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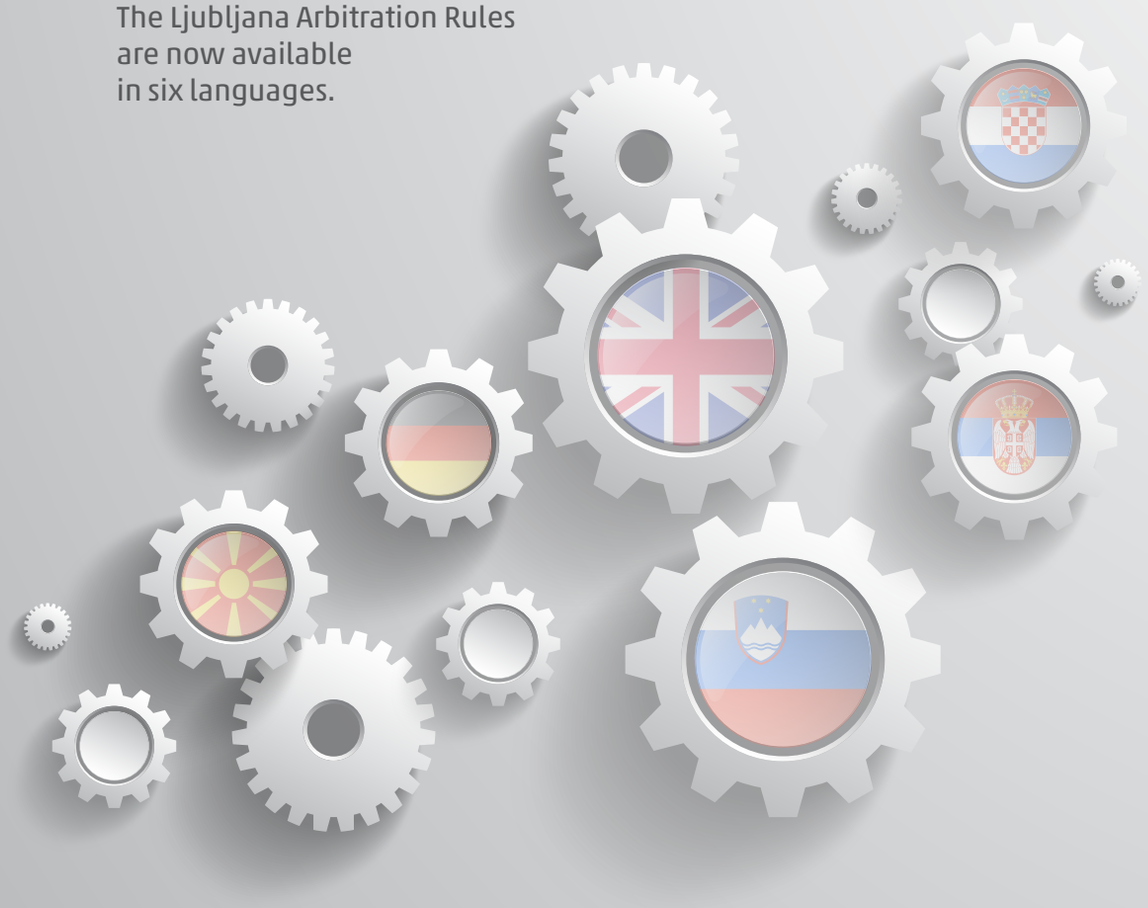

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Vloga korporativnih pravnikov v arbitražnem postopku

V tujini so razprave o vlogi korporativnih pravnikov in pravnic (v nadaljevanju bo za oboje uporabljena moška slovnična oblika) zelo živahne in potekajo na različnih ravneh. Na mednarodni ravni se korporativni pravniki povezujejo v različna združenja, ki skrbijo za razvoj znanja in veščin ter izmenjavo dobrih praks in izkušenj. Poleg povezovanja na splošni ravni se korporativni pravniki združujejo tudi na ožjih strokovnih področjih, denimo na področju arbitraže (npr. Corporate Counsel International Arbitration Group – CCIAG). Povsem drugačna pa je slika v Sloveniji. Pri nas o vlogi korporativnih pravnikov v gospodarstvu le redko razpravljamo. Razprav o njihovi vlogi v reševanju sporov pa sploh ni zaslediti.

Zato je skrajni čas, da tudi v Sloveniji odpremo razpravo o vlogi korporativnega pravnika v arbitražnem postopku. Pričujoči uvodnik naj bo skromen poskus v tej smeri.

Ko pride do spora, se morajo korporativni pravniki izkazati kot suvereni odločevalci, ki usmerjajo potek postopka in delo (zunanjega) odvetnika. Za to je potrebno znanje, popolna informiranost, zaupanje vodstva družbe, visoka stopnja samostojnosti in ustrezen položaj znotraj gospodarske družbe. Te lastnosti korporativnih pravnikov niso samoumevne, so pa ključnega pomena za učinkovito upravljanje časa in stroškov v arbitražnem postopku.

Uporabniki arbitraže širom sveta (z njimi so mišljena podjetja) pričakujejo učinkovite arbitražne postopke, pri čemer učinkovitost merijo skozi čas in denar. Eno najpomembnejših vprašanj je, koliko me bo rešitev spora stala. Ko govorimo o stroškovni učinkovitosti arbitraže, je potrebno najprej podrobneje proučiti strukturo stroškov arbitražnega postopka, preden delamo zaključke. V zadnjem času so bile med uporabniki arbitraže izvedene številne analize stroškov postopka. Tako je denimo ICC Commission on Arbitration and ADR leta 2012 pripravila – še vedno aktualno – študijo o razmerju med stroški arbitraže (plačilo za senat in administrativni stroški) in stroški strank (stroški pravnega zastopanja, stroški prič in od strank imenovanih izvedencev, potni in nastanitveni stroški strank itd.). V ta namen je komisija ICC analizirala izdane arbitražne odločbe v letih 2003 in 2004. Rezultati so pokazali, da stroški strank predstavljajo kar 82 % vseh stroškov arbitražnega postopka, medtem ko predstavljata plačilo za arbitražni senat 16 %, administrativni stroški pa 2 % celotnih stroškov arbitražnega postopka (gl. poročilo Techniques for Controlling Time and Costs in Arbitration, 2012).

Sekretariat Stalne arbitraže pri GZS je v letu 2014 analiziral vzorec arbitražnih odločb, izdanih med leti 2006 in 2013. Analiza pokaže, da stroški strank (predvsem pravnega zastopanja) predstavljajo 62 %, plačilo za arbitražni senat 30 %, administrativni stroški pa 8 % celotnih stroškov arbitražnega postopka. Za potrebe študije je bil izbran vzorec 40 reprezentativnih arbitražnih odločb iz omenjenega obdobja. Povprečna vrednost spornega predmeta analiziranih arbitražnih odločb je znašala

2.507.635,39 EUR (vrednosti so se gibale od 3.338,34 EUR pa do 44.960.750,56 EUR). Od tega predstavljajo domače arbitraže (vse stranke s sedežem v Sloveniji) 52,5 %, mednarodne arbitraže pa 47,5 % (vsaj ena stranka s sedežem izven Slovenije). Stranke so prihajale iz 11 različnih držav (Slovenija, Madžarska, Hrvaška, Nemčija, Švica, Makedonija, Avstrija, Norveška, Bosna in Hercegovina, Velika Britanija in Črna Gora).

Obe navedeni analizi privedeta do podobnega rezultata: levji delež stroškov arbitražnega postopka predstavljajo stroški strank, natančneje stroški pravnega zastopanja.

Iz navedenega izhaja, da če želijo uporabniki stroškovno optimizirati arbitražni postopek, morajo posebno pozornost nameniti predvsem optimiziranju stroškov zunanjega zastopanja. Z drugimi besedami to pomeni, da mora korporativni pravnik sproti nadzirati in odobravati stroške odvetnika. Če malo karikirava, je njegova vloga podobna tisti, ki jo ima nadzorni inženir pri gradnji objekta. In v tej točki je vloga korporativnega pravnika ključna. Vprašanje, ki se zastavlja, je torej, kako naj korporativni pravnik v praksi pristopi k navedeni optimizaciji. Vprašanje lahko zastavimo tudi tako, da vključuje obe strani enačbe: kakšen je pomen sodelovanja med korporativnim pravnikom in odvetnikom pri učinkovitem menedžmentu arbitražnega postopka?

Priporočljivo je, da se korporativni pravniki omenjenega izziva lotijo z okvirno »check-listo« vprašanj, na katera morajo imeti ustrezne odgovore, če želijo optimizirati čas in stroške arbitražnega postopka. Gre za posamezne stadije v razvoju spora, ki imajo pomemben vpliv na stroške in v katerih je sodelovanje med korporativnimi pravniki in odvetniki ključnega pomena. Ti so zlasti: (i) izbira odvetnika, ki je specialist za arbitražo, (ii) analiza možnosti za poravnavo pred in med arbitražnim postopkom, (iii) izbira primernega arbitra, (iv) določitev strategije pravdanja, (v) začetek arbitražnega postopka – vsebina zahteve za arbitražo, (vi) nadaljnje pisne vloge strank v arbitražnem postopku, (vii) priče, (viii) izvedenci, (ix) ustna obravnava itd. V tem smislu priporočava branje poročila Effective Management of Arbitration – A Guide for In-House Counsel and Other Party Representatives (ICC Commission on Arbitration and ADR, 2015), po katerem povzemava v nadaljevanju predstavljeni pristop.

V vseh navedenih stadijih razvoja spora je potrebno sprejemanje odločitev. Odločitve pa vselej sprejema *stranka*, zanjo pogosto *korporativni pravnik*. Ustrezne odločitve glede obvladovanja časa in stroškov postopka lahko torej stranka sprejme le, če med korporativnim pravnikom in odvetnikom obstaja ozračje sodelovanja in sinergije. Vsaka stranka namreč najbolje pozna svoje interne procese ter pomen in vrednost, ki ga ima zanjo konkreten spor. Drugače povedano, *spor je od stranke*, prav tako pa je njen tudi denar. Zato je prav stranka tista, ki je v najboljšem položaju, da oceni kolikšno tveganje je pripravljena sprejeti in kakšne odločitve v postopku bo sprejela. Pri odločitvah pa bo stranki pogosto pomagal odvetnik na podlagi informirane ocene prednosti in slabosti posameznih alternativ, ki jih ima stranka na voljo. Korporativni pravnik zato ne sme »spustiti vajeti« in enostavno »outsourcati« reševanje spora.

Idealno sodelovanje med korporativnim pravnikom in odvetnikom bo tako obsegalo: (i) odpiranje relevantnih vprašanj v primerni fazi postopka, (ii) opredelitev različnih možnosti, ki jih ima stranka na voljo, (iii) preigravanje prednosti in slabosti posameznih možnosti in (iv) oblikovanje usmeritev kot osnove za sprejem

optimalnih procesnih odločitev v primerni fazi postopka. Pravzaprav to ni nič drugega kot oblikovanje arbitražnega postopka po meri stranke, ki jo omogoča fleksibilnosti arbitraže in visoka stopnje avtonomije, ki jo v arbitraži uživajo stranke.

Ponazorimo to na primeru vložitve zahteve za arbitražo, s katero se začne arbitražni postopek.

Ko se stranka odloči za vložitev zahteve za arbitražo, si mora korporativni pravnik najprej zastaviti nekatera osnovna vprašanja: (i) kakšen cilj zasleduje stranka z zahtevo za arbitražo?; (ii) ali s kratko/enostavno zahtevo v konkretnem primeru stranka prihrani stroške?; (iii) za toženo stranko: ali naj v odgovoru na zahtevo za arbitražo sledim ravni kompleksnosti/obsega zahteve za arbitražo?; (iv) za toženo stranko: kakšen naj bo moj pristop glede na to, da imam (v primerjavi s tožnikom) za pripravo odgovora na zahtevo za arbitražo omejen čas?

