1/1719-2303-1-SM.pdf (27. 8. 2016).

23 To give an example on accredited certification service providers: The Deutsche Post (German Post) is deemed a certification service provider where interested users who must be also the domain owner, including companies and individuals, can apply online for obtaining a digital signature, available at: http://www.deutsche-post.de/dpag?tab=1&skin=hi&check=yes&lang=de_EN&xmlFile=link1017535_49490 (28. 8. 2016). To give another example, AuthentiDate, available at: http://www.exceet-secure-solutions.de/en/digital-transformation-the-competitive-edge/ (29. 8. 2016), which offers innovative business process solutions, software and cloud services using electronic signatures and timestamps for small, medium and large companies nationally and internationally in accordance with the New Electronic Signature Act of 2001, also known as "The New Electronic Signature Act-SigG", and also in accordance with the Directive of 13 December 1999 on a Community framework for electronic signatures, also known as (Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures), see http://merlin.obs.coe.int/show_iris_link.php?iris_link=2000-1%3A5&id=515 (28. 8. 2016).

provisions that regulate e-procedures.[24] Under Article 228 (2), electronic submissions, briefs, petitions or any other documents are incorporated in the case files as soon as they are electronically submitted.[25] In addition, the Law No. 11.419 of 2006, which amended the Brazilian Code of Civil Procedure of 1973, governs the electronic judicial processes through provisions that deal, *inter alia*, with the period of transition to e-procedures.[26] In practice of law, the Superior Court of Justice ('STJ'), which exercises an exclusive jurisdiction over the recognition of foreign judgments and foreign arbitral awards under Article 105 (I) (i) of the Constitution of Brazil of 2008 as amended in 2014,[27] has created a system for electronic filing of lawsuits and submissions (e-STJ). Through this e-system, Brazilian lawyers can file lawsuits pertaining to the recognition and enforcement of foreign judgments and foreign awards electronically.

To give another example, the Code of Civil Procedure in Greece, as amended in 2015, allows in Article 119 (4)[28] an electronic filing of applications, documents and evidence, provided that the document contains an advanced electronic signature within the meaning of Article 3 (1) of the Presidential decree of 2001.[29] In addition, the Presidential Decree on Electronic submission of motions and related documents (evidences and procedural documents) before the civil courts of 2013, *Ηλεκτρονική κατάθεση προτάσεων και σχετικών εγγράφων (αποδεικτικών μέσων και διαδικαστικών εγγράφων) ενώπιον των πολιτικών δικαστηρίων*[30] allows production of documents, evidence, and e-payments online. However, this requires, among other conditions and principles, establishing an e-filing system in both civil courts and bar associations of Greece, using an advanced e-signature by lawyers, ensuring transparency, control the correctness of the process and the reliability of each individual activity and personal information of all interested individuals and organizations "providers", ensuring continuity of service by enabling the processing of the case until the publication of the decision and the appeal, and finally ensuring technical support from providers of electronic filing services.[31]

Finally, and maybe most importantly, some national laws, especially in civil law countries, allow filing of cases, submission of documents, and production of evidence through a unified online information system. By analogy, this may also be applicable to the submission of cases pertaining to the enforcement of cross-border arbitral awards rendered online

24 The Code of Civil Procedure of Brazil is available only in Portuguese, see http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm (28. 8. 2016).

25 The provision is available only in Portuguese, translated to English by: Luísa B. A. Quintão, attorney-at-law, the dispute resolution practice of Justen, Pereira, Oliveira & Talamini (Brazil).

26 This law is available only in Portuguese, see http://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2006/Lei/L11419.htm (28. 8. 2016). The related provision translated to English by: Luísa B. A. Quintão. She further added that Sao Paulo State Courts are subject to a specific set of rules that govern their internal affairs and judicial communications (NSCGJ). The NSCGJ has specific rules concerning the transmission of information and official communications made electronically under Section XIII, as well as a whole chapter regarding e-procedure itself (Chapter XI). However, all the provisions are limited to proceedings conducted at the Sao Paulo State Courts. On the NSCGJ, which is available only in Portuguese, see http://www.tjsp.jus.br/Download/ConhecaTJSP/NormasJudiciais/NSCGJTomoIDJETachado.pdf (28. 8. 2016).

27 *See* https://www.constituteproject.org/constitution/Brazil_2014.pdf (28. 8. 2016). Although Article 105 (1) (i) of the Constitution does not expressly indicate the recognition of foreign arbitral awards, some commentators in Brazil concluded that the STJ has also an exclusive jurisdiction over the recognition and enforcement of foreign arbitral awards because arbitral awards are equivalent to court's judgments since the enactment of the Brazilian Law of Arbitration of 1996. On this matter, Cesar Pereira Guimarães states that: "A domestic arbitral award in Brazil can therefore be enforced before a judicial court without any prior recognition procedure, almost exactly as if it were a court judgment. A foreign award can also be enforced in the same terms, but only after it has been recognized by the STJ. The language of the Constitution does not expressly mention arbitral awards as being subject to recognition by the STJ, but the interpretation given to Article 105, I, "i." of the Constitution encompasses arbitral awards, particularly after they have been given the status of *sentença* by Law n. 9.307. This matter, together with numerous other topics of Law n. 9.307, including the abolition of the double *exequatur*, was examined by the STF in the important leading case SE 5.206 AgR/EP, in which the constitutionality of Law n. 9.307 was upheld". See "Recognition of Foreign Judgments and Awards In Brazil" in Marçal Justen Filho, Cesar Pereira Guimarães, and Maria Augusta Rost, Brazil Infrastructure Law, Eleven International Publishing, The Hague. 2016, pp. 463.

28 The provision is available only in Greek (author's translation). The provision in Greek reads: "4. Τα δικόγραφα κάθε φύσεως, είναι δυνατόν να υποβάλλονται και με ηλεκτρονικά μέσα, εφόσον φέρουν προηγμένη ηλεκτρονική υπογραφή, κατά την έννοια του άρθρου 3 παρ. 1 του π.δ. 150/2001 (Α' 125). Κατά τον ίδιο τρόπο είναι δυνατό να υποβάλλονται και τα επικαλούμενα με τις προτάσεις αποδεικτικά μέσα. Το δικόγραφο που έχει υποβληθεί με ηλεκτρονικά μέσα θεωρείται ότι κατατέθηκε, εφόσον επιστραφεί στον αποστολέα του εγγράφου από το δικαστήριο ηλεκτρονική απόδειξη, που θα φέρει προηγμένη ηλεκτρονική υπογραφή, κατά την άνω έννοια και θα περιέχει και την έκθεση κατάθεσης". On this Code in Greek, see http://www.dsanet.gr/1024x768.htm (28. 8. 2016).

29 On this presidential decree, which is available only in Greek see http://dide.flo.sch.gr/Plinet/Nomothesia-Internet/PD.150-2001.pdf (28. 8. 2016). See also https://www.taxheaven.gr/laws/law/index/law/470 (28. 8. 2016).

30 The law is available only in Greek (author's translation). On the provisions of this decree in Greek see http://www.dsanet.gr/Epikairothta/Nomothesia/pd150.htm (28. 8. 2016). See also https://www.taxheaven.gr/laws/law/index/law/549 (28. 8. 2016).

31 *Ibid.*

National courts in some common law and civil law countries, including Switzerland and Israel, have decided to enforce e-arbitration agreements in the same manner and to the same effect as traditional arbitration agreements

Enforcement of Cross-Border E-Arbitration Agreements under the New York Convention of 1958

Article II (2) of the NYC requires that an arbitration agreement be in writing and signed by the parties. One may comment on the writing requirement contained in above article as follows:

> *"What constitutes a 'writing . . . signed by the parties' becomes a valid topic of discussion in the online world. The ubiquitous 'I agree' button is not enough to satisfy the treaty's requirements, but will current electronic signature acts work? Further, is that to which a party agreed in an online arbitration clause even close to what took place? This all relates the fourth circle of basic e-commerce issues: impersonal, distant, linguistically and culturally diverse, unsecure, jurisdictionless, and lacking in an absolute set of controlling law. This fourth circle is the most novel, amorphous, and dynamic and requires counsel to be familiar enough with e-commerce issues to anticipate risks."*[32]

Due to the different judicial interpretations of the form requirement in the Contracting States' courts, the UNCITRAL recommends that the Contracting States' courts interpret Article II (2) of the NYC considering, *inter alia*, the wide use of electronic commerce. Specifically, it recommends that Article II, Paragraph 2, of the NYC be applied recognising that the circumstances described therein are not exhaustive.[33] Also, the Model Law on E-Commerce of 1996 adopts a broadened and modern definition of the form requirement under Article 6 (1), which reads: "*Where the law required information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference*". Additionally, national laws in some civil law countries, including Germany, Switzerland, Austria, and Slovenia, have broadened the concept of an arbitration agreement to include an exchange of letters (telex, telegram) or other means of telecommunications such as facsimile or e-mail "e-arbitration agreement". This important development is attributed to the wide use of e-communications and e-documents in modern international commercial transactions.[34]

National courts in some common law and civil law countries, including Switzerland[35] and Israel,[36] have decided to enforce e-arbitration agreements in the same manner and to the same effect as traditional arbitration agreements. In addition, e-arbitration agreements may be enforced under the UN Convention on E-Contracting of 2005 ('The ECC') based on the favourable provision provided by Article VII of the NYC. The ECC provides new avenues under Article 20 for applying the same Convention to any electronic communications relating to contracts that might be concluded or enforced under other international conventions, including the NYC. Article 20 (1) of the ECC reads:

> *"The provisions of this Convention apply to the use of electronic communications in connection with the formation or performance of a contract to which any of the following international conventions, to which a Contracting State to this Convention is or may become a Contracting State, apply: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958."*[37]

32 *See* Berlin, *C., supra* fn. 20, pp. 58.

33 *See supra* fn. 15.

34 Hong-lin, Y., Nasir, M. comment on this development as follows: "*The use of traditional paper documents in international trade has been sharply criticized. 'Not only do paper documentation and procedures represent as much as 10 per cent of goods value, they are slow, insecure, complicated and growing'. No one is in a position to ignore the fast development of cyber-trade, which has generated a large number of electronic contracts for the purpose of international trade, such as e-bills of lading and electronic arbitration agreements. Consequently, over the last decade both international documents and national laws have started to address this development*". *See* Can Online Arbitration Exist Within the Traditional Arbitration Framework?, Journal of International Arbitration, Vol. 20, No. 5/2003, pp. 459.

35 For example, in a case decided by the Swiss Supreme Court in 1995, the Court interpreted Art. 2 (2) of the NYC broadly, considering that 'exchange of letters or telegrams' includes any other means of communications. The Court further observed that the form requirement of the NYC is met since it is equivalent to that form provided by Art. 178 (1) of the Swiss Code on Private International Law. The original decision in French reads: "*L'art. 178 al. 1 LDIP s'inspire manifestement de cette formulation. Celle-ci, qui a pris en compte le développement des moyens modernes de communication, doit donc également servir à l'interprétation de l'art. II al. 2 de la Convention de New York. Il suit de là que les exigences formelles posées par ce traité international se recoupent en définitive avec celles de l'art. 178 LDIP*". (Author's translation). This decision is available at http://servat.unibe.ch/verfassungsrecht/bge/c3121038.html (28. 8. 2016), cited as BGE 121 III 38, 44, E.2c.

36 *See*, for example, the decision of the Tel Aviv-Jafa Court of First Instance in *Global Ltd., v. Advtive Imaging Technologies* (case no. 38891-10-11), *Advtive Imaging Technologies v. Global Ltd.* (case no. 55013-11-11), available in Hebrew at: he.hh-law.co.il/files/shevach.doc (28. 8. 2016). A translation of this decision made from Hebrew to Arabic. A translation from Arabic to English made by the author.

37 The ECC, Art. 20 (1).

The above article aims to remove any obstacles facing electronic commerce under existing international conventions identified by the same article, particularly the NYC. In other words, the ECC enables national courts to address issues pertaining to the use of electronic communications arising in the context of other international conventions, especially the NYC.

Based on the above analysis, arbitration agreements contained in international commercial contracts that have been concluded online are valid, and are enforced in national courts of the NYC states in the same manner and to the same effect as conventional arbitration agreements, bearing in mind that many national laws have recognised the validity of e-arbitration agreements, as well as the fact that some national courts have decided to enforce such arbitration agreements. National laws of evidence in most common law and civil law countries, especially in the USA and in France, have given e-documents, including e-arbitration agreements, the same evidential value as written documents in national courts.

The enforcement of cross-border e-arbitration agreements in national courts is possible under the NYC based on the more-favourable-right provision contained in Article VII of the same Convention. As noted earlier, the more-favourable-right provision might be a national law, including arbitration laws or those laws regulating e-commerce transactions, an international treaty or a convention, including the NYC. In that, the reference of Article 20 (1) of the ECC to the NYC, which links the NYC to e-commerce transactions in general and to e-contracting in particular, constitutes a supportive provision in favour of the enforcement of e-arbitration agreements under the ECC as a more-favourable-right provision.

On this matter, one may observe that international commercial arbitration laws and most national commercial arbitration laws have recognised the legal validity of arbitration agreements in an electronic form, while e-arbitral awards are still required to be in writing.[38] In comparison, online arbitration agreements and online arbitral awards are formed by using the Internet and other related technological means so they are written in an electronic form rather than hard copy.[39]

Obstacles Facing the Enforcement of E-Arbitral Awards in National Jurisdictions

Despite the extra-territorial effect of online arbitral awards, there are obstacles facing the enforcement of e-awards in national courts of the NYC Contracting States. These obstacles include the absence of the form requirement of both arbitration agreement and arbitral award, the absence of a physical place of arbitration and non-designation of the place at which the award is made, a violation of due process, including oral hearings, the formality issues such as inability of providing a duly authenticated original award or a duly certified copy thereof, and the original agreement or a dully certified copy thereof, the public policy considerations, and finally the use of the e-payment system facilitating e-commerce transactions for the enforcement of e-arbitral awards. Most of these obstacles are based on the grounds for the refusal of recognition and enforcement of an arbitral award under the NYC.

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The grounds for the refusal of recognition and enforcement of an arbitral award are listed in Article V of the NYC. [40] Some of these grounds may be raised by the losing party, while other grounds may be raised by the national court, *ex officio*. Paragraph one of the above article enumerates a set of procedural grounds that may be raised by the losing party, including invalidity of an arbitration agreement, a lack of due process, irregularity in the composition of the arbitral tribunal or arbitral procedure, and setting aside or suspension of an arbitral award.

Paragraph two of Article V of the NYC lays down two substantive grounds that might be raised by the court, which exclusively include inarbitrability of the subject-matter of the dispute, and contradiction of an award to public policy of the country in which the recognition and enforcement is sought.

The writing requirement contained in Article II (1,2) of the NYC may constitute an obstacle in some jurisdictions that may hinder the enforcement of an e-arbitral

38 *See* Liyanage, C.: Online Arbitration Compared to Offline Arbitration and the Reception of Online Consumer Arbitration: An Overview of the Literature, Sri Lanka Journal of International Law, Vol. 22, Issue 1/2010, pp. 186.

39 *Ibid.*

40 On the NYC convention see http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf (28. 8. 2016).

award,[41] especially in those countries whose national laws deal in a restrictive manner with the form issues in arbitration. In other jurisdictions, however, national laws and courts skipped over such obstacle dealing in a liberal manner with the form requirement, particularly in civil law jurisdictions, including Germany, France, Switzerland, Austria, and Slovenia as noted earlier. This means that the writing requirement of an arbitration agreement in these countries is no longer an obstacle facing the recognition and enforcement of an e-award. On this matter, one may observe that:

> *"It is quite clear that the second alternative of Article II (2) was added in order to facilitate practices in international trade of concluding contracts by correspondence. Its purpose was therefore to enhance the possibility of concluding arbitration agreements in international trade. Bearing in mind the state of communication technology at the time – when the fastest means of mass commercial communication was the telegram – it is clear that the delegates included the most modern technology without excluding future developments in ways to transmit written words. One should note that from today's perspective the telegram is a less secure way of communication than e-mail. An e-mail message automatically contains the e-mail address of the sender, which to some extent can be used as a first source of information about the sender. There was often no identification procedure for dispatching telegrams."*[42]

For avoiding these obstacles resulting from the absence of a physical place in online arbitration, parties may designate the country in which the e-arbitration institution is based as the place of arbitration, if institutional arbitration is applicable

The absence of a physical place of arbitration may also be an obstacle facing the enforcement of an e-arbitral award in both common law and civil law jurisdictions, especially since Article I of the NYC provides that: "*This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought* [...]".[43] Also, this is because the place of arbitration may determine the procedural law of the arbitration *lex arbitri*, including the validity of the arbitration agreement.[44] Apart from that, national courts of the place of arbitration often have jurisdiction to rule on issues relating to arbitration such as ruling on applications for interim measures, and applications for setting aside an arbitral award.[45] In addition, the NYC, which is deemed a part of a national law in most common law and civil law countries, provides in Article V (1) (e) that a national court has the right to refuse to recognise and enforce an arbitral award if it has not become binding under the law of the country in which the award was made.

A violation of due process is also deemed one of the major obstacles that may hinder the enforcement of online arbitral awards in national courts

For avoiding these obstacles resulting from the absence of a physical place in online arbitration, parties may designate the country in which the e-arbitration institution is based as the place of arbitration, if institutional arbitration is applicable. In case of the absence of such designation, the arbitrator(s) must designate the place of arbitration based on rules of the arbitration institution. In all other cases, the arbitrators must designate the place of e-arbitration, taking into account the circumstances of the case, based on Article 20 (1) of the UNCITRAL Model Law of 1985 as amended in 2006, and also based on the original intention of the parties to an e-arbitration.

Some commentators suggest adopting the principle of delocalisation of international arbitration because the application of this principle detaches international commercial arbitration from control imposed by the law of the place of arbitration *lex fori*. Other commentators, however, have contested this suggestion on the grounds that this would encounter several legal problems, including the applicability of mandatory rules and principles of *lex fori*, issues of arbitrability, the validity of an arbitration agreement, and the extent of intervention and support by national courts.[46]

A violation of due process is also deemed one of the major obstacles that may hinder the enforcement of online arbitral awards in national courts. Under Article V (1) (b) of the NYC, the losing party may oppose the recognition and enforcement of an arbitral award

41 The NYC is silent regarding the law governing the writing requirement and therefore, parties may use the law of either the country of setting aside of an award or the country of recognition and enforcement of an award.

42 *See* Arsic, J.: International Commercial Arbitration on the Internet: Has the Future Come Too Early? Journal of International Arbitration, Vol. 14, Issue 3/1997, pp. 216.

43 *See* Art. I (1), the NYC.

44 *See* Altenkirch, M.: A Fast Online Dispute Resolution Program To Resolve Small Manufacturer-Supplier Dispute Using the ODR M-S Program, Dispute Resolution Journal, Vol. 67, Issue 3/2012, pp. 51.

45 *Ibid.*

46 *See* Amro, I.: The Use of Online Arbitration in the Resolution of International Commercial Disputes, Vindobona Journal of International Commercial Law and Arbitration, Vol. 18(2)/2014, pp. 140.

based on violation of due process if that party was not given a proper notice of the appointment of the arbitrators or of the arbitral proceedings, or if it was not able to be heard orally, or if it was unable to present its case during the arbitral proceedings. However, only very serious irregularities shall constitute a violation of due process under the above provision.[47] With respect to e-arbitration process, serious irregularities may include a true inability for one or both parties to allege facts, submit arguments, or produce evidence due to the technology chosen by the arbitral tribunal, for instance, because such technology was particularly difficult to use and prevented a party from filing its submissions on time.[48] It may also include the absence of a video-conferencing session and in-person meeting, and the parties may oppose enforcement if the law governing the arbitration provides for a right to be heard orally and the parties have not waived it.[49] Apart from that, it may include lengthy technical failures, for instance disruption of sound and image transmission in a video conference allowing one party to make its case without the other being online.[50]

In this instance, the court in the country of enforcement must decide whether there is a breach of due process or not. If a court finds that a breach of due process exists, the court may consider the request of the losing party for refusing recognition and enforcement. Even though it is difficult to prove a violation of due process, the Hamburg Court of Appeal in a decision dated 3 April 1975[51] reversed the lower court's decision granting enforcement of the arbitral award made in favour of the U.S. claimant. It refused to enforce the award because the sole arbitrator violated due process by not allowing the German firm (the respondent) to present its case. The court noted that such an extreme case existed since the arbitrator and the AAA[52] had not only violated the principle of a fair hearing, but the award was made without giving an opportunity to the German firm to obtain knowledge of the letter the other party had submitted.[53] On this decision, Thomas Shultz states:

> *"The arbitral tribunal would be well advised to make sure that every document that it receives and that is relevant to the case (i.e. not mere billing matters, for example) is also properly transmitted to the other party before taking the document into consideration. The same holds true for documents that are uploaded to a case management website but are not accessible or readable by one party, for instance, because of the use of a format that was unusual and had not been agreed upon."*[54]

In addition, a lack of due process, either in traditional or online arbitration, may constitute a breach of public policy in the country of recognition and enforcement. In such a case, a court may refuse to recognise and enforce an arbitral award, *ex officio*, relying on Paragraph 2 (b) of Article V of the NYC. Specifically, an error in the transmission of an electronic document, which is not received by one of the parties, may amount to a violation of international public policy.[55] Moreover, an absence of a face-to-face hearing may also be considered a violation of due process in some jurisdictions based on public policy and consequently, an e-award may not be recognised and enforced in national court unless the parties have waived this right in their arbitration agreement explicitly.

To avoid all of these obstacles, a national court will deal in a liberal manner with the issues relating to due

However, only very serious irregularities shall constitute a violation of due process

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47 *See* Schultz, T.: Information Technology and Arbitration: A Practitioner's Guide, Kluwer Law International, The Hague. 2006, pp. 120.

48 *Ibid.*

49 *Ibid.*

50 *Ibid.*

51 *See* YB, Vol. II-1977 (Germany, no. 11), p. 241. Despite this holding of the Court of Appeal, *Oberlandesgericht*, German courts yet apply the requests for refusing recognition and enforcement based on violation of due process in a restrictive manner. An example is the decision of the Court of Appeal of Thuringia on 8 August 2007 in which the court dismissed the respondent's objection to enforcement of the ICC award on the ground of violation of German public policy, because the arbitral tribunal lacked due process by failing to take into account the respondent's argument and witness statements. The court found that the arbitrators had complied with the respondent's right to due process and as a result, the court held that there was no violation of due process as a part of international public policy. In its reasoning, the court referred to the findings of the Swiss Federal Supreme Court in the annulment proceedings, which held that the arbitrators had complied with the defendant's right to due process. The court noted that the Swiss Court applied the same notion of due process that is applicable in Germany. As the Swiss Court's conclusions in the annulment proceedings were not visibly wrong and grossly incorrect, they were binding on and could not be reviewed by the enforcement court. On that basis, the court held that there was no violation of due process as a part of international public policy. On this decision see http://www.dis-arb.de (28. 8. 2016), *cited in* YB, Vol. XXXIII-2008 (Germany, no. 113), pp. 534-540.

52 The American Arbitration Association to which the dispute was referred to arbitration under its own rules of arbitration.

53 *See* Amro, I., *supra* fn. 9, at pp. 162.

54 *See* Schultz, T., *supra* fn. 47, pp. 122.

55 *Ibid,* pp. 122.

To avoid all of these obstacles, a national court will deal in a liberal manner with the issues relating to due process, considering the specific nature of an e-arbitral award on the one hand, and the national laws of arbitration, which may give parties the right to waive oral hearings and agree to conduct hearings via means of technology, on the other hand

process, considering the specific nature of an e-arbitral award on the one hand, and the national laws of arbitration, which may give parties the right to waive oral hearings and agree to conduct hearings *via* means of technology, on the other hand. On this matter, one may assume that if the right to an oral hearing exists and a videoconferencing session was held, it may be recalled that this should not amount to a violation of this right, as the goal of an in-person meeting is to be able to react instantaneously to the allegations of one's opponent, and this goal is met in a videoconferencing session.[56] On that basis, holding an oral hearing by means of videoconferencing should be regarded as a valid form of oral hearing,[57] especially since holding an oral hearing may not be mandatory in some jurisdictions, as stated above.

One may note that U.S. courts have found that an arbitral tribunal must give the parties the opportunity to be heard at a meaningful time, and in a meaningful manner.[58] U.S. courts have generally interpreted this rule to require arbitrators to provide the parties with a hearing on the evidence.[59] However, the parties' agreement to settle their dispute through e-arbitration may be deemed a waiver of hearing. To put this into a practical context, the parties' agreement to use the ODR M-S Protocol, as an application of the International Centre for Dispute Resolution (hereafter the 'ICDR'), should constitute such a waiver.[60] In other jurisdictions, a national court may consider the institutional arbitration rules under which parties agree to settle their dispute, especially the fact that some of these rules may allow online hearings. For example, the rules of the International Commercial Arbitration Court in Russia ('ICAC') give any of the parties the right to request to participate in the hearing by means of videoconferencing, or *e-hearing*.[61]

With respect to an online notification, some national laws have impliedly recognised the notification of an award through means of technology, including e-mail exchanges. For example, the English Arbitration Act in Section 55 (1) gives the parties the right to agree on the requirements for notification of the award to the parties. Otherwise, absent the parties' agreement, the parties shall be notified of the award by service of copies of the award, which shall be done without delay after the award is made, under paragraph two of the same section.[62] The English Arbitration Act also allows, among other forms, the rendition of an award electronically under Section 52, as stated earlier. This means that an e-award can be made and the parties notified electronically. In that, it is desirable that other national laws of both common law and civil law countries include similar provisions for facilitating the enforcement of e-awards in general, and for facilitating the rendition and the notification of e-awards in particular. Also, some institutional arbitration rules have recognised e-notifications, including the ICC 2012 Rules of Arbitration, which provides in Article 3 (2) that notifications or communications made by the secretariat and the arbitral tribunal may be made by delivery against receipt, registered post, courier, email, or any other means of telecommunication that provides a record of the sending thereof.[63]

The formality issues are also deemed an obstacle facing the enforcement of e-arbitral awards in national courts. Under Article IV of the NYC, the party seeking recognition and enforcement shall supply the duly authenticated original award or a duly certified copy at the time of the application. That party shall also supply the original arbitration agreement referred to in Article II[64] or a duly certified copy. The question is whether an e-award and an e-arbitration agreement meet both the authentication and certification required under Article IV of the NYC.

To avoid this obstacle, some commentators link Article IV of the NYC to Article III of the same convention, stating that:

> *"Article IV of the New York Convention stipulates that the party seeking recognition and enforcement*

56 *Ibid*, pp. 120.

57 *Ibid*.

58 On some of these decisions see, for example, *Iran Aircraft Indus. v. Avco Corp*., 980 F.2d 141, 145-46 (2d Cir. 1992); *Generica Ltd. v. Pharmaceuticals Basics, Inc*., 125 F.3d 1123, 1129-131 (7th Cir. 1997).

59 *See*, for example, *Hoteles Con-dado Beach v. Union De Tronquistas,* 763 F.2d 34, 40 (1st Cir.1985).

60 *See* Altenkirch, M., *supra* fn. 44, pp. 52.

61 *See* ICAC Rules, § 32(6), available at http://www.tpprf-mkac.ru/en/2010-06-13-13-33-51/regleng (29. 8. 2016).

62 The English Arbitration Act of 1996, §55 (1).

63 *See* The ICC 2012 Rules of Arbitration, Art. 3(2), available at http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/ (28. 8. 2016).

64 An agreement in writing.

of the award shall, at the time of the application, supply duly authenticated originals or duly certified copies of the award and of the arbitration agreement. However, Article IV should be read together with Article III of the Convention. Under Article III, an award has to be made in accordance with the "rules of procedure of the territory where the award is relied upon"; in other words, if the country where the award was made accepts an electronic form of writing there should be no barrier to enforcement of the online award. The same reasoning can also be applied to the requirement of a "duly authenticated original award or a duly certified copy" which presumes that the award is issued in writing and authenticated by the court of the country where the award was made. An award made in electronic form should be regarded as an "authentic copy in writing", as long as the applicable law recognizes the concept of electronic writing. Consequently, the validity of the online award should be recognized by the enforcing state."[65]

In practice, courts in some common law countries – especially U.S. courts – have construed the formalities provided in Article IV of the NYC in a liberal manner in order to facilitate enforcement of a foreign arbitral award. That is because the United States is a very pro-arbitration country, and its courts aim to encourage arbitration in accordance with the federal policy favouring arbitration in the United States. In *Continental Grain Co. and Foremost Farms Inc*., for example, the United States District Court for the Southern District of New York confirmed an arbitral award, which was only certified by the director of the New York Regional Office of the American Arbitration Institution, and not by the Panel member. It concluded:

"A director certified the award, instead of a panel member who heard the New York arbitration. Because the director is an objective party and is responsible for all arbitrations in the New York Regional Office, a copy of the award certified by the director is sufficient for confirmation purposes."[66]

Likewise, courts in some civil law countries – especially in Germany – have also interpreted Article IV of the NYC liberally in order to facilitate recognition and enforcement of arbitral awards. For example, in a decision made by the Hamm Court of Appeal on 27 September 2005, the court accepted a simple copy of the arbitration agreement based on the less strict requirements of the German law, and granted enforcement of the arbitral award rendered in favour of the claimant concluding, *inter alia*, that:

"The formal conditions for a request for enforcement are met. The claimant supplied the authenticated original arbitral award of 28 May 2002 and interim arbitral award of 27 August 1999, as well as certified translations thereof. Admittedly, only a simple copy of the document containing the arbitration clause was first supplied by the defendant. However, that suffices, since the stricter requirements of Art. IV (1) New York Convention are superseded by the provisions of Sect. 1064 ZPO pursuant to Art. VII Convention."[67]

Based on the above analysis, courts of both common law and civil law countries must deal with the formalities required for the recognition and enforcement of e-arbitral awards liberally. In doing so, courts may rely, *inter alia*, on a national law as the more-favourable-right provision under Article VII of the NYC, noting that the NYC is silent regarding the law applicable to the formalities of Article IV. Therefore, the authentication has to be fulfilled either under the law of the country of origin or under the law of the country of recognition and enforcement, as noted in the above example from Germany. In that, it is desirable that arbitrators in an *ad hoc* arbitration issue a hard copy of an e-award in order to meet the formality requirements of Article IV of the NYC, especially in those countries whose national arbitration laws require that an arbitral award be in writing and signed by the arbitrators. In online institutional arbitration, one of the practical solutions for facing the problems arising out of the formalities required under Article IV of the NYC is to provide parties with a hard copy of an arbitral award although the award is made in an electronic form. For example, the ICDR tends to provide parties, upon request of a party, a certified copy of the arbitral award *via* regular mail.[68] As such, the issuance of a hard copy of an e-award shall constitute a practical solution

Courts of both common law and civil law countries must deal with the formalities required for the recognition and enforcement of e-arbitral awards liberally.

In doing so, courts may rely, *inter alia*, on a national law as the more-favourable-right provision under Article VII of the NYC, noting that the NYC is silent regarding the law applicable to the formalities of Article IV. Therefore, the authentication has to be fulfilled either under the law of the country of origin or under the law of the country of recognition and enforcement

65 *See* Hong-lin, Y., Nasir, M., *supra* fn. 34, pp. 472.

66 *Matter of Arbitration between Continental Grain Co. and Foremost Farms Inc.;* published in 1998 U.S. Dist. LEXIS 3509, *cited in* YB, Vol. XXV-2000 (United States), pp. 820-822.

67 On this decision *see* http://www.dis-arb.de (28. 8. 2016), *cited in* YB, Vol. XXXI-2006 (Germany, no. 90, sub. 1-3), pp. 685-697.

68 *See* Altenkirch, M., *supra* fn. 44, pp. 52.

to meet the formality requirement of the NYC in both *ad hoc* and institutional arbitration, and also to avoid the refusal of recognition and enforcement of an e-award by national courts, either based on the lack of formality issues or based on the lack of due process.

It should be emphasized that some national laws do not stipulate that an arbitral award be in a specific form, including the English Arbitration Act of 1996, and the Swiss Code of Private International Law, as stated above. This means that an arbitral award made and signed electronically might be accepted in both jurisdictions. However, in order to avoid any obstacle facing recognition and enforcement, it might be advisable that arbitrators provide the parties signed printed copies of an e-award. As far as the enforcement of an e-award is concerned, it should be observed that most common law and civil law countries have enacted laws that regulate the use of e-signatures in e-commerce transaction. Consequently, the e-signature of an arbitral award by the arbitrators, as well as by the parties, is accepted and constitutes *prima facie* valid evidence in national courts.

It should be emphasized that some national laws do not stipulate that an arbitral award be in a specific form, including the English Arbitration Act of 1996, and the Swiss Code of Private International Law

This means that an arbitral award made and signed electronically might be accepted in both jurisdictions. However, in order to avoid any obstacle facing recognition and enforcement, it might be advisable that arbitrators provide the parties signed printed copies of an e-award

Setting aside of an award in the country of origin based on the sole ground that it was rendered online might also be an obstacle facing the enforcement of an e-award in national courts under Article V (e) of the NYC.

To avoid this obstacle, the parties may waive their right to set aside an arbitral award before the court in the country in which an award has been made. The right of the parties to waive an appeal is widely recognised in some national laws, and in most institutional arbitration rules, as well see below. That is, the right for setting aside an award as a ground for the refusal of recognition and enforcement may not be exercised by the parties in national courts and therefore, an e-award can be recognised and enforced under the NYC based on the permissive language of Article V of the NYC.

Some national laws of arbitration, especially in civil law countries, allow parties to waive their right to set aside an award, for example, the new Decree of 2011 reforming the law governing arbitration in France provides in Article 1522 that the parties can agree to waive their right to set aside an arbitral award rendered in France in international arbitration. It reads: "*By way of a specific agreement the parties may, at any time, expressly waive their right to bring an action to set aside*". Apart from that, the applications to set aside an arbitral award in international arbitration no longer stay the enforcement of the award under the above decree. This means that the winning party shall be able to enforce an award while an application to set aside the award is still pending in French courts. In addition, setting aside of an award is not deemed one of the grounds for the refusal of recognition and enforcement of an award rendered abroad ("a foreign award") listed in Article 1520 of the above law.[69] In practice, French courts have decided in many cases to enforce arbitral awards despite the fact that they have been set aside in the countries of origin.[70]

To give another example, the German Arbitration Law of 1998 provides in Section 1061(3) ZPO that if the award is set aside abroad after having been declared enforceable, an application for setting aside the declaration of enforceability may be made.[71] Obviously, setting aside an award abroad may not be enough to stop the award's enforcement in Germany, thus, an application before the German court for setting aside the declaration of enforceability may also be required.[72] In that, it should be observed that the grounds for setting aside the declaration of enforceability of an award that

69 On this decree in French see http://www.iaiparis.com/pdf/Decret_n_2011-48_du_13_janvier_2011_portant_reforme_de_l_arbitrage.pdf (28. 8. 2016). On this decree in English see http://www.parisarbitration.com/wp-content/uploads/2014/02/French-Law-on-Arbitration.pdf (28. 8. 2016). See also http://www.sccinstitute.com/media/37105/french_law_on_arbitration.pdf (28. 8. 2016).

70 *See* for example, *Pabalk Ticaret* (Turkey) *v. Norsolor* (France), Revue de l'Arbitrage (Bulletin issued by the French arbitration committee), 1983, pp. 525, *cited in* YB, Vol. VIII-1983 (France), pp. 362-365. Another important case followed this case; in *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation-OTV)*, the Court of Appeal of Paris on 19 December 1991 reached the same conclusion. It decided to enforce the award, which was rendered in favor of OTV notwithstanding it was set aside in the country of origin (Switzerland-Geneva). This decision was published in YB, Vol. XIX-1994 (France, no.18), pp. 655-657. Afterwards, the Supreme Court on 23 March 1994 affirmed this decision. The Supreme Court's decision is published in YB, Vol. XX-1995, (France, no. 23), pp. 663-665. Decisions of the Supreme Court are available in French at https://www.courdecassation.fr/ (28. 8. 2016).

71 Concerning the provisions of the Law in English *see* http://www.dis- arb.de/scho/51/materials/german-arbitration-law-98-id3I (28. 8. 2016).

72 Weinacht, F.: Enforcement of Annulled Foreign Arbitral Awards in Germany, Journal of International Arbitration, Vol. 19, No. 4/2002, pp. 319, stated that this procedure does not violate Germany's obligation as a state party to the New York Convention, because the Convention not only allows the party seeking enforcement to avail itself of the domestic law of the signatory state in whose territory enforcement is sought, but also allows the restrictions on enforcement rights built into the domestic law, as well as for waiver of enforcement rights.

has been set aside abroad are similar to those applicable on declaration of enforceability of a domestic award.[73]

Most institutional arbitration rules allow parties to waive their right to set aside an award. To give an example, the ICC 2012 Rules of Arbitration provides in Article 34 (6) that:

> "*Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.*"[74]

To give another example, the London Court of International Arbitration Rules of 2014 ('the LCIA Rules') provide in Article 26 (8) that:

> "*Every award (including reasons for such award) shall be final and binding on the parties. The parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver shall not be prohibited under any applicable law.*"[75]

Finally, the use of an e-payment system and e-payment methods may also be an obstacle that may impede the enforcement of e-arbitral awards in those jurisdictions of both common law and civil law countries in which national courts yet deal with online methods of payment strictly.

The solution for this obstacle is likely to extend the use of online methods of payment facilitating e-commerce transactions to recognition and enforcement of online arbitral award, including credit cards, debit cards, prepaid cards which can be either real or virtual, and electronic checks ('e-checks'). The recent developments of e-commerce and technology dictate that such methods of payment be used and accepted in national courts for facilitating the enforcement of arbitral awards rendered online. Finally, and may be most importantly, some countries have promulgated specific laws that regulate e-payment, including Denmark and Russia through the Danish Payment Services and Electronic Money Act of 2011[76], and the Russian law on the national payment system of 2011,[77] respectively.

Conclusion

1. The NYC gives a national court the right to scrutinise whether an arbitral award meets the requirements for enforcement before enforcing it in its own territory. Such judicial review differs from state to state and even from one court to another within the same state. In doing so, a national court may rely on the NYC, national laws of arbitration, national laws regulating e-commerce and e-signatures, international conventions and model laws regulating e-commerce and e-signature.

2. The enforcement of cross-border online arbitration agreements is possible under the NYC based on the more-favourable-right provision contained in Article VII of the same convention, especially since many national laws in both common law and civil law countries have recognised the validity of arbitration agreements concluded and signed electronically. Some national courts in both common law and civil law countries have construed the writing requirement of the NYC liberally, and accordingly have decided to enforce e-arbitration agreements in their own jurisdictions.

3. A national court of the country in which recognition and enforcement of an e-award is sought, may accept to recognise and enforce an e-award if a national law permits such enforcement. A national court must deal in a liberal manner with requests for recognition and enforcement of e-arbitral awards, considering the specific nature of an e-arbitral award and the new developments in e-communications. In doing so, a court may not consider, as impediments facing the enforcement of an e-award, the absence of a written arbitration agreement, the absence of an oral hearing, the absence

The enforcement of cross-border online arbitration agreements is possible under the NYC based on the more-favourable-right provision contained in Article VII of the same convention, especially since many national laws in both common law and civil law countries have recognised the validity of arbitration agreements concluded and signed electronically

A national court must deal in a liberal manner with requests for recognition and enforcement of e-arbitral awards, considering the specific nature of an e-arbitral award and the new developments in e-communications

73 *See* §1059 (1, 2) ZPO, which is similar to Art. V of the NYC.

74 The ICC 2012 Rules of Arbitration, Art. 34 (6).

75 *See* the LCIA Arbitration Rules 2014, available at http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article%2026 (28. 8. 2016).

76 *See* http://www.consumerombudsman.dk/Regulatory-framework/Payment-Services-Act (28. 8. 2016).

77 Federal Law No. 161-FZ of June 27, 2011, "On the National Payment System", available at http://www.cbr.ru/eng/analytics/federal_law_161fz.pdf (28. 8. 2016).

of a physical place of arbitration, the absence of the written form of an award, and parties' inability to provide a duly certified copy of an agreement or an award. However, it is desirable that arbitrators issue a signed, printed copy in order to avoid the refusal of an e-award in national courts. If online institutional arbitration is applicable, the ODR provider "institution" must issue a printed copy signed by the arbitrators and sealed by the institution, and send it to the parties through regular mail.

To avoid the refusal of recognition and enforcement of e-arbitral awards under the NYC, parties and arbitrators must carefully examine, *inter alia*, how national laws and courts in the prospective country of enforcement deal with the formation and the validity of an e-arbitration agreement

4. To avoid the refusal of recognition and enforcement of e-arbitral awards under the NYC, parties and arbitrators must carefully examine, *inter alia*, how national laws and courts in the prospective country of enforcement deal with the formation and the validity of an e-arbitration agreement. Also, they must examine the possibility for conducting oral hearings online as part of due process under the law of that country.

5. Some national laws in civil law countries, including Brazil and Greece, allow filing of cases, submission of documents, and production of evidence through a unified online information system. This shall be applicable to submission of cases pertaining to the enforcement of cross-border online arbitral awards.

6. There are obstacles facing the recognition and enforcement of e-arbitration agreements and e-arbitral awards under the NYC, including the writing requirement, the physical place of arbitration, the due process and oral hearings, the formality requirements, and setting aside of an award.

7. To avoid the above obstacles facing recognition and enforcement of cross border e-arbitral awards under the NYC, and also to create a more liberal regime in favour of the enforcement of cross-border e-arbitral awards and e-arbitration agreements, national courts of both common law and civil law countries must apply the provisions of both the NYC and national laws liberally, considering the new developments of e-commerce and information technology. National laws of arbitration must be revised in those countries whose laws have not yet recognised the validity of both e-arbitration agreements and e-arbitral awards.

Potrošnik kot stranka arbitražnega sporazuma

Prikaz arbitražne odločbe SA 5.6-10/2014

Neli Okretič

Uvod

Veljaven arbitražni sporazum[1] je *conditio sine qua non* za pristojnost arbitraže. Stranke se z njegovo sklenitvijo odpovejo pristojnosti rednih sodišč za reševanje določenega spora. Pri sklepanju arbitražnega sporazuma je pomembno, da stranke natančno določijo njegovo vsebino in izrazijo soglasje za arbitražno reševanje spora; pomembna je predvsem opredelitev pravnega razmerja, navedba strank sporazuma, sedeža arbitraže, števila, načina izbire in kvalifikacij arbitrov, jezika postopka, uporabnih arbitražnih pravil in uporabnega prava ter odločitev za institucionalno ali *ad hoc* arbitražo.[2] Nejasno in dvoumno oblikovano besedilo arbitražnega sporazuma lahko hitro pripelje do vprašanja, ali sta se stranki veljavno odpovedali jurisdikciji rednih sodišč in za rešitev spora izbrali arbitražo. Primer SA 5.6-10/2014 prikazuje, kakšna vprašanja lahko odpre pomanjkljiva arbitražna klavzula, še posebej v primeru, ko je toženec pasiven, kar izključuje možnost konkludentne[3] sklenitve arbitražnega sporazuma. V konkretnem primeru je moral arbiter posameznik, preden bi lahko začel spor meritorno presojati, preveriti cel sklop procesno pravnih vprašanj, ki so se nanašala na njegovo pristojnost za reševanje spora. Ker je bil sedež arbitraže v Sloveniji, se je uporabljal Zakon o arbitraži, ne glede na to, da je šlo za tuje stranke postopka.[4]

Kompetenca o kompetenci

Arbiter posameznik oziroma arbitražni senat ima pristojnost, da odloči o lastni pristojnosti, vključno z ugovori, ki se nanašajo na obstoj ali veljavnost arbitražnega sporazuma.[5] Gre za doktrino kompetence o kompetenci (*kompetenz-kompetenz, competence-competence*), ki je (skoraj) univerzalno sprejeta.[6]

Kadar je arbitražna klavzula nejasna, morajo arbitri najprej analizirati, ali iz besedila arbitražne klavzule ob uporabi prava, merodajnega za arbitražno klavzulo, izhaja prava volja strank za arbitražno reševanje spora. Katero pravo se uporablja za presojo veljavnosti arbitražne klavzule je predmet razlage,[7] vendar je prevladujoče stališče slovenske teorije, da se uporabi pravo sedeža arbitraže, v konkretnem primeru slovensko pravo.[8] Odkaz na uporabo slovenskega prava je dodatno podkrepil zapis strank tako v arbitražni klavzuli kot v glavni (posojilni) pogodbi. Golo besedilo arbitražne klavzule, sedež arbitraže in pravo, ki se uporablja za presojo pogodbe, so običajni kriteriji, na podlagi katerih se določa pravo, merodajno za arbitražno klavzulo – in vsi trije so odkazovali na slovensko pravo. Pravo, ki se uporablja za presojo glavne pogodbe, v konkretnem primeru ni bilo izrecno izbrano s strani strank, zato je prišla v poštev Uredba (ES) št. 593/2008 Evropskega Parlamenta in Sveta z dne 17. junija 2008 o pravu, ki se uporablja za pogodbena obligacijska razmerja (Uredba Rim I).[9] Čeprav so iz področja uporabe Uredbe Rim I izključeni dogovori o pristojnosti arbitraže ali sodni

Primer SA 5.6-10/2014 prikazuje, kakšna vprašanja lahko odpre pomanjkljiva arbitražna klavzula, še posebej v primeru, ko je toženec pasiven, kar izključuje možnost konkludentne sklenitve arbitražnega sporazuma

V konkretnem primeru je moral arbiter posameznik, preden bi lahko začel spor meritorno presojati, preveriti cel sklop procesno pravnih vprašanj, ki so se nanašala na njegovo pristojnost za reševanje spora

1 Isto velja za arbitražno klavzulo.

2 Glej Born, G., International Arbitration: Law and Practice, Kluwer Law International, 2012, str. 34 in naslednje.

3 Glej šesti odstavek 10. člena Zakona o arbitraži (ZArbit, Ur. l. RS, št. 45/08).

4 1. člen ZArbit.

5 Glej 19. člen ZArbit in 30. člen Ljubljanskih arbitražnih pravil.

6 Glej Born, G., International Arbitration: Law and Practice, Kluwer Law International, 2012, str. 51 in naslednje.

7 Glej Born, G., International Arbitration: Law and Practice, Kluwer Law International, 2012, str. 54 in naslednje.

8 Galič, A.: Priznanje in izvršitev domačih in tujih arbitražnih odločb v Sloveniji, v: Zbornik znanstvenih razprav, letnik 73, Ljubljana, 2013, str. 116.

9 UL L 177, 4.7.2008, str. 6–16.

pristojnosti, to ne pomeni, da se uredba ne more uporabiti glede glavne pogodbe. Kljub temu, da izrecne določbe o uporabnem pravu v glavni pogodbi ni bilo, je iz besedila pogodbe izhajal sklic na slovensko pravo, kar je arbiter posameznik, na podlagi uredbe Rim I, štel kot izraz avtonomije strank glede izbire prava.

Na veljavnost arbitražne klavzule pa lahko vpliva tudi lastnost strank

V konkretnem primeru ni bilo sporno, da sta bila cedent kot tožnik pravna, toženec pa fizična oseba. Ker je na podlagi glavne pogodbe šlo za posojilo določenega denarnega zneska, se je odprlo vprašanje, ali gre za razmerje med podjetjem in potrošnikom, ki je predmet posebne ureditve

Nejasna terminologija arbitražne klavzule je v naslednjem koraku arbitra posameznika privedla do presoje, ali je bil namen strank predložiti spor v servisiranje institucionalni arbitraži – Stalni arbitraži pri GZS. Uporaba besedne zveze "*arbitration court*", čeprav vsebuje termin "*court*", lahko kaže na voljo strank po predložitvi spora stalni, permanentni arbitražni instituciji; odsotnost pravil za sestavo *ad hoc* arbitraže prav tako vodi do istega zaključka. Nemalo arbitražnih senatov in tudi arbitražnih institucij se je že soočalo s podobnim vprašanjem zaradi pomanjkljivih arbitražnih klavzul, pri čemer je od konkretnega primera odvisno, ali je bil pristop *pro arbitration*.[10] Ker arbitražna klavzula ni vsebovala posebnih določb o procesnih pravilih, je izbiri Stalne arbitraže pri GZS sledila tudi uporaba Arbitražnih pravil Stalne arbitraže pri GZS (Ljubljanskih arbitražnih pravil).

Stranke in arbitrabilnost

V konkretnem primeru sta bili stranki glavne pogodbe tudi podpisnici arbitražne klavzule, zaradi pravnih posledic cesije pa se je pojavilo vprašanje, ali je stranka arbitražne klavzule tudi tožnik (cesionar) sam

Reševanje spora z arbitražo velja le za stranke, ki so se temu izrecno ali konkludentno podredile. V konkretnem primeru sta bili stranki glavne pogodbe tudi podpisnici arbitražne klavzule, zaradi pravnih posledic cesije pa se je pojavilo vprašanje, ali je stranka arbitražne klavzule tudi tožnik (cesionar) sam. Nesporno je, da arbitražna klavzula ni bila sklenjena med strankama konkretnega arbitražnega postopka, torej med cesionarjem in dolžnikom, ampak je bila sklenjena med cedentom in dolžnikom. Slovensko pravo, ki se uporablja za presojo glavne pogodbe in tudi arbitražne klavzule, velja tudi za presojo vprašanja prenosljivosti in odnosa med cesionarjem in dolžnikom. Slovenska teorija in sodna praksa štejeta arbitražno klavzulo kot "stransko pravico", kar pomeni, da se v primeru cesije terjatve prenese tudi arbitražna klavzula.[11] Takšno stališče podpira tudi mednarodna arbitražna praksa.[12] Prav tako je tožnik (cesionar) s sklicevanjem na arbitražno klavzulo izrazil vezanost nanjo; ugovarjal ni niti pristojnosti Stalne arbitraže pri GZS.

Na veljavnost arbitražne klavzule pa lahko vpliva tudi lastnost strank. Splošno velja, da lahko sklene arbitražni sporazum vsaka fizična ali pravna oseba, vključno z osebami javnega prava.[13] V konkretnem primeru ni bilo sporno, da sta bila cedent kot tožnik pravna, toženec pa fizična oseba. Ker je na podlagi glavne pogodbe šlo za posojilo določenega denarnega zneska, se je odprlo vprašanje, ali gre za razmerje med podjetjem in potrošnikom, ki je predmet posebne ureditve. IX. poglavje ZArbit ureja potrošniške spore, ki so podvrženi specialnim pravilom z namenom varstva šibkejše stranke. V konkretnem primeru je bilo potrebno najprej analizirati lastnosti strank – ali gre na strani tožnika za podjetje in na strani toženca za potrošnika. Sam ZArbit pri presoji tega vprašanja napotuje na določbe Zakona o varstvu potrošnikov,[14,15] v skladu s katerim je potrošnik fizična oseba, ki pridobiva ali uporablja blago in storitve za namene izven njegove poklicne ali pridobitne dejavnosti; podjetje pa je pravna ali fizična oseba, ki opravlja pridobitno dejavnost, ne glede na njeno pravnoorganizacijsko obliko ali lastninsko pripadnost.[16] Presoja arbitra posameznika, da stranki arbitražnega sporazuma spadata v kategorijo potrošnika in podjetja, torej, da gre za potrošniški spor, pomembno vpliva na arbitrabilnost spora. Ker so potrošnikom kot šibkejšim strankam zagotovljena dodatna jamstva,[17] je sklenitev arbitražnega sporazuma možna le po nastanku spora. V konkretnem primeru je bila arbitražna klavzula sestavni del glavne pogodbe, kar pomeni, da je bila vsekakor sklenjena pred nastankom spora, kar vodi v zaključek, da spor pa ni arbitrabilen,[18] ne glede na kasnejšo cesijo terjatve skupaj z arbitražno klavzulo.

10 Glej npr. Felipe Mutis Tellez, *Prima facie* decisions on jurisdiction of the arbitration institute of the Stockholm Chamber of Commerce: towards consolidation of a "pro arbitration" approach, dostopno na: http://www.sccinstitute.com/media/29996/felipe-mutis-tellez_paper-on-scc-challenges-on-jurisdiction.pdf (29. 8. 2016).

11 Glej npr. VSK sklep Cpg 145/2009 z dne 10. 12. 2009 in VSL sklep II Cpg 266/2010 z dne 11. 05. 2010 ter Juhart, M. v: Obligacijski zakonik s komentarjem, II. knjiga, GV Založba, Ljubljana, 2003, str. 581. Za primerjavo glej tudi Špec, B., Cesija terjatve in arbitražni sporazum, v: Slovenska arbitražna praksa, letnik IV, št. 2/2015, str. 11-15.

12 Born, G., International Commercial Arbitration, 2nd edition, Kluwer Law International, 2014, str. 1465.

13 Glej drugi odstavek 4. člena ZArbit.

14 Zakon o varstvu potrošnikov (ZVPot), Ur. l. RS, št. 98/04 – uradno prečiščeno besedilo, 114/06 – ZUE, 126/07, 86/09, 78/11, 38/14 in 19/15.

15 Glej 44. člen ZArbit.

16 Drugi in tretji odstavek 1. člena ZVPot.

17 Glej 45.-47. člen ZArbit.

18 Za mednarodno pravni vidik glej Born, G., International Commercial Arbitration, 2nd edition, Kluwer Law International, 2014, str. 943 in naslednje.

Na podlagi navedenega je arbiter posameznik zaključil, da nima pristojnosti za odločanje v konkretnem primeru.

Sklep

Primer SA 5.6-10/2014 prikazuje, do kakšnih vprašanj lahko pripelje pomanjkljiva arbitražna klavzula ter kakšen je vpliv merodajnega prava na presojo veljavnosti arbitražne klavzule in tudi arbitrabilnosti spora. Iskanje prave volje strank za arbitražno reševanje spora je zapleten proces in, četudi se z ustrezno razlago vzpostavi "splošen" obstoj in veljavnost arbitražne klavzule, na vprašanje dopustnosti arbitražnega reševanja sporov vplivajo tudi specialna pravila, ki meje arbitrabilnosti ožijo.

Primer SA 5.6-10/2014 prikazuje, do kakšnih vprašanj lahko pripelje pomanjkljiva arbitražna klavzula ter kakšen je vpliv merodajnega prava na presojo veljavnosti arbitražne klavzule in tudi arbitrabilnosti spora

LJUBLJANA
ARBITRATION CENTRE
AT THE CHAMBER OF COMMERCE
AND INDUSTRY OF SLOVENIA

Case No.: SA 5.6-10/2014

Arbitral Award

issued
by the Sole Arbitrator

In the Arbitration Matter No.: SA 5.6-10/2014

between

Claimant:

and

Respondent:

(the Claimant and the Respondent hereafter jointly referred as: the "**Parties**")

for the payment of EUR 150,750 with accruals

Issued and signed by the Sole Arbitrator in four equal copies, one for each of the Parties, one for the LAC and one for the Sole Arbitrator in accordance with Article 41.4 of the Arbitration Rules of the Ljubljana Arbitration Centre at the Chamber of Commerce and Industry of Slovenia valid from 1.1.2014.

Table of Contents

Case No.: SA 5.6-10/2014 *Arbitral Award*

I. Case Information

1. Claimant:

2. Claimant's Representative:

3. Respondent:

4. Respondent's Representative:

   Not appointed

5. Sole Arbitrator:

6. Seat of Arbitration:

   Ljubljana, Slovenia

7. Language of the Arbitration Proceedings:

   English

8. Governing law of the Arbitration Clause:

   Slovenian

9. Governing Law of the Arbitration Proceedings:

   Slovenian and the Arbitration Rules of the Ljubljana Arbitration Centre at the Chamber of Commerce and Industry of Slovenia, valid from 1.1.2014 (hereafter: the "**Rules**")

10. Arbitration Clause (as contained in the Article 5.2 of the Loan Agreement):

    The disputes which can not be settled by negotiations, it dares in Arbitration court of Ljubljana in order provided by the current legislation of Republic of Slovenia.