Na voljo ima namreč dve možnosti: (i) lahko vloži kratko in koncizno zahtevo za arbitražo (brez obširne utemeljitve in dokazov), ki vsebuje zgolj minimalne predpostavke, ki jih zahtevajo arbitražna pravila, obširno utemeljevanje pa si pridrži za čas po oblikovanju arbitražnega senata, ali pa (ii) vloži izčrpno zahtevo za arbitražo, v kateri predstavi vse svoje argumente in ki vsebuje tudi že dokaze. Smiselno enako velja za odgovor na zahtevo za arbitražo.

Krajša in enostavnejša zahteva za arbitražo običajno pomeni prihranek stroškov za stranko v začetni fazi postopka. Po drugi strani pa se lahko stranka z izčrpno zahtevo za arbitražo izogne potrebi po nadaljnjih rundah vlaganja pisnih vlog in na ta način pospeši postopek, vendar pa to ne drži vselej, zlasti ne v kompleksnih sporih. Če je primarni namen vložitve zahteve za arbitražo sprožiti pogovore o poravnavi oz. zainteresirati nasprotno stran, ki se sicer noče pogovarjati, potem je ta cilj običajno dosežen že s kratko/enostavno zahtevo, ki pa vendarle pomeni močan pritisk, pretrganje zastaranja in pričetek formalnega postopka, ki vodi do končne arbitražne odločbe. Daljša zahteva za arbitražo pa se zdi primernejša v situacijah, ko obstaja potreba po tem, da nasprotni strani že na začetku postopka pokažemo moč tožnikovih argumentov in s tem zamejimo polje morebitne poravnave. Preigravanje argumentov za in proti je le ilustrativno, od posameznega primera pa je odvisno, kateri argumenti bodo pretehtali v prid takšni ali drugačni procesni odločitvi. Takšen pristop je seveda uporabljiv za vsa procesna vprašanja v arbitražnem postopku.

Glede na povedano lahko vidimo, da so (časovno in stroškovno) optimalne postopkovne odločitve v arbitražnem postopku možne le ob jasni delitvi nalog in tvornem sodelovanju med korporativnim pravnikom in odvetnikom ter ob predpostavki, da korporativni pravnik s podporo vodstva družbe aktivno sodeluje pri sprejemanju teh odločitev.

Bodimo odločni.

mag. Marko Djinović
strokovni urednik

prof. dr. Aleš Galič
odgovorni urednik

Equal representation in international arbitration

Rashda Rana SC, 39 Essex Chambers
Barrister, Arbitrator & Mediator

Rashda is an international arbitration practitioner and arbitrator with 26 years' of broad ranging experience in transactional, litigation and ADR, across a variety of areas of law and jurisdictions. Rashda also teaches international commercial arbitration and has published widely on the subject. Rashda is an active member of a number of significant industry associations. She is the current President of the ArbitralWomen; former President of CIArb (Australia) and an experienced CEDR accredited mediator. She has been appointed in numerous international commercial arbitrations, both institutional and ad hoc.

For many years now, a key objective of many organisations, and the motivation behind a number of government initiatives, has been the promotion and improvement in the role and position of women in the dispute resolution community around the world. To date, those objectives have been pursued on a piece-meal basis, without following through on results or any meaningful analysis of their success or failure. Without the necessary concrete steps and consistent and regular assessment of their utility, programmes designed to improve the role of women in the law have often had the opposite effect. Women in the law generally, and in dispute resolution more particularly, continue to leave the profession and/or fail to reach their true potential as a result of gender inequality.

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In order to meet this challenge, for some years now there have been in place various diversity awareness programs in many organisations. However, they do not seem to have resulted in more diverse organisations or institutions (including law firms). The problem that has more recently been identified is that most standard diversity programs weren't taking into account *all* of peoples' responses, all of the re-actions people have to information and stimuli being processed by the brain on an intuitive, unconscious level.

Improving diversity (hence achieving or striving for equality) now lies in recognizing and managing hidden or implicit biases. These biases are our "mental shortcuts based on social norms and stereotypes". Over the last three decades, our understanding of unconscious bias has evolved considerably and is now well understood.

These developments in understanding unconscious bias indicate that, to some extent, the problem of continuing inequality lies in deep-rooted cultural perceptions and misperceptions. In every field of endeavour, unconscious bias is evident and perpetuated. A substantial amount of research has been published demonstrating the impact of unconscious bias in various arenas and how bias may be contributing to disparities in various industries.

Our brains are hard wired to rapidly categorise people instinctively, and we use the most obvious and visible categories to do this: age, body weight, physical attractiveness, skin colour, gender and disability. But we use many other less visible dimensions such as accent, social background, sexual orientation, nationality, religion, education, and even job title or organisational department. These categories automatically assign a whole suite of unconscious characteristics, good and bad, to anyone categorised as being from that group. They are automatic and unconscious biases, over which we have little control, and they influence everyone, no matter how unbiased we think we may be.

So, your background, personal experiences, societal stereotypes and cultural context can have an impact on your decisions and actions without you realising. Implicit or unconscious bias happens by our brains making incredibly quick judgments and assessments of people and situations without us realising. We are unlikely to be aware of these views and opinions, or be aware of their full impact and implications.

Unconscious bias can also be caused by conditional learning. For example, if a person has a bad experience with someone they categorize as belonging to a particular group, they often associate that entire group with that bad experience. From a survival point of view, this mental grouping into good or bad helped the brain make quick decisions about what was safe or not safe and what was appropriate or not appropriate. It was a developed survival mechanism hard-wired into our brains — and this makes it far more difficult to eliminate or minimize than originally thought. Luckily, though, the mind and the unconscious within it are malleable and can, therefore, be changed or controlled.

There are a few common known unconscious biases that directly impact the workplace, what we do, how we work and how we live. They include:

1. **Affinity bias**: The tendency to warm to people like ourselves. This means that people tend to choose to work with someone of the same nationality, gender, race, and age. Because it feels more comfortable to be with people who appear similar to us, we intuitively create uniform groups. The problem is that uniforms groups produce uniform ideas.

2. **Halo effect**: The tendency to think everything about a person is good because you like that person and to assume things you have not observed. The warm emotion we feel toward a person, place, or thing predisposes us to liking everything about that person, place, or thing. These good first impressions tend to positively colour later negative impressions and conversely, negative first impressions can negatively colour or persist despite later positive impressions.

3. **Perception bias**: The tendency to form stereotypes and assumptions about certain groups that make it impossible to make an objective judgement about members of those groups. Implicit stereotypes (sometimes referred to as "subconscious bias") refer to the association of groups of people with certain traits or activities. Without our being aware of it, these associations can powerfully influence decisions such as which candidate to hire. Bias is mostly applied where it is most visible: race, gender, age.

4. **Confirmation bias**: The tendency for people to seek information that confirms pre-existing beliefs or assumptions. To make sense of the world we create coherence from events. We make associations between events and regular occurrences. We assume regularity and dislike disorder. A common example is viewing or reading news articles which confirm what you already believe to be the case and challenging those which put a dissonant version to your existing views.

5. **Group think**: This bias occurs when people try too hard to fit into a particular group by mimicking others or holding back thoughts and opinions which contradict the group view. This causes them to lose part of their identities and causes organizations to lose out on creativity and innovation. Homogenous groups produce homogenous results: a diversified workforce drives greater innovation and business growth.

If people are aware of their hidden biases, they can monitor and attempt to ameliorate hidden attitudes before they are expressed through behaviour. This compensation can include attention to language, body language and to the stigmatization felt by target groups. Recognizing that the problem is in many others — as well as in ourselves — should motivate us all to try both to understand and to act.

In order to progress in society, in order to bring about the changes that are needed, we need to change our minds, deliberately and actively by being alert to and aware of our biases and acting to control them. When considering strategies to address unconscious bias one must consider both individual and institutional strategies. Institutions should:

- Develop concrete, objective indicators & outcomes for hiring, evaluation, and promotion to reduce standard stereotypes;

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- Develop standardized criteria to assess the impact of individual contributions in performance evaluations;

- Develop and utilize structured interviews and develop objective evaluation criteria for hiring;

- Provide unconscious bias training workshops for all constituents.

Individual strategies to address unconscious bias include:

- Promoting self-awareness: recognizing one's biases is the first step (by taking an Implicit Association Test);

- Understanding the nature of bias is also essential. The strategy of categorization that gives rise to unconscious bias is a normal aspect of human cognition. Understanding this important concept can help individuals approach their own biases in a more informed and open way;

- Opportunities to have discussions, with others (especially those from socially dissimilar groups) can also be helpful. Sharing your biases can help others feel more secure about exploring their own biases. It is important to have these conversations in a safe space-individuals must be open to alternative perspectives and viewpoints. This means developing the vocabulary for that discussion to take place;

- Facilitated discussions and training sessions promoting *bias literacy* utilizing the concepts and techniques have been proven effective in minimizing bias. Evidence suggests that providing unconscious bias training for faculty members reduces the impact of bias in the workplace.

There are many initiatives underway around the world to encourage the shift to equality, examples of this abound: the Equal Representation in Arbitration Pledge; the HeForShe Campaign, the GQual Campaign and various other UN Women Campaigns to address inequality in tribunals, the judiciary and in the law more generally. Many organisations *say* they are committed to equality and diversity with the following types of proclamation, heralded as some great badge of honour for the institution/organisation:

> *"The [Insert Organisation Name here] values diversity and is committed to equality of opportunity."*

or

> *"We are committed to ensuring all selection processes are fair and that all applicants receive equal treatment."*

However, saying that this is what you do or value, does not always translate into action. There is a great deal of lip service to the quotes above but how do we know that this is actually being implemented actively? If it is being done actively then why do the figures appear so woeful? The figures are not improving because women are not getting those roles, which are supposedly the subject of equality and diversity proclamations.

The tide seems to be shifting ever so slowly. Much more can and needs to be done. The global dispute resolution community needs to take steps to eradicate for the benefit of all, and in the name of justice, the inequality of treatment prevalent throughout the dispute resolution world. Changes are clearly needed in the legal profession and even small steps taken daily will eventually lead to the goal of equality/parity between men and women. It is a goal worth striving for since without equality women are unable to contribute to the work of the law as they should and society is failing to benefit from the full potential of all those who practice law.

Equality of opportunity and equality of treatment, in the law generally, but in dispute resolution more specifically, are human rights issues worthy of our support. We will all benefit immeasurably from striving to achieve such equality.

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The UNCITRAL Transparency Standards and the Ljubljana Arbitration Rules*

Judith Knieper, PhD

Judith Knieper is a legal consultant with 26 years of professional experience. She has been working in South East Europe from 1998 – 2013 for numerous donors/organizations, e.g. OSCE, CoE, Worldbank and GIZ, the Deutsche Gesellschaft für Internationale Zusammenarbeit, the German international cooperation. She conducted two regional projects in the area of CISG and Alternative Dispute Resolution for GIZ. Currently, she is working for UNCITRAL as legal officer in Vienna, Austria being responsible for the UNCITRAL Transparency Standards (the Transparency Registry being operated with the funding by the European Union and by OFID (the OPEC Fund for International Development)). She obtained both Legal State Exams in Frankfurt, Germany as well as her PhD.

50 years of UNCITRAL

The United Nations Commission on International Trade was established on 17 December 1966 when the General Assembly adopted Resolution 2205 (XXI). For the last 50 years, UNCITRAL has successfully worked to progressively harmonise and unify the law of international trade and dispute settlement has always been an important part of this work. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), known as the New York Convention, was one of the many factors that led to the creation of UNCITRAL and showed how successful a multi-lateral approach can be. Since then UNCITRAL has developed a number of texts in the area of dispute resolution, e.g. the UNCITRAL Model Law on International Commercial Arbitration in force in 72 states with a total of 102 jurisdictions having adopted it, but also contractual and other texts, e.g. like the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings.[1]

Transparency instruments in place

The multi-lateral approach is far from being outdated: In the area of investment arbitration, UNCITRAL developed the Transparency Standards from 2010-2014, consisting of the Rules on Transparency in Treaty-Based Investor-State Arbitration ('Transparency Rules'), the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ('Transparency Convention') and the Transparency Registry.