II. Summary of Proceedings

1. On 26.5.2014, the Ljubljana Arbitration Centre at the Chamber of Commerce and Industry of Slovenia (hereafter the "**LAC**") received an incomplete Request for Arbitration from the claimant [redacted] Limited (the "**Claimant**" or [redacted]') represented, based on the enclosed power of attorney, by its Slovenian Attorney at Law Mr. [redacted] By the letter, dated 27.05.2014, the LAC, in accordance with Article 5.2 of the Rules, requested [redacted] to supplement its Request for Arbitration.

2. On 9.6.2014, the LAC received completed Request for Arbitration dated May 23, 2014. The Claimant claimed from [redacted] (the "**Respondent**" or [redacted]) payment of the principal amount of EUR 150,000, plus contractual and default interest earned from the principal, default interest earned from the contractual interest, as well as costs of arbitral proceeding and default interest from the deadline of their voluntary payment until the day of their actual payment.

3. On 9.6.2014, the Secretariat of the LAC summoned [redacted] to submit the answer to the Request for Arbitration. [redacted] confirmed receipt of delivery through DHL courier service on 10.6.2014.

4. On 23.7.2014, the Secretariat of the LAC informed the Parties on the failure of [redacted] to submit an answer to the Request for Arbitration. The Board of the LAC determined that a sole arbitrator shall be appointed by the Parties to decide in the dispute and to determine the seat of arbitration. The Secretariat of the LAC has summoned the Parties to nominate the sole arbitrator by the August 1st, 2014 and to pay the advance costs of the arbitration proceedings. The Secretariat of the LAC has determined the value of a dispute to EUR 150,750 (principal EUR 150,000 and EUR 750 contractual interest). The total amount of advance costs to be paid by the Parties was determined by the Secretariat of the LAC at EUR 16,000. Out of this total amount, the Secretariat of the LAC has allocated the advance costs amounting to EUR 7,000 to be paid by the Claimant and EUR 8,000 by the Respondent. The registration fee has been credited to the Claimant's part of the advance costs (Article 1(2) of Appendix II of the Rules). [redacted] confirmed the receipt of the LAC's letter on the 1.8.2014.

5. The Claimant has paid its part of advance costs on the July 29, 2014. The Respondent failed to pay the advance costs by the deadline of August 11, 2014 as set forth in the letter of the LAC dated 23.7.2014. In its Request for Arbitration, the Claimant has proposed [redacted] as a sole arbitrator. The Respondent has not responded. As the Parties made no joint nomination by the August 1st , 2014, the Board of the LAC appointed [redacted] as the Sole Arbitrator pursuant to Article 14.2 of the Rules. The Sole Arbitrator [redacted] declared his acceptance to act as the sole arbitrator on the 13.8.2014.

6. On 14.8.2014, the Secretariat of the LAC sent to the Parties the Board of the LAC decision on appointment of [redacted] as the Sole Arbitrator and on the payment of the advance on the costs of the arbitration. The LAC secretariat directed [redacted] to pay in addition to the Claimants' share of the advance costs in the amount of EUR 7,000 also [redacted] share of advance costs in the total amount of EUR 8,000, that [redacted] failed to pay. [redacted] confirmed the delivery of the LAC'S letter through the DHL courier service and receipt of the same on the 18.8.2014.

7. On 3.9.2014, the Sole Arbitrator issued the Procedural Order no.1 and Procedural Timetable that was delivered to [redacted] through the DHL courier service on the September 16, 2014 and to [redacted] by e-mail (to the email address of its agent [redacted]) on the September 3, 2014. The Sole Arbitrator determined that the arbitration proceeding shall be conducted in accordance with the Rules, that the language of arbitration proceedings shall be English and the place of arbitration shall be Ljubljana, Slovenia. None of the Parties objected to the Procedural Order no.1 and Procedural Timetable.

8. On 18.9.2014, the Sole Arbitrator issued the Procedural Order no. 2. and the Procedural Timetable as determined by the Sole Arbitrator. The Sole Arbitrator summoned [redacted] to deliver its Statement of Claim by 29.10.2014. It was sent to the addresses of both Parties, and delivered to [redacted], but there is no evidence of being served to [redacted], who could not be located by DHL courier service at his registered address.

9. On October 29, 2014, [redacted] submitted its Statement of Claim by e-mail to the Sole Arbitrator followed by the original on the October 30, 2014.

10. The Sole Arbitrator issued the Procedural Order No. 3 on Submission of Statement of Defence on October 30, 2014. It was received by [redacted] on November 4, 2014, and delivered to [redacted] address on October 13, 2014.

11. [redacted] has failed to provide any Statement of Defence to the Sole Arbitrator by the deadline set forth by the Sole Arbitrator, which was December 10, 2014, nor later.

12. On 10.12.2014, the Sole Arbitrator issued the Procedural Order no. 4 on Intended Termination of Arbitration Proceedings due to the Lack of Jurisdiction. [redacted] received it on December 24, 2014 and [redacted] on December 11, 2014.

13. On 2.01.2014, the Sole Arbitrator received [redacted] Objection on the Intended Termination of the Arbitration Proceedings (hereafter: "**Objection**"). [redacted] has not responded to the Procedural Order no. 4.

14. Any writings and communications in the arbitral proceedings by the Sole Arbitrator with respect to [redacted] were addressed and made to the aforementioned address of [redacted] Attorney at Law, authorized representative of [redacted] in Slovenia, as evidenced by the submitted power of attorney.

15. [redacted] did not respond to the Request for Arbitration and did not participate in the arbitral proceedings, although he was duly informed on the start and on the course of the arbitration proceedings. Any communication that was made in the course of the proceedings by the Sole Arbitrator to [redacted] was made simultaneously also to [redacted] and *vice versa*.

III. Factual Background

1. This is a dispute among [redacted], a Cyprus financial and investment firm, acting as an assignee of a lender and [redacted] a natural person and the Principality of Monaco's resident, acting as a borrower (debtor) under a loan agreement that [redacted] concluded with a Cyprus investment firm. [redacted] failed to repay the loan. [redacted] now claims repayment of the principal, interest and costs from Mr [redacted]

2. According to [redacted] is the founder of the [redacted] in the Principality of Monaco and the [redacted] mentioned in 2011 in Moscow to his client and friend [redacted], a resident of the Republic of Slovenia, that he needs a short term loan of EUR 150,000. [redacted] were friends and had personal contacts. [redacted] offered himself to ask the company [redacted] ("[redacted]"), an investment company from Cyprus about the possibility of lending aforementioned amount to [redacted] Consequently, [redacted] agreed on the terms of the loan and [redacted] signed the Loan Agreement No. 28.3.2011 (documentary evidence no. C1, as marked pursuant to the written submissions numbering convention contained in the Procedural Order 1 and Procedural Timetable of the Sole Arbitrator dated 3.9.2014[1]; hereafter: the **Loan Agreement**) in Moscow. [redacted] then send the Loan Agreement to Cyprus, where [redacted] signed it on 28.3.2011. According to [redacted] on the same day, the total amount of EUR 150,000 (the "**Loan**") was credited to the bank account of [redacted] through the Cyprus Marfin Laiki Bank.

3. [redacted] failed to pay back the loan on time despite several reminders by [redacted] in 2011, 2012 and 2013 and [redacted], acting at the request of [redacted] and as a friend of [redacted] has asked [redacted] several times to repay the Loan, but without success.

4. Subsequently, on August 9, 2013, [redacted] as an assignor, entered into the Cession of Rights Agreement No. 01/2013 ("**Cession Agreement**", documentary evidence no. C3) with the Claimant, a Cyprus financial and investment company, acting as the assignee. The claim of [redacted] for the repayment of the Loan against [redacted] was assigned to [redacted] According to [redacted] informed [redacted] on the assignment of claims under the Loan Agreement to [redacted] by a letter dated October 2, 2013, which was sent by the Slovenian registered mail to the address 4 [redacted]. No evidence on receipt of such letter by [redacted] was submitted.

IV. The Claimant's Positions

1. The Sole Arbitrator hereby in part refers to the [redacted] statements as contained in the Factual Background sections III.2 to 4 above that are for the avoidance of repetition incorporated here by reference.

2. In addition to above, [redacted] objected intended termination of the Arbitration Proceedings by the Sole Arbitrator. Since [redacted] did not offer, sell or market the money lending in any way and since Mr. [redacted] was the only person the Lender had ever lent the money to, the provisions of the Slovenian Consumer Protection act should not apply. The Claimant asserted that [redacted] is not an undertaking within the scope of the Slovenian Consumer Protection Act, and the provisions of the Slovenian Arbitration Act Official Gazette of the Republic of Slovenia No. 45/2008; hereafter: **ZArbit**) on consumer disputes are therefore not applicable to [redacted]. Pursuant to Article 1/15 of the Slovenian Consumer Protection Act the financial services are services that are regulated by the Slovenian Consumer Credit Act. [redacted] is not an undertaking that is nor was in the business of lending the money to other natural or legal third person, hence cannot be considered as an undertaking pursuant to the Slovenian Consumer Credit Act. Act of lending by [redacted] to [redacted] cannot be considered as financial services, nor information society service nor goods. As a result, the Claimant asserted that the ZArbit provisions on consumer disputes are not applicable in the case.

V. The Respondent's Positions

1. [redacted] has not responded to the Statement of Claim. [redacted] has not participated in the arbitration proceedings, although the writings from the LAC and the Sole Arbitrator have been sent to his address as stated in the Statement of Claim and the Loan Agreement. [redacted] has not responded to any writing or summon.
2. Despite the failure of [redacted] to respond to the Request for Arbitration, the Sole Arbitrator has continued the proceedings pursuant to Article 35 of the Rules without treating such failure in itself as an admission of the Claimant's claims. In addition, the Sole Arbitrator has continued to send any his writings in the course of the proceedings also to [redacted]

VI. Evidence Submitted and Considered

1. For the purposes of the consideration and the issuance of the arbitral award, the Sole Arbitrator has reviewed the written statements and produced evidences of the Claimant including the Loan Agreement (documentary evidence no. C1), the certificate of [redacted] (documentary evidence no. C2), the Cession Agreement (documentary evidence no. C3), Letter of [redacted] attorney of [redacted] dated 2.10.2013 to [redacted] (documentary evidence no. C4) and the Slovenian registered mail certificate of sending the mail to the address [redacted] dated 2.10.2003 (documentary evidence no. C5).
2. The Claimant has proposed also the testimony of [redacted] with respect to its statements on the conclusion of the Loan Agreement and with respect to [redacted] reminders to [redacted]. In the light of his decision, the Sole Arbitrator considers that such testimony is not relevant, hence has refused to hear it pursuant to Article 31 of the Rules.
3. The Respondent has failed to take part in the arbitration proceedings.

VII. Reasons Upon Which the Award is Based

1. The arbitration clause as invoked by [redacted] is contained in Section 5 of the Loan Agreement and reads as follows (second paragraph of Section 5 of the Loan Agreement; I shall hereafter refer to this section of the Loan Agreement as "**Arbitration Clause**"):

   The disputes which can not be settled by negotiations, it dares in Arbitration court of Ljubljana in order provided by the current legislation of Republic of Slovenia.

2. [redacted] as the Claimant has challenged neither the jurisdiction of the LAC nor validity of the Arbitration Clause nor the governing law of the arbitration proceedings. On the other hand, [redacted] has failed to take part in the proceedings, hence has by inaction refuse to honour the Arbitration Clause. The Sole Arbitrator therefore deems necessary to preliminary consider existence and validity of the Arbitration Clause and its own jurisdiction.
3. Under Article 19 of the ZArbit and Article 30 of the Rules, the Sole Arbitrator has a right to decide on its own jurisdiction. ZArbit applies to any arbitrations having a seat in Slovenia, regardless whether the parties are domestic or foreign entities (Article 1 of the ZArbit)
4. As a preliminary question, in order to ascertain its jurisdiction, the Sole Arbitrator must resolve the question whether there is according to the wording of the Arbitration Clause and the applicable law an agreement among the Parties to arbitrate.

a. The wording of the Arbitration Clause is not clear. First of all it uses the phrase: "..*The disputes which can not be settled by negotiations, it dares in Arbitration court of Ljubljana*:" As such the wording uses ambiguous phrase "…*it dares in Arbitration court*". It is true that the wording of the Arbitration Clause uses the term "*arbitration*", but what makes it unclear is that the verb "*dare in*" is used in this regard and the "*court*". Use of the word *court* in relation to arbitration is not unusual, but regular.[2] As will be explained under section VII.5 of this award below, the reference to the court was used and is used in the Rules and in the LAC's previous rules. Hence, the reference to "arbitration court" in the wording actually supports the view that the parties agreed on arbitration of disputes under the Loan Agreement. The verb "*dare*" in English denotes "challenges; to have a courage to do something; to do"[3]. Using it in the phrase referring to arbitration and simultaneously with the phrase "disputes which can not be settled by negotiations", it is understood by the Sole Arbitrator to express the will of the parties to arbitrate disputes. The general imperfect English wording of the Loan Agreement may further support such conclusion of the Sole Arbitrator. It does not appear that a native English speaker drafted the Loan Agreement. According to the Claimant, [redacted], a Cyprus entity, drafted it (Part I of the Statement of Claim). This may further explain the ambiguities in the English wording and why the above-mentioned phrase containing the verb dare was used by the parties to the Loan Agreement to express the will of the parties to submit any disputes to arbitration. Hence, it is the Sole Arbitrator conclusion, that the Arbitration Clause expresses the will of the parties to the Loan Agreement to resolve any disputes from the Loan Agreement by arbitration.

b. With regard to the wording of the Arbitration Clause, the Sole Arbitrator understands its phrase "*in order provided by the current legislation of Republic of Slovenia*" to actually mean according to the rules of the current legislation of Republic of Slovenia. Accordingly, in the view of the Sole Arbitrator the will of the parties to the Loan Agreement was that the Slovenian law governs the Arbitration Clause. Such conclusion of the Sole Arbitrator is further supported by the reference to Ljubljana as the place of arbitration in the Arbitration Clause and the generally known fact that Ljubljana is a capital of the Republic of Slovenia. Prevailing legal theory in Slovenia accepts the view that law of the arbitration's seat shall be used to determine validity of the arbitration agreement.[4] In addition, conclusion that the Slovenian law shall govern the arbitration clause is further supported also by the references to the Slovenian law in the Section 3.4 of the Loan Agreement and the Sole Arbitrator's finding that the substantive law governing the Loan Agreement shall be Slovenian law (*see infra* section c). The plain wording of the Arbitration Clause, the seat of arbitration and the applicable substantive law to the agreement are commonly accepted grounds for the determination of the applicable law to the arbitration clause.[5] Because all three methods for determination of the law applicable to Arbitration Clause refer or direct to the Slovenian law (wording of the Arbitration Clause, the place of arbitration and the governing law) and there is no other national law mentioned in the wording of the Loan Agreement and Arbitration Clause, the Sole Arbitrator's holds that the will of the parties to the Loan Agreement was to determine the Slovenian law as a governing law of the Arbitration Clause.

c. The Loan Agreement does not contain any express contractual provision on the governing substantive law of the Loan Agreement. With respect to the determination of the substantive law of the Loan Agreement, the Sole Arbitrator's view is that such law must be determined pursuant to the Article 3 of 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**"). The fact that Mr. [redacted] does not appear to be an EU Member state resident, does not prevent application of the Rome I. Rome I is universal in scope (its Article 2).[6] Pursuant to its Article 3.1 the law expressly or implicitly chosen by the parties shall govern contractual relationship among the parties. In this regard the Sole Arbitrator acknowledges that the scope of Rome I does not cover arbitration agreements and the choice of the courts. This is, however, not to say that the Rome I can not be applied for the consideration of the substantive law (and assignability) of a contract containing the arbitration agreement. If the choice of law is not express, but implicit, the choice of law shall be clearly demonstrated. The only references to any national law in the Loan Agreement are the references to the Slovenian law. Section 3.4 of the Loan Agreement provides that: *In all other cases of default of contractual obligations (its validity, conclusion, performance, change, cancellation) the Party bear responsibility defined by the Contract, positions of the Republic of Slovenia.* The Sole Arbitrator understands the phrase in the parenthesis of 3.4 to refer to the contractual obligations, because contractual obligations can be valid, be concluded, performed, changed and cancelled. The provisions of the Loan Agreement prior to Article 3.4 only provide for the contractual obligations and remedies. No other national law is mentioned in the Loan

Agreement. In the light of the circumstances that the parties to the Loan Agreement referred to the Slovenian law in its Section 3.4 pointing out also to contractual obligations' validity, conclusion, performance, change and cancellation and in Section 5.2. dealing with the resolution of disputes (as analysed immediately above), it must be conceded that the will of the parties to choose the Slovenian law is not only clearly demonstrated by the circumstances of the case but also likely clearly demonstrated by the Loan Agreement's terms.[7] Finally, also the [redacted] Statement of Claim based its claim on the Slovenian law (part IV of the Statement of Claim). The Sole Arbitrator therefore concludes that the parties to the Loan Agreement choose the Slovenian law as a substantive law governing the Loan Agreement.

5. As a next, the Sole Arbitrator must ascertain whether the parties to the Loan Agreement intended to refer their dispute to the LAC. The Arbitration Clause namely refers to the Arbitration court in Ljubljana, but there is no "*Arbitration court in Ljubljana*". A the time of conclusion of the Loan Agreement in 2011, the official name of the LAC in English was "the Permanent Court of Arbitration attached to the Chamber of Commerce and Industry of Slovenia".[8] There was no "Arbitration court in Ljubljana" on or around the date of the Loan Agreement nor nowadays. The Sole Arbitrator view is that the reference to the "court" in the phrase "Arbitration court" refers to permanent arbitration institution, instead to an *ad hoc* arbitration. The same can be substantiated due to the absence of any indication on how shall the *ad hoc* arbitration be composed. The only "court" of arbitration in Ljubljana at that time was the LAC. Because there was no other arbitration court in Ljubljana, Slovenia at the time of entry into the Loan Agreement, but for the LAC, the Sole Arbitrator concludes that the will of the parties (as evidenced also at least by the Claimant's Statement of Claim) was to refer their disputes under the Arbitration Clause to the LAC. Such position of the Sole Arbitrator is concordant also with similar decisions of arbitral tribunals and courts internationally, where the arbitral tribunals and the courts considered similar imperfect arbitration clauses.[9] The Arbitration Clause does not mention expressly any procedural rules that would apply to arbitration proceedings. As a result, pursuant to Article 2 of the Rules, it is deemed that the Parties have agreed to the Rules with respect to arbitration proceedings, because the proceedings have commenced after the entry of the Rules into force (which was 1.1.2014).

6. Under the above-mentioned reasons, the Sole Arbitrator concludes that the Arbitration Clause in the Loan Agreement expresses the will of the parties to the Loan Agreement to apply the Slovenian law to the Arbitration Clause. In addition, the Sole Arbitrator also concludes that the Slovenian law and the Rules shall apply with respect to arbitration proceedings. Moreover, the Sole Arbitrator holds that the parties in the Loan Agreement expressed the Slovenian law as a governing law of the Arbitration Clause.

7. Before considering further, whether there is in the light of the existing arbitration agreement the jurisdiction of the LAC to resolve the dispute among [redacted] and [redacted] the Sole Arbitrator needs to consider also the parties to the Arbitration Clause in the light of its cession pursuant to the Cession Agreement. [redacted] has invoked the Arbitration Clause, thus has honoured it in accordance with the Loan Agreement and did not challenge the jurisdiction of LAC. With respect to effects of assignment of the Loan Agreement on the Arbitration Clause, the Sole Arbitrator's view is that the Slovenian law, that governs the Loan Agreement, shall apply also with respect to the question of assignability and relationship between the assignee ([redacted]) and the debtor ([redacted]). This follows from the wording of Article 3.2 of the Rome I that applies for the substance of the Loan Agreement, subject to considerations of the Sole Arbitrator under section VI.4.c above.

   a. It is obvious that the Arbitration Clause as contained in the Loan Agreement was not signed among [redacted] and [redacted] being the parties to this arbitration proceedings. Instead, it was entered only among [redacted] (as original creditor and later assignor) and [redacted] that were parties to the Loan Agreement. Notwithstanding to the said, the Slovenian law, as the governing law of the Loan Agreement and Arbitration Clause, supports validity of the arbitration clause in cases of cession/assignment of claims.

   b. Under Slovenian law, a debtor and an assignee are generally bound by an arbitration clause contained in an agreement the claims of which were assigned, despite there was no arbitral agreement signed among the assignee and the debtor. It is asserted that in such case also the arbitration agreement is transferred as an ancillary right relating to the assigned claim.[10] Such position of the Slovenian jurisprudence is concordant also with the international arbitration practice.[11] Hence, the arbitration clause shall continue to apply further among the assignee and the original debtor. There is no contractual provision in the Loan Agreement that would generally limit the right of the parties to assign the claims under the agreement. As a result, despite not having signed the Loan Agreement containing the invoked Arbitration Clause with [redacted]

the Sole Arbitrator concludes that the assignment of the Loan Agreement containing the Arbitration Clause under the Cession Agreement to [redacted] shall generally allow arbitration of disputes between [redacted] as the Claimant and [redacted] as the Respondent under such Arbitration Clause.

8. Having ascertained the general validity and existence of the arbitration clause between the Parties[12], and in the light of the Sole Arbitrator's finding that [redacted] is clearly a natural person, the Sole Arbitrator must consider also the ZArbit provisions that specifically address arbitration of consumer disputes. [redacted] is clearly a natural person. ZArbit that is applicable to any arbitration having its seat in the Republic of Slovenia (Article 1 of ZArbit) provides for the special rules with respect to consumer disputes. Pursuant to Article 45 of ZArbit an arbitration agreement among a business undertaking and a consumer may be concluded only after the dispute arises. In the present case, present arbitration agreement was entered into among [redacted] (that is event not the Claimant, which shall be addressed later) and [redacted] when concluding the Loan Agreement. The dispute arose two years later or at earliest after the repayment of the loan was due (*see* Article 1.3 of the Loan Agreement); hence clearly after the Arbitration Clause was agreed among [redacted]. No statements were made and no evidence was submitted that any agreement to arbitrate was agreed among [redacted] after the dispute arose. The Sole Arbitrator must therefore initially consider whether [redacted] on the one side and [redacted] on the other are business undertaking and consumer pursuant to the ZArbit, respectively. Because the ZArbit provisions, including also its Chapter IX dealing with Consumer Disputes, apply to arbitrations having the seat in Slovenia regardless whether the parties to such proceedings are domestic or foreign entities, it follows that the question of whether the Parties are consumers or entrepreneurs should be assessed under the Slovenian law. The issue to what extent does assignment of the Lender's receivables to the Claimant under the Loan Agreement affect the validity or existence of arbitration agreement with respect to consumers, will be considered by the Sole Arbitrator only if the Sole Arbitrator concludes that [redacted] cannot be construed as business undertakings for the purposes of ZArbit. If the dispute fits within the scope of a business to consumer dispute under Article 44 of the ZArbit, the dispute among the Parties shall not be arbitrable under the Slovenian law regardless of its later transfer, because the Arbitration Clause was concluded before the dispute arose. In such case, the parties cannot submit its dispute under the Loan Agreement to arbitration and the arbitration lacks the jurisdiction to arbitrate such dispute.

9. The Sole Arbitrator initially turns to the question of whether the Respondent is a consumer for the purposes of the ZArbit. Article 44 of the ZArbit refers with respect to definition of a consumer and a business to the Slovenian Consumer Protection Act (Official Gazette of the Republic of Slovenia No. 25/98 with subsequent amendments; hereafter "**ZVPot**"). Pursuant to the ZVPot (its Article 1.2), a consumer is a natural person acquiring or using goods or services for the purposes outside of his or her profession or business activities. On the other hand, ZVPot defines business undertaking as legal or natural person conducting profitable activities regardless of its corporate legal form or ownership. In the concrete case, the Loan Agreement was concluded between [redacted]

   a. According to the Claimant [redacted] is a friend of and had personal contacts with [redacted] who was helping him obtaining the Loan (sections I. and II. of the Statement of Claim). The Loan Agreement uses in its wording the name [redacted] and the prefix Mr. There is no statement or evidence from the Claimant or in the Loan Agreement that [redacted] would be acting in relation to the Loan within the scope of its business activity or profession. Also the Claimant has not objected the view that [redacted] is a consumer, it only claimed in its Objection that [redacted] as an investment company is not an undertaking within the scope of the ZArbit's Article 43. The Loan Agreement does not refer to any business use of the funds by Mr. [redacted] and albeit [redacted] is a founder of healthcare (Life Check) centres, there were no statements by [redacted] that the funds pursuant to the Loan Agreement were intended for such business purposes of [redacted] was thus not acting for the purposes of his or her profession or business activities but for his personal needs. The question is whether he was acquiring or using goods or services when entering into the Loan Agreement. In the view of the Sole Arbitrator, the answer to this question is affirmative. The Sole Arbitrator does not share the view of the Claimant that the granting of a credit would not fit within the scope of services covered by the definition of a consumer pursuant to the ZVPot. Although specifically regulated under the Slovenian Consumer Credit Act (Official Gazette of the Republic of Slovenia No. 59/10 with subsequent amendments; hereafter: "**ZPotK-1**"), credit and granting of the credits remains to be covered by the provisions of the ZVPot. A consumer acquiring a credit from an investment firm is in the view of the Sole Arbitrator still covered by the ZVPot generally. ZVPotK-1 provides

only specific rules with respect to the consumer credits. There is no provision in the ZVPot that would otherwise exclude application of the ZVPot with respect to consumer credits. On the other hand there are provisions of the ZVPot that expressly exclude ZPotK-1, which means that the ZVPot is general law regulating the consumer protection. Finally, ZArbit in this regard refers only to ZVPot with respect to definition of consumer and undertaking. Because the intention of the legislator was to secure the position of consumer as a weaker party with respect to arbitration agreement[13], it is also logical that such broad definition of the term consumer and undertaking was used. For its application, ZArbit does not require any further connection to activities of such persons or entities, but for those that are provided in definition of a consumer and an undertaking pursuant to Articles 1.1 and 1.2 of the ZVPot.[14] Hence, the Sole Arbitrator concludes that Mr. [redacted] was a consumer within the scope of Slovenian law when entering into the Loan Agreement with the Lender.

b. According to the Claimant, [redacted] is an investment company from Cyprus (Section I of the Statement of Claim) and [redacted] is a financial and investment company from Cyprus (Section III of the Statement of Claim). In the view of the Sole Arbitrator, [redacted] and [redacted] fulfil the requirements for a business undertaking within the scope of the Slovenian ZArbit. First, ZArbit refers to ZVPot only with respect to definition of a consumer and business undertaking. It does not refer to any other definition of the ZVPot or ZPotK-1 in this regard. It follows that both Melsona and Geolane are conducting profitable activities as investment companies. Although the question of whether the undertaking was marketing services or loans may be important with respect to consumer disputes with respect to the governing law of the agreement (see Article 6 of the Rome I), it is not relevant for the definition of an undertaking pursuant to the ZVPot. Secondly, lending of funds, is not construction building for third parties for example, but it is a typical activity and transaction that can be pursued by any commercial company, regardless whether a commercial entity is otherwise registered for such type of business. This is under the Slovenian law so because the commercial undertakings are by law authorized to conduct anything what serves to their purpose and lending of the undertaking funds is in the view of the Sole Arbitrator considered as such.[15] Such scope of business activities also fits within the scope of the undertaking's definition under the Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on Credit Agreements for Consumers and repealing Council Directive 87/102/EC and under the ZVPotK-1, which should be uniformly applied in the EU.[16] The Claimant has not stated nor proved that it would be different under the Cyprus law and given the uniform application of the EU law this even does not appear to be possible. In this regard, it shall be stressed that the Sole Arbitrator in his Procedural order no. 2 and Procedural Timetable dated September 18, 2014 has expressly inquired from the Claimant to provide statement and evidence with respect to [redacted] and the Parties with respect to the conduct of lending activities and authorizations for lending activities. Similar request was made also when requesting Statement of Defence from the Respondent. The Claimant merely maintained in its Objection that [redacted] had not lent money in no other way and that this was a single transaction without referring to any evidence that would substantiate its statements (such as, for example financial statements or list of the company's lawful activities). Article 44 of the ZArbit applies if an undertaking conducts profitable activities on the market (Article 1.3 of the ZVPot and Article 44 of the ZArbit). As lending of funds is in the view of the Sole Arbitrator's a regular and lawful activity carried out by any undertaking and particularly investment and/or financial undertaking, the Sole Arbitrator concludes that the both [redacted] and [redacted] fit within the scope of the business undertakings pursuant to the Slovenian ZArbit and ZVPot. One could claim and the Sole Arbitrator may share such view that only [redacted] qualification as an undertaking within the scope of the ZVPot and ZArbit is relevant for the consideration of whether the Arbitration Clause was entered among an undertaking and a consumer. Nevertheless, in the light of the aforementioned Sole Arbitrator's conclusion, that both, [redacted], are to be regarded as such, further analysis of such question appears to be irrelevant.