The Transparency Rules are a robust set of procedural rules making Investor-State disputes open to the public (regarding publication of documents, access to the hearing and participation of third parties to the procedure), based on a treaty concluded on or after 1 April 2014 and applying the UNCITRAL Arbitration Rules. For Investment treaties concluded before 1 April 2014, UNCITRAL prepared an 'efficient mechanism'[2] for those States that wish to make the Transparency Rules applicable to their existing treaties: the Transparency Convention. The Transparency Registry is the platform where the documents of the Investor-State disputes will be published[3].

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* The views expressed herein can in no way be taken to reflect the official opinion of the United Nations, the European Union and OFID, the OPEC Fund for International Development.

1 See the upcoming contribution of Corinne Montineri on the latest modernisation of the Notes in the next issue of the Slovenian Arbitration Review (Slovenska arbitražna praksa).

2 See Resolution 69/116 adopted by the General Assembly on 10 December 2014.

3 See under http://www.uncitral.org/transparency-registry/registry/index.jspx.

Reasons for promoting transparency in investor-State dispute resolution

Although the topic seems to be rather technical, it is of crucial importance in the area of investor-State dispute settlement (ISDS). They represent a fundamental change from the status quo of arbitrations conducted outside the spotlight. Indeed, investor-state disputes often concern regulations that have huge public policy implications, e.g. regarding health, natural resources extraction, infrastructural development, environment and energy

With this legal framework and structure in place, promotion and awareness raising is now key. Although the topic seems to be rather technical, it is of crucial importance in the area of investor-State dispute settlement (ISDS). They represent a fundamental change from the status *quo* of arbitrations conducted outside the spotlight. Indeed, investor-state disputes often concern regulations that have huge public policy implications, e.g. regarding health, natural resources extraction, infrastructural development, environment and energy. However, they were almost always private and confidential, despite the fact that these cases very often have far-reaching implications even for State budgets, an issue that, of course, interests the general public and thus should allow and enable its public access.

Before embarking in the process of drafting the Transparency Rules, governments made clear the reason why they did so. In fact, on the policy discussions on Transparency, the summary report of the UNCITRAL Working Groups reads as follows:

> *"[d]iscussion on the need of ensuring transparency in treaty-based investor-State arbitration should be considered in the context of foreign direct investment as a tool for the long-term sustainable growth [...]. Amongst others, foreign direct investment was said to contribute to building productive capacities and improve infrastructure of countries; to enhance access to essential services such as water, education, and health care — including for the poor and marginalized; and it could also generate spill-over effects by increasing demand and encouraging domestic entrepreneurship. That, it was further said, could lead to a virtuous cycle of an increase in domestic employment, in domestic demand and, ultimately, to sustained economic growth".*[4]

Target group of applying the Transparency Rules: States, parties and arbitration centres, such as the Ljubljana Arbitration Centre

Transparency is in the interest of the general public, who want to get information on investment cases, but also in the interest of States and actors in the area of investment and ISDS. The system as such is indeed very much challenged and transparency could help rebuild trust in the system and contribute to good governance[5].

A) One essential target group are States when drafting new investment treaties or when reconsidering already concluded treaties. States have followed different ways of introducing transparency into their newly negotiated treaties. Some States include rules on transparency, these rules being largely influenced and inspired by the Transparency Rules[6]. Some States allow the investors to opt for an arbitration according to the UNCITRAL Arbitration Rules, which according to Article 1(4) incorporate the Transparency Rules[7], while other states instead foresee the applicability of the Transparency Rules whatever the underlining Arbitration Rules might be[8].

For investment treaties concluded before 1 April 2014, States could make the Transparency Rules applicable to their existing treaties by adopting the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration. Up to date, the Convention has been ratified by Mauritius and signed by 16 other States, e.g. Canada, the United States, some EU member countries (not Slovenia).

B) Besides States, also the investors are an essential target group. Indeed an investor and a State could, as parties to a dispute based on a treaty, decide to apply the Transparency Rules, even when the treaty does not require their application. Since the Transparency

4 Working Group Report, A/CN.9/712, para 16.

5 Which does not mean that the discussion should or could end here: possible improvements to the ISDS system is a constant work in progress and is one of the three possible future work topics for UNCITRAL. A respective decision will be taken at the next session of the Commission, see Report of the Commission Session 2016, A 71/17, paras. 187 *et seq*.

6 The Australia-Republic of Korea Free Trade Agreement, signed on 8 April 2014 imports not only the Transparency Rules by reference to the UNCITRAL Arbitration Rules *via* Article 11:16 (3), but in addition includes in Article 11.21 a general rule on "transparency of arbitral proceedings", which is largely inspired by the Transparency Rules.

7 The Agreement between Japan and the Islamic Republic of Iran on Reciprocal Promotion and Protection of Investment allows in Article 18 II b) investors to initiate an arbitration according to the UNCITRAL Arbitration Rules.

8 See Article 10(3) of the Treaty between Switzerland and Georgia (*Accord entre la Confédération suisse et la Géorgie concernant la promotion et la protection réciproque des investissements*), which provides that whatever arbitration rules the investor may wish to apply, the Transparency Rules are in any case applicable.

Rules entered into force in 2014, this has been done in two investor-State disputes: in the case *Iberdrola, S.A. (España) and Iberdrola Energía, S.A.U. vs. Bolivia* and in the case *BSG Resources Limited vs. Guinea*.

C) A third target group are arbitration centres that offer the service to administer treaty based investor-State disputes, such as the PCA, SCC, ICC and the Ljubljana Arbitration Centre (the LAC).

Ljubljana Arbitration Centre

The LAC might wish to update its Rules[9] in order to promote its readiness to administer treaty based investor-State disputes.

The LAC Rules have been drafted in 2013 and entered into force on 1 January 2014 (Article 53 LAC Rules). The Rules define the LAC as a centre administering domestic and international disputes – no limitation to commercial arbitration is foreseen, which suggests that the LAC is ready to administer investor-State disputes as well.

Article 50 contains the rules on confidentiality. Paragraph 1 stipulates that the LAC, the arbitrators (including the emergency arbitrator) shall maintain confidentiality, unless otherwise agreed by the parties. Paragraph 2 regulates the confidentiality regime for parties – the parties could either agree or be required by a legal duty to a transparent proceeding.

In case the LAC would like to administer disputes, to which the Transparency Rules are not applicable on the basis of the investment treaty but by direct agreement of the parties, Article 50 does not constitute an obstacle. Parties agreeing to apply the Transparency Rules implicitly agree to lift the confidentiality requirements of Article 50.

In cases however, where the Transparency Rules would apply directly on the basis of an investment treaty, Article 50 may not be sufficiently clear. As stated above, Article 50(1) requires for the LAC and the arbitrators to maintain confidentiality of the proceedings unless the Parties have agreed otherwise. It might be unclear, whether this agreement was in fact reached between the Parties on the basis of the investment treaty, which provides for the application of the Transparency Rules. In any case, this dilemma may easily be overcome by applying Article 1(7) of the Transparency Rules which states that the Transparency Rules prevail. The LAC may however, wish to clarify in its Rules that any confidentiality provisions of Article 50 would be overridden by the Transparency Rules.

Furthermore, it may be useful for the LAC, in order to clarify and state its readiness to administer transparent investor-State treaty based disputes, to include in the rules a hint to the possibility of parties to agree to the application of the Transparency Rules. Such a reminder in the Rules would facilitate the LAC to promote itself as a possible venue for the settlement of treaty based investor-State disputes as well as serve the promotion of the Transparency Rules.

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Furthermore, it may be useful for the LAC, in order to clarify and state its readiness to administer transparent investor-State treaty based disputes, to include in the rules a hint to the possibility of parties to agree to the application of the Transparency Rules

9 Arbitration Rules of the Ljubljana Arbitration Centre at the Chamber of Commerce and Industry of Slovenia (the »Ljubljana Arbitration Rules«).

Abuse of process in international arbitration

Practitioner's view

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Introduction

The "Abuse of Process in International Arbitration" is a very broad topic that is discussed and shall be discussed among scholars and practitioners. The topic covers a variety of legal and factual situations that can be named as "abuse of process", but the term itself is not intentionally defined

The "Abuse of Process in International Arbitration" is a very broad topic that is discussed and shall be discussed among scholars and practitioners. The topic covers a variety of legal and factual situations that can be named as "abuse of process", but the term itself is not intentionally defined[1]. This is due to the reasons that this term can include different legal and factual circumstances, such as re-litigating the issues resolved in arbitration before the court, dilatory tactics, procedural ambushes, excessive coaching of witnesses, use of (clearly biased) experts, ethical clash of counsels from different jurisdictions etc. The range of those circumstances is very difficult to identify. However, these situations can be roughly divided into two categories:

1. The abuse of right that occurs when its beneficiary uses it in contradiction with the goal pursued by the rule instituting that right; and

2. The abuse of right when its exercise affects the balance of interests at stake and favours in a disproportionate manner the beneficiary of the right.[2]

Also, in legal literature and case law there are variety of adjectives to describe the term "abusive", such as unreasonable, arbitrary, dilatory, capricious, frivolous, harmful, malicious, vexatious, tortious, detrimental, disproportionate, fraudulent, excessive[3].

This paper shall address only one part of the abuse of process in international arbitration, this being how the counsel can respond to the abuse of process in international arbitration by the other counsel and/or other party. This paper shall also address possible remedies which are available to the counsel in described situations and whether the remedies are (not)providing sufficient "assistance" to the party conducting the arbitral process in good faith. These remedies are usually available to the parties based on the rules of institutions where the arbitration is taking place, law on arbitration of the seat of arbitration or "soft law", such as IBA Rules on the Taking of Evidence in International Arbitration[4]. This paper shall address above stated issues through several practical examples, which are frequently occurring in practice. Lastly, it is to be noted that the base for this article is not the scholarly

1 Rogers, C., "Guerilla Tactics and Ethical Regulation" in Guerrilla Tactics in International Arbitration, Horvath and Wilske (ed.), 2013, Kluwer Law International, p. 313.

2 Ascensio, H., "Abuse of Process in International Investment Arbitration" in Chinese Journal of International Law (2014), Oxford Journals, p. 763.

3 Ascensio, H., op.cit., p. 763.

4 IBA Rules on the Taking of Evidence in International Arbitration adopted by a resolution of the International Bar Association (IBA) Council on 29 May 2010.

research performed by this author, but rather his opinion based on practical experience. Nevertheless, the author believes that this article can be of interest to both practitioners and scholars in international arbitration.