10. Given that none of the Parties is a Slovenian entity or resident, it follows that there are international elements of a dispute. In this regard, the Sole Arbitrator must also ascertain whether the provisions of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (Official Gazette of the SFRY, International Treaties No. 11/81 and Official Gazette of the Republic of Slovenia, International Treaties, No. 45/2008 No. 45/2008; hereafter: "**NY Convention**") would affect its considerations on arbitrability of the Arbitration Clause and dispute. NY Convention is applicable to recognition and enforcement of arbitral awards not considered as domestic awards in the State where the enforcement is sought (Article I.3). Article 1 of the ZArbit defines arbitrations having a seat in

Slovenia, regardless whether the parties to arbitration are foreign entities, as domestic arbitrations. Pursuant to Article 42 of the ZArbit only enforcement of a foreign arbitral award in Slovenia is subject to the rules of the NY Convention. Foreign arbitral awards are awards issued by an arbitral tribunal having a seat outside of Slovenia (Articles 1.2 and 42 of the ZArbit). Thus, in case of enforcement of an arbitral award issued in this arbitral proceeding in Slovenia the arbitral award in the present case would not present a foreign arbitral award that shall be enforced pursuant to the terms of the NY Convention, but a domestic award that shall be enforced on the basis of Article 41 of the ZArbit. On the other hand, given the residence of [redacted] in the Principality of Monaco as evidenced also from the wording of the Loan Agreement (*see* signature page of the Loan Agreement referring to the address of Mr. [redacted]), the Sole Arbitrator considers that any arbitral award issued by the LAC, if intended as enforcement or recognition there, may be considered under the Monaco legislation as a foreign arbitral award and thus be subject to enforcement or recognition pursuant to the NY Convention.[17] In this regard, the Sole Arbitrator notes that the Principality of Monaco has signed the NY Convention with the "commercial reservation". Consequently, Monaco will apply the NY Convention to any LAC's arbitral award only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the Monaco law. Consumer disputes are referred as an example of disputes which are not considered as commercial in the international arbitration practice, hence Monaco may exclude application of the NY Convention.[18]

11. Notwithstanding that Slovenia had not made commercial reservation under Article I(3) of the NY Convention, lack of such reservation in the view of the Sole Arbitrator does not automatically mean arbitrability of a consumer dispute under the Slovenian national law.[19] The arbitrability of a dispute concerns the question whether a dispute is capable of settlement by arbitration under the applicable law. Thus (as in the present case according to the Sole Arbitrator), although dispute may be within the scope of an existing arbitration agreement, it may still be non-arbitrable because under the applicable law it may not be decided by arbitrators but by a court only.[20] In other words, even if there is existing and generally valid arbitration clause, the laws may still prevent or impose restrictions on arbitration of certain types of disputes. It is true that the question of arbitrability of consumer disputes in international arbitration and NY Convention context may be viewed to some extent disputed[21]; however, the fact is that there are many states that impose restrictions on arbitrability of consumer disputes regardless whether NY convention is applicable to a dispute, including many EU states and Slovenia. Such non-arbitrability of consumer disputes appears to be prevailing and accepted in the EU.[22] In the light of the above considerations, the Sole Arbitrator considers that the Slovenian restriction of arbitrability of consumer disputes is therefore also concordant with the prevailing international arbitration practice.

12. In the light of the Sole Arbitrator's conclusions that: the Slovenian law governs the Arbitration Clause (*supra* VII.4.b), the seat of arbitration is Slovenia and the arbitration proceedings shall be governed by the Rules and the Slovenian law (*supra* VII.5), the parties choose Slovenian law as the governing law of the Loan Agreement (*supra* VII.4.c); and that [redacted] on the one side and Mr.. [redacted] on the other fall within the scope of business undertaking(s) and a consumer for the purposes of Article 42 of the ZArbit, the Sole Arbitrator must regretfully conclude that the invoked dispute among the Parties to this dispute is not arbitrable, because the arbitration agreement was not entered into among the Parties after the dispute arose. Consequently, the Sole Arbitrator must dismiss the claim of the Claimant because it does not have jurisdiction to resolve the dispute among [redacted] and [redacted] under the Arbitration Clause in the Loan Agreement. According to Article 30 of the Rules the Sole Arbitrator may rule on its jurisdiction in an award or another decision. Because of the Sole Arbitrator's power to decide on its own jurisdiction, the Sole Arbitrator considers that the arbitration award is the appropriate form to decide on the lack of its jurisdiction in the present dispute.[23]

VIII. Determination of Costs

1. Pursuant to Article 45.4 of the Rules the Sole Arbitrator shall include in the final award the costs of the arbitration as finally determined by the Secretariat of the LAC and specify the individual fees and expenses of each of the arbitrators and the LAC. The Secretariat of the LAC has determined the costs by the letter dated 13.02.2015.

2. The issue of jurisdiction was a complex one, the outcome of which was difficult to predict. The Claimant has requested the arbitration, but the Respondent has failed to take part in the proceedings. Based on the said and due to the lack of jurisdiction, the Sole Arbitrator allocated the costs of the arbitration as determined further below.

IX. Decision

Based on the foregoing considerations the Sole Arbitrator hereby in accordance with Articles 21 and 30.3 of the Rules issues the following Arbitral Award:

1. **The Sole Arbitrator does not have jurisdiction to resolve the dispute between the claimant Cyprus against the respondent claimed by the Request for Arbitration dated May 23, 2014.**
2. **Consequently, the Sole Arbitrator hereby dismisses the claim of the claimant Cyprus against the respondent Monaco as contained in the Request for Arbitration dated May 23, 2014 to pay the sum of:**
   - **the principal amounting to EUR 150,000.00**
   - **the contractual interest earned (Article 2 of the contract dated 28 March 2011) amounting to EUR 750.00**
   - **the default interest earned from the principal (Article 3 of the contract dated 28 March 2011) from 28 May 2011 until payment;**
   - **the default interest earned from the contractual interest (Article 3 of the contract dated 28 March 2011) from 28 may 2011 until payment;**
   - **the expenses of the arbitral proceedings plus statutory default interest from the deadline for their voluntary payment until payment.**
3. **The costs of the arbitration proceedings as determined by the Secretariat of the LAC consist of (i) the fees of the Sole Arbitrator; (ii) the administrative fee of the LAC and (iii) the expenses of the Sole Arbitrator:**
   a. **The fees of the Sole arbitrator are determined at EUR 6,494.00 (VAT not included pursuant to Article 45.7 of the Rules);**
   b. **The administrative fees of the LAC are determined at the EUR 4,007.50 (VAT not included pursuant to Article 45.7 of the Rules);**
   c. **The expenses of the Sole Arbitrator amount in total to EUR 266.37.**
4. **The costs of arbitration proceedings, as determined pursuant to item 3 of the decision immediately above, amounting in total to EUR 10,767.87 and the corresponding VAT, not included pursuant to Article 45.7 of the Rules, if any, shall be borne by the claimant**

Date: Friday, February 27, 2015
Seat of Arbitration: Ljubljana, Slovenia

Pursuant to Article 41 of the Rules to be sent in four equal and signed copies to Ljubljana Arbitration Centre, Dimčeva 13, 1504 Ljubljana, Slovenia.

[1] Hereafter the Sole Arbitrator refers to such documentary evidence number as a documentary evidence number.
[2] Just to mention the International Chamber of Commerce Arbitration, which is commonly referred as the "Court"(available at *http://www.iccwbo.org/about-icc/organization/dispute-resolution-services/icc-international-court-of-arbitration/*, site visited on the 20.2.2015)
[3] *See* definition of verb "dare" available at http://www.merriam-webster.com/dictionary/dare, visited on 13.2.2015
[4] Dr. Aleš Galič; Priznanje in izvršitev domačin in tujih arbitražnih odločb v Sloveniji [Recognition and Enforcement of Domestic and Foreign Arbitral Awards in Slovenia], Zbornik znanstvenih razprav, letnik 2013, Page. 116.
[5] See Gary B. Born, International Commercial Arbitration, Choice of Law in International Commercial Arbitration, page 41 and further, Kluwer Law International, 2001
[6] *See also Garcimartin Alferez, Franciso J.*; The Rome I Regulation: Much ado about nothing, The European Legal Forum, Forum iuris communis Europea, www.european-legal-forum.com., page I-62 [available at http://www.simons-law.com/library/pdf/e/884.pdf, site visited on the 16.2.,2015)
[7] The Slovenian law and jurisprudence follows the same rule. See Higher Court in Celje Slovenia, Judgment case no. Cp 119/2012 [the court reasoned that the reference to the Austrian legislation in a contract substantiates the argument, that the will of the parties is beyond any doubt expressed in the contractual provisions].
[8] *See* The Rules on Arbitral Proceedings before the Permanent Court of Arbitration attached to the Chamber of Commerce and Industry of Slovenia (Official Gazette of the Republic of Slovenia No. 63/93 with further amendments) that were applicable in 2011 and the recommended arbitration clause of the LAC at that time. The model clause was referring in English to the Permanent Court of Arbitration.
[9] *See, Born,* supra endnote 5, page 187 as well as the Final Award In ICC Case no. 5294 of 22 February 1988 as reprinted in Born, supra endnote 6, on page 78 and further. Similarly also *Felipe Mutis Tellez*; Prima Facie Decisions on Jurisdiction of the Arbitration Institute of the Stockholm Chamber of Commerce: Towards Consolidation of A 'Pro Arbitration' Approach, available at http://www.sccinstitute.se/media/29996/felipe-mutis-tellez_paper-on-scc-challenges-on-jurisdiction.pdf; site visited on the 16.2.2015 [on page 2 the author states that "*the SCC would assert jurisdiction even if the Institute's name is mentioned incorrectly, or even if the clause generally refers to an arbitration court located in Stockholm*"]
[10] See decisions of the Higher Court in Ljubljana [Višje sodišče v Ljubljani], VSL decision II Cpg 266/2010 and Higher Court in Koper [Višje sodišče v Kopru], VSK decision Cpg 145/2009.
[11] See Interim award in ICC Case no 4131 of September 1982, as available in Born, supra endnote 5, p 654 and Gary B. Born, *International Commercial Arbitration*, Second Edition (Kluwer Law International 2014) p. 1465.
[12] The Sole Arbitrator has referred to general existence and general validity of arbitration clause in the previous analysis, without considering application of special consumer protection rules and arbitrability of arbitration agreement discussed now.
[13] Commentary to Chapter IX of the ZArbit; Arbitration Act Bill (*Predlog zakona o arbitraži*), Poročevalec DZ, no. 00720-2/2008/8, Ljubljana 14.02.2008.
[14] *Id.*
[15] Article 6.4 of the Slovenian Commercial Companies Act (ZGD-1). Lending may constitute activities intended to use the excessive funds of an undertaking as an example.
[16] EU Consumer Credit Directive (2008/48/EC) in this regard in its recitals stresses the need for full harmonisation throughout the Community: "full harmonisation is necessary in order to ensure that all consumers in the Community enjoy a high and equivalent level of protection of their interests and to create a genuine internal market". *See* Recitals 9, 10 and 15 of the said Directive. Definitions of undertaking under Slovenian law and the Directive are the same. Considerations of the Sole Arbitrator are substantiated also by reference to the jurisprudence of the German Courts where the definition of an undertaking also complies with the Directive's definition of an undertaking that is further compliant with the Slovenian law). *See* for example German BGH decision XI ZR 513/07 dated 9.12.2008; available at http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=46781&pos=0&anz=1; site visited on the 19.2.2015
[What is needed is that the undertaking at the time of conclusion of the Loan Agreement carries out its business or independent professional activities, whereby this can be the case also if there is only one Loan Agreement]. Such decision was confirmed also in case of 10 U 56/12 of the German Oberlandsgericht Stuttgart [reasoning that even a building contract can be construed as part of the business and activities of an undertaking, regardless whether there is only one such agreement entered into by one entity]. http://www.iww.de/quellenmaterial/id/150910
[17] Information on status of signatories and reservations of the NY Convention available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (site visted on the 19.2.2015)
[18] *See* Albert Jan van den Berg (ed), Yearbook Commercial Arbitration 2003 - Volume XXVIII, Yearbook Commercial Arbitration, Volume 28, Kluwer Law International 2003), Second Reservation ("Commercial Reservation") on pp. 574 – 575; [There is also a tendency to rely on the broad description of what constitutes "commercial" as is given in conjunction with the UNCITRAL Model Law on International Commercial Arbitration of 1985]. Consumer disputes are considered as "non-commercial" under the UNCITRAL Model Law on International Commercial Arbitration of 1985. *See also* Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General (A/CN.9/264) in Charles H. Brower II , Jack J. Coe , et al., NAFTA Chapter Eleven Reports; Kluwer Law International 2006), page 600.
[19] Born, supra endnote 11, p. 946. [This is different from the view generally taken of the New York Convention, which is that both "commercial" and other types of subject matter may be categorized as "nonarbitrable," depending on national law.]

[20] Albert Jan van den Berg, New York Convention of 1958, Annotated List of Topics, page 16; available at http://www.newyorkconvention.org/court-decisions/list-of-topics-description (site visited on January 19, 2015); Born, supra endnote 11, page 893

[21] *See* also Born, *supra* endnote 11, Nonarbitrability and International Arbitration Agreements pp. 943 – 1045; dr. Christian Aschauer; A landmark decision of the Austrian Supreme Court clarifying when parties to arbitration Agreements should be treated as consumers or entrepreneurs, Slovenska arbitražna praksa, marec 2014, page 11.

[22] *Id* Born, pp. 1017-1020 (particularly footnote 412 referring to Slovenia as an example of arbitrability of consumer disputes). In this regard, it shall be noted that according to Born among the EU Member States France (France has not made commercial reservation to the NY Convention) and Sweden are examples of states where consumer disputes are arbitrable in international settings. But, with respect to Sweden, *please see* Lars Heuman, Sigvard Jarvin, The Swedish Arbitration Act of 1999 Five Years on: A Critical Review of Strengths and Weaknesses, Juris Publishing, Inc., Apr. 1, 2006, p. 177 [author refers to "*objections that a dispute is not arbitrable are not subject to waiver and are to be taken into account ex officio by the arbitral tribunal or the court*"]. Germany, Austria and other EU Member states contain restrictions on arbitrability of consumer disputes. With respect to Germany: *see* Judgement of the BGH, Case No. XI ZR 349/08 available at http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=53636&pos=0&anz=1 and in B2C Arbitration: Consumer Protection in Arbitration, Alexander J. Belohlavek, Juris Net , LLC 2012, p. 275 and 276 [*German courts applying German consumer protection rules with respect to arbitrability of disputes even if arbitration clause is governed by foreign law*]. With respect to Austria: *see* dr. Christian Aschauer id, note 21 [*the Supreme Court in a dispute involving foreign parties and arbitration in Vienna under the ICC rules has considered a party to arbitration agreement as non-consumer, in order to enforce the arbitral award, but has not waived the application consumer protection rules in the setting aside proceedings with respect to arbitral award. Notably, the Court's affirmative decision on the jurisdiction of arbitral tribunal was not based on the NY Convention and lack of commercial reservation or non-acceptance of arbitrability defences in international disputes with respect to the NY Convention, but because it regarded parties in a shareholder/corporate dispute as an entrepreneur and not as an consumer*].

[23] *See* Article 40 of ZArbit and Dr. Stefan Kroll, Recourse Against Negative Decisions on Jurisdiction, Arbitration International, Kluwer Law International 2004, Volume 20, Issue 1, pp. 55-72.

Ljubljana Arbitration Rules
Macedonian

To be able to live up to the expectations of their users from the region, the Ljubljana Arbitration Rules are now available, in addition to the original English and Slovenian versions, in German, Serbian, Macedonian and Croatian. The LAC is the only arbitral institution that provides its services to its users from the ex-Yu region in their local languages.

Longstanding experience and unparalleled services in administering commercial disputes involving parties from the regions of the Adriatic and ex-Yu make the LAC a convenient forum for the settlement of commercial disputes in the region.

Љубљански арбитражен центар
при Стопанската комора на Словенија
Димичева улица 13, 1504 Љубљана, Словенија

www.sloarbitration.eu
Секретаријат:
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СОДРЖИНА

АРБИТРАЖНИ ПРАВИЛА

НА ЉУБЉАНСКИОТ АРБИТРАЖЕН ЦЕНТАР
ПРИ СТОПАНСКАТА КОМОРА НА СЛОВЕНИЈА

[Ова е официјален превод на Љубљанските арбитражни правила на македонски јазик, кои во оригинал се составени на англиски јазик. Во случај на несогласување на текстовите, ќе преовлада текстот на англиски јазик.]

УВОДНИ ОДРЕДБИ

Член 1
Љубљански арбитражен центар при Стопанската комора на Словенија

Љубљанскиот арбитражен центар при Стопанската комора на Словенија (ЉАЦ), познат и како Постојан арбитражен суд при Стопанската комора на Словенија е самостојна и независна институција, која дава поддршка и го организира решавањето на домашните спорови и на споровите со меѓународен елемент, во согласност со Арбитражните правила на Љубљанскиот арбитражен центар при Стопанската комора на Словенија (правила) и со другите правила и постапки за коишто странките се договориле. Органи на ЉАЦ се претседателството и секретаријатот. Организацијата на ЉАЦ е регулирана со Додатокот I.

Член 2
Примена на правилата

1. Ако странките се договориле, дека спорот ќе го решава арбитражен совет, кој е конституиран во согласност со овие правила или дека спорот ќе го предадат на решавање на ЉАЦ, се смета дека се согласиле со примената на овие правила ако арбитражната постапка е поведена по нивното влегување во сила.
2. Додатоците I, II и III се составен дел на овие правила.
3. Ако арбитражната спогодба е склучена пред влегувањето во сила на овие правила, одредбите од членовите 11 и 12 од овие правила и Додатокот III нема да се применуваат, освен ако странките не се договорат поинаку.

Член 3
Комуникација со ЉАЦ

Комуникацијата на странките со ЉАЦ се одвива на словенечки или на англиски јазик.

ПОЧЕТОК НА АРБИТРАЖНАТА ПОСТАПКА

Член 4
Почеток на постапката

Арбитражната постапка почнува кога ЉАЦ ќе го прими барањето за арбитража.

Член 5
Барање за арбитража

1. Барањето за арбитража мора да содржи:
   i. имиња, адреси и податоци за контакт (електронски адреси, телефонски броеви, телефакс броеви) на странките и нивните полномошници,
   ii. копија од арбитражната спогодба, или ако не постои посебна исправа за тоа, опис и евентуални докази за постоење на арбитражната спогодба,
   iii. опис на спорот и на околностите врз кои се заснова барањето,
   iv. барање,
   v. процена на вредноста на барањето, кога тоа не се однесува на паричен износ,
   vi. предлог за бројот на арбитрите, за јазикот на постапката и за седиштето на арбитражата ако странките за тоа предходно не се договориле,
   vii. номинација на еден или на повеќе арбитри ако тоа произлегува од арбитражната спогодба,
   viii. потврда за уплатена уписна такса.
2. Ако барањето за арбитража не ги содржи сите елементи од ставот 1, секретаријатот може да го повика тужителот да го дополни барањето за арбитража, во рок кој ќе го определи секретаријатот. Ако тужителот не постапи во согласност со повикот, секретаријатот може да ја запре постапката.
3. Кон барањето за арбитража, тужителот мора да го приложи својот даночен број (ако го има) или друга соодветна идентификациска ознака за данокот на додадена вредност.

Член 6
Уписна такса

1. При поднесувањето на барањето за арбитража тужителот мора да плати уписна такса во согласност со Додатокот II.

2. Секретаријатот нема да го достави барањето за арбитража до туженият додека не се плати уписната такса.

3. Ако тужителот не ја плати уписната такса, секретаријатот ќе определи дополнителен рок за плаќање. Ако и во дополнителниот рок уписната такса не биде платена, секретаријатот може да ја запре постапката.

Член 7
Одговор на барањето за арбитража

1. Секретаријатот ќе го достави барањето за арбитража до туженият и ќе го повика да одговори на него во рок од 30 дена..
2. Одговорот на барањето за арбитража мора да содржи:
   i. имиња, адреси и податоци за контакт (електронски адреси, телефонски броеви, телефакс броеви) на странките и нивните полномошници,
   ii. евентуален приговор за ненадлежност на советот конституиран врз основа на овие правила,
   iii. изјава во врска со наводите на тужителот,
   iv. одговор на барањето на тужителот,
   v. одговор на проценатa на вредноста на барањето кога тоа не се однесува на паричен износ,
   vi. предлог за бројот на арбитрите, за јазикот на постапката и за седиштето на арбитражата ако странките за тоа предходно не се договориле и
   vii. номинација на еден или на повеќе арбитри, ако тоа произлегува од арбитражната спогодба.
3. Туженият поднесува противтужба или приговор заради пребивање, по правило, со поднесувањето на одговорот на барањето за арбитража. На противтужбата и приговорот заради пребивање сообразно се применуваат одредбите од членот 5 од овие правила.

4. Кон одговорот на барањето за арбитража тужениот мора да го приложи својот даночен број (ако го има) или друга соодветена идентификациска ознака за данокот на додадена вредност.
5. Ако тужениот не одговори на барањето за арбитража, постапката продолжува во согласност со одредбите на овие правила.

Член 8
Рокови

1. Се смета дека писмената и известувањата се навремено испратени, ако се предадени последниот ден од рокот или пред тоа во согласност со членот 9 од овие правила.
2. Рокот започнува да тече наредниот ден од денот на кој се смета дека писменото или известувањето е примено во согласност со членот 9 од овие правила. Ако тој ден во местото на престојувалиштето или во седиштето на адресатот е државен празник или неработен ден, рокот започнува да тече првиот,нареден работен ден. Државните празници и неработните денови, во периодот кога тече рокот, се засметуваат во рокот. Ако во местото на престојувалиштето или во седиштето на адресатот последниот ден од рокот е државен празник или неработен ден, рокот истекува првиот нареден работен ден.
3. ЉАЦ може по барање на која било странка или по сопствена иницијатива да го продолжи или скрати кој било рок, кој го определила или е надлежна да го определи или да го измени.

Член 9
Писмена и известувања

1. Писмената и известувањата му се испраќаат на адресатот на последната позната адреса за прием на писмена. Писмената и известувањата може да се достават преку курирска служба, препорачано по пошта, преку електронска пошта, телефакс или на кој било друг начин со кој се обезбедува или овозможува потврда за испраќањето.
2. Кога странката има полномошник, се смета дека писменото или известувањето кое му било испратено на полномошникот ѝ е испратено на странката.

3. Писменото или известувањето се смета за примено на денот, кога фактички му било предадено на адресатот или на денот, кој во зависност од начинот на испраќање определен со ставот 1, може да се смета дека писменото или известувањето е примено.
4. Сите писмена и известувања (заедно со прилозите) мора да бидат поднесени во доволен број примероци (за ЉАЦ, за секоја странка и за секој арбитер), освен кога тие се испраќаат по електронска пошта.
5. Пред секретаријатот да му го предаде предметот на советот, странките мораат сите писмена и известувања да ги достават до ЉАЦ. Кога ЉАЦ ќе ги извести странките дека го предал предметот на советот, сите писмена и известувања странките ги испраќаат непосредно и истовремено,на советот и на спротивната странка, како и на ЉАЦ заради информирање..

Член 10
Одбивање на предметот

Претседателството може да го одбие предметот ако е очигледно (prima facie) дека не е постои надлежност за решавање на спорот според овие правила или ако странките се договориле за примена на правила кои суштествено отстапуваат од одредбите на овие правила, така што спроведувањето на постапката би било несразмерно отежнато.

Член 11
Спојување на постапките

1. По предлог на странките, претседателството може да спои две или повеќе постапки, кои се водат според овие правила:
   i. ако сите странки се согласни со тоа или
   ii. ако сите барања од постапките се опфатени со иста арбитражна спогодба или
   iii. кога сите барања од постапките не се опфатени со иста арбитражна спогодба, ако странките во постапките се исти, барањата произлегуваат од ист правен однос и претседателството оцени дека арбитражните спогодби се меѓусебно согласни.

2. При одлучување за спојување на постапките претседателството ги зема предвид сите околности, кои ги смета за релевантни, вклучувајќи ја и околноста дали барем во една постапка веќе бил именуван арбитер, а ако бил именуван, дали биле именувани исти или различни арбитри. Пред донесување на одлуката претседателството ќе се посоветува со странките и со веќе именуваните арбитри.
3. Ако странките не се договорат поинаку, постапките ќе се спојат со постапката која почнала прва.

Член 12
Придружување на странка

Советот може по барање на која било странка да дозволи кон постапката како странка да се придружи едно или повеќе трети лица, под услов сите лица да се обврзани со иста арбитражна спогодба. Откако на сите странки, вклучувајќи ги и третите лица, им дал можност да се изјаснат за барањето за придружување на трето лице, советот може да не го дозволи придружувањето ако со тоа несразмерно би се повредиле интересите на која било странка.

КОНСТИТУИРАЊЕ НА АРБИТРАЖНИОТ СОВЕТ

Член 13
Број на арбитри

Странките можат да се договорат за бројот на арбитрите. Ако странките не се договорат за бројот на арбитрите, спорот ќе го решава арбитражен совет составен од тројца арбитри, освен ако претседателството поради сложеноста на предметот, вредноста на спорниот предмет или други околности не одлучи за спорот да решава арбитер-поединец.

Член 14
Именување на арбитри

1. Странките можат да се договорат за поинаков начин на именување на арбитрите од оној кој е предвиден со овие правила. Во случај кога советот не е конституиран во рокот кој го определиле странките, или во случај кога странките не определиле рок, во рокот кој го определил секретаријатот, арбитрите се именуваат во согласност со членовите 14 и 15 од овие правила.
2. Кога советот е составен од арбитер-поединец, странките го номинираат спогодбено. Ако странките не го номинираат спогодбено, секретаријатот ќе им определи рок во кој мораат да ја извршат номинацијата. Ако арбитерот-поединец не биде номиниран и во тој рок, него ќе го именува претседателството..
3. Кога советот е составен од повеќе арбитри, секоја странка номинира ист број арбитри. Така номинираните арбитри по потврдувањето, во рок од 15 дена по повикот од страна на секретаријатот, номинираат арбитер кој ќе биде претседател на советот. Ако некој од арбитрите не е номиниран во договорениот или од страна на секретаријатот определениот рок, арбитерот ќе го именува претседателството.
4. Номинираниот арбитер мора да биде потврден во согласно со членот 17 од овие правила и со тоа се смета дека е именуван за арбитер. Арбитрите се во договорен однос со странките и вршат услуги за странките.
5. Кога според овие правила претседателството именува арбитри, мора да води сметка за природата на спорот, материјалното право, седиштето на арбитражата, јазикот на постапката, државјанството односно припадноста на странките и другите околности на предметот.

Член 15
Именување на арбитри во случај на сопарничарство

1. Кога на страната на тужителот и/или туженият има повеќе лица, арбитрите се именуваат на начин определен со членот 14 од овие правила, освен ако со овие правила не е поинаку определено.