Abuse of process in international arbitration through several examples

Situation 1 – Key Witness not available for cross-examination

It is not uncommon that in the long-lasting relationship between the parties, there are persons (on both sides) that are most familiar with the facts of this relationship. Further, there are contracts that contain very complex technical details, which are more understandable to persons with technical background, rather than to the lawyers. When the relationship between the parties ceases to be a relationship and becomes a dispute, these persons are often called as witnesses. Nowadays it is common to present the testimony of a witness in the written form, i.e. in the form of a statement. This possibility is expressly provided in rules of some arbitration institutions[5], but this rule is also recognized in the IBA Rules on the Taking of Evidence in International Arbitration[6], which provide for the "witness statement" as the term defined in its preamble, i.e. clearly recognising it as the type of evidence commonly used in the international arbitration. Some arbitral institutions do not a have a rule regarding the written statements of the witness, but in practice, they are frequently used.[7] Therefore, persons that are most familiar with the facts of the previous relationship often become "key witnesses" for the party that provides its witness statement as the evidence to support its case and subsequently this evidence may have significant impact on the outcome of the case. Due to its significance, it is natural that the other party may request the cross-examination of such witness, for many reasons, such as attempt to confront the witness with some other evidences, discrepancies between the statement and other written evidences in the file, request for explanation of the written statement etc. However, if the "key witness" is not available for the cross-examination for reasons that are not obviously justified (such as death or difficult illness), but rather questionable (for example providing medical documents indicating that the witness is sick, but clearly not so severely), the party that seeks the cross-examination would be deprived from such possibility and clearly placed in unequal position. Therefore, it is a question for the party seeking cross-examination how to deal with this "*guerrilla tactics*[8]". One way would be to use the possibility provided in the article 4.7 of IBA Rules on the Taking of Evidence in International Arbitration[9], i.e. request the arbitral tribunal to disregard such statement. The obstacle in application of this provision is that the arbitral tribunal needs to engage itself in determination whether there is a valid reason for not-attending the hearing, which in practice could mean that the party requesting that the statement should be disregarded needs to prove that there are no valid reasons for not-attendance or shift the burden of proof to the other party, which should then try to persuade the tribunal that the reasons are justified. Even if one counsel decides to use this possibility and arbitral tribunal disregards the statement of key witness, the statement, as such, shall remain in the file and, more importantly, in minds of the arbitrators, even though formally the statement is not considered as the evidence in that particular case. Therefore, this author believes that using the possibility to have the key witness statement simply disregarded is not the best strategy for arguing the case for the client. There are several reasons for that and they can be divided into two types. First type of the reasons is more formal and is related to the fact that arbitrators need to rule on the issue of disregarding of the statement, which include other negative issues such as:

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5 Article 33 of Arbitration Rules of the Ljubljana Arbitration Centre at the Chamber of Commerce and Industry of Slovenia (the »Ljubljana Arbitration Rules«): "*After prior consultation with the parties, the Arbitral Tribunal may order that, prior to a hearing and within a period of time set by the Arbitral Tribunal, an individual testimony shall be presented in the form of a signed written statement*" or article 28 of Belgrade Arbitration Centre (BAC) Rules: "*Unless the arbitral tribunal decides otherwise, the parties may present witness statements in writing.*"

6 Preamble of IBA Rules on the Taking of Evidences in International Arbitration states that a "Witness Statement' means a written statement of testimony by a witness of fact.

7 For example, Permanent Arbitration at Chamber of Commerce and Industry of Serbia.

8 The book that is dedicated to this subject: Guerrilla Tactics in International Arbitration, Horvath and Wilske (ed.), 2013, Kluwer Law International.

9 Article 4.7 of IBA Rules on Taking of Evidences: "*If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise*".

a. The parties would engage their time and effort in proving some issues not clearly related to the case itself;

b. The parties are losing time and money on side issues;

c. This request averts the arbitrators attention from the main points of the case;

d. The parties are proving the issues related to facts not relevant to the case, such as whether there are justified reasons for non-attendance, which could lead to the situation that one party proves that a witness is sick, while the other party proves that he/she is "not that sick" etc.);

e. The arbitrators need to adopt a formal decision on this issue either through the procedural order or in the final award and provide the reasoning, which can lead to discussion among arbitrators and even disagreement between them.

The second type of the reasons are of more material nature, i.e. related to the issue how the case would be finally presented to the arbitrators to the benefit of the party not abusing the process. Namely, there are several possibilities for the other party to react in the above described situation, without formal disregard of the witness statement:

a. In the written submission the party may comment the witness statement in details and make reference to other written evidence in the file and confront them and make conclusion that the statement is weak evidence;

b. As the key witness would not appear at the cross-examination, other party may insist that its interpretation of the facts and not of the key witness prevails, as the key witness is not present to clarify any issue;

c. If the party would insist on formal dismissal of the evidence, which would be accepted, then its initial answer in a written position to the issues stated by the key witness would be also disregarded, as they would be considered as reply to not accepted evidence and it is clear that the counsel wants these arguments to be heard and taken into consideration,

d. The party who would accept that the written statement remains as the evidence, but uses the above stated method of dealing with it, would be seen in the eyes of arbitrators as prudent, reasonable and non-aggressive party or counsel, which is something not to be disregarded when the award is to be taken.

In short, by choosing the other strategy, i.e. the strategy without using procedural methods for the dismissal of the evidences, the party creates the atmosphere of confidence in its position, arguments and interpretation of facts and turns the fact that the key witness is not available to its favour because its reply to the key witness statement remains unanswered by the party that introduced this witness, which subsequently means that its interpretation and arguments are the ones that should be weighted more by the arbitrators.

Situation 2 – Expert Witness not so "unbiased"

Use of expert witnesses appointed by the parties became a standard in international arbitration, i.e. it is expected from the parties to provide the reports of experts as part of the evidences submitted by that party. Surprisingly, it is hard to imagine the case where one party would submit the report of the expert that is not (somehow) in favour of that party. In many instances, the explanation for the above stated phenomenon is that the experts may provide their reports under different assumptions and initial information and therefore their reports may not necessarily cover the complete disputed issue in the arbitration, but rather their view on a certain issue presented to them by the party nominating them or counsels representing that party. This is why two reports that are diametrically opposed may be seen in the same case, as they sometimes do not represent the complete opinion of the expert on the disputed issue, but on the facts presented to the expert. However, sometimes it is clear from the outset that the expert is biased towards the party that appointed it, due to different reasons. Sometimes, the expert is regularly engaged by a company for different tasks and not only arbitration and therefore the expert has the interest to continue working for such a company. In some cases there could be a previous employment or similar relationship between the party and the expert or in extreme cases (which in fact occurred and the author personally experienced this situation), the expert was employed with the company affiliated with the party

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that appointed such expert. In that particular case, the expert did not mention this fact in the disclaimer or introduction of his report or at the beginning of the cross-examination. Therefore, one counsel needs to ask itself whether this person is the "Expert" or the "Witness", when it is obvious that he/she is biased and how to deal with this situation. Again, there are two possible paths that could be taken. First, the formal approach to this issue is to request the challenge of the expert through the procedure of the rules of the arbitral institution. For example, BAC Rules and Rules of the Permanent Arbitration of Serbian Chamber of Commerce and Industry provide that the challenge of the expert shall be done accordingly to the rules applicable for the challenge of the arbitrators[10]. This would mean that the party needs to file an official request for challenge of the expert and prove that *"there are circumstances that give rise to justifiable doubts as to his impartiality and independence"*[11], while the arbitral panel needs to rule on such request. In this scenario, the party requesting the challenge needs to prove the above stated circumstances, which may not always be as clear as in the presented case, and the arbitrators need to provide reasoning for their decisions. In fact, the parties and the arbitrators are again exploiting resources on issues not crucial for the case itself, but rather on issues that are of less importance. On the other hand, even if the time spent on this procedure would not be that essential, one counsel needs to ask itself what if the challenge is not accepted and the expert remains as "expert" in the particular case, which means that the arbitrators need to give weight to his report as any other expert report, even though there are indications that his impartiality and independence are not intact. In other words, one counsel and the party represented by that counsel would be in worse situation than before the challenge as the allegations regarding the impartiality and independence were not proven. Second approach to this issue is less formal and does not include the official request for challenge of this person as biased, but implies using this fact as the strategic advantage for the other party. Namely, the other party may use the fact that the expert did not disclose its affiliation to the party that appointed him to cross-examine him on that issue and request the explanation why this fact was not presented to the arbitral tribunal. This would create the "atmosphere" that one party is hiding some facts, while the other is prudent and honest to the tribunal, which is important for every arbitral tribunal. Further, typically the "biased report" would be based on too many assumptions, which would make the report not very useful to the tribunal or incomplete, if the expert does not mention all issues relevant for his opinion. This is great opportunity for the counsel to put forward all these issues and disclose the gaps in the report or indicate that assumptions on which the report has been made in fact make the report wrong and therefore not relevant for the decision in the case. So, what can be achieved by this second approach? The author believes that by opting for the second approach, the counsel does not risk that the decision on challenge would be negative, while it gains the reputation before the arbitrators that, by allowing this evidence to remain in the case, it is to be seen as the party that replies to all evidences of the other party, but also represents itself as the "honest and party loyal to the arbitral process", which the author believes is respected by the arbitral tribunals internationally.

Situation 3 – Last minute submissions

While conducting the arbitration process, the arbitral panel typically provides for some time-schedule at the beginning of the procedure (agreed by the parties), which schedule includes certain timelines and milestones until when the parties may present evidences, reply to each other's submissions, when the hearings will take place etc. Usually, the parties follow this plan, unless there are some extraordinary circumstances that could not possibly be taken into account when the schedule was agreed. However, it is not rare that a party does not follow this agreed plan and submits the evidences after the agreed period of time, introduces new evidences with each written submission, or introduces new witness or experts at the last moment. Those persons were not approved at the case management conference nor it was agreed that any party can bring expert or witness any time. Once one party introduces one evidence (witness or expert), the other party cannot simply ignore it. Neither can the arbitral tribunal ignore such evidence, since the panel certainly shall be familiar with its content. At the same time, the arbitral panels are reluctant to dismiss the evidences due to the fact that they were introduced late, because of the risk that their rejection of

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10 Article 28 of BAC Rules and article 37 of the Rules of Permanent Arbitration of Serbian Chamber of Commerce and Industry.

11 Article 21 of BAC Rules.

The author believes that the prudent counsel should weight possible positive and negative consequences before it uses formal remedies for possible abuse of process, such as challenge of experts, request for dismissal of certain evidences, as the outcome of such requests is not always certain. On the other hand, the author believes that less formal approach to the above described situations can be more beneficial for the party that is facing such situations

the evidence would be interpreted by that party that it "*was unable to present its case*" which could lead to the annulment of the award[12] or failure of recognition of the arbitral award[13] in other jurisdiction. Therefore, it is again the question for the counsel how to deal with these "last minute surprises". Similar to the above presented situations, the author believes that the formal use of procedural mechanism and request to the tribunal to reject the evidence is not beneficial to the interest of the party it represents. Namely, due to the reluctance of the tribunals to reject the evidences, the party that requests such rejection needs to engage the resources for such exercise, without great chances for success. In addition, if the evidence is not rejected, it remains with the same weight as evidences introduced timely in the file. On the other hand, this last minute surprises are opportunity for the other party to make a research why this evidence is introduced late and typically the reason would be either the attempt of the other party to "cast a new shadow on the case" or "surprise the other party with key evidence". If the counsel prepared the case properly it is hard to imagine that there can be real last minute surprises or if the counsel knew that some crucial evidence exists, but is not introduced timely, this counsel should be prepared for such scenario and should have proper answer to that. If the last minute evidence is provided to give some new view on the case, well prepared counsel shall by cross examination succeed to return the case on the path it desires. However, in practice this last minute surprises are usually attempts of the other party to introduce some evidences of suspicious nature, such as biased experts or witnesses that are not very "reliable". Therefore, this is an opportunity for the counsel to cross-examine such experts or witnesses, to confront them with other evidences in the file and by doing so, the counsel may strengthen its case, while insisting on the formal dismissal of the evidences may not have such effect or contrary, it can lead to opposite effect, as explained above.

Conclusion

By this paper, the author wanted to describe several practical situations when the counsel is faced with possible abuse of process by the opposing counsel or party and to emphasize that not necessarily each abuse of process by one party should be followed by use of formal remedies by the other party. The author believes that the prudent counsel should weight possible positive and negative consequences before it uses formal remedies for possible abuse of process, such as challenge of experts, request for dismissal of certain evidences, as the outcome of such requests is not always certain. On the other hand, the author believes that less formal approach to the above described situations can be more beneficial for the party that is facing such situations. In fact, the author believes that such situations can be the opportunity for prudent counsel to turn the abuse of process into the scenario in which it shall present its case to the arbitrators as the prudent and honest party, opposite to the one performing the abuse, which the arbitral tribunals weight when deliberating and rendering the final award.