2. Кога советот е составен од повеќе арбитри, а на страната на тужителот и/или туженият има повеќе лица, тужителите односно тужените мораат заедно да номинираат ист број арбитри. Ако некоја од странките не ја изврши заедничката номинација во договорениот или од страна на секретаријатот определениот рок, арбитерот или арбитрите ги именува претседателството. По исклучок, претседателството може, откако на странките ќе им овозможи да се изјаснат, да ги поништи извршените именувања на арбитрите и да именува арбитер или арбитри и да определи кој арбитер ќе биде претседател на советот.

Член 16
Непристрасност и независност на арбитрите

1. Секој арбитер мора да биде непристрасен и независен.
2. Лицето именувано за арбитер, мора на секретаријатот да му поднесе потпишана изјава за прифаќање на функцијата, за својата достапност, непристрасност и независност. Во изјавата мора да ги наведе сите околности, кои би можеле да предизвикаат основано сомневање за неговата непристрасност и независност. Секретаријатот ќе им испрати копија од изјавата, на странките и на другите арбитри и ќе определи рок во кој можат да дадат забелешки.
3. Ако околностите од ставот 1 се појават во текот на постапката арбитерот мора за тоа без одлагање, писмено да ги извести странките, другите арбитри и ЉАЦ.

Член 17
Потврдување на арбитрите

1. За потврдување на номинираниот арбитер одлучува секретаријатот. Притоа секретаријатот ја зема предвид изјавата од членот 16 став 2 и сите околности кои би можеле да предизвикаат сомневање за неговата непристрасност и независност, достапноста и можноста за квалитетно и навремено извршување на задачите на арбитер, како и евентуалните забелешки на странките. Секретаријатот не мора да ја образложи својата одлука.

2. Ако потврдувањето на номинираниот арбитер е одбиено, секретаријатот ќе ја повика странката односно арбитрите, во рок кој ќе им го определи, повторно да извршат номинација. Во исклучителни случаи, по претходно советување со странките и другите арбитри, арбитерот може непосредно да го именува претседателството.
3. Советот е конституиран по потврдувањето на сите номинирани арбитри. Секретаријатот ќе ги извести странките дека советот е конституиран.

Член 18
Изземање на арбитрите

1. Изземање на арбитерот може да се побара само ако постојат околности, кои предизвикуваат основано сомневање за неговата непристрасност и независност или ако арбитерот ги нема квалификациите, за кои странките се договориле. Странката може да бара изземање на арбитерот, кој го номинирала или учествувала при неговата номинација, само поради причини за кои дознала по извршената номинацијата на арбитерот.
2. Странката може да бара изземање на арбитерот најдоцна во рок од 15 дена од денот кога дознала за околностите од ставот 1. Ако странката во тој рок не бара изземање се смета дека се одрекла од тоа право.
3. Барањето за изземање на арбитерот странката го доставува до секретаријатот. Барањето мора да биде во писмена форма и образложено.
4. За барањето за изземање секретаријатот ги известува арбитерот чиешто изземање се бара, другите странки и останатите арбитри и определува рок во којшто можат да се изјаснат за поднесеното барање за изземање.
5. Ако другите странки се согласуваат со изземањето на арбитерот или ако арбитерот сам се повлече од функцијата, ќе се именува заменик на арбитерот во согласност со членот 19 од овие правила. Фактот дека арбитерот се повлекол од својата функција или дека странките се договориле за негово изземање, не значи дека ги прифатил како основани причините за неговото изземање.

6. Ако другите странки не се согласат со изземањето на арбитерот или ако арбитерот сам не се повлече од функцијата, за барањето за изземање одлучува претседателството. Претседателството не мора да ја образложи својата одлука.

Член 19
Разрешување на арбитри и именување на заменици арбитри

1. Претседателството ќе го разреши арбитерот од неговата функција ако:
   i. сите странки се согласат арбитерот да се разреши,
   ii. арбитерот, поради правни или фактички причини, не е во состојба да ги извршува своите задачи или не ги извршува во согласност со овие правила,
   iii. го прифати повлекувањето на арбитерот,
   iv. го прифати барањето за изземање на арбитерот во согласност со членот 18 од овие правила.
2. Пред да ја донесе одлуката од ставот 1 точка 2 претседателството може на странките и на арбитерот да им даде можност да се изјаснат за разрешувањето. Претседателството не мора да ја образложи одлуката за разрешување.
3. Кога арбитерот е разрешен од својата функција или ако умре во текот на постапката, за именување на заменик на арбитерот сообразно се применуваат одредбите од членовите 13 до 17 од овие правила.
4. Кога за спорот решава совет составен од повеќе арбитри, претседателството, по исклучок, може да одлучи, останатите арбитри за предметот да одлучат сами. Притоа претседателството ќе ја земе предвид фазата во која се наоѓа постапката и другите околности на предметот. Пред да ја донесе одлуката претседателството ќе се посоветува со странките и со останатите арбитри.
5. По именувањето на заменик на арбитерот ново конституираниот совет одлучува дали и во кој обем е потребно да се повторат преземените процесни дејствија.

ПОСТАПКА ПРЕД АРБИТРАЖНИОТ СОВЕТ

Член 20
Предавање на предметот на советот

По конституирањето на советот и по уплатата на авансот на трошоците, секретаријатот му го предава предметот на советот.

Член 21
Водење на постапката

1. Советот ја води постапката во согласност со овие правила и договорот на странките, на начин кој го смета за соодветен, при што со странките мора да постапува рамноправно и на секоја од нив, во која било фаза од постапката, да ѝ даде разумна можност да се изјасни за предметот. При извршувањето на своите дискрециони овластувања советот мора да ја води постапката, така што ќе ги спречи непотребните одолжувања и трошоци и ќе обезбеди правична и ефикасна постапка за решавање на спорот.
2. Сите учесници во постапката се должни да се однесуваат со добра волја и да сторат сè што е потребно за ефикасно водење на постапката и за избегување на непотребните трошоци и одолжувања. Ако странката се однесува спротивно на обврската од овој став, советот тоа може да го земе предвид при распределбата на трошоците на арбитражната постапка меѓу странките.

Член 22
Седиште на арбитражата

1. Ако странките не се договориле за седиштето на арбитражата, седиштето ќе го определи претседателството, освен ако со оглед на околностите на предметот одлучи дека е посоодветно седиштето на арбитражата да го определи советот.
2. Советот, по предходно советување со странките, може да одржи усна расправа или да преземе друго процесно дејствие на кое било место кое го смета за соодветно.

3. Советот може да се состане и да се советува во кое било место кое го смета за соодветно.
4. Се смета дека арбитражната одлука е донесена во седиштето на арбитражата.

Член 23
Јазик на постапката

1. Ако странките не се договориле, на кој јазик или јазици ќе се води постапката, советот мора за тоа да одлучи веднаш по конституирањето. Притоа советот мора да ги има предвид околностите на предметот и на странките да им даде можност за тоа да се изјаснат.
2. Советот може да одлучи, кон одделен документ или доказ да се приложи превод на јазикот или на јазиците на постапката.

Член 24
Меродавно материјално право

1. Советот одлучува за спорот врз основа на правните правила, кои ги избрале странките за решавање на суштината на спорот. Изборот на правото или правниот систем на определена држава значи непосредно упатување на примена на материјалното право на таа држава, без правилата за судирот на законите.
2. Ако странките не го избрале материјалното право, советот одлучува врз основа на правните правила кои ги смета за соодветни.
3. Советот може да одлучува по правичност (amiable compositeur или ex aequo et bono) само врз основа на изрично овластување од странките.
4. Советот ќе одлучува во согласност со одредбите на договорот и ќе ги почитува трговските обичаи.

Член 25
Временски план за текот на постапката

1. По предавањето на предметот на советот, советот е должен без одлагање, по предходно советување со странките, да утврди временски план за текот на постапката.

2. Со временскиот план за текот на постапката советот ги определува роковите за поднесување тужба и одговор на тужбата и за евентуалните натамошни писмени поднесоци, датумот(ите) на усните расправи, датумот до кој советот ќе ја донесе арбитражната одлука и другите елементи кои ги смета за неопходни.
3. Советот е должен временскиот план за текот на постапката и неговите евентуални измени да им ги достави на странките и на ЉАЦ.

Член 26
Тужба

1. Тужителот е должен во рокот определен од страна на советот, да им ја испрати тужбата на туженият, на сите арбитри и на ЉАЦ.
2. Доколку тоа не е содржано во барањето за арбитража, тужбата треба да содржи:
   i. барање и
   ii. факти и правен основ врз кои тужителот го заснова барањето.
3. Кон тужбата, доколку е тоа можно, треба да се приложат исправите и другите докази на кои се повикува тужителот.

Член 27
Одговор на тужба

1. Туженият е должен во рок определен од страна на советот, да им го испрати одговорот на тужбата на тужителот, на сите арбитри и на ЉАЦ.
2. Доколку тоа не е содржано во одговорот на барањето за арбитража, одговорот на тужбата треба да содржи:
   i. наводи за тоа дали и во колкав обем туженият го признава или го оспорува тужбеното барање, и
   ii. факти и причини врз кои туженият ги заснова своите наводи.
3. Кон одговорот на тужбата, доколку е тоа можно, треба да се приложат и исправите и другите докази на кои се повикува туженият.

4. На противтужбата и приговорот заради пребивање сообразно се применуваат одредбите од членот 26 од овие правила.

Член 28
Натамошни писмени поднесоци

Советот може по предходно советување со странките да одлучи кои видови писмени поднесоци освен тужбата и одговорот на тужбата треба да ги поднесат странките и да определи рок за нивно поднесување.

Член 29
Измена на барањето

Ако странките не се спогодат поинаку, странките можат во текот на постапката да ја изменат или дополнат тужбата, одговорот на тужбата, противтужбата или приговорот заради пребивање, само ако така изменети останат во рамките на арбитражната спогодба. Советот нема да дозволи измени, ако оцени дека поради тоа постапката несразмерно ќе се одолжи или дека поради тие измени несразмерно ќе бидат повредени интересите на другите странки или поради други оправдани причини.

Член 30
Надлежност на советот

1. Советот е надлежен да одлучува за својата надлежност, вклучувајќи ги и сите приговори, кои се однесуваат на постоењето или на полноважноста на арбитражната спогодба.
2. Странката мора да го поднесе приговорот за ненадлежност најдоцна во одговорот на тужбата, односно во случај на противтужба или приговор заради пребивање во одговорот на противтужбата или во одговорот на приговорот заради пребивање. Фактот дека странката номинирала арбитер или учествувала во постапката за негово именување, не влијае врз нејзиното право на приговор. Приговорот дека советот ги пречекорува границите на својата надлежност, странката мора да го поднесе веднаш кога советот ќе преземе дејствие за кое странката смета дека претставува пречекорување. Во двата случаи, советот може да го дозволи приговорот кој е поднесен подоцна во текот на постапката, ако смета дека задоцнувањето на странката е оправдано.

3. Советот одлучува за својата надлежност со решение или со арбитражната одлука. Советот може да продолжи со постапката и да донесе арбитражна одлука без оглед на тоа дали пред државниот суд се води постапка за оспорување на неговата надлежност.

Член 31
Докази

1. Советот ја оценува допуштеноста, релевантноста, значењето и доказната сила на секој доказ.
2. Советот може кога било во текот на постапката од која било странка да побара, во определен рок:
   i. да објасни кои докази ги предлага и кои факти ги докажува со одделните докази,
   ii. да предложи исправи или други докази, за кои советот смета дека би можеле да бидат релевантни за исходот на постапката.

Член 32
Усна расправа

1. Усна расправа ќе се одржи, по барање на некоја од странките или ако советот оцени дека тоа е потребно.
2. Советот мора навремено да ги извести странките за времето и местото на одржување на усната расправа.
3. Усната расправа не е јавна, освен ако странките не се договорат поинаку.
4. Советот одлучува дали за текот на усната расправа ќе се води записник и во каква форма.

Член 33
Сведоци

1. Советот го определува начинот и текот на сослушувањето на сведоците и вештаците кои се именувани од страна на странките. Советот може да одлучи сведоците или вештаците да не бидат присутни при давањето изјави на другите сведоци или вештаци. Советот може да определи сослушување на сведоците и вештаците со употреба на телекомуникациски средства (на пример преку видеоконференција).

2. Советот може пред почетокот на секоја усна расправа од странките да побара да се изјаснат кој сведок или вештак го предлагаат и кои факти ги докажуваат со нивното сведочење..
3. Советот може по предходно советување со странките да одлучи, пред усната расправа и во рокот кој ќе го определи, одделно сведочење да се поднесе во форма на потпишана писмена изјава.

Член 34
Вештак именуван од страна на советот

1. Советот може по советување со странките да именува еден или повеќе вештаци со задача да му дадат писмен наод и мислење за прашањата кои ќе ги утврди советот.
2. Советот може да побара од странките,да му ги дадат на вештакот сите релевантни податоци и да му ги достават или да му овозможат пристап до исправите, стоката или другите предмети и нивен преглед.
3. Добиениот наод и мислење на вештакот советот го доставува до странките и им дава можност да дадат писмени забелешки.
4. По барање на секоја странка вештакот може да се сослуша на усната расправа, на која странките можат да му поставуваат прашања и да доведат други вештаци, да дадат свое мислење за спорните прашања.

Член 35
Пропуштање на странките

1. Ако тужителот, без оправдани причини, не поднесе тужба во определениот рок, советот ќе ја запре постапката, освен ако постојат други прашања за кои мора да одлучи и ако советот оцени дека тоа е потребно.
2. Ако тужениот, без оправдани причини, не поднесе одговор на тужбата во определениот рок, советот ќе ја продолжи постапката, а пропуштањето на тужениот, само по себе, нема да го смета за признание на наводите на тужителот.

3. Ако странката која била уредно известена, без оправдани причини не дојде на усната расправа, советот може да ја продолжи постапката.
4. Ако странката која била уредно повикана да поднесе исправи или други докази, без оправдани причини нема да го стори тоа, советот може да донесе одлука врз основа на доказите со кои располага.
5. Ако странката без оправдани причини не ги преземе дејствата, кои според овие правила или по барање на советот е должна ги преземе, советот ќе оцени какви последици ќе настанат од таквото нејзино однесување.

Член 36
Одрекување од правото на приговор

Се смета дека странката се одрекла од правото на приговор поради непочитување на арбитражната спогодба, на овие правила или на други правила, кои се применуваат во постапката, ако знаела или можела да знае за непочитувањето, но и покрај тоа и понатаму учествувала во постапката и не поднела приговор поради непочитување без непотребно одлагање или во рокот кој бил определен за таков приговор.

Член 37
Привремени мерки

1. Советот може, по барање на странката, да определи каква било привремена мерка, која ја смета за потребна. Советот може во врска со предложената привремена мерка да побара од странката соодветно обезбедување.
2. По исклучок, ако оцени дека е тоа итно, советот може да определи привремена мерка, пред да ѝ овозможи на спротивната странка да се изјасни за барањето. Во таков случај, советот е должен веднаш штом тоа ќе биде можно, на спротивната странка да ѝ овозможи да се изјасни за барањето и врз основа на нејзината изјава да ја преиспита одлуката за привремена мерка.
3. По барање на која било странка, а во исклучителни случаи, по претходно известување на странките, и по своја иницијатива, советот може да ја измени, задржи или отповика привремената мерка, која ја определил,

4. Со прифаќањето на овие правила странките се обврзуваат дека секоја привремена мерка ќе ја извршат без одлагање, односно во рокот кој го определил советот. Странката која бара привремена мерка, одговара за трошоците и за штетата коишто ќе ги предизвика мерката на која било странка, доколку советот подоцна утврди дека во тогашните услови мерката не би смеела да биде определена. Советот може да одлучи за барањата за враќање на така настанатите трошоци или штета, во секое време во текот на постапката.
5. Барањето за определување привремена мерка или друго средство за обезбедување, кое странката го поднела до државниот суд, не е неспоиво со арбитражната спогодба или со овие правила и не се смета за одрекување од арбитражната спогодба.

Член 38
Арбитер за итни случаи

1. Странката на која ѝ е потребна итна привремена мерка и која не може да чека до конституирањето на советот, може да бара постапка пред арбитер за итни случаи, која е уредена во Додатокот III.
2. Правилата за постапката пред арбитерот за итни случаи не се применуваат ако странките се договориле да ја исклучат примената на Додатокот III.

Член 39
Завршување на расправата

1. Кога советот ќе оцени дека странките имале доволно можности да се изјаснат за предметот, ќе прогласи дека расправата е завршена.
2. Во исклучителни случаи, советот може пред да ја донесе арбитражната одлука, по предлог на странките или по сопствена иницијатива, повторно да ја отвори расправата.

АРБИТРАЖНА ОДЛУКА

Член 40
Донесување на арбитражна одлука и решенија

1. Кога советот е составен од повеќе арбитри, арбитражната одлука или решение ги донесува со мнозинство гласови од своите членови. Ако не може да се постигне мнозинство, арбитражната одлука или решението ги донесува претседателот на советот.
2. Советот може да донесе посебни арбитражни одлуки за одделните барања или прашања.
3. Советот може да го овласти претседателот на советот да одлучува за прашањата на постапката, но советот може процесната одлука подоцна да ја измени.
4. Ако некој од арбитрите без оправдана причина одбие да учествува при советувањето заради донесување на арбитражната одлука или решение, иако за тоа му била дадена разумна можност, тоа не ги спречува останатите арбитри да донесат одлука.

Член 41
Форма и дејство на арбитражната одлука

1. Арбитражната одлука се донесува во писмена форма. Советот мора да ги наведе причините врз кои се заснова арбитражната одлука, освен ако странките се договориле дека арбитражната одлука не треба да се образложи.
2. Арбитражната одлука е конечна и ги обврзува странките. Меѓу странките има дејство на правосилна судска пресуда. Со прифаќање на овие правила странките се обврзуваат дека секоја арбитражна одлука ќе ја извршат без одлагање односно во рокот, кој е определен со одлуката.
3. Арбитрите мора да ја потпишат арбитражната одлука и да го наведат датумот на нејзиното донесување и седиштето на арбитражата, определено во согласност со членот 22 од овие правила. Кога советот е составен од повеќе арбитри, а некој од арбитрите не ја потпише арбитражната одлука, во одлуката мора да се наведат причините зошто арбитерот не ја потпишал.

4. Советот без одлагање ќе му ја достави на секретаријатот арбитражната одлука, во доволен број потпишани примероци, за сите странки и за ЉАЦ,
5. Секретаријатот на сите примероци од арбитражната одлука ќе потврди дека станува збор за арбитражна одлука донесена врз основа на овие правила.
6. Секретаријатот на секоја странка ќе ѝ достави примерок од арбитражната одлука. Еден примерок од арбитражната одлука и потврдите за извршеното доставување на странките се чуваат кај ЉАЦ.

Член 42

Рок за донесување на конечна арбитражна одлука

Советот е должен конечната арбитражна одлука да ја донесе во рок од девет месеци откако му бил предаден предметот во согласност со членот 20 од овие правила. Поради оправдани причини, претседателството може, врз основа на образложен предлог на советот или по сопствена иницијатива, тој рок да го продолжи. Притоа советот може да побара објаснување за состојбата на предметот и за причините кои го оневозможиле донесувањето на арбитражната одлука во рокот.

Член 43

Порамнување и други причини за завршување на постапката

1. Ако пред донесувањето на конечната арбитражна одлука, странките се порамнат за спорот, советот ќе донесе решение за запирање на постапката или ако тоа го побараат странките, а советот се согласува, ќе го запише порамнувањето во форма на арбитражна одлука врз основа на порамнување. Така донесената арбитражна одлука советот не мора да ја образложи, а за неа се применуваат одредбите од членовите 40 и 41 од овие правила.
2. Ако пред донесување на арбитражната одлука, продолжувањето на постапката стане непотребно или невозможно поради која било причина, која не е наведена во ставот 1, советот ќе ги извести странките дека има намера да донесе решение за запирање на постапката. Советот може да донесе решение за запирање на постапката, освен ако некоја од странките поради оправдани причини, приговара на тоа.

Член 44

Исправка и толкување на арбитражната одлука и дополнителна одлука

1. Во рок од 30 дена од приемот на арбитражната одлука секоја странка може, со известување до останатите странки и до секретаријатот, да побара од советот:
   i. исправка на печатните, пресметковните или другите слични грешки во арбитражната одлука,
   ii. толкување на одделни точки или делови од арбитражната одлука и
   iii. донесување на дополнителна арбитражна одлука за барањата кои биле истакнати во постапката, а за кои не било одлучено.
2. Советот ќе им овозможи на другите странки да се изјаснат за барањето од ставот 1. Ако советот смета дека барањето е основано, ќе ја исправи грешката во арбитражната одлука, односно ќе даде толкување на арбитражната одлука во рок од 30 дена, или ќе донесе дополнителна арбитражна одлука во рок од 60 дена од приемот на барањето. Претседателстото може од оправдани причини, врз основа на образложен предлог од советот, да ги продолжи роковите од овој став.
3. Советот може да ги исправи грешките во арбитражната одлука и по сопствена иницијатива во рок од 30 дена од донесувањето на арбитражната одлука.
4. На исправката, толкувањето на арбитражната одлука и на дополнителната арбитражна одлука се применуваат одредбите од членовите 40 и 41 од овие правила. Исправката односно толкувањето се составен дел на арбитражната одлука.

ТРОШОЦИ НА АРБИТРАЖНАТА ПОСТАПКА

Член 45
Трошоци на арбитражата

1. Трошоците на арбитражата се состојат од:
   i. награда за советот,
   ii. административни трошоци на ЉАЦ и
   iii. трошоци на советот и на ЉАЦ
2. Пред да ја донесе арбитражната одлука, советот од секретаријатот треба да го добие конечно утврдениот износ на трошоците на арбитражата. Секретаријатот го утврдува конечниот износ на трошоците на арбитражата во согласност со тарифата (Додаток II) која важи во времето на започнувањето на постапката.
3. Кога постапката ќе заврши пред донесување на конечна арбитражна одлука со решение за запирање на постапката или со арбитражна одлука врз основа на порамнување, секретаријатот ќе го утврди конечниот износ на трошоците на арбитражата, земајќи ја предвид фазата во која постапката завршила, работата кој ја извршил советот и другите релевантни околности. Во тој случај, висината на наградата за советот може да биде пониска од минималниот износ, кој произлегува од Додатокот II.
4. Во конечната арбитражна одлука, арбитражната одлука врз основа на порамнување или решението за запирање на постапката советот мора да ги вклучи трошоците на арбитражата, чиј конечен износ го утврдил секретаријатот и да ги раздели на награди и трошоци за секој арбитер поодделно и административни и други трошоци на ЉАЦ.
5. Ако странките поинаку не се спогодиле, советот по барање на која било странка ќе одлучи за начинот на распределба на трошоците на арбитражата меѓу странките, земајќи го предвид начелото на успех на странките во постапката и другите релевантни околности.

6. Странките се солидарно одговорни за плаќањето на трошоците на арбитражата, на арбитрите и на ЉАЦ.
7. Уписната такса, административните трошоци на ЉАЦ и наградата за советот, кои произлегуваат од Додатокот II, не го содржат евентуалниот данок на додадена вредност. По именувањето, арбитрите се должни на секретаријатот да му ја соопштат висината на данокот на додадена вредност, кој ќе се наплати на нивната награда.

Член 46
Трошоци на странките

Ако странките не се договориле поинаку, советот по барање на која било странка, во конечната арбитражна одлука, арбитражната одлука врз основа на порамнување или во решението за запирање на постапката ќе одлучи за надомест на разумните трошоци, кои ги имале странките во постапката, вклучувајќи ги и трошоците за правното застапување, земајќи го предвид начелото на успех на странките во постапката и другите релевантни околности.

Член 47
Аванс за покривање на трошоците на арбитражата

1. Секретаријатот го утврдува износот кој мора да го платат странките како аванс за покривање на трошоците на арбитражата (аванс).
2. Авансот одговара на висината на предвидените трошоци на арбитражата, определени во членот 45 став 1 од овие правила. Авансот се уплатува на банкарската сметка на ЉАЦ.
3. Тужителот и туженият мора да уплатат по половина од износот на авансот, освен ако се утврдени посебни аванси. Ако покрај тужбата е поднесена и противтужба или приговор заради пребивање, секретаријатот може за секоја странка да одреди посебен аванс, што одговара на нејзиното барање. Ако авансот не е доволен за покривање на трошоците на арбитражата или во други оправдани случаи, секретаријатот може, по предлог на советот или по сопствена иницијатива, да им наложи на странките да уплатат дополнителен аванс.

4. Ако некоја од странките во рокот кој го определил секретаријатот не го уплати потребниот аванс, секретаријатот ќе ја повика спротивната странка да го уплати и ќе ѝ одреди рок за плаќање. Ако спротивната странка не ја изврши уплатата во согласност со повикот, секретаријатот може делумно или во целост да ја запре постапката. Ако една од странките ја изврши уплатата наместо другата странка, советот може на нејзино барање да донесе посебна арбитражна одлука, со која на другата странка ќе ѝ наложи да го надомести уплатениот дел од авансот.
5. По завршување на постапката, неискористениот дел од авансот им се враќа на странките.

ЗАБРЗАНА АРБИТРАЖНА ПОСТАПКА

Член 48
Правила за забрзана арбитражна постапка

1. Правилата за забрзана арбитражна постапка (забрзана постапка) се применуваат само доколку странките со арбитражната спогодба или подоцна изрично се договориле за забрзана постапка. Странките можат да се договорат за забрзана постапка најдоцна до поднесувањето на одговорот на барањето за арбитража.
2. Кога странките се договориле за забрзана постапка се применуваат Арбитражните правила на Љубљанскиот арбитражен центар при Стопанската комора на Словенија со измените утврдени со овој член.
3. Ако странките не се договорат поинаку, во забрзаната постапка за спорот одлучува арбитер-поединец, освен ако претседателството,со оглед на сложеноста и другите околности на предметот,не одлучи за спорот да решава совет составен од тројца арбитри.
4. Кога советот е составен од арбитер-поединец, странките го номинираат спогодбено, во рок од 15 дена од повикот на секретаријатот. Ако арбитерот-поединец не е номиниран во тој рок, него го именува претседателството.

5. Кога советот е составен од повеќе арбитри, тужителот номинира арбитер во барањето за арбитража, а туженият во рок од 15 дена од повикот на секретаријатот. Именуваните арбитри во рок од 15 дена од повикот на секретаријатот, номинираат арбитер кој ќе биде претседател на советот. Ако некој од арбитрите не е номиниран во рок, него го именува претседателството.
6. Конечната арбитражна одлука мора да биде донесена во рок од шест месеци од предавањето на предметот на советот во согласност со членот 20 од овие правила. Претседателството може да го продолжи рокот поради оправдани причини, врз основа на образложен предлог на советот или по сопствена иницијатива. Притоа претседателството може од советот да побара објаснувања за состојбата на предметот и причините за неможноста за донесување на арбитражната одлука во определениот рок.
7. Советот ја води забрзаната постапка на начин кој ќе му овозможи конечната арбитражна одлука да ја донесе во рокот определен во ставот 6. Ако советот не одлучи поинаку, се применуваат следниве одредби:
   i. по поднесувањето на одговорот на барањето за арбитража, по правило, странките имаат право да поднесат само тужба, одговор на тужба, евентуална противтужба односно приговор заради пребивање и одговор на нив;
   ii. сите писмена и известувања се испраќаат по електронска пошта;
   iii. роковите кои ги определува советот за поднесување писмени поднесоци, по правило, не се подолги од 15 дена;
   iv. освен ако странките се договорат, дека за спорот ќе се одлучува само врз основа на писмени поднесоци, советот може да одржи усна расправа;
   v. по одржаната усна расправа странките веќе не можат да поднесуваат писмени поднесоци;
   vi. советот мора накратко да ги наведе причините врз кои се заснова арбитражната одлука, освен ако странките се договориле дека арбитражната одлука не треба да се образложува.

ОПШТИ ПРАВИЛА

Член 49
Основно правило

Во врска со сите прашања, кои со овие правила не се посебно уредени, советот, странките и ЉАЦ мораат да постапуваат во духот на овие правила и со цел да се обезбеди извршност на арбитражната одлука.

Член 50
Доверливост

1. Ако странките изрично не се договорат поинаку, ЉАЦ, арбитрите и арбитерот за итни случаи се должни да обезбедат доверливост на постапката, арбитражната одлука, решенијата и другите одлуки на советот. Ова обврска важи и за вештаците, кои ги именува советот и за членовите на претседателството и секретаријатот.
2. Ако странките изрично не се договорат поинаку, должни се како доверливи да ги чуваат арбитражните одлуки, решенијата и другите одлуки на советот и на ЉАЦ, како и сите документи кои во постапката ги поднела која било од странките и кои не се јавно достапни, освен во случај и во обем во кој странката е обврзана да ги открие или откривањето е неопходно за заштита или за остварување на нејзините права односно за извршување или за поништување на арбитражните одлуки пред државен суд.
3. Советувањата на советот се доверливи.
4. ЉАЦ може во анономна форма, која не овозможува идентификација на странките и на другите лица, да ја објави арбитражната одлука, решенијата и другите одлуки на советот и на ЉАЦ во стручни публикации, освен ако во рок од 60 дена од нивното донесување некоја од странките се противи на тоа во писмена форма.

Член 51
Јазик на правилата

Кога словенечкиот јазик не е јазик на постапката, англиската верзија на овие правила има поголема сила во однос на другите јазични верзии.

Член 52
Исклучување на одговорноста

Арбитрите, арбитерот за итни случаи, ЉАЦ, членовите на претседателството и секретаријатот, Стопанската комора на Словенија и нејзините вработени не се одговорни за штетата која настанала од која било услуга или пропуштање во врска со арбитражната постапка, ако исклучувањето на одговорноста е допуштено според важечкото право.

Член 53
Влегување во сила

Овие правила влегуваат во сила на 1 јануари 2014 година.

ДОДАТОЦИ

ДОДАТОК I
ОРГАНИЗАЦИЈА НА ЉАЦ

Член 1
ЉАЦ

1. Љубљанскиот арбитражен центар при Стопанската комора на Словенија (ЉАЦ) е самостојна и независна институција, која обезбедува административна поддршка при решавањето на споровите.

2. Органи на ЉАЦ се претседателството и секретаријатот. Условите за работење и за извршување на задачите на ЉАЦ ги обезбедува Стопанската комора на Словенија.

Член 2
Задачи на ЉАЦ

ЉАЦ:

i. го организира и обезбедува поддршка при решавањето на домашните спорови и споровите со меѓународен елемент преку арбитража, посредување и други алтернативни начини за решавање на спорови во согласност со своите правила и другите правила и постапки за кои се договориле странките;

ii. обезбедува информации во врска со арбитражата, посредувањето и другите алтернативни начини на решавање на споровите.

Член 3
Претседателство

1. Претседателството е составено од претседател, потпретседател и пет членови.

2. Во одделни постапки, претседателството донесува одлуки за кои е надлежено, во согласност со овие правила или други правила на ЉАЦ за кои се договориле странките. Одлуките на претседателството се конечни и претседателството не е должно да ги образложи.

3. Седниците на претседателството ги свикува и води претседателот, а во негово отсуство потпретседателот. Тројца членови на претседателството го сочинуваат кворумот за полноважно одлучување. Претседателството донесува одлуки со мнозинство гласови од присутните членови. Ако не може да се постигне мнозинство, претседателот има одлучувачки глас. Членовите на претседателството не можат да се воздржат од гласање.
4. Во итни случаи, во име на претседателството, одлука донесува претседателот, а во негово отсуство, потпретседателот.
5. Членот на претседателството нема право на глас, ако станува збор за одлучување во постапката во која е именуван за арбитер. Тој факт не влијае врз потребниот кворум за полноважно одлучување.

Член 4
Именување на претседателството

1. Претседателството го именува управниот одбор на Стопанската комора на Словенија.
2. Мандатот на претседателот, потпретседателот и членовите на претседателството трае четири години со можност за повторно именување.
3. Во исклучителни случаи управниот одбор на Стопанската комора на Словенија може да го отповика членот на претседателството. Ако на членот на претседателството му престане мандатот поради оставка, отповикување или поради која било друга причина, управниот одбор на Стопанската комора на Словенија, за преостанатиот дел од мандатот, ќе именува нов член на претседателството.

Член 5
Секретаријат

1. Секретаријатот има стручна служба, која врши надзор над ефикасноста на текот на постапките и работата на арбитрите и врши други задачи во согласност со овие правила. Со секретаријатот раководи генерален секретар.

2. Во одделни постапки, секретаријатот донесува одлуки за кои е надлежен во согласност со овие правила или со други правила на ЉАЦ за кои странките се договориле. Одлуките на секретаријатот се конечни и секретаријатот не е должен да ги образложи.
3. Секретаријатот може да одлучува за одделни прашања од надлежност на претседателството, кои му ги пренело претседателството.

Член 6
Именување на генерален секретар

Генералниот секретар го именува претседателот на Стопанската комора на Словенија со согласност на претседателот на ЉАЦ, за мандатен период од четири години, со можност за повторно именување.

Член 7
Работа на ЉАЦ

ЉАЦ ја штити доверливоста на постапките, арбитражните одлуки, решенијата и другите одлуки. Во сите постапки, ЉАЦ дејствува непристрасно и во духот на ефикасноста на постапката.

ДОДАТОК II
ТАРИФА

Член 1
Уписна такса

1. Уписната такса од членот 6 од овие правила изнесува 1.000 EUR и е неповратна.
2. Уписната такса е вклучена во административните трошоци на ЉАЦ од членот 3 на овој додаток.
3. Уписната такса се засметува во делот од авансот кој мора да го уплати тужителот во согласност со членот 47 од овие правила.

Член 2
Награда за советот

1. Секретаријатот ја утврдува висината на наградата за претседателот на советот и за арбитерот-поединец врз основа на табелата А. Наградата за арбитерот-поединец е за 20% повисока од наградата за претседателот на советот.
2. Секој од членовите на советот добива 60% од наградата за претседателот на советот. По советување со советот, секретаријатот може да определи поинаков процент за награда за член на советот.
3. Вредноста на спорниот предмет се определува како збир на вредноста на сите тужбени барања и на барањата од противтужбите. Тоа важи и за приговорите заради пребивање, освен ако нивното решавање не претставува значително зголемување на работата. Кога вредноста на спорниот предмет не е можно да се утврди, секретаријатот при утврдување на висината на наградата за советот ќе ги земе предвид сите релевантни околности на предметот.
4. Секретаријатот при утврдувањето на висината на наградата за советот ја зема предвид грижливоста и ефикасноста на арбитрите, обемот на извршената работа, сложеноста на предметот, ефикасноста на текот на постапката и навременото донесување на арбитражната одлука. Во исклучителни случаи секретаријатот може да отстапи од износите кои произлегуваат од табелата А.

Член 3
Административни трошоци на ЉАЦ

1. Секретаријатот ги утврдува административните трошоци на ЉАЦ врз основа на табелата Б.
2. Вредноста на спорниот предмет се утврдува како збир на вредноста на сите тужбени барања и на барањата од противтужбите. Тоа важи и за приговорите заради пребивање, освен ако нивното решавање не претставува значително зголемување на работата. Кога вредноста на спорниот предмет не е можно да се утврди, секретаријатот при утврдување на висината на административните трошоци на ЉАЦ ќе ги земе предвид сите релевантни околности на предметот.
3. Во исклучителни случаи секретаријатот може да отстапи од износите кои произлегуваат од табелата Б.

Член 4
Трошоци на советот и на ЉАЦ

1. Покрај наградата за советот и административните трошоци на ЉАЦ, секретаријатот ја утврдува и висината на износот за покривање на разумните трошоци, кои ги направиле одделните арбитри и ЉАЦ.
2. Трошоците на советот може да ги содржат и наградите и трошоците за вештаците, кои во согласност со членот 34 од овие правила ги именува советот.
3. ЉАЦ усвојува упатства за пресметувањето на трошоците на советот, кои се наменети за арбитрите.

ТАБЕЛА А

Вредност на спорниот предмет	Награда за претседателот на советот[1]	
(во ЕУР)	Минимум (во ЕУР)	Максимум (во ЕУР)
до 25.000	**1.800**	**2.700**
од 25.000 до 50.000	**1.800** + 2,8 % од вредноста над 25.000	**2.700** + 4,2 % од вредноста над 25.000
од 50.000 до 100.000	**2.500** + 4,2 % од вредноста над 50.000	**3.750** + 6,3 % од вредноста над 50.000
од 100.000 до 250.000	**4.600** + 1,6 % од вредноста над 100.000	**6.900** + 2,4 % од вредноста над 100.000
од 250.000 до 500.000	**7.000** + 1,56 % од вредноста над 250.000	**10.500** + 2,34 % од вредноста над 250.000
од 500.000 до 1,000.000	**10.900** + 1,22 % од вредноста над 500.000	**16.350** + 1,83 % од вредноста над 500.000
од 1,000.000 до 2,000.000	**17.000** + 0,64 % од вредноста над 1,000.000	**25.500** + 0,96 % од вредноста над 1,000.000
од 2,000.000 до 5,000.000	**23.400** + 0,42 % од вредноста над 2,000.000	**35.100** + 0,63 % од вредноста над 2,000.000
од 5,000.000 до 10,000.000	**36.000** + 0,34 % од вредноста над 5,000.000	**54.000** + 0,51 % од вредноста над 5,000.000
од 10,000.000 до 20,000.000	**53.000** + 0,2 % од вредноста над 10,000.000	**79.500** + 0,3 % од вредноста над 10,000.000
од 20,000.000 до 50,000.000	**73.000** + 0,12 % од вредноста над 20,000.000	**109.500** + 0,18 % од вредноста над 20,000.000
од 50,000.001	**ја определува претседателството**	

1 Наградата за арбитерот поединец е за 20% повисока од наградата за претседателот на советот.

ТАБЕЛА Б

Вредност на спорниот предмет	Административни трошоци на ЉАЦ
(во ЕУР)	(во ЕУР)
до 25.000	**2.000**
од 25.000 до 50.000	**2.000** + 2 % од вредноста над 25.000
од 50.000 до 100.000	**2.500** + 2 % од вредноста над 50.000
од 100.000 до 250.000	**3.500** + 1 % од вредноста над 100.000
од 250.000 до 500.000	**5.000** + 1 % од вредноста над 250.000
од 500.000 до 1,000.000	**7.500** + 0,4 % од вредноста над 500.000
од 1,000.000 до 2,000.000	**9.500** + 0,31 % од вредноста над 1,000.000
од 2,000.000 до 5,000.000	**12.600** + 0,08 % од вредноста над 2,000.000
од 5,000.000 до 10,000.000	**15.000** + 0,06 % од вредноста над 5,000.000
од 10,000.000 до 20,000.000	**18.000** + 0,02 % од вредноста над 10,000.000
од 20,000.000 до 50,000.000	**20.000** + 0,005 % од вредноста над 20,000.000
од 50,000.001	**21.500**

ДОДАТОК III
ПОСТАПКА ПРЕД АРБИТЕР ЗА ИТНИ СЛУЧАИ

Член 1
Арбитер за итни случаи

1. Постапката пред арбитерот за итни случаи почнува по барање на странка во согласност со членот 38 од овие правила.
2. Арбитерот за итни случаи има надлежност наведена во членот 38 став 1 и 2 од овие правила.
3. Надлежноста на арбитерот за итни случаи престанува, кога предметот ќе се предаде на советот во согласност со членот 20 од овие правила, односно кога привремената мерка ќе престане да ги обврзува странките во случаите од членот 7 став 3 од овој додаток,.
4. Кога предметот му е предаден на советот пред арбитерот за итни случаи да определи привремена мерка, арбитерот за итни случаи ќе ја задржи надлежноста за определување на привремена мерка во рокот од членот 6 став 2 од овој додаток.

Член 2
Барање за постапка пред арбитер за итни случаи

1. Барањето за постапка пред арбитер за итни случаи (барањето) странката, по правило, го поднесува до ЉАЦ преку електронска пошта.
2. Барањето мора да содржи:
   i. имиња, адреси и контакт податоци (електронски адреси, телефонски броеви, телефакс броеви) на странките и нивните полномошници,
   ii. копија од арбитражната спогодба или ако не постои посебна исправа за тоа, опис и евентуални докази за постоење на арбитражната спогодба,
   iii. опис на спорот,
   iv. бараната привремена мерка и причините поради кои се бара привремената мерка,
   v. причините за итност, поради кои определувањето на привремената мерка не може да почека до конституирање на советот,
   vi. предлог за јазикот и за седиштето на постапката пред арбитерот за итни случаи и за меродавното материјално право и
   vii. доказ за платените трошоци за постапката пред арбитерот за итни случаи, во согласност со членот 8 од овој додаток.
3. Барањето мора да биде поднесено на јазикот за кој странките се договориле дека е јазик на арбитражната постапка. Ако странките за тоа не се договориле, барањето мора да биде поднесено на јазикот на кој е составена арбитражната спогодба.
4. Кога странката бара постапка пред арбитер за итни случаи пред поднесувањето на барањето за арбитража, барањето за арбитража мора да го поднесе во рок од 10 дена од денот кога секретаријатот го примил барањето за постапка пред арбитер за итни случаи. Во спротивно секретаријатот ќе ја запре постапката пред арбитерот за итни случаи.
5. По приемот на барањето за постапка пред арбитер за итни случаи секретаријатот без одлагање ќе ѝ го достави на спротивната странка.

Член 3
Именување на арбитер за итни случаи

1. Претседателството именува арбитер за итни случаи, што е можно побрзо, по правило, во рок од 48 часа од приемот на барањето. По именувањето, секретаријатот на арбитерот за итни случаи без одлагање му го предава предметот.
2. Претседателството нема да именува арбитер за итни случаи, кога од барањето произлегува дека очигледно (prima facie) не постои надлежност за одлучување според овие правила.

3. Арбитерот за итни случаи мора да биде непристрасен и независен. Арбитерот е должен да ги наведе сите околност, кои би можеле да предизвикаат основано сомневање за неговата непристрасност и независност. За арбитерот за итни случаи се применува членот 18 од овие правила, со исклучок на рокот од членот 18 став 2 од овие правила, кој е скратен на три дена.
4. Ако странките не се договориле поинаку, арбитерот за итни случаи не смее да биде именуван за арбитер во која било друга постапка која се однесува на спорот во врска со кој постапувал како арбитер за итни случаи.

Член 4
Седиште на постапката пред арбитерот за итни случаи

Седиштето на постапката пред арбитерот за итни случаи е исто со седиштето за кое странките се договориле дека е седиште на арбитражата. Ако странките не се договориле за седиштето на постапката пред арбитерот за итни случаи, седиштето е во Љубљана, освен ако претседателството со оглед на околностите на предметот не одлучи поинаку.

Член 5
Водење на постапката пред арбитерот за итни случаи

Арбитерот за итни случаи ја води постапката на начин кој го смета за соодветен, при што мора да води сметка за околностите на предметот и за итноста на постапката. Во секој случај арбитерот за итни случаи мора со странките да постапува рамноправно и на секоја од нив да ѝ даде разумна можност да се изјасни за предметот.

Член 6
Одлука за привремена мерка

1. Одлуката за привремена мерка арбитерот за итни случаи ја донесува во форма на решение.
2. Арбитерот за итни случаи мора да го донесе решението во рок од 15 дена од денот кога секретаријатот му го предал барањето во согласност со членот 3 став 1 од овој додаток. Поради оправдани причини, претседателството може по предлог на арбитерот за итни случаи или по сопствена иницијатива да го продолжи рокот. Притоа претседателството може од арбитерот за итни случаи да побара да даде објаснувања за состојбата на предметот и за причините за недонесувањето на решението во рокот.
3. Решението мора:
   i. да биде донесено во писмена форма,
   ii. да го содржи датумот на донесување, седиштето на постапката пред арбитерот за итни случаи и причините на кои се заснова, и
   iii. да биде потпишано од страна на арбитерот за итни случаи.
4. Арбитерот за итни случаи е должен решението веднаш да го достави до странките и до ЉАЦ.

Член 7
Дејство на привремената мерка

1. Привремената мерка ги обврзува странките. Со прифаќањето на овие правила странките се обврзуваат дека секоја привремена мерка ќе ја извршат без одлагање односно во рокот кој ќе го определи арбитерот за итни случаи.
2. Врз основа на образложен предлог од која било странка, арбитерот за итни случаи може привремената мерка да ја измени, задржи или отповика.
3. Привремената мерка престанува да ги обврзува страните:
   i. ако постапката пред арбитерот за итни случаи е запрена во согласност со членот 2 став 4 од овој додаток,
   ii. ако се усвои барањето за изземање на арбитерот за итни случаи.
   iii. ако така одлучи арбитерот за итни случаи или советот и
   iv. со завршување на арбитражната постапка, освен ако советот не одлучи поинаку.
4. Привремената мерка на арбитерот за итни случаи и причините за нејзино донесување не го обврзуваат советот.

Член 8
Трошоци на постапката

1. Странката е должна при поднесување на барањето да ги плати трошоците на постапката пред арбитерот за итни случаи.
2. Трошоците на постапката пред арбитерот за итни случаи се состојат од:
   i. награда за арбитерот за итни случаи во висина од 10.000 ЕУР и
   ii. неповратна административна такса во висина од 3.000 ЕУР.
3. Трошоците на постапката не го вклучуваат евентуалниот данок на додадена вредност.
4. Претседателството може по предлог на арбитерот за итни случаи или по сопствена иницијатива да одлучи за зголемување или за намалување на трошоците на постапката, при што ги зема предвид околностите на предметот, работата извршена од страна на арбитерот за итни случаи и од ЉАЦ, како и другите релевантни околности.
5. Ако странката не ги плати трошоците на постапката во рокот, секретаријатот нема да постапува по барањето односно ќе ја запре постапката.
6. На барање на странката, советот во арбитражната одлука ќе одлучи за начинот на распределба на трошоците на постапката пред арбитерот за итни случаи меѓу странките.

Член 9
Општо правило

За сите прашања кои со овој додаток не се посебно уредени, арбитерот за итни случаи, претседателството и секретаријатот ќе постапуваат во духот на овој додаток и на Арбитражните правила на Љубљанскиот арбитражен центар при Стопанската комора на Словенија.

СТАНДАРДНИ АРБИТРАЖНИ КЛАУЗУЛИ

Арбитражна постапка

Секој спор, несогласување или барање кое произлегува од овој договор или е во врска со овој договор, вклучувајќи ги и неговото непочитување, престанок или полноважност ќе биде конечно решен во арбитражната постапка во согласност со Арбитражните правила на Љубљанскиот арбитражен центар при Стопанската комора на Словенија.

Додатоци кои се препорачуваат:

- *Арбитражниот совет ќе биде составен од [тројца арбитри / арбитер-поединец].*
- *Седиштето на арбитражата ќе биде [град и држава].*
- *Арбитражната постапка ќе се води на [...] јазик.*
- *За суштината на спорот ќе се применува[...] право.*

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Забрзана арбитражна постапка

Секој спор, несогласување или барање кое произлегува од овој договор или е во врска со овој договор, вклучувајќи ги и неговото непочитување, престанок или полноважност ќе биде конечно решен во арбитражната постапка во согласност со Арбитражните правила на Љубљанскиот арбитражен центар при Стопанската комора на Словенија, со примена на правилата за забрзана арбитражна постапка.

Додатоци кои се препорачуваат:

- *Арбитражниот совет ќе биде составен од [тројца арбитри / арбитер-поединец].*
- *Седиштето на арбитражата ќе биде [град и држава].*
- *Арбитражната постапка ќе се води на [...] јазик.*
- *За суштината на спорот ќе се применува[...] право.*

Арбитражна постапка без арбитер за итни случаи

Секој спор, несогласување или барање кое произлегува од овој договор или е во врска со овој договор, вклучувајќи ги и неговото непочитување, престанок или полноважност ќе биде конечно решен во арбитражната постапка во согласност со Арбитражните правила на на Љубљанскиот арбитражен центар при Стопанската комора на Словенија. Правилата за постапката пред арбитер за итни случаеви не се применуваат.

Додатоци кои се препорачуваат:

- *Арбитражниот совет ќе биде составен од [тројца арбитри / арбитер-поединец].*
- *Седиштето на арбитражата ќе биде [град и држава].*
- *Арбитражната постапка ќе се води на [...] јазик.*
- *За суштината на спорот ќе се применува[...] право.*

Примена на стандардните арбитражни клаузули

На странките кои сакат да изнесат спор за решавање пред Љубљанскиот арбитражен центар при Стопанската комора на Словенија, им се препорачува, во договорот да вклучат една од горе наведените стандардни арбитражни клаузули.

Со вклучување на стандардната арбитражната клаузула во договорот, странките се договараат дека спорот ќе го решат во арбитражна постапка пред Љубљанскиот арбитражен центар при Стопанската комора на Словенија и така си обезбедуваат брзо, ефикасно и стручно решавање на спорот. Стандардните арбитражните клаузули странките можат да ги дополнат или да ги прилагодат во согласност со своите потреби односно со околностите. При обликувањето на арбитражните клаузули странките можат да договорат, на пример, поинаков број арбитри, од оној определен со Љубљанските арбитражни правила (Љубљанските арбитражни правила во основа предвидуваат дека арбитражниот совет е составен од тројца арбитри). Исто така странките можат во арбитражната клаузула да го определат седиштето на арбитражата, јазикот на кој ќе се води арбитражната постапка и материјалното право кое ќе се применува на содржината на спорниот однос.

Кога станува збор за поедноставни спорови или спорови од помала вредност, каде што брзината на решавање е од посебен интерес за странките, во договорот можат да вклучат посебна стандардна арбитражна клаузула, со која се определува примена на правилата за забрзана арбитражна постапка (член 48 од Љубљанските арбитражни правила).

Љубљанските арбитражни правила ја уредуваат и посебната постапка пред арбитерот за итни случаи (Додаток III). Кога странките сакаат да ја исклучат примената на постапката пред арбитерот за итни случаи, се препорачува во договорот да вклучат посебна стандардна арбитражна клаузула, со која се исклучува примената на правилата за постапката пред арбитерот за итни случаи (Додаток III од Љубљанските арбитражни правила).

При обликувањето на арбитражната клаузула странките мораат да бидат внимателни. Важно е арбитражната клаузула да биде составена така што од неа јасно и недвосмислено ќе произлегува договорот на странките дека евентуалниот спор ќе биде конечно решен со арбитража (а не пред државен суд) и дека ќе го решава Љубљанскиот арбитражен центар при Стопанската комора на Словенија. Нејасната или двосмислената арбитражна клаузула може суштествено да ја отежне арбитражната постапка или во краен случај да ја оневозможи.

Повеќе информации за арбитражната постапка и за преводите на стандардните арбитражни клаузули на други јазици може да се најдат на веб страната **www.sloarbitration.eu**.

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Ohranjanje integritete senata in omejitev pravice do proste izbire pooblaščenca v mednarodni arbitraži

Anja Primožič

Anja Primožič se je z arbitražo prvič srečala kot udeleženka tekmovanja Willem C. Vis International Commercial Arbitration Moot. Leta 2013 je z odliko diplomirala na Pravni fakulteti Univerze v Mariboru na temo: Institut neodvisnosti in nepristranskosti v mednarodni gospodarski arbitraži. Po končanem študiju je izkušnje nabirala ob delu v pisarni izvršitelja, kasneje pa v mednarodni ekipi spletnega igralniškega podjetja. Septembra 2015 se je zaposlila pri družbi Deloitte svetovanje d.o.o, kjer je sprva delovala na področjih obdavčitve fizičnih in pravnih oseb ter transfernih cen v oddelku davčnega svetovanja, sedaj pa v pravnem oddelku Deloitte Legal svetuje domačim in tujim družbam glede vprašanj gospodarskega statusnega in pogodbenega prava. E-mail: anprimozic@deloitteCE.com

Bistvo instituta neodvisnosti in nepristranskosti arbitrov je vsem poznano, razlikovanje med obema pojmoma pa velikokrat zahteva dodatno obrazložitev oziroma podrobnejša pojasnila.

Neodvisnost arbitra se povezuje z osebnimi, socialnimi in finančnimi odnosi med arbitrom in stranko ali njenim pooblaščencem. Gre torej za objektivno merilo, ker je možno določiti katera razmerja med stranko ali njenim pooblaščencem in arbitrom so sporna. Arbitri so dolžni pred imenovanjem razkriti vse okoliščine in razmerja, ki bi lahko vzbudila dvom o njihovi neodvisnosti (angl. *duty to disclose*).

Nepristranskost je za razliko od neodvisnosti subjektivna in abstraktna. Po definiciji Redferna in Hunterja[1] je arbiter nepristranski, kadar ne stremi v korist ene stranke oziroma nima predsodkov proti eni izmed strank ali njenemu primeru. Nepristranskost narekuje arbitrom, da na abstraktni ravni, miselno vzdržujejo enako distanco proti obema strankama in ne preferirajo ene izmed njiju.

Govorimo o težko dokazljivem zavednem in nezavednem stanju arbitrovih misli. Kršitev nepristranskosti se mora manifestirati navzven, torej skozi pisno ali ustno izražanje mnenja arbitra, sicer je ni moč dokazati.[2] Seveda je eden izmed načinov dokazovanja pristranskosti objektivno vidno pomanjkanje neodvisnosti; subjektivno pomanjkanje nepristranskosti velikokrat izvira iz razmerja zaradi katerega je vprašljiva arbitrova neodvisnost. Lahko zaključimo, da sta oba elementa, nepristranskost in neodvisnost, sicer analitično različna, vendar sta tesno povezana in se medsebojno dopolnjujeta.[3]

Pri institutu neodvisnosti in nepristranskosti gre za temeljno načelo arbitražnega postopka, ki je bilo prvotno zapisano v 9. členu Arbitražnih pravil UNCITRAL-a leta 1977. Leta 1985 se je z Vzorčnim zakonom UNCITRAL-a[4] razširilo in tako postalo mednarodni standard.[5] Zahteva po neodvisnem in nepristranskem senatu se pojavi v vseh institucionalnih arbitražnih pravilih ter predstavlja pogoj za integriteto postopka in izdajo pravične arbitražne odločbe.

Hkrati institut neodvisnosti in nepristranskosti omejuje načelo avtonomije strank v arbitražnem postopku, ki sicer strankam omogoča prosto izbiro arbitrov. Tako

Pri institutu neodvisnosti in nepristranskosti gre za temeljno načelo arbitražnega postopka, ki je bilo prvotno zapisano v 9. členu Arbitražnih pravil UNCITRAL-a leta 1977

Leta 1985 se je z Vzorčnim zakonom UNCITRAL-a razširilo in tako postalo mednarodni standard

1 Redfern, A., Hunter, M.: Law and practice of international commercial arbitration, 5th Edition, London 2009, Sweet&Maxwell, str. 220.

2 Raeschke-Kessler H.: Unparteilichkeit und Unabhängigkeit des Schiedsrichters, <http://www.39essex.com/docs/articles/internationalarbitrationseminarhr.pdf> (20. 4. 2016).

3 Morrsey, J., Graves, J.: International Sales Law and Arbitration, Problems, Cases, and Commentary, Kluwer Law international 2008, str. 363.

4 UNCITRAL Model Law on International Commercial Arbitration.

5 Raeschke-Kessler, H., navedeno delo.

stranka ne more imenovati arbitra, za katerega obstaja dvom o njegovi nepristranskosti in neodvisnosti. V primeru, da se pojavi navzkrižje interesov, ima nasprotna stranka na voljo zahtevo za izločitev spornega člana senata.

Kje torej nastane problem, sugeriran v naslovu prispevka?