12 Article 58 of the Arbitration Act of the Republic of Serbia.

13 Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

Initiation of Arbitration in the Context of Multi-tiered Clauses Leading to Arbitration

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Definition of the Multi-tiered Clauses Leading to Arbitration

Multi-tiered clauses leading to arbitration are also referred to as "escalation clauses", "multi-tier clauses", "step clauses" or "multi-step alternative dispute resolution clauses".[1] Multi-tiered clauses leading to arbitration may be defined as clauses that provide for resolution of disputes in two or more tiers, whereby the tiers may be divided into pre-arbitration tiers and arbitration as the last tier. The purpose of the pre-arbitration tiers is that the parties try to settle the dispute amicably, without employing arbitration. If amicable resolution of the dispute through the pre-arbitration tiers does not succeed, the dispute may then be submitted to arbitration for the final resolution.[2]

The parties may contract various dispute resolution mechanisms as the pre-arbitration tiers. The most commonly contracted are: negotiation, mediation and expert determination. Any of these pre-arbitration mechanisms may be stipulated as a pre-arbitration tier and they may also be combined. For example, the parties may stipulate only one pre-arbitration tier (e.g. negotiation) to be followed by arbitration, or they may contract complex multi-tiered clauses with all three dispute resolution mechanisms each representing one pre-arbitration tier that are followed by arbitration. The exact scheme of the pre-arbitration tiers in the multi-tiered clause depends on what the parties deem to be most appropriate for their transaction and the particular business agreement that the parties will reach.[3]

There are many reasons why the parties decide to contract multi-tiered clauses leading to arbitration. For example, parties may want to try to resolve their dispute amicably before they submit it to arbitration. Once initiated, arbitration may antagonize the parties' positions thereby reducing the probability of reaching amicable settlement of the dispute. Conduct of pre-arbitration tiers circumvents this risk since it gives the parties a chance to settle their dispute before reaching the arbitration stage. Furthermore, resolving the dispute amicably – by finding a common position and interest in the dispute – results in a much higher probability for the parties to preserve their business relationship and have a prospect of business cooperation

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1 Berger K. P.: "Law and Practice of Escalation Clauses", Arbitration International, 2006, Vol. 22, No. 1, p. 1 and Born G. B.: "International Commercial Arbitration", (3d. ed. 2009), p. 278.

2 Jollies, A.: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement", reprinted from (2006) 72 Arbitration 4 (Sweet and Maxwell, London), p. 329.

3 Manuel Arroyo (ed): "Arbitration in Switzerland: The Practitioner's Guide", Kluwer Law International 2013) p. 1453.

in the future.[4] In addition, arbitration may be very costly and time-consuming. Therefore, it may be in the interests of the parties to "filter" disputes before submitting them to arbitration, by trying to resolve them amicably through the pre-arbitration tiers stipulated in the multi-tiered clause.[5] Due to aforementioned reasons, multi-tiered clauses leading to arbitration have become standard clauses in some business transactions, such as construction contracts, especially the ones that use FIDIC rules, and intellectual property transactions.[6]

The tribunals and courts analyze the wording of the multi-tiered clause leading to arbitration in order to determine whether multi-tiered clause provides for an obligation or it provides for a right of the parties to use the pre-arbitration tiers

After the dispute arises, the claimant may question whether it needs to use all the contracted pre-arbitration tiers before it submits the dispute to arbitration or not. The answer to this question will depend on several criteria, which are elaborated in the next part of this paper.

When do the parties have to use the pre-arbitration tiers?

Arbitration practice shows that courts and arbitral tribunals do not require the parties to use strictly defined formulation when drafting multi-tiered clause leading to arbitration in order to contract a mandatory pre-arbitration tier

Detailed analysis of the case law shows that the courts and arbitral tribunals use three criteria to determine whether a particular pre-arbitration tier has to be used by the claimant before it submits the dispute to arbitration. The courts and arbitral tribunals:

a. analyze the wording of the multi-tiered clause leading to arbitration;

b. analyze whether the parties contracted a precise mechanism with determined time limits in the multi-tiered clause leading to arbitration; and

c. apply general principles of contract law.

These criteria are elaborated in more detail hereunder.

Wording of the Multi-tiered Clause Leading to Arbitration

The tribunals and courts analyze the wording of the multi-tiered clause leading to arbitration in order to determine whether multi-tiered clause provides for an *obligation* or it provides for a *right* of the parties to use the pre-arbitration tiers. If the multi-tiered clause provides for an obligation to use the pre-arbitration tier (mandatory pre-arbitration tier), this will point to conclusion that the claimant may initiate arbitration only after employing such mandatory pre-arbitration tier. On the other hand, if the multi-tiered clause provides for a right of the parties to use the pre-arbitration tiers, the claimant may submit the dispute directly to arbitration, without using the non-mandatory pre-arbitration tier.

Arbitration practice shows that courts and arbitral tribunals do not require the parties to use strictly defined formulation when drafting multi-tiered clause leading to arbitration in order to contract a mandatory pre-arbitration tier. Generally, any wording which supports conclusion that the parties contracted an obligation to use the pre-arbitration tier will suffice. In line with this, it was considered that the following multi-tiered clauses provided for mandatory pre-arbitration tier:

- "Any controversy that may arise [...] out of this Agreement *shall* be submitted to senior management representatives of the parties who will attempt to reach an amicable settlement [...]. If an amicable solution cannot be reached by negotiation, the dispute *shall* be finally settled by arbitration by a panel of one (1) arbitrator.";[7]

- "Disputes *shall* be adjudicated by a DAB in accordance with Sub-Clause 20.4. [Sub-Clause 20.4:] If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of the Contract [...] either Party *may* refer the dispute in writing to the DAB for its decision [...]. If either Party is dissatisfied with the DAB's decision, then either Party *may*, [...] give notice to the other Party of its dissatisfaction. [...] [*N*]*either Party shall be entitled to commence arbitration* of a dispute

4 Kayali, D.: "Enforceability of Multi-Tiered Dispute Resolution Clauses", Journal of International Arbitration, Kluwer Law International 2010, Volume 27 Issue 6, pp. 551-553.

5 Fernández-Ballesteros M. A. and Arias D. (eds): "Liber Amicorum Bernardo Cremades", Wolters Kluwer España; La Ley 2010, p. 733.

6 Pryles, M.: „Multi-Tiered Dispute Resolution Clauses", Volume 18, no. 2 (2001), Journal of International Arbitration, p. 159. Gomm Ferreira Dos Santos, M.: "The Role of Mediation in Arbitration: The Use and the Challenges of Multi-tiered Clauses in International Agreements", Revista Brasileira de Arbitragem, Comitê Brasileiro de Arbitragem (CBAr) & IOB 2013, Volume X Issue 38, p. 9.

7 Jimenez-Figueres D.: "Multi-Tiered Dispute Resolution Clauses in ICC Arbitration", 14 ICC Bull. 71 (No. 1, 2003), pp. 84 – 85 (all emphasis added).

unless a notice of dissatisfaction has been given in accordance with this Sub-Clause. [...] Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration.";[8]

- clauses which provide that arbitration may start "only if" a particular pre-arbitration tier is employed by the claimant;[9] or

- clauses with similar wording that indicates the parties' intention to contract a mandatory pre-arbitration tier.

On the other hand, it was considered that non-mandatory pre-arbitration tiers were contracted in case multi-tiered clause provided the following:

- "all disputes related to the present contract *may* be settled amicably";[10]

- "either party [...] *may* refer the dispute to an expert for consideration of the dispute";[11]

- multi-tiered clause which expressly provides that engagement in a particular pre-arbitration tier is a right or an option of the parties; or

- any other multi-tiered clause which would stipulate that a particular pre-arbitration tier is non-mandatory.

Precise Mechanism with Clear Time Limits

Besides analyzing the wording of multi-tiered clause leading to arbitration, arbitral tribunals and courts often analyze whether the parties contracted a precise mechanism with determined time limits for the pre-arbitration tier. As a general rule, the more detailed mechanism with clear time limits is stipulated in the clause, the more likely it is that arbitral tribunal or court finds pre-arbitration tier mandatory. For example, if a multi-tiered clause generally stipulates pre-arbitration mediation – without specifying applicable procedural rules for mediation or how long pre-arbitration mediation should last before the parties may go to arbitration – this will strongly point to conclusion that such pre-arbitration mediation is non-mandatory.

Importance of this criterion is evident from the case law. For example, in ICC case no. 6276 from January 1990 the dispute settlement clause was:

> *"Any differences arising out of the execution of the Contract shall be settled friendly and according to mutual goodwill between the two parties; if not, it shall be settled in accordance with Clause 63 of the General Conditions of Contract."*[12]

Clause 63 provided that the dispute is to be submitted to the Engineer for decision on the dispute and provided in great detail the procedure to be followed by the parties and the Engineer. The tribunal found that, while the claimant abided to the first pre-arbitration tier, the second pre-arbitration tier was not conducted by the claimant. The claimant argued that it is dismissed from its obligation to submit the dispute to the Engineer since it was not informed by the respondent on the name of the Engineer. The tribunal rejected claimant's argument and concluded that: "procedure, which has been entered into voluntarily made *detailed*, encased within *precise time limits* and requiring the Engineer to draft a report, is strictly binding upon the parties and governs their conduct before resorting to arbitration... is governed by precise rules which may not be transgressed."[13]

The same approach was taken by many legal scholars, courts and arbitral tribunals.[14]

Besides analyzing the wording of multi-tiered clause leading to arbitration, arbitral tribunals and courts often analyze whether the parties contracted a precise mechanism with determined time limits for the pre-arbitration tier

8 Case A. SA v. B. SA, Swiss Federal Supreme Court decision no. 4A_124/2014, judgment of July 7, 2014 (all emphasis added).

9 Varady, T., Barcelo III J. J., Von Mehren A. T.: "International Commercial Arbitration, a Transnational Perspective", V Edition, 2012, American Casebooks, p. 14.

10 ICC case no. 4230, as cited in Kayali, D.: "Enforceability of Multi-Tiered Dispute Resolution Clauses", Journal of International Arbitration, (Kluwer Law International 2010, Volume 27 Issue 6) p. 567, (emphasis added).

11 ICC case no. 10256, cited in Jimenez-Figueres D.: "Multi-Tiered Dispute Resolution Clauses in ICC Arbitration", 14 ICC Bull. 71 (No. 1, 2003), pp. 87-88, (emphasis added).

12 See ICC case no. 6276 from January 1990, a Swedish contractor v. the Secretary of the People's Committee for a Municipality of an Arab State and the Secretary of the People's Committee of Health of that Municipality, Partial Awards, ICC Case Nos. 6276 and 6277, 1990, International Journal of Arab Arbitration, 2009, Volume 1 Issue 4) pp. 363 – 367.

13 *Ibid.*

14 See for example decisions of the Swiss Federal Supreme Court, case no. 4A_46/2011, judgment of May 16, 2011; Swiss Federal Supreme Court, case no. 4A_18/2007 of June 6, 2007; German BGH no.

This is a logical approach since, the more precise multi-tiered clause with clear time limits is stipulated, the easier it will be for the courts and tribunals to determine true will of the parties. Vague and broad clauses without precise mechanism and time limits for pre-arbitration tiers may lead to situations in which one party is precluded from initiating arbitration for indeterminate period of time, which is reason why the courts and tribunals will generally hesitate to enforce such vague clauses. On the other hand, detailed structure of the pre-arbitration tiers points to conclusion that the parties gave sufficient consideration to the pre-arbitration tiers and also makes the pre-arbitration tier sufficiently determined so that it may be enforced by the courts or tribunals.

General principles of contract law

The third criterion used by the courts and arbitral tribunals is the application of the general principles of contract law. This criterion is applied as a corrective in comparison to the first two aforementioned criteria

The third criterion used by the courts and arbitral tribunals is the application of the general principles of contract law. This criterion is applied as a corrective in comparison to the first two aforementioned criteria. So, even if the arbitral tribunal or court (when applying first two criteria) finds that the parties agreed on a mandatory pre-arbitration mechanism, it will not enforce such mandatory pre-arbitration mechanism and will allow the claimant to submit the claim directly to arbitration if such result would be in accordance with the general principles of contract law.

The arbitration practice shows that the courts and tribunals analyze the following:

- whether the claimant tried to resolve the dispute pursuant to the contracted multi-tiered clause leading to arbitration;
- whether the claimant's and respondent's behavior was in accordance with the principle of good faith;
- whether it would be in accordance with the general principles of contract law, and in particular the principle of good faith, to allow the claimant to submit the dispute directly to arbitration, before conducting all the contracted pre-arbitration mechanisms as stipulated in the multi-tiered clause.[15]

An example of the application of this criterion may be seen in the case of the Swiss Federal Supreme Court where the mentioned court rejected the respondent's objection to the arbitral tribunal's jurisdiction. Respondent's objection was based on the fact that the claimant submitted its claim prematurely, without conducting pre-arbitration mediation pursuant to contracted multi-tiered clause leading to arbitration. The Swiss Federal Supreme Court considered that the respondent's objection was not raised in good faith.[16] It found that even though respondent had opportunities to pursue pre-arbitration mediation itself, it never used these opportunities. Namely, respondent never initiated and not even suggested conduction of pre-arbitration mediation – it only used the lack of pre-arbitration mediation to challenge the jurisdiction of the tribunal, which in the court's view precluded it from raising such objection.[17]

Similarly to the Swiss Federal Supreme Court, arbitration practice and legal scholars also consider the claimant should have the right to submit the dispute directly to arbitration if it tried to resolve the dispute through the mandatory pre-arbitration tier, but the respondent refused to take part in the pre-arbitration tier or otherwise prevented the utilization of the pre-arbitration tier. According to these sources, in such situation, any respondent's objection that the mandatory pre-arbitration tier was not properly conducted should be rejected as abusive and contrary to the principle of good faith and the court or the tribunal should deny

VIII ZR 344/97 of November 18, 1998; French Cour de Cassation in Cass. com. *Medissimo v. Logica*, 29 April 2014, no 12-27.004; Supreme Court of New South Wales, Australia, in the case Hooper Bailie Associated Ltd v. Natcon Group Pty Ltd as cited in Michael Pryles: "Multi-Tiered Dispute Resolution Clauses", Journal of International Arbitration, Kluwer Law International 2001, Volume 18 Issue 2, pp. 162 – 163; Candid Prod. Inc. v. International Skating Union, 530 F. Supp. 1330 (S.D.N.Y. 1982) and International Research Corp. PLC v. Lufthansa Systems Asia Pacific Pte Ltd and Datamat, Supreme Court of Singapore, High Court, 12 November 2012, Summons No 636 of 2012. Also see Fernández-Ballesteros M.A. and Arias D. (eds): "Liber Amicorum Bernardo Cremades" Wolters Kluwer España; La Ley 2010, p. 744; Jollies A.: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement", Reprinted from (2006) 72 Arbitration, p. 330. and Arroyo M. (ed): "Arbitration in Switzerland: The Practitioner's Guide", Kluwer Law International 2013) p. 1456.

15 Kayali, D.: "Enforceability of Multi-Tiered Dispute Resolution Clauses", Journal of International Arbitration, Kluwer Law International 2010, Vol. 27, Issue 6, p. 570-571.

16 In this case the Swiss Federal Supreme Court found that the pre-arbitration mediation was not mandatory. However, the court gave additional reasons for dismissing the respondent's arguments by analyzing the behavior of the parties through the principle of good faith.

17 Judgment of the Swiss Federal Supreme Court in the case A. SA v. B. SA, no. 4A_18/2007 of June 6, 2007.

enforcement of the multi-tiered clause. On the other hand, if the claimant submitted the dispute directly to arbitration in breach of the multi-tiered clause leading to arbitration, even though the respondent was prepared to conduct the mandatory pre-arbitration tier, the claimant has no right to initiate arbitration and the mandatory pre-arbitration tier should be enforced.[18]

Repercussions of a failure to use the pre-arbitration mechanisms

Courts and tribunals have two different approaches when deciding on the consequences of a premature claim submitted in breach of the multi-tiered clause leading to arbitration. These approaches are the substantive approach and the procedural approach.

According to the substantive approach, multi-tiered clause leading to arbitration is a contract of substantive legal nature. Accordingly, if the claimant breaches its obligations arising out of the multi-tiered clause, the respondent may seek remedies available for the breach of the contract (*e.g.* damages). The substantive approach is mostly abandoned today since it is not practical. Namely, in vast majority of cases the respondent in the arbitration will not be able to prove any damages resulting from the claimant's breach of the multi-tiered clause, leaving such breach without any sanctions.[19]

Procedural approach is accepted in most courts' and arbitral tribunals' decisions. According to this approach, multi-tiered clauses are contracts of procedural nature, so the breach of the multi-tiered clause should have repercussions on the arbitration procedure. This approach has two variations. According to the first variation, when the claimant submits the dispute to arbitration prematurely, multi-tiered clause should be enforced by dismissing the claim. According to the second variation of the procedural approach, the tribunal should order a stay of the arbitration proceedings until the contracted procedure has been complied with by the claimant.[20]

Although there are court and tribunal's decisions that follow both variations of the procedural approach,[21] scholars mainly advocate the second variation as more practical. Staying the arbitral procedure until all the mandatory pre-arbitration tiers have been used by the claimant seems to be in both parties interests. The respondent's interests are validly protected since arbitral proceedings will not be continued until the claimant conducts all the mandatory pre-arbitration tiers pursuant to the multi-tiered clause leading to arbitration. The claimant's interests are also protected since it will not have to pay double fees for the arbitration proceedings and there will be no risk of lapse of statute of limitation (since the claim will not be dismissed). Also, another issue that should be taken into consideration is that, if the claim is dismissed as premature, both parties will lose precious time in constitution of the new tribunal after the dispute is submitted again to arbitration. On the other hand, if the arbitration procedure is stayed, both parties will benefit from swift justice since it will not be necessary to appoint another tribunal, which may be time consuming and may result in additional costs for the parties.[22]

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18 See Fernández-Ballesteros M.A. and Arias D. (eds): "Liber Amicorum Bernardo Cremades", Wolters Kluwer España, La Ley 2010, pp. 741 – 742; Jollies A.: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement", Reprinted from (2006) 72 Arbitration, Sweet and Maxwell, London, p. 330. See decisions of the Swiss Federal Supreme Court in the case X Ltd. v. Y S.p.A., no. 4A_628/2015 of March 16, 2016 and in the case A. SA v. B. SA, no. 4A_124/2014, judgment of July 7, 2014, Manufacturer v Manufacturer, Final Award, ICC Case No. 8445, 1994 in Albert Jan van den Berg (ed), Yearbook Commercial Arbitration 2001 – Vol. XXVI, Yearbook Commercial Arbitration, Kluwer Law International 2001, pp. 167 – 180; see Biloune (Syria) and Marine Drive Company Ltd. (Ghana) v. Ghana Investment Centre and Government of Ghana (UNCITRAL), Award on Jurisdiction and Liability, 27 October 1989, 95, ILR, 184, XIX Yearbook Commercial Arbitration 11 (1994), p. 18.

19 See decision of the Swiss Federal Supreme Court in the case X Ltd. v. Y S.p.A., no. 4A_628/2015 of March 16, 2016. See Boog C.: "How to Deal with Multi-tiered Dispute Resolution Clauses - Note - 6 June 2007 - Swiss Federal Supreme Court", ASA Bulletin, Association Suisse de l'Arbitrage; Kluwer Law International 2008, Volume 26 Issue 1, p. 107.

20 Jollies, A.: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement", Reprinted from (2006) 72 Arbitration 4, Sweet and Maxwell, London, pp. 331, 336 – 337.

21 For example, the author participated in arbitration in which the tribunal decided to dismiss a premature claim submitted in breach of the multi-tiered clause leading to arbitration.

22 See decision of the Swiss Federal Supreme Court in the case X Ltd. v. Y S.p.A., no. 4A_628/2015 of March 16, 2016; cases Hooper Bailie Associated Ltd. v. Natcon Group Pty Ltd., (1992) 28 N.S.W.L.R. 194., Channel Tunnel Group v. Balfour Beatty Construction Ltd. [1993] A.C. 334., Cable & Wireless plc v. IBM United Kingdom Ltd. [2002] C.L.C. 1319. Also see Kayali D.: "Enforceability of Multi-Tiered Dispute Resolution Clauses", Journal of International Arbitration, Kluwer Law International 2010, Volume 27 Issue 6, pp. 551 – 577. Furthermore, see Jollies A.: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement", Reprinted from (2006) 72 Arbitration, pp. 332 – 333, 336 – 337.

Jurisdiction to decide on the issue of premature arbitration

Multi-tiered clauses leading to arbitration provide many benefits for business parties, if properly drafted

However, poorly drafted multi-tiered clauses may lead to disputes between the parties and result in legal repercussions which the parties did not necessarily have in mind when drafting the clause. This is why the drafting of such clauses should be done with the appropriate care, having in mind the criteria regarding the enforceability of the multi-tiered clauses leading to arbitration that are set forth in the courts' and arbitral tribunals' practice, as analyzed this paper

If the claimant submits the claim to arbitration tribunal prematurely, contrary to the multi-tiered clause leading to arbitration, a question arises who should decide on the consequences of such premature claim. It might be argued that the court should have jurisdiction since arbitration may start only after the whole procedure stipulated in the multi-tiered clause was followed through. However, a line of scholarly work and courts' and arbitral tribunals' decisions argue that this issue is covered by the *Kompetenz-Kompetenz* principle and that the arbitral tribunal should have competence to decide on the repercussions of a premature claim.[23]

This seems as a justified approach. By contracting multi-tiered clause parties agree on arbitration as a final dispute resolution mechanism, after the pre-arbitration tiers have been used, thereby excluding the jurisdiction of the courts to adjudicate their dispute. Such agreement does not change legal nature if one party breaches the stipulated pre-arbitration procedure and submits claim to the arbitration tribunal prematurely. Conclusion that state courts should be competent to decide on the repercussions of the premature claim would be defendable only in special circumstances when the parties themselves expressly contracted that pre-arbitration mechanism is condition precedent to arbitration. However, in other situations, in which the parties have contracted a mandatory pre-arbitration mechanism but have not expressly contracted the pre-arbitration mechanisms as a condition precedent to arbitration, such stand-point is without merit.

Conclusion

Multi-tiered clauses leading to arbitration provide many benefits for business parties, if properly drafted. Parties may amicably settle their dispute or they may, if amicable settlement of the dispute proves to be unsuccessful, submit the dispute to arbitration. However, poorly drafted multi-tiered clauses may lead to disputes between the parties and result in legal repercussions which the parties did not necessarily have in mind when drafting the clause. This is why the drafting of such clauses should be done with the appropriate care, having in mind the criteria regarding the enforceability of the multi-tiered clauses leading to arbitration that are set forth in the courts' and arbitral tribunals' practice, as analyzed this paper. This paper suggests that there are widely accepted criteria for drafting mandatory multi-tiered clauses leading to arbitration that are enforced by the courts and arbitral tribunals. In case arbitration is initiated prematurely, in breach of multi-tiered clause leading to arbitration, this paper suggests that procedural approach should be taken by the courts and tribunals when deciding on the repercussions of the premature claim and that stay of the arbitral proceedings should be a preferred sanction for such breach.

23 See Fernández-Ballesteros M.A. and Arias D. (eds): "Liber Amicorum Bernardo Cremades", Wolters Kluwer España; La Ley 2010, p. 733; Born G. B.: "International Commercial Arbitration", (3d. ed. 2009), p. 241 and Jollies A.: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement", Reprinted from (2006) 72 Arbitration, p. 330., Jollies A.: „Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement", Reprinted from (2006) 72 Arbitration, p. 335. See ICC case no. 9977 dated June 22,1999; decision of the Swiss Federal Supreme Court taken in the case A. SA v. B. SA, no. 4A_124/2014, judgment of July 7, 2014.; decision Cour d'appel Paris, 4 March 2004 in *Nihon Plast v. Takata-Petri*, Revue de l'arbitrage 1/2005, 143-161; Burlington N.R.R. Co. v. Canadian Nat'l Railway, [1997] 1 S.C.R. 5 (B.C. S.Ct.).