Običajno se stranki najprej odločita za pooblaščenca, ki ju bo pred arbitražo zastopal in kasneje po pravilih določene institucije ali katerih drugih pravilih sestavita senat oziroma izbereta arbitra

Običajno se stranki najprej odločita za pooblaščenca, ki ju bo pred arbitražo zastopal in kasneje po pravilih določene institucije ali katerih drugih pravilih sestavita senat oziroma izbereta arbitra. Če katera od strank izbere arbitra, ki bi lahko bil v očeh druge stranke pristranski, ima slednja na voljo pravna sredstva, da prepreči njegovo imenovanje oziroma zahteva njegovo izločitev tekom postopka, ko izve za sporne okoliščine, ki bi po njenem mnenju lahko vplivale na njegovo razsojo. Problem nastane, kadar dogodki tečejo po drugem časovnem zaporedju. Stranki že izbereta arbitre, imenovan je neodvisen in nepristranski arbitražni senat in postopek steče. Naknadno ena izmed strank zamenja ali doda k svoji pravni ekipi pooblaščenca, ki je z arbitrom (ali več arbitri) v "neprimernem" oziroma domnevno spornem razmerju. Stranka seveda črpa svojo izbiro novega oziroma dodatnega pooblaščenca iz pravice do proste izbire pooblaščenca. Zavedno ali nezavedno pa s svojo potezo zamaje integriteto senata. Po pravilih o razkrivanju informacij mora arbiter tudi tekom postopka razkriti informacije o novonastalih spornih okoliščinah strankam, ki se lahko odločijo podati zahtevo za njegovo izločitev. Skozi cel postopek se varuje pravica strank do neodvisnega in nepristranskega senata z institutom izločitve arbitra. V odsotnosti drugih pravil, lahko torej stranka, ki s tekom postopka ni zadovoljna vsak trenutek pooblasti osebo, ki je morebiti v poslovnem, zakonskem ali drugem razmerju z arbitrom, ki se ga želi znebiti. S postavitvijo pooblaščenca, ki ima določeno sporno razmerje z arbitrom se lahko tudi zavlačuje postopek in preloži izdaja odločbe. Problem torej ni v tem, da stranka ne bi mogla podati zahteve za izločitev arbitra in s tem ohraniti integriteto senata v postopku, pač pa dejstvo, da je sam institut izločitve arbitra lahko predmet zlorab.

Problem nastane, kadar dogodki tečejo po drugem časovnem zaporedju. Stranki že izbereta arbitre, imenovan je neodvisen in nepristranski arbitražni senat in postopek steče. Naknadno ena izmed strank zamenja ali doda k svoji pravni ekipi pooblaščenca, ki je z arbitrom (ali več arbitri) v "neprimernem" oziroma domnevno spornem razmerju

V praksi sta pred letom 2013 znana predvsem dva primera, v katerih so se stranke želele poslužiti alternative in podale zahtevek za odstranitev pooblaščenca nasprotne stranke iz arbitražnega postopka. Obe arbitražni odločbi,[6] izdani pod okriljem Mednarodnega centra za razreševanje investicijskih sporov (ICSID),[7] zelo nazorno razdelata pristojnosti senatov za odločanje o vprašanju odstranitve pooblaščenca in razloge za in proti takšni rešitvi.

Vprašanja, ki se pri tem pojavijo so:

- ali se pooblaščenca lahko odstrani in kako to vpliva na pravico stranke do proste izbire pooblaščenca?
- kdo ima pristojnost odločati o odstranitvi pooblaščenca?
- kdaj je smotrno odstraniti pooblaščenca in ne izločiti arbitra?

Po mnenju Waincymerja,[8] ki je komentiral ICSID-ovi odločbi, je potrebno pri uporabi takšnih neobičajnih pristopov in institutov upoštevati dva vidika, ki jih arbitraža mora zadovoljiti; to sta pravičnost in učinkovitost. Kadar trčita dve temeljni pravici v arbitraži, v obravnavani situaciji sta to pravica do neodvisnega in nepristranskega senata in pravica do proste izbire pooblaščenca, mora senat pravično in učinkovito razdelati vplive omejevanja. Waincymer zavzame stališče, da pravica do proste izbire pooblaščenca enostavno ne more obstajati brez omejitev. V kolikor je postopek že v kasnejšem stadiju in ne bi bilo smiselno menjavati senata ter novi pooblaščenec dejansko ogroža integriteto senata in s tem povzroča nezaupanje strank in javnosti v arbitražni postopek ter se dotičnemu pooblaščencu stranke prepove sodelovati oziroma se ga odstrani iz postopka, po mnenju Waincymerja ne gre za kršenje pravice do proste izbire pooblaščenca. Gre zgolj za neko omejitev izbire z namenom ohranjanja integritete senata in preprečevanja zlorab. Če na zadevo pogledamo z vidika izbire potencialnih arbitrov, lahko vidimo, da je situacija, kadar dogodki potekajo po drugem zaporedju, precej podobna. Strankam tudi ni omogočeno imenovati arbitra, ki bi z že izbranim pooblaščencem imel sporno razmerje. Nekako se pojavi

6 Hrvatska Elektroprivreda, d.d. (tožnik) v. The Republic of Slovenia (toženec) – ICSID Case No. ARB/05/24, The Rompetrol Group N.V. (tožnik) v. Romania (toženec) – ICSID Case No. ARB/06/3.

7 International Centre for Settlement of Investment Disputes (ICSID).

8 Waincymer, J.: Reconciling Conflicting Rights in International Arbitration: The Right to Coice of Counsel and the Right to an Independent and Impartial Tribunal, Arbitration International, 2010, Vol. 26, str. 608-612.

ideja, da gre za princip "*last in, first out*" za namene preprečevanja dodatnih procesnih zapletov ter zasledovanja ekonomičnosti, učinkovitosti in pravičnosti, čeprav je zadeva veliko bolj kompleksna.

V obeh primerih iz prakse, *Rompetrol v. Romania* in *Hrvatska Elrektroprivreda v. Slovenija*, se senata opredelita za pristojna za odstranitev pooblaščenca na podlagi t. i. inherentnih pooblastil senata (angl. *inherent powers*), kljub neobstoju eksplicitnih norm v zvezi z odstranitvijo pooblaščenca. Brown[9] v svoji študiji beleži, da veliko različnih senatov izvaja t. i. inherentna pooblastila, redko pa predstavijo jasno avtoriteto, ki jim daje takšno pristojnost. Arbitri največkrat zagovarjajo, da črpajo pristojnost iz principa "*competence competence*". Pogosta je tudi argumentacija, da gre za naravni proces razsojanja, ki spada k vlogi razsodnika. Nekateri se celo sklicujejo na temeljne principe prava. Možno je torej na inherentna pooblastila gledati kot na implicirano pristojnost.[10] Waincymer vidi kot logični pristop, da se tudi za odstranitev pooblaščenca uporabi enak pristop, kot ga predvidevajo dogovorjena arbitražna pravila v zvezi z izločitvijo arbitra.[11] Tako bi odgovor na vprašanje, kdo naj odloča o odstranitvi pooblaščenca, črpali iz sklopa pravil o izločitvi arbitra, ki se uporabljajo v danem postopku. Potrebno je razumeti, da se pri odstranitvi pooblaščenca ne ocenjuje njegova nepristranskost in neodvisnost, temveč kako njegova prisotnost vpliva na integriteto senata.

Potrebo po reševanju teh vprašanj in širšo potrebo podati okvir sprejemljivega ravnanja pooblaščencev strank v mednarodni arbitraži so zaznali tudi v Mednarodni odvetniški zbornici[12] in tako 25. maja 2013 sprejeli *Smernice IBA o zastopanju strank v mednarodni arbitraži*[13] (v nadaljevanju: Smernice). Smernice želijo nasloviti težave, ki nastajajo zaradi dejstva, da so pooblaščenci strank v mednarodni arbitraži velikokrat vodeni s strani različnih predpisov oziroma da pravila njihovega ravnanja določajo etične norme različnih pravnih redov.[14] Med drugim gre za poskus preprečevanja taktičnega imenovanja pooblaščencev, ki povzročijo navzkrižje interesov, v kasnejših fazah postopka, z namero zavlačevati postopek, pridobiti naklonjenost arbitra ali morda celo načrtovati izločitev arbitra iz postopka. Primarni cilj, ki ga Smernice zasledujejo, je razjasnitev vprašanja pristojnosti senata za izvajanje nadzora nad pooblaščenci strank, prav tako pa ponuditi vodilo odvetnikom oziroma pooblaščencem, kako naj etično ravnajo v postopkih mednarodne arbitraže. Na tem mestu velja še opozoriti, da Smernice namenoma zavzamejo širšo definicijo pooblaščenca,[15] in sicer je to vsaka oseba, vključno z zaposlenimi pri stranki, ki v arbitraži za račun stranke vlaga zahtevke, zagovarja in predstavlja stranko ter njene argumente, ne glede na to ali je dotični pooblaščenec po lokalni zakonodaji kvalificiran zastopati stranko pred nacionalnimi sodišči. Definicija ne zajema prič in izvedencev.

Smernice predstavljajo pobudo pri usklajevanju različnih, morebiti celo nasprotujočih si, pravil glede ravnanja pooblaščencev strank po celem svetu, s ciljem doseči enoten standard, ki bi pomagal premostiti pravne in kulturne razlike med udeleženci v mednarodni arbitraži.[16]

Smernice v prvem členu določajo okvir svoje uporabe: kadar obstaja dogovor med strankami o njihovi uporabi ali kadar arbitražni senat, po posvetovanju s strankami, želi uporabiti smernice, seveda če ima oziroma opraviči pristojnost odločati o vprašanju pooblaščencev zaradi zagotavljanja poštenosti in integritete postopka.[17]

V nadaljevanju sta kratko predstavljeni določili 5. in 6. člena Smernic, ki se navezujeta na zgoraj opisano problematiko oziroma odražata scenarije omenjenih ICSID-ovih primerov.

5. "Once the Arbitral Tribunal has been constituted, a person should not accept representation of a Party

V obeh primerih iz prakse, *Rompetrol v. Romania* in *Hrvatska Elrektroprivreda v. Slovenija*, se senata opredelita za pristojna za odstranitev pooblaščenca na podlagi t. i. inherentnih pooblastil senata (angl. *inherent powers*), kljub neobstoju eksplicitnih norm v zvezi z odstranitvijo pooblaščenca

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9 Brown, C.: The Inherent powers of International Courts and Tribunals, 76 British Yearbook International Law 195, 2005, str. 195-244.

10 Waincymer, J., navedeno delo, str. 613-614.

11 Waincymer, J., navedeno delo, str. 618.

12 International Bar Association (IBA).

13 IBA Guidelines on Party Representation in International Arbitration.

14 Bienvenu, P., Kotrly, M.: Examining IBA Guidelines in Party representation in International Arbitration, <http://www.nortonrosefulbright.com/files/examining-iba-guidelines-on-party-representation-in-international-arbitration-pdf-145kb-109028.pdf> (20. 4. 2016).

15 Definitions of IBA Guidelines on Party Representation in International Arbitration.

16 Gl. <http://www.wunscharb.com/news/new-soft-law-counsel-conduct-international-arbitration-practice-iba-guidelines-party-representa> (6. 4. 2016).

17 "*The Guidelines shall apply where and to the extent that the Parties have so agreed, or the Arbitral Tribunal, after consultation with the Parties, wishes to rely upon them after having determined that it has the authority to rule on matters of Party representation to ensure the integrity and fairness of the arbitral proceedings.*".

in the arbitration when a relationship exists between the person and an Arbitrator that would create a conflict of interest, unless none of the Parties objects after proper disclosure."

Stranke se morajo zavedati svojih omejitev in ne smejo imenovati pooblaščencev, ki bi povzročili navzkrižje interesov in s tem ogrozili neodvisnost in nepristranskost senata

Stranke se morajo zavedati svojih omejitev in ne smejo imenovati pooblaščencev, ki bi povzročili navzkrižje interesov in s tem ogrozili neodvisnost in nepristranskost senata. Sicer pa določba predvsem apelira na pooblaščence, da svojo vlogo izvajajo transparentno ter vzamejo v obzir dolžnost izogibanja navzkrižju interesov preden sprejmejo funkcijo pooblaščenca v postopku.[18]

V 6. členu Smernice izrecno govorijo o možnosti senata, da izključi pooblaščenca stranke, kadar je le-ta sprejel sodelovanje v pozni fazi postopka in ustvarja navzkrižje interesov.[19]

6. "*The Arbitral Tribunal may, in case of breach of Guideline 5, take measures appropriate to safeguard the integrity of the proceedings, including the exclusion of the new Party Representative from participating in all or part of the arbitral proceedings.*"

V komentarju citirane določbe Smernice opozarjajo, da naj bi senat, pred uporabo instituta odstranitve pooblaščenca, dal strankam možnost, da se izjasnijo o obstoju navzkrižja interesov, glede pristojnosti senata in posledicah, ki bi jih taka odločitev senata prinesla. Odločitev senata glede pravnega sredstva proti kršitvam strank oziroma njihovih pooblaščencev mora biti sorazmerna glede na težo kršitve, potencialni vpliv na pravice strank ter obstoj dobre vere pooblaščencev, z namenom zagotovitve pravičnega in učinkovitega poteka arbitražnega postopka.[20]

Odločitev senata glede pravnega sredstva proti kršitvam strank oziroma njihovih pooblaščencev mora biti sorazmerna glede na težo kršitve, potencialni vpliv na pravice strank ter obstoj dobre vere pooblaščencev, z namenom zagotovitve pravičnega in učinkovitega poteka arbitražnega postopka

Po sprejetju so bile Smernice predmet številnih razprav in kritik. Švicarsko arbitražno združenje[21] (v nadaljevanju: ASA) v svojih komentarjih[22] na Smernice izpostavlja predvsem pomisleke, da na arbitra ne bi smela biti preložena odgovornost, da skrbi za upoštevanje etičnih standardov in načel profesionalnega ravnanja pooblaščencev. Po mnenju ASA je takšna vloga funkciji arbitra tuja in z njo neskladna. Nadalje Smernice po mnenju ASA povečujejo tveganje za dodatne procesne zahtevke, s čimer se povzroča zavlačevanje postopka oziroma izguba časa in denarja ter oddaljevanje od cilja arbitražnega postopka, ki ga predstavlja čim hitrejša izdaja pravične meritorne odločbe.

Po mnenju Bensona[23] lahko kritike Smernic delimo v tri skupine, in sicer tiste, ki zanikajo potrebo po posebni ureditvi ravnanja pooblaščencev v mednarodni arbitraži, tiste, ki verjamejo, da arbitraža ne bi smela regulirati področja ravnanja pooblaščencev in da bo sistem postavljanja številnih "pravil" uničil prednosti, ki jih ima arbitraža pred državnimi sodišči ter zadnjo skupino, ki jo predstavljajo skeptiki. Slednji se zavedajo obstoja problematike zaradi odsotnosti pravil o etičnem ravnanju pooblaščencev strank, vendar so skeptični glede same izvedbe. V svojem članku Benson, ki je zagovornik sprejetja Smernic, zaključi, da je glede na porast pomembnih in kompleksnih zadev, ki so zaupane v razsojanje arbitražnim senatom, še kako pomembno, da se pravila etičnega ravnanja pooblaščencev strank uredi ter da se Smernice vzamejo v obzir kot poskus harmonizacije ter primer najboljše prakse.

Velja ponovno poudariti, da so Smernice zgolj vodilo. Odločitev, ali se bo priporočilom sledilo in kako se le-ta inkorporirajo v arbitražno prakso je na senatih, strankah in pooblaščencih.

Oktobra 2014 je, kljub delno skeptičnim odzivom na Smernice, Londonsko mednarodno arbitražno sodišče (LCIA), objavilo nova arbitražna pravila, ki vključujejo zavezujoče splošne smernice za pooblaščence strank, in sicer v 18. členu[24] določajo obvezo strank obvestiti arbitražni senat in ostale stranke o nameri spremeniti ali dodati pooblaščenca. Stranka, ki ima željo spremeniti ali dodati pooblaščenca, mora predhodno pridobiti dovoljenje arbitražnega senata, sicer taka sprememba ni dovoljena.

Problematika je še vedno predmet mnogo razprav. V marcu 2016 je v organizaciji Instituta za mednarodno arbitražo (ITA) in Ameriškega združenja za

18 Art. 5 IBA Guidelines on Party Representation.

19 Za ugotavljanje navzkrižja interesov se naj senat obrne na IBA Guidelines on Conflicts of Interest in International Arbitration 2014.

20 Articel 27 IBA Guidelines on Party Representation.

21 Association Suisse de l'Arbitrage.

22 Gl. <http://www.arbitration-ch.org/pages/en/publications/conference-and-position-papers/index.html> (21. 3. 2016).

23 The IBA Guidelines on Party Representation: An Important Step in Overcoming the Taboo of Ethics in International Arbitration, <http://www.gibsondunn.com/publications/Documents/IBAGuidelinesPartyRep.pdf> (21. 3. 2016).

24 Article 18.3 LCIA Arbitration Rules (2014).

mednarodno pravo (ASIL) potekala konferenca,[25] kjer so strokovnjaki preučevali obveznosti etičnega ravnanja pooblaščencev v mednarodni arbitraži ter potencialno reguliranje tega področja v prihodnosti. Po poročanju Kluwer Arbitration bloga,[26] vodilnega spletnega vira o aktualnem dogajanju v mednarodni arbitraži, se je večina panelistov strinjala, da je potrebno ravnanje pooblaščencev v mednarodni arbitraži urediti s pravili, vendar niso dosegli soglasja o tem, kdo bi naj etična pravila v mednarodni arbitraži sprejel.

Menim, da pri predstavljeni problematiki ni moč podati enoznačnega zaključka. V obzir je potrebno vzeti argumente obeh strani. V sled navedenemu lahko torej pričakujemo še dodatne razprave in usklajevanja v zvezi z ureditvijo ravnanja pooblaščencev v mednarodni arbitraži.

Povsem razumljivo je določba o možnosti odstranitve pooblaščenca iz 6. člena Smernic sprožila plaz različnih, tudi negativnih komentarjev. Razumem dvom o smotrnosti dodeljevanja pravice arbitrom izvajati nadzor nad ravnanjem pooblaščencev. Arbitri naj načeloma ne bi posegali v razmerja med pooblaščenci in strankami, katerim je v interesu predstaviti svoj primer v najboljši možni luči. Načelo *audiatur et altera pars* v najširšem smislu vključuje pravico do proste izbire pooblaščenca, za katerega stranke menijo, da bo njihov primer najbolje zagovarjal. Sama možnost izključitve pooblaščenca, predstavljena v 6. členu Smernic, sicer po mojem mnenju ni zastavljena nerazumno široko, saj je omejena na primere, pri katerih bi dejansko lahko prišlo do potencialne zlorabe instituta izločitve arbitra oziroma nepoštenega vplivanja na postopek. V tej luči se določba ne zdi sporna.

Sočasno se strinjam z navedbami Bensona oziroma z vprašanjem, ki ga izpostavi v svojih razmišljanjih o Smernicah, da v kolikor se zadeve ne uredijo, kdo bo odločal o pravilih etičnega ravnanja v mednarodni arbitraži, če ne arbitražna skupnost sama? Prepustiti razsojanje o ravnanju pooblaščencev v mednarodni arbitraži državnim sodiščem po lokalnem pravu, iz katerega pooblaščenci izhajajo, je nesmiselno in predstavlja še toliko večje tveganje, da bi arbitraža izgubila prednosti, ki jih uporabnikom nudi. V tem pogledu je po mojem mnenju predvsem ogrožena hitrost, ekonomičnost in učinkovitost postopka. Dodatno se je potrebno zavedati, da lahko pooblaščence strank v mednarodni arbitraži predstavljajo gospodarstveniki in tudi strokovnjaki iz drugih področij, ki niso vezani na upoštevanje etičnih pravil posameznih lokalnih odvetniških zbornic. Smernice smiselno rešujejo problematiko s široko definicijo pooblaščenca, ki zajema tudi interne pravne zastopnike ter druge.

Splošno prepričanje, in tudi prepričanje avtorice, je, da mora senat, tudi v primeru odsotnosti pravil, bdeti nad postopkom in ga voditi po načelih pravičnosti in učinkovitosti. Smislu arbitražnega postopka sicer ne bi bilo zadoščeno. V primerih iz prakse, ki obravnavajo predmetno problematiko, je nesporno stališče senatov, da imajo, sicer v omejenem obsegu, pristojnost nadzora nad ravnanjem pooblaščencev strank. Senat je pristojen odločati o odstranitvi pooblaščenca, kadar je to potrebno zaradi zaupanja javnosti v postopek, zaradi varovanja integritete samega postopka in zato, da se strankam prepreči nedovoljeno taktiziranje v zvezi z izločitvijo arbitra. Senatom je treba dopustiti pristojnost odločanja o odstranitvi pooblaščenca, kadar je to potrebno zaradi preprečevanja hujših zlorab.

Obravnavana člena Smernic predstavljata dober poskus harmonizacije dopustnega ravnanja strank in njihovih pooblaščencev. Dejstvo je, da je arbitraža živa, se razvija ter postaja vedno bolj kompleksa. Na njen razvoj imajo največji vpliv udeleženci arbitraže. Arbitrom, pooblaščencem in predvsem strankam bi moralo biti v interesu ohraniti integriteto postopka, katerega cilj predstavlja izdaja pravične in posledično izvršljive arbitražne odločbe.

Splošno prepričanje, in tudi prepričanje avtorice, je, da mora senat, tudi v primeru odsotnosti pravil, bdeti nad postopkom in ga voditi po načelih pravičnosti in učinkovitosti. Smislu arbitražnega postopka sicer ne bi bilo zadoščeno. V primerih iz prakse, ki obravnavajo predmetno problematiko, je nesporno stališče senatov, da imajo, sicer v omejenem obsegu, pristojnost nadzora nad ravnanjem pooblaščencev strank

Načelo *audiatur et altera pars* v najširšem smislu vključuje pravico do proste izbire pooblaščenca, za katerega stranke menijo, da bo njihov primer najbolje zagovarjal. Sama možnost izključitve pooblaščenca, predstavljena v 6. členu Smernic, sicer po mojem mnenju ni zastavljena nerazumno široko, saj je omejena na primere, pri katerih bi dejansko lahko prišlo do potencialne zlorabe instituta izločitve arbitra oziroma nepoštenega vplivanja na postopek. V tej luči se določba ne zdi sporna

25 Gl. <https://www.asil.org/event/ita-asil-conference-spotlight-ethics-international-arbitration-advocates-arbitrators-and> (15. 5. 2016).

26 Gl. <http://kluwerarbitrationblog.com/2016/04/18/who-should-regulate-counsel-conduct-in-international-arbitration/>(15.5. 2016).

Učinek arbitražne odločbe in predhodne odredbe po ZIZ

Prikaz sklepa VSRS Cpg 5/2014

Neli Okretič

Upnik, ki ima arbitražno odločbo domače arbitraže, a sodišče še ni izdalo sklepa o razglasitvi izvršljivosti oziroma sklep še ni pravnomočen, lahko zavaruje bodočo izvršbo z institutom predhodne odredbe v skladu s pravili ZIZ

Primer, s katerim se je ukvarjalo Vrhovno sodišče RS,[1] osvetljuje in povzema razliko med postopkom eksekvature in same izvršbe ter pojasnjuje dopustnost ugovorov glede na različen namen, ki ga postopka zasledujeta. Postopek razglasitve izvršljivosti arbitražnih odločb oziroma postopek eksekvature je namenjen temu, da arbitražna odločba, ki jo je izdala domača arbitraža, postane tudi izvršljiva in s tem izvršilni naslov, na podlagi katerega se lahko vodi izvršba.

Z Zakonom o arbitraži[2] je bil uveden obvezen postopek razglasitve izvršljivosti, v katerem Okrožno sodišče v Ljubljani po uradni dolžnosti presoja domačo arbitražno odločbo z vidika arbitrabilnosti in javnega reda Republike Slovenije.[3] Sodišče odloča po pravilih nepravdnega postopka in, v kolikor je domača arbitražna odločba znotraj meja arbitrabilnosti in ne krši javnega reda, izda sklep, s katerim razglasi arbitražno odločbo za izvršljivo. Pravnomočen sklep o razglasitvi izvršljivosti skupaj z arbitražno odločbo tvori izvršilni naslov, na podlagi katerega se lahko začne izvršilni postopek. Ker je postopek razglasitve izvršljivosti namenjen temu, da domača arbitražna odločba postane izvršljiva, so temu ustrezno omejeni tudi ugovori strank. V postopku eksekvature se namreč ni mogoče in tudi ni smiselno sklicevati na opozicijske in impugnacijske ugovore; na takšne ugovore se lahko sklicuje v morebitnem kasnejšem izvršilnem postopku.[4]

Zoper sklep sodišča je dopustna pritožba na Vrhovno sodišče RS, kot edino instanco. Ker gre za suspenzivno pravno sredstvo, je za upnika ključno vprašanje, kako se lahko zavaruje.[5] Na podlagi ZArbit ima arbitražna odločba med strankami učinek pravnomočne sodbe,[6] zato lahko potegnemo vzporednice s pravnomočno, a še ne izvršljivo sodbo. Upnik, ki ima arbitražno odločbo domače arbitraže, a sodišče še ni izdalo sklepa o razglasitvi izvršljivosti oziroma sklep še ni pravnomočen, lahko zavaruje bodočo izvršbo z institutom predhodne odredbe v skladu s pravili ZIZ. Za zavarovanje denarne terjatve, lahko upnik predlaga sodišču izdajo predhodne odredbe na podlagi odločbe domačega sodišča ali *drugega organa, ki še ni izvršljiva*, če izkaže pogoj objektivne nevarnosti.[7] Velika prednost zavarovanja s predhodno odredbo je, da ima stvarnopravne učinke, saj upniku (praviloma) prinaša zastavno pravico na predmetu zavarovanja.[8]

1 VS RS sklep Cpg 5/2014 z dne 23. 9. 2014.

2 Zakon o arbitraži (ZArbit), Ur. l. RS, št. 45/08.

3 Glej 41. člen ZArbit v povezavi s 7. točko prvega odstavka 9. člena ZArbit.

4 Glej 55. člen Zakona o izvršbi in zavarovanju (ZIZ), Ur. l. RS, št. 3/07 – uradno prečiščeno besedilo, 93/07, 37/08 – ZST-1, 45/08 – ZArbit, 28/09, 51/10, 26/11, 17/13 – odl. US, 45/14 – odl. US, 53/14, 58/14 – odl. US, 54/15 in 76/15 – odl. US.

5 Glej Galič, A., Procesnopravni vidiki potrditve izvršljivosti domačih arbitražnih odločb v Sloveniji, v: Slovenska arbitražna praksa, letnik II, št. 3/2013, str. 4-10.

6 38. člen ZArbit.

7 Glej 257. člen ZIZ.

8 Glej 260. člen ZIZ.

VS4002613

Odločba:	VSRS sklep Cpg 5/2014
ECLI:	
Oddelek:	Gospodarski oddelek
Datum seje senata:	23.09.2014
Senat:	Vladimir Balažic (preds.), dr. Miodrag Đorđević (poroč.), dr. Mile Dolenc
Področje:	ARBITRAŽNO PRAVO
Institut:	domača arbitražna odločba - priznanje izvršljivosti arbitražne odločbe - opozicijski ugovor - impugnacijski ugovor
Zveza:	ZArbit člen 40, 40/2-2, 41, 41/2. ZIZ člen 55. ZPP člen 365. ZNP člen 37.

JEDRO:
Postopek eksekvature je namreč treba jasno ločiti od postopka izvršbe, saj ta vodi do nastanka (popolnega) izvršilnega naslova, ne pa do same izvršbe. Sodišče v skladu z drugim odstavkom 41. člena ZArbit dopušča zavrnitev priznanja izvršljivosti arbitražne odločbe le v primeru ne-arbitrabilnosti spora in nasprotovanja arbitražne odločbe javnemu redu. Opozicijski in impugnacijski ugovori dolžnika (na primer, da je dolžnik v vmesnem času obveznost že izpolnil) zato v postopek eksekvature ne sodijo. Enako velja za ugovor, da še ni potekel paricijski rok.

IZREK:
Pritožba se zavrne in se sklep sodišča prve stopnje potrdi.

OBRAZLOŽITEV:
1. Stalna arbitraža pri Gospodarski zbornici Slovenije v Ljubljani je 1. julija 2013 izdala arbitražno odločbo v zadevi SA 5.6-5/2012, s katero je odločila o zahtevkih predlagateljice zoper nasprotno udeleženko, tako da je nasprotni udeleženki naložila plačilo 697.926,51 EUR glavnice z zamudnimi obrestmi (1. in 3. točka izreka odločbe) ter 3.626,93 EUR kapitaliziranih zamudnih obresti (2. točka izreka odločbe); posledično ji je naložilo tudi plačilo stroškov arbitražnega postopka in odvetniških stroškov (4. in 5. točka izreka odločbe). V preostalem delu pa je zahtevek predlagateljice zavrnila (6. točka izreka odločbe).