The scope of key issues in the arbitration of Montenegro compared to the benchmark arbitral institutions in the world

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Introduction

On 31 July 2015 the Parliament of Montenegro adopted the Law on arbitration[1]. Montenegro passed the Law on arbitration, being one of 90 states that implemented the UNICTRAL Model Law. The law came into force in August 2015. As the Provisions from the Law on Civil Procedure had been applied before the Law on arbitration was passed, it had been noticed that the Law on Civil Procedure was not suitable for the current needs of businesses, investors and other interested parties as the Law on Civil Procedure was incomplete and in certain provisions contradictory.[2] In addition, one of the provisions, *inter alia*, stipulated that in case the arbitration court was composed of persons among which one person was a judge at one of the state courts, he or she had to be the chairperson of the Arbitral Tribunal or a sole arbitrator.[3]

By the adoption of the Law on arbitration the distinction between domestic disputes and disputes with a foreign element was eliminated. Soon after the enforcement of the Law on arbitration drafting of the new Arbitration rules commenced.[4] Prior to the adoption of Arbitration rules before the Chamber of Commerce of Montenegro, the Assembley of the Chamber of Commerce of Montenegro (the CCM) brought the decision on the constitution of the Arbitration court before the CCM, which means that the previous two arbitration courts were abolished: the Permanent Elected Court and the Foreign Trade Arbitration Csourt. The permanent list of arbitrators was abolished according to the new regulation that contains only a list of arbitrators having the informative character.

While drafting the Montenegrin arbitration rules[5], the working group carried out examinations regarding comparative resolutions and concluded that in the last few years drafting and adoption of new arbitration rules occurred in the following arbitral institutions: UNCITRAL Rules (2010)[6], ICC Rules (2012)[7],

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1 Law on arbitration, Official Gazette of Montenegro, No. 47/2015.

2 Law on Civil Procedure, Official Gazette of Montenegro, Nos. 22/2004 and 76/2006.

3 Law on Civil Procedure, Art. 475, para. 2.

4 Arbitration rules of the Arbitration court before the Chamber of commerce of Monenegro, 2015.

5 Working group avails of the opportunity to express special gratitude to the Embassy of the Kingdom of Norway, GIZ and especially to prof. dr. Aleš Galič, Vice-Chairperson of the Ljubljana Arbitration Centre (the LAC), who was the main bearer of all activities related to drafting the 2015 Arbitration rules of the Arbitration court before the Chamber of commerce of Monenegro.

6 The United Nations Commission on International Trade Law.

7 ICC International Court of Arbitration.

Rules of Lewiatan court of arbitration (2012)[8], VIAC Rules (2013)[9], ADCCCA Rules (2013)[10], BAC Rules (2013)[11], LCIA Rules (2014)[12] and the Ljubljana Arbitration Rules (2014)[13].

Striving to adjust the arbitration rules to the current events and aiming to be in line with other arbitral institutions features the adoption of arbitration rules of Zageb by the end of 2015[14], as well as the Arbitration rules of the Permanent elected court before the Chamber of Commerce of Serbia in June, 2016.[15] There is a good example of SIAC that originally adopted its arbitration rules in 2013 and after three years, new rules were adopted indicating the awarness of how important it is to achieve more efficient and thorough dispute resolution through arbitral proceedings and continuous adjustments to current trends. New SIAC Rules (2016) will obtain consolidation of disputes and it will give chance to parties to join the existing arbitration and by doing so to provide resolution of proceedings in the early stage. These modifications contributed to more expedient and more efficient proceedings of the SIAC arbitration.[16]

On the occasion of drafting new Arbitration Rules of Montenegro, the Ljubljana Arbitration Rules (2014), the Rules of Austrian VIAC, the New ICC Rules and UNICTRAL Rules have been compared

On the occasion of drafting new Arbitration Rules of Montenegro, the Ljubljana Arbitration Rules (2014), the Rules of Austrian VIAC, the New ICC Rules and UNICTRAL Rules have been compared.

Since the adoption of modifications and amendments to the UNICTRAL Model Law, new provisions have been established such as: interim measures, emergency arbitration, emergency arbitrator and multi-party arbitration. First, there was a caution whether to accept the amendments to national law or to enact new laws on arbitration on the basis of the adopted amendments to the UNICTRAL Model Law.

In this article, I will pay special attention to the sections related to commencement of arbitral proceedings, interim measures, emergency arbitral proceedings and proceedings before the emergency arbitrator.

Commencement of the arbitral proceedings

Pursuant to the Law on Arbitration in Montenegro, it is envisaged that the arbitral proceedings commence by filing a request for arbitration or a statement of claim[17], while the Arbitration Rules of the CCM stipulate that the arbitral proceedings shall be instituted by lodging a statement of claim, and arbitration begins when the court receives the statement of claim.[18] Similarly, arbitral proceedings before the Permanent Arbitration Court of the Croatian Chamber of Economy are initiated by a claim[19], whereas the Rulebook on Permanent arbitration of the Chamber of Commerce of Serbia envisages the commencement of the proceedings by filing a request for arbitration or by filing a statement of claim to the secretariat.[20] The Belgrade Rules in Article 11, provide that the proceedings may be commenced only by the statement of claim, as opposed to the rules of the FTCA (and many other institutions), which allow for the commencement of the proceedings both by a request for arbitration and a statement of claim. This is said to promote the efficiency of the proceedings, since the claimant's claims must be presented in the first written submission. Pursuant to Article 11(6) of the Belgrade rules, if the statement of claim does not contain all the required elements, the Secretariat may invite the claimant to supplement it within a specified period of time. If the claimant fails to do so, the Secretariat may determine that the proceedings are terminated.[21]

8 Rules of the Court of Arbitration at the Polish Confederation of Private Employers Lewiatan.

9 The International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (Vienna International Arbitral Centre).

10 Abu Dhabi Centre for Arbitration and Mediation.

11 Rules of the Belgrade Arbitration Centre.

12 London Court of International Arbitration Centre.

13 Arbitration Rules of the Ljubljana Arbitration Centre at the Chamber of Commerce and Industry of Slovenia (the Ljubljana Arbitration Rules), 2014.

14 The Rulebook on arbitration before the Permanent arbitration court of the Croatian Chamber of Economy (The Rules of Zagreb), 2015.

15 The Rulebook on Permanent arbitraton before the Chamber of Commerce of Serbia (Official Gazette of the RS, No. 58/2016).

16 See http://www.bakermckenzie.com/-/media/files/insight/publications/2016/07/new-siac-rules-2016/al_singapore_newsiacrules_ (15. 07. 2016).

17 Law on arbitration, Official Gazette of Montenegro, No. 47/2015, Art. 35.

18 Rules on Arbitration of the arbitration court before the Chamber of Commerce of Montenegro, 2015, Art. 4.

19 The Rulebook on arbitration before the Permanent arbitration court of the Croatian Chamber of Economy (The Rules of Zagreb), 2015, Art. 28, para. 1, it. 1.

20 The Rulebook on permanent arbitration before the Chamber of Commerce of Serbia ("Official Gazette of the RS", No. 58/2016) Art. 25, para. 1, it. 1.

21 See http://kluwerarbitrationblog.com/2014/05/06/belgrade-arbitration-center-adopts-bac-rules/ (G. Born, M. Scekic.: Belgrade Arbitration Centre adopts BAC Rules (14. 09. 2016).

Regarding the very procedure of commencing the arbitral proceedings, e.g. the party desiring to commence an arbitration before CAM/CCBC will notify this institution through its President, in person or by registered mail, providing sufficient copies for all the parties, arbitrators and the Secretariat of the CAM/CCBC. The Secretariat of the CAM/CCBC will send a copy of the notice and respective documents that support it to the other party, requesting that, within fifteen days, it describes in brief any matter that may be the subject of its claim, the respective amount, as well as comments regarding the seat of arbitration, language, applicable law.[22]

Filing a claim instead of a request for arbitration according to the Arbitration Rules of CCM is devised to commence and complete the arbitration procedure as soon as possible and respondent may within 30 days, at the latest, respond to the statement of claim, file a counterclaim or lodge a set-off claim, and possibly object to the jurisdiction of the arbitration court.[23] This procedure is contrary to other arbitration rules within which the arbitral proceedings commence by filing the request for arbitration[24] and respondent can lodge the objection to the jurisdiction of the arbitration court only after the constitution of the tribunal in the response to the statement of claim. Under most institutional rules, the respondent will be afforded an opportunity, within a time limit, to reply to the request for arbitration and assert counterclaims. The time for replying is ordinarily short: Article 5 of the 2012 ICC Rules grants 30 days, as does Article 3 of the 2014 ICDR Rules, while Rule 4(1) of the 2013 SIAC Rules allows for 14 days. These deadlines are often extended, either by agreement between the parties or leave of the institution.[25]

According to the Rules on Arbitration of the arbitration court before the CCM the Arbitral Tribunal is bound to render the arbitral award within 6 months from the date of the submission of the case to the Arbitral Tribunal. This deadline has been determined to make the arbitral proceeding as efficient as possible.[26]

Interim measures

Interim and conservatory measures also known as provisional or protective measures[27] that can be ordered by the Arbitral Tribunal have been enabled and placed at the disposal of arbitral institutions thanks to the amendments of UNICTRAL Model Law in 2006.[28] These amendments[29] that are related to interim measures were accepted with caution and skepticism by various arbitral institutions and only after many years, i.e after the amendments to the rules of the arbitral proceedings, have arbitral institutions dedicated a special section to interim measures and an emergency arbitration procedure.[30] Although great limitations existed in the past with regard to the authority of the Arbitral Tribunal to issue such interim measures, national laws and the institutional rules now provide for such power of Arbitral Tribunals.[31] By obtaining authorization to be able to order an interim measure, Arbitral Tribunals were given full jurisdiction in making the decision. It was absurd that the Arbitral Tribunal could make a decision on the merits of the dispute, and it was not allowed to make a decision regarding interim measures because until the adoption of amendments to the UNICTRAL Model Law 2006 only the state court could order an interim measure. Nowadays, Montenegrin Law on Arbitration and the Arbitration

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22 CAM/CCBC, Center for arbitration and mediation of the Chamber of Commerce Brazil-Canada, Arbitration Rules, Chapter II, Article 4.

23 Rules on Arbitration of the arbitration court before the Chamber of Commerce of Montenegro, 2015, Art. 7.

24 See Lew, J. D. M., Mistelis, L. & Kröll, S.: Comparative International Commercial Arbitration, Kluwer Law International, the Hague, London, New York. 2003, p. 515.

25 Born, G.: Procedural Issues on International Arbitration, second edition, Wolters Kluwer, The Hague, London, New York. 2016, p. 168

26 Rules on Arbitration of the arbitration court before the Chamber of Commerce of Montenegro, Art. 40.

27 See Scherer, M., Richman, L. M., Gerbay, R.: Arbitrating under the 2014 LCIA Rules, User's Guise, Wolters Kluwer, the Hague, London, New York. 2015, 259.

28 UNICTRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted 2006, Art. 17.

29 See Tucker, A. L.: Interim Measures Under Revised UNCITRAL Arbitration Rules: Comparison to Model Law Reflects both Greater Flexibility and Remaining Uncertainty, Volume 1, Issue 2, International Commercial Arbitration Brief, 1, 2/2011, p. 15-23.

30 For a recent detailed overview of the availability of interim measures in support of arbitration in 43 different jurisdictions worldwide, see Lawrence W. Newman and Colin O. (eds.), Interim Measures in International Arbitration (Juris 2014). See also, IBA Arbitration Committee, Arbitration – Country Guides, which give further information on the law and practice of arbitration in more than 50 countries, available at http://www.ibanet.org.

31 Born, G.: International Commercial Arbitration, (2009), p. 1966 in: K. Heinz, S. M. Böckstiegel: Arbitration in Germany, The Model Law in Practice, Wolters Kluwer, the Hague, London, New York, second edition, 2015, p. 654.

Rules of the Arbitration Court at the CCM, based on the UNCITRAL Model Law amendments have regulated the issue of interim measures in detail.

An interim measure can be ordered at the request of any party, if parties have not otherwise agreed. The Arbitral Tribunal adopts the interim measure in the form of an order or in another form.

According to the Montenegrin Law it is envisaged that the party requesting an interim measure shall, within its request, offer indisputable evidence that in case the interim measure is not ordered, it shall most likely cause damage that will not be adequately compensated and that such damage will be much greater than the damage suffered by the party against whom the interim measure is ordered

Having ordered the interim measure by the Arbitration Tribunal, prior to rendering the final arbitral award on the merits of the case, the party is required to:

1. Maintain or restore the *status quo* pending determination of the dispute;

2. Take action that would prevent, or refrain from taking action that is likely to cause, current or future harm or prejudice to the arbitral process itself;

3. Preserve assets out of which the obligations imposed in the arbitral award may subsequently be enforced; or

4. Preserve evidence that may be relevant to the resolution of the dispute.[32]

The Arbitral Tribunal may require from the parties to grant appropriate security.[33] In case of emergency the Arbitral Tribunal can order an interim measure before granting the opposing party the opportunity to voice its opinion regarding the interim measure. However, the Arbitral Tribunal is obliged, at the earliest convenience, to give the opposing party a chance to express its opinion regarding the request and make comments on ordering the interim measure.[34]

Montenegrin Law on arbitration regulates the modification, suspension and termination of interim measures

Article 25 of the LCIA Rules expressly authorizes the Arbitral Tribunal to order a party to provide security for all or part of the amount in dispute and also to preserve, store or sell a thing under the control of such party and relating to the subject matter of the arbitration. Furthermore, it should be noted that pursuant to Article 25 (3) of the LCIA Rules, after the formation of the Arbitral Tribunal, the parties may resort to state courts for interim measures in exceptional circumstances only. In order to facilitate parties needing urgent interim measures before the constitution of the Arbitral Tribunal, Article 29 of the ICC Arbitration Rules now provides the "emergency arbitrator" the power to grant such interim measures.[35]

According to the Montenegrin Law it is envisaged that the party requesting an interim measure shall, within its request, offer indisputable evidence that in case the interim measure is not ordered, it shall most likely cause damage that will not be adequately compensated and that such damage will be much greater than the damage suffered by the party against whom the interim measure is ordered. There is a possibility that the party requesting an interim measure will succeed on the merits of the claim, where such possibility shall not affect the discretion of the Arbitral Tribunal in making any subsequent determination. The Arbitral Tribunal must assess and take into consideration interests of each party[36].

Similar to the Montenegrin Law, DIS Rules provide[37] that the Arbitral Tribunal may (but is not required to) request the applicant to provide appropriate security in connection with the interim measure ordered. The Arbitral Tribunal has discretion as to the kind and amount of the security requested. The Arbitral Tribunal will generally take into account and quantify the damage, which could arise from the interim measure to the party concerned. The competent German state court may have the discretion to admit, deny or modify the interim measure rendered by the Arbitral Tribunal.

Montenegrin Law on arbitration regulates the modification, suspension and termination of interim measures. The Arbitral Tribunal may modify, suspend or terminate an interim measure at the request of any party or, in exceptional circumstances and with the prior notice to the parties, the Arbitral Tribunal can do it on its own initiative.[38]

32 Law on arbitration, Official Gazette of Montenegro, No. 47/2015, Art. 21.

33 Ibid., Art. 24

34 Rules on Arbitration of the arbitration court before the Chamber of Commerce of Montenegro, 2015, Art. 35.

35 K. Heinz, S. M. Böckstiegel: Arbitration in Germany, The Model Law in Practice, Wolters Kluwer, second edition, the Hague, London, New York, 2015, p. 656.

36 Law on arbitration, Official Gazette of Montenegro, No. 47/2015, Art. 22.

37 German Institution of Arbitration, DIS Rules, Section 20.1 sentence 2.

38 Law on arbitration, Official Gazette of Montenegro, No. 47/2015, Art. 23.

The Arbitral Tribunal may require from parties to be immediately informed about the change of the facts on which the interim measure was requested or ordered. The Arbitral Tribunal may modify the original order on interim measures even after its recognition by the courts. An important issue arises related to the duration of interim measures and their modifications in case of the altered circumstances. The party that requested ordering the interim measure is in a particular way allowed to determine itself what the altered circumstances might be.[39]

The Law on arbitration regulates costs and damages in respect of interim measures. Accordingly, the party that demanded ordering of the interim measures shall be responsible for all costs and damages caused by the interim measure if the Arbitral Tribunal finds later that the measure should not have been ordered. The Arbitral Tribunal may issue the decision on costs and damages at any stage of the proceedings.[40]

Pursuant to the Law on arbitration, it is not incompatible with an arbitration agreement that the interim measure can be ordered by the state court before the commencement of the arbitration procedure or during the arbitral proceeding, and that the party files a request for rendering the interim measure and that the court brings the decision on the interim measure.[41]

According to the Law on arbitration the state court will recognize and enforce the interim measure that was determined (rendered) by the domestic Arbitral Tribunal regardless of the state where the measure was rendered.[42]

Recognition and enforcement of an interim measure can be refused at the request of the party against whom the measure was ordered if the court determines that the refusal is justified, that it was not acted upon the decision of the Arbitral Tribunal or the interim measure was terminated or suspended by the Arbitral Tribunal or by the court of the state where the arbitral proceeding was conducted in case the court is competent for the arbitral proceeding, or if the measure was suspened by the state upon whose legislation the interim measure was rendered. In case there are any modifications, suspensions or terminations of the interim measure, the party that requires or upon whose request the interim measure was recognized and ordered is obliged to immediately notify the court on these modifications. The court competent for the recognition and enforcement of the interim measure can demand from the party that lodged the request to file the appropriate security. The court will not require the appropriate security if the Arbitral Tribunal had brought the decision about the security already.[43]

In accordance with the UNCITRAL Model Law, the Austrian Arbitration Act does not bar a party from applying for interim measures before a state court even if the dispute is subject to an arbitration agreement. However, the competence to issue interim measures is not primarily with the state courts. The Arbitral Tribunal may render interim or protective measures in accordance with section 593 ACCP.

However, *ex parte* interim measures can only be granted by Austrian state courts as section 593 ACCP provides that a tribunal may issue interim measures only after hearing the other party.

The Arbitral Tribunal has the authority to render such interim measures as it deems necessary and even such measures as are unknown to Austrian law. Interim measures issued by an Arbitral Tribunal are enforceable before Austrian state courts and only subject to scrutiny on grounds similar to the grounds for refusal or enforcement of an arbitral award. Furthermore, Austrian courts enforce interim measures issued by Arbitral Tribunals having their seat outside Austria or in case the seat of arbitration has not yet been determined without separate *exequatur* proceedings. Where the interim measure is of any type unknown to Austrian law, the courts will have to transform it to a type of interim measure known in Austria that the most closely reflects the measure which is issued by the tribunal.[44]

Recognition and enforcement of interim measure may be rejected if the court determines that it could not determine the interim measure within its jurisdiction

Pursuant to the Law on arbitration, it is not incompatible with an arbitration agreement that the interim measure can be ordered by the state court before the commencement of the arbitration procedure or during the arbitral proceeding, and that the party files a request for rendering the interim measure and that the court brings the decision on the interim measure

39 Ibid., Art. 25.

40 Ibid., Art. 26.

41 Ibid., Art. 11.

42 Ibid., Art. 27.

43 Ibid., Art. 28.

44 Konrad, C. W., Peters, P. A.: Austria, The European, Middle Eastern and African Arbitration Review 2016, London, 2015, p. 21-26.

Recognition and enforcement of interim measure may be rejected if the court determines that it could not determine the interim measure within its jurisdiction pursuant to regulations of Montenegro, unless it brings decision that, for the sake of its enforcement, it can alter the measure, according to regulations and without modifying its substance

pursuant to regulations of Montenegro, unless it brings decision that, for the sake of its enforcement, it can alter the measure, according to regulations and without modifying its substance. The court before which the recognition and enforcement of interim measure is sought shall not examine the conduct of the process of bringing decision and shall not undertake a review of the substance of the interim measure.[45]

Emergency arbitration

Emergency arbitration is the novelty devised to make the arbitral proceedings more expedient in certain cases. In order to institute the emergency arbitration it is stated that parties shall agree such a procedure no later than the submission of the response to the claim filed by the respondent.[46]

If the parties have not agreed otherwise, the emergency arbitration will be resolved by a sole arbitrator, unless the Presidency of the arbitral institution decides, due to the complexity of the case or any other circumstances, to constitute the Arbitral Tribunal of three arbitrators.[47]

Parties are obliged to propose the sole abitrator by mutual agreement and if they do not do that in the period of 15 days at the latest from the announcement to secretariat, the Presidency will appoint the arbitrator.[48]

The Arbitral Tribunal renders the final award in the period of six months. The Presidency of the Arbitral Tribunal can extend that deadline in case of justified reasons, following the reasoned proposal of theArbitral Tribunal or of its own motion. Presidency of the arbitration court can request from the Arbitral Tribunal the report on the state of the case and reasons of inability to render the award within six months since the receipt of the case.[49]

The Arbitral Tribunal shall conduct the emergency proceedings in such way that it can render its award within six months since the receipt of the case or in the extended deadline determined by the Presidency of the court. As a rule, unless otherwise determined by the tribunal, each party may submit only one written submission after filing responses to the claim. Any counterclaim or set-off objection must already be pointed out in the response to the claim.[50]

All written submissions and notifications are sent electronically. Written submissions are principally submitted in no longer than 15 days, and the deadline is always determined by the Arbitral Tribunal.

Unless the parties have agreed that the dispute would be decided upon the written submissions filed, the Arbitral Tribunal can conduct an oral hearing. After the oral hearing, parties cannot submit any further written submissions.

The Arbitral Tribunal in its arbitral award states the summary of the reasons upon which the award is based, unless the parties have agreed not to state these reasons.[51]

Emergency arbitrator

Emergency arbitrator proceedings commence at the request of a party that requires an interim measure, which cannot wait for the constitution of the Arbitral Tribunal.[52] The request is sent electronically. It is submitted in the language, which is agreed by the parties to be the language of arbitral proceedings.

As a rule, since the Presidency of the arbitration court receives the request, it appoints the emergency arbitrator within 48 hours. The Presidency shall not appoint the emergency arbitrator if the request does not indicate that the arbitration court is competent for resolving the dispute according to the set arbitration rules.

Similar to the provisions of Montenegrin Law on arbitration, the arbitrator or tribunal may be appointed within 48 hours of the request if the LCIA court is satisfied that the circumstances justifiably require exceptional urgency. However, where only one arbitrator

45 Law on arbitration, Official Gazette of Montenegro, No. 47/2015, Art. 28.

46 Arbitration rules of the Arbitration court before the Chamber of Commerce of Montenegro, Art. 46, para.1.

47 Ibid., Art. 46, para. 3.

48 Ibid., Art. 46, para. 4.

49 Ibid., Art. 46, para. 5.

50 Ibid., Art. 46, para. 6.

51 Ibid., Art. 46, para.7.

52 Werdnik, R.: Emergency Arbitrator and the New Ljubljana Rules, Slovenska arbitražna praksa, Ljubljana, 3/2013, p. 15-18.

needs to be appointed, the LCIA has done this on occasion within 24 hours.[53]

SIAC's approach to emergency proceedings relies primarily on Emergency Arbitrators who can be called upon to answer emergency issues before the Arbitral Tribunal has been constituted.[54]

Impartiality and independence[55] are required for the appointment of the emergency arbitrator.[56] Emergency arbitrator can not be appointed if he has already been appointed as the emergency