2. Okrožno sodišče v Ljubljani (v nadaljevanju sodišče prve stopnje) je s sklepom I R 737/2013 z dne 5. 3. 2014 razglasilo izvršljivost arbitražne odločbe Stalne arbitraže pri Gospodarski zbornici Slovenije SA 5.6.-5/2012 z dne 1. 7. 2013 (I. točka izreka sklepa). Sklenilo je, da predlagateljica sama nosi stroške postopka razglasitve izvršljivosti domače arbitražne odločbe (II. točka izreka sklepa).

3. Zoper sklep sodišča prve stopnje je nasprotna udeleženka vložila pritožbo zaradi bistvene kršitve določb nepravdnega postopka, zmotne uporabe materialnega prava ter zmotne in nepopolne ugotovitve dejanskega stanja.

4. Predlagateljica je na pritožbo odgovorila in predlagala njeno zavrnitev.

5. S sklepom Okrožnega sodišča v Murski Soboti St 4105/2014-2 z dne 9. 9. 2014 se je nad toženo stranko začel

stečajni postopek. S tem je po zakonu samem prišlo do prekinitve postopka (4. točka prvega odstavka 205. člena Zakona o pravdnem postopku, v nadaljevanju ZPP). Ker pa je prišlo do prekinitve postopka potem, ko so bila v pritožbenem postopku opravljena vsa procesna dejanja oziroma so potekli roki zanje, prekinitev postopka na izdajo odločbe Vrhovnega sodišča ne vpliva.(1)

6. Sodišče predlog za razglasitev izvršljivosti domače arbitražne odločbe zavrne, če je podan kateri od razlogov za razveljavitev iz 2. točke drugega odstavka 40. člena Zakona o arbitraži (v nadaljevanju ZArbit, drugi odstavek 41. člena ZArbit). V skladu s to določbo sodišče razveljavi domačo arbitražno odločbo, če po uradni dolžnosti ugotovi, da predmet spora ne more biti predmet arbitražnega sporazuma ali da je arbitražna odločba v nasprotju z javnim redom Republike Slovenije.

7. V postopku razglasitve izvršljivosti domače arbitražne odločbe sodišče odloča po pravilih nepravdnega postopka, v katerem se smiselno uporabljajo določbe ZPP, če ni z ZArbit ali Zakonom o nepravdnem postopku (v nadaljevanju ZNP) določeno drugače (drugi odstavek 9. člena ZArbit, 37. člen ZNP).

8. Pritožba ni utemeljena.

9. Sodišče prve stopnje je pravilno obrazložilo, da sodišče po drugem odstavku 41. člena ZArbit lahko zavrne predlog za razglasitev izvršljivosti domače arbitražne odločbe le, če je podan kateri od razlogov za razveljavitev iz 2. točke drugega odstavka 40. člena tega zakona. Nasprotna udeleženka obstoja takšnih razlogov ni izkazala, pač pa je v postopku pred sodiščem prve stopnje kot tudi v pritožbi ugovarjala le, da sta se s predlagateljico v mesecu januarju 2014 (po pravnomočnosti arbitražne odločbe in po poteku paricijskega roka) dogovarjali, da bo nasprotna udeležena terjatev predlagateljice poravnala delno s proti-dobavami (v vrednosti 8.000,00 EUR mesečno), delno pa z nakazili na njen transakcijski račun (v višini 15.000,00 EUR mesečno).

10. Vendar pa s takšnimi ugovori nasprotna udeleženka v postopku priznanja izvršljivosti domače arbitraže odločbe ne more uspeti. Postopek eksekvature je namreč treba jasno ločiti od postopka izvršbe, saj ta vodi do nastanka (popolnega) izvršilnega naslova, ne pa do same izvršbe. Sodišče v skladu z drugim odstavkom 41. člena ZArbit dopušča zavrnitev priznanja izvršljivosti arbitražne odločbe le v primeru ne-arbitrabilnosti spora in nasprotovanja arbitražne odločbe javnemu redu. Opozicijski in impugnacijski ugovori dolžnika (na primer, da je dolžnik v vmesnem času obveznost že izpolnil) zato v postopek eksekvature ne sodijo. Enako velja za ugovor, da še ni potekel paricijski rok.(2) Dolžnik bo namreč takšne ugovore lahko uveljavljal v kasnejšem izvršilnem postopku (8. in 9. točka prvega odstavka 55. člena Zakona o izvršbi in zavarovanju).

11. Vrhovno sodišče je tako ugotovilo, da pritožba nasprotne udeleženke ni utemeljena, zaradi česar jo je zavrnilo na podlagi tretjega odstavka 9. člena ZArbit v povezavi z 37. členom ZNP in 365. členom ZPP.

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Op. št. (1):
Opisano stališče je izpeljano iz drugega odstavka 207. člena ZPP;

opira pa se na argument, da procesna upravičenja strank z izdajo odločbe v času po prekinitvi postopka, ki nastopi po opravi vseh procesnih dejanj oziroma poteku roka zanje niso v ničemer ogrožena. Glej sklep VS RS III Ips 41/97 z dne 4. 12. 1998.

Op. št. (2):

Galič, dr. Aleš; Procesnopravni vidiki potrditve izvršljivosti domačih arbitražnih odločb v Sloveniji; v: Slovenska arbitražna praksa, november 2013, str. 8.

Vprašanje veljavnosti arbitražnih klavzul v intra-EU bilateralnih investicijskih sporazumih bo dočakalo svoj dan na Sodišču EU

Neli Okretič

Nemško Zvezno vrhovno sodišče (*Bundesgerichtshof, BGH*) je v maju 2016 postavilo predhodno vprašanje Sodišču EU glede združljivosti "*investor-state*" arbitražne klavzule, vsebovane v dvostranskem sporazumu o zaščiti naložb, sklenjenim med državama članicama Evropske unije (*intra-EU BIT*), z zakonodajo EU.[1] Vprašanja, povezana z veljavnostjo *intra-EU BITs* in arbitražnih klavzul, so že nekaj časa sporna, predvsem zaradi stališča Evropske komisije o njihovi nezdružljivosti z zakonodajo EU in poziva Evropske komisije državam članicam, naj *intra-EU* bilateralne investicijske sporazume odpovedo.[2]

Spor izvira iz investicijske arbitraže med nizozemsko zavarovalnico Achmea B.V. (pred tem Eureko B.V.) in Slovaško republiko, ki se je v letu 2008 začel na podlagi bilateralnega investicijskega sporazuma,[3] zaradi določenih ukrepov, ki jih je Slovaška sprejela v sektorju zdravstvenega zavarovanja. Arbitražni senat s sedežem v Frankfurtu na Majni je odločal na podlagi pravil UNCITRAL in leta 2012[4] izdal arbitražno odločbo,[5] zoper katero je Slovaška vložila zahtevo za njeno razveljavitev. V zahtevi je Slovaška navajala vrsto razlogov, zaradi katerih meni, da je arbitražna klavzula, vsebovana v *intra-EU* bilateralnem investicijskem sporazumu, nezdružljiva z zakonodajo EU, predvsem s 344., 267. in 18. členom Pogodbe o delovanju Evropske unije (PDEU). Višje deželno sodišče (*Oberlandesgericht* oz. *OLG*) v Frankfurtu na Majni, ki je o tem odločalo na prvi stopnji, je zahtevo Slovaške zavrnilo;[6] postopek se je nadaljeval pred Zveznim vrhovnim sodiščem (BGH), ki je predhodno vprašanje Sodišču EU tudi postavilo.[7] Ker ima glavno pristojnost za razlago določb PDEU Sodišče EU, BGH Sodišče EU sprašuje, ali so členi 344, 267 in 18 PDEU v koliziji z možnostjo arbitražnega reševanja sporov, vsebovani v 8(2) členu *intra-EU BIT* in če so, kakšen je primeren način za rešitev te kolizije, ob upoštevanju, da je bil bilateralni investicijski sporazum sklenjen pred pristopom ene od držav pogodbenic k EU, arbitražni postopek pa se je začel po tem.[8] BGH dodaja, da v kolikor je arbitražna klavzula nezdružljiva z zakonodajo EU, stranki nista sklenili veljavnega arbitražnega sporazuma, kar je razlog za razveljavitev arbitražne odločbe na podlagi § 1059 (2)(1a) nemškega zakona o civilnem procesu (*Zivilprozessordnung*).

Pogled BGH na navedbe Slovaške glede kolizije med zakonodajo EU in arbitražnimi klavzulami, vsebovanimi v *intra-EU BITs*, je izredno zanimiv in vsekakor ponuja nekaj zanimivih iztočnic. Z vidika BGH, členi 344., 267. in 18. PDEU možnosti arbitražnega reševanja sporov, ki je predvidena v *intra-EU BIT* med Slovaško in Nizozemsko, ne onemogočajo:

Vprašanja, povezana z veljavnostjo *intra-EU* BITs in arbitražnih klavzul, so že nekaj časa sporna, predvsem zaradi stališča Evropske komisije o njihovi nezdružljivosti z zakonodajo EU in poziva Evropske komisije državam članicam, naj *intra-EU* bilateralne investicijske sporazume odpovedo

Spor izvira iz investicijske arbitraže med nizozemsko zavarovalnico Achmea B.V. (pred tem Eureko B.V.) in Slovaško republiko, ki se je v letu 2008 začel na podlagi bilateralnega investicijskega sporazuma, zaradi določenih ukrepov, ki jih je Slovaška sprejela v sektorju zdravstvenega zavarovanja

1 Zadeva C-284/16.

2 Za več o tem, glej http://europa.eu/rapid/press-release_IP-15-5198_en.htm (14. 8. 2016).

3 Bilateralni investicijski sporazum je bil leta 1991 sklenjen med Češkoslovaško in Nizozemsko. Slovaška je pravna naslednica Češkoslovaške in z njenim vstopom v EU leta 2004 je ta sporazum postal *intra-EU BIT*.

4 Leta 2010 je arbitražni senat izdal "*Award on jurisdiction, arbitrability and suspension*", katero je Slovaška prav tako izpodbijala. Dostopna je na povezavi http://www.italaw.com/sites/default/files/case-documents/ita0309.pdf (14. 8. 2016).

5 Arbitražna odločba je dostopna na http://www.italaw.com/sites/default/files/case-documents/italaw3206.pdf (14. 8. 2016).

6 Odločba OLG je dostopna na povezavi: http://www.italaw.com/sites/default/files/case-documents/italaw7079.pdf (14. 8. 2016).

7 Odločba BGH je dostopna na povezavi: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2016&Sort=3&nr=74612&linked=bes&Blank=1&file=dokument.pdff (14. 8. 2016).

8 Vprašanja za predhodno odločanje so dostopna na: http://curia.europa.eu/juris/document/document.jsf?text=&docid=182687&pageIndex=0&doclang=SL&mode=lst&dir=&occ=first&part=1&cid=404365 (16. 8. 2016).

344. člen PDEU:

"*Države članice se obvezujejo, da bodo spore glede razlage ali uporabe Pogodb reševale le na načine, določene v Pogodbah.*"

Možnost arbitražnega reševanja sporov, ki je vsebovana v členu 8(2) *BIT*, po mnenju BGH ne krši 344. člena PDEU, ker se ta člen nanaša le na spore med državami članicami EU, poleg tega pa je njegova uporaba omejena le na interpretacijo in uporabo določil Pogodbe o Evropski uniji in Pogodbe o delovanju Evropske unije (v nadaljevanju: Pogodb) – torej ne bilateralnih investicijskih sporazumov. Za spore, ki nastanejo na podlagi *BITs*, zakonodaja EU ne predvideva nobenega posebnega mehanizma za njihovo reševanje. Zato je BGH zaključilo, da člen 344 PDEU ne prepoveduje državi članici, da predloži spor med njo in investitorjem v reševanje arbitraži.

267. člen PDEU:

"*Sodišče Evropske unije je pristojno za predhodno odločanje o vprašanjih glede:*

(a) razlage Pogodb;

(b) veljavnosti in razlage aktov institucij, organov, uradov ali agencij Unije.

Kadar se takšno vprašanje postavi kateremu koli sodišču države članice in če to sodišče meni, da je treba glede vprašanja sprejeti odločitev, ki mu bo omogočila izreči sodbo, lahko to vprašanje predloži v odločanje Sodišču.

Kadar je takšno vprašanje postavljeno v postopku, ki teče pred sodiščem države članice, zoper odločitev katerega po nacionalnem pravu ni pravnega sredstva, je to sodišče dolžno predložiti zadevo Sodišču.

Kadar je takšno vprašanje postavljeno v postopku, ki teče pred sodiščem države članice glede osebe, ki ji je odvzeta prostost, Sodišče odloča v najkrajšem možnem roku."

Z vidika BGH, 8(2) člen *BIT* ne krši niti 267. člena PDEU. Čeprav arbitražni senat nima pristojnosti za predložitev predhodnega vprašanja Sodišču, to po stališču BGH ne ogroža skladne razlage Pogodb, kar je glavni namen 267. člena PDEU. Ko bo nacionalno sodišče odločalo o razveljavitvi ali priznanju ter izvršitvi arbitražne odločbe, bo lahko preverilo skladnost z zakonodajo EU in, v kolikor bo to potrebno, podalo zahtevo za predhodno vprašanje na podlagi navedenega člena PDEU.[9]

18. člen PDEU:

"*Kjer se uporabljata Pogodbi in brez poseganja v njune posebne določbe, je prepovedana vsakršna diskriminacija glede na državljanstvo.*"

Potencialno kršitev določb PDEU je BGH našlo v določbi 18. člena PDEU, ki govori o nediskriminaciji na podlagi državljanstva. Glede na to, da imajo na podlagi spornega *intra-EU BIT* le slovaški oziroma nizozemski državljani ali entitete na voljo arbitražno reševanje sporov, tega privilegija ostali državljani in entitete Unije ne uživajo. Ne glede na to, ali gre v primeru člena 8(2) *BIT* za diskriminacijo ali ne, BGH ni zaključilo, da je člen o možnosti arbitražnega reševanja sporov neuporaben. Diskriminacija na podlagi 18. člena PDEU je odpravljena s tem, da so diskriminiranim državljanom Unije zagotovljene enake ugodnosti, zato naj se, po mnenju BGH, arbitražna klavzula iz *BIT* razširi tudi na investitorje iz ostalih držav članic.

Odločitev SEU je vsekakor težko pričakovana, saj gre za vprašanje, katerega vpliv se bo zrcalil tudi na vse ostale arbitražne klavzule, vsebovane v bilateralnih investicijskih sporazumih med državami članicami EU

Odločitev SEU je vsekakor težko pričakovana, saj gre za vprašanje, katerega vpliv se bo zrcalil tudi na vse ostale arbitražne klavzule, vsebovane v bilateralnih investicijskih sporazumih med državami članicami EU. Kateremu stališču – Slovaške in Evropske komisije ali BGH – bo SEU sledilo, je težko predvideti. V luči različnih stališč o vprašanju skladnosti *intra-EU BITs* z zakonodajo EU ne gre spregledati delovnega dokumenta Odbora za trgovinsko politiko (storitve in naložbe) Sveta EU, v katerem predlog delegacije petih držav članic kaže na željo po pripravi multilateralnega investicijskega sporazuma, ki bi nemudoma nadomestil vse obstoječe *intra-EU BITs*.[10]

Zadevo bomo na Slovenski arbitražni praksi tudi v prihodnje spremljali.

9 Tako tudi SEU v zadevi Eco Swiss (C-126/97), odst. 34 in 37.

10 Dokument je dostopen na povezavi: http://www.s2bnetwork.org/wp-content/uploads/2016/05/Intra-EU-Bits2-18-05.pdf (14. 8. 2016).

Odpoved sodnemu nadzoru arbitražne odločbe ni nezdružljiva z Evropsko konvencijo o človekovih pravicah

Zadeva Tabbane proti Švici (št. 41069/12)

Neli Okretič

Evropsko sodišče za človekove pravice je prvega marca 2016 odločilo v zadevi Tabbane proti Švici,[1] v kateri se je prvič do sedaj ukvarjalo z vprašanjem združljivosti odpovedi sodnemu nadzoru arbitražne odločbe s prvim odstavkom 6. člena Evropske konvencije o človekovih pravicah, ki zagotavlja vsaki osebi pravico do sodnega varstva.

Oris zadeve[2]

Francosko podjetje Colgate-Palmolive Service SA (v nadaljevanju Colgate) je z namenom lokalnega izdelovanja njihovih produktov sklenilo poslovno sodelovati s tunizijskim poslovnežem Tabbanom in njegovimi tremi sinovi (v nadaljevanju: pritožniki). Stranki sta sklenili več pogodb, ki so določale finančne in pravne obveznosti, med katerimi je bil tudi dogovor, ki je podjetju Colgate ponujal opcijo za pridobitev delnic pritožnikov v holdingu Hysys (v nadaljevanju opcijska pogodba). Do spora je prišlo, ko je podjetje Colgate želelo opcijo izkoristiti, pritožniki pa so zahtevo za prenos delnic zavrnili. Opcijska pogodba je vsebovala arbitražno klavzulo, v skladu s katero se vsi spori predložijo v reševanje arbitražnemu senatu, sestavljenemu iz treh arbitrov, v skladu s pravili Mednarodne trgovinske zbornice (ICC). Določitev sedeža arbitraže je bila prepuščena odločitvi arbitrov. Arbitražna klavzula je vsebovala tudi določbo, da je odločba arbitražnega senata (do)končna in zavezujoča ter da nobena izmed strank nima pravice do pritožbe zoper arbitražno odločbo pred katerim koli sodiščem.[3] Arbitražni postopek se je začel v letu 2008, arbitražni senat s sedežem v Ženevi pa je leta 2011 izdal arbitražno odločbo, s katero je odločil v korist podjetja Colgate. Pritožniki so se, v želji po razveljavitvi arbitražne odločbe, obrnili na švicarsko Zvezno sodišče. Švicarski zakon o mednarodnem zasebnem pravu dopušča, da se stranke, v kolikor nobena izmed njih nima domicila, običajnega prebivališča ali poslovnega podjema v Švici, z izrecno določbo v arbitražnem sporazumu ali s kasnejšim pisnim dogovorom odpovejo tožbi za razveljavitev arbitražne odločbe, ki je izdana v Švici oziroma sodni preizkus omejijo.[4] Po preučitvi arbitražne klavzule, vsebovane v opcijski pogodbi, je švicarsko Zvezno sodišče zahtevo pritožnikov štelo kot nedopustno, ker sta se stranki veljavno odpovedali pravici do izpodbijanja arbitražne odločbe. Pritožniki[5] so vložil zahtevo na Evropsko sodišče za človekove pravice (v nadaljevanju ESČP) v juliju 2012 in, med drugim, zatrjevali kršitev pravice do dostopa do sodišča v Švici, ki bi obravnavalo njihov zahtevek za izpodbijanje arbitražne odločbe. Prav tako so zatrjevali, da je 192. člen švicarskega zakona o mednarodnem zasebnem pravu, ki omogoča, da se določene stranke odpovejo sodnemu nadzoru nad arbitražno odločbo, nezdružljiv s prvim odstavkom 6. člena Evropske konvencije o človekovih pravicah (v nadaljevanju EKČP).

Odločitev ESČP

Kot je ESČP izpostavilo, pravica do sodnega varstva ni absolutna in ne nujno pomeni pravice dostopa do (državnega) sodišča v tradicionalnem pomenu besede

Evropsko sodišče za človekove pravice je prvega marca 2016 odločilo v zadevi Tabbane proti Švici, v kateri se je prvič do sedaj ukvarjalo z vprašanjem združljivosti odpovedi sodnemu nadzoru arbitražne odločbe s prvim odstavkom 6. člena Evropske konvencije o človekovih pravicah, ki zagotavlja vsaki osebi pravico do sodnega varstva

1 Odločitev ESČP je dostopna na povezavi http://hudoc.echr.coe.int/eng?i=001-161870#{%22itemid%22:[%22001-161870%22]} (1.8.2016).

2 Za več o sami zadevi glej http://www.humanrights.ch/upload/pdf/160324_Entscheid_Tabbane_v._Switzerland_-_challenge_to_the_resolution_of_a_dispute_by_the_International_Court_of_Arbitration.pdf (1.8.2016).

3 "*The decision of the arbitration shall be final and binding and neither party shall have any right to appeal such decision to any court of law.*"

4 Art. 192(1) of the 1987 Federal Private International Law Act: "If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190(2)."

5 V marcu 2013 je g. Tabbane umrl; njegova žena in trije sinovi so zadevo prevzeli in nadaljevali postopek.

– sodišča, ki je del jurisdikcije določene države. Na podlagi sodne prakse ESČP je izrecna ali konkludentna odpoved pravicam iz prvega odstavka 6. člena EKČP dopustna, če je izražena prostovoljno in nedvoumno, če so zagotovljena minimalna jamstva, ki ustrezajo pomenu tega dejanja, ter takšna odpoved ne nasprotuje kakšnemu pomembnemu javnemu interesu.[6] Zato se na podlagi sodne prakse ESČP prostovoljna arbitraža lahko šteje za dopustno odpoved pravici do sodnega varstva, v kolikor je ta odpoved prostovoljna, jasna in zakonita.[7] ESČP je te kriterije uporabilo tudi za presojo odpovedi sodnemu nadzoru nad arbitražno odločbo.

ESČP je zaključilo, da omejitev pravice pritožnikov glede dostopa do sodišča ni neproporcionalna, ker sledi razumnim ciljem ter obenem spoštuje pritožnikovo avtonomijo. V samo bistvo pravice do sodnega varstva v tem primeru ni bilo poseženo

ESČP pri presoji gornjih kriterijev ni našlo nobenega indica, ki bi kazal na kakršno koli prisilo pri sklepanju opcijske pogodbe in arbitražne klavzule; prav tako je šlo za jasno in nedvoumno odpoved, z zagotovljenimi minimalnimi jamstvi, ki ustrezajo pomenu tega dejanja, saj so pritožniki sodelovali tako pri oblikovanju arbitražnega senata kot tudi v arbitražnem postopku. Zahteva pritožnikov je bila že s strani švicarskega Zveznega sodišča temeljito analizirana, sodba sodišča pa obrazložena in ni kazala na kakršno koli arbitrarnost.

V naslednjem koraku je ESČP obravnavalo vprašanje združljivosti 192. člena švicarskega zakona o mednarodnem zasebnem pravu z določbami EKČP. Najprej je poudarilo, da EKČP ne predvideva popularne tožbe (*actio popularis*) za interpretacijo pravic, priznanih s konvencijo. Prav tako ne predvideva možnosti pritoževanja posameznikov zoper določbe nacionalne zakonodaje, zgolj ker menijo, da so v nasprotju s konvencijo, brez da bi bili sami v zvezi s tem prizadeti. ESČP je pri presoji tega vprašanja izhajalo iz dveh glavnih vodil, katerim je sledil švicarski zakonodajalec pri sprejemanju zakona: prvič, promociji Švice, kot okolja prijaznega mednarodni arbitraži, z izogibanjem dvojnega nadzora nad arbitražno odločbo – najprej v postopku izpodbijanja arbitražne odločbe in nato še v postopku priznanja in izvršitve; in drugič, zmanjšanju dotoka zadev na švicarsko Zvezno sodišče. Po mnenju ESČP so ti cilji, ki jih je zasledoval zakonodajalec, legitimni. Še posebej, ker imajo stranke zgolj možnost, da se odpovejo tožbi za razveljavitev arbitražne odločbe, če izpolnjujejo navedene kriterije, niso pa k odpovedi zavezane. ESČP je na tej točki opomnilo tudi na drugi odstavek 192. člena švicarskega zakona o mednarodnem zasebnem pravu, ki v primerih odpovedi sodnega nadzora švicarskega Zveznega sodišča nad arbitražno odločbo, v postopku izvršitve arbitražne odločbe v Švici predvideva uporabo Newyorške konvencije[8] po analogiji, kar zagotavlja nadzor nad resnimi kršitvami.

ESČP je zaključilo, da omejitev pravice pritožnikov glede dostopa do sodišča ni neproporcionalna, ker sledi razumnim ciljem ter obenem spoštuje pritožnikovo avtonomijo. V samo bistvo pravice do sodnega varstva v tem primeru ni bilo poseženo.

Sklepne misli

ESČP je odgovorilo na pomembno vprašanje, ki je bilo predmet številnih razprav. Švica je ena izmed jurisdikcij, ki v zakonodaji izrecno predvideva možnost odpovedi tožbi za razveljavitev arbitražne odločbe, njihova sodna praksa pa se je vedno zavzemala za pristop, kateremu je sledilo ESČP: odpoved je dopustna, če je jasna, prostovoljna in zakonita. Odločitev ESČP kaže tudi na to, da takšne določbe v nacionalni zakonodaji niso že same po sebi nezdružljive z EKČP, saj zanje obstajajo legitimni razlogi.

6 Glej npr. A. T. proti Avstriji, št. 32636/96, 21. 3. 2002.

7 Glej npr. Transado-Transportes Fluviais do Sado, S. A. proti Portugalski, št. 35943/02, 16. 12. 2003 in Suda proti Češki, št. 1643/06, 28. 10. 2010.

8 Newyorška konvencija o priznanju in izvršitvi tujih arbitražnih odločb iz leta 1958, Ur. l. SFRJ, MP, št. 11/81.

Slovenska arbitražna praksa odslej tudi na portalu Tax-Fin-Lex

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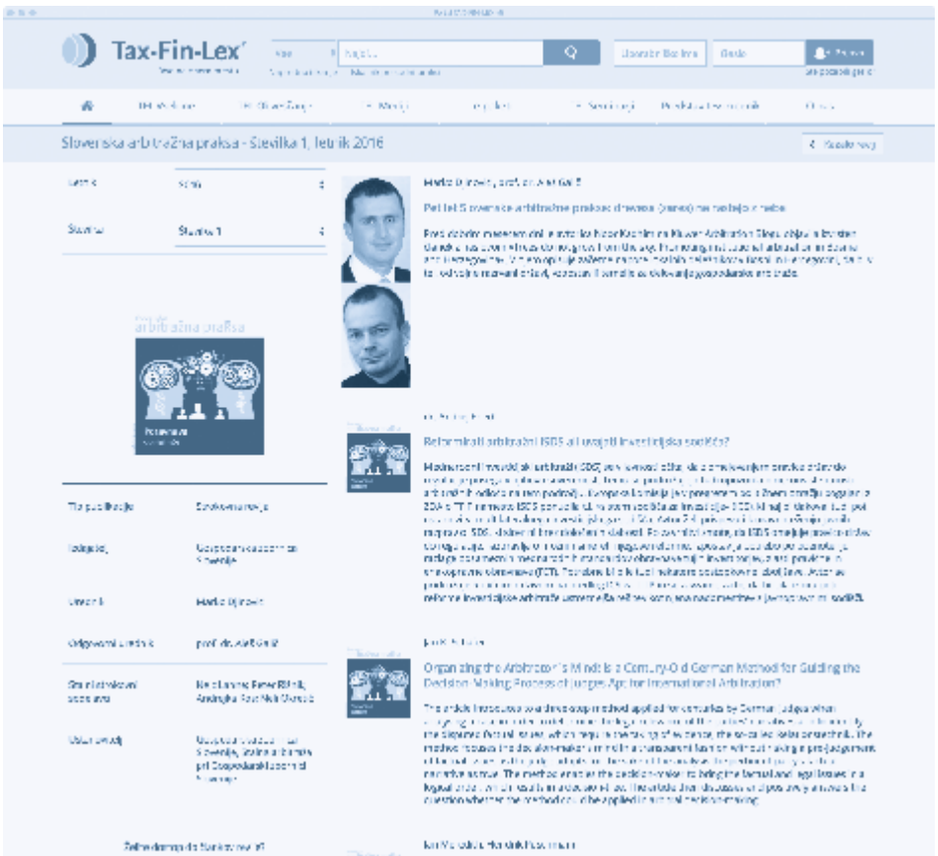

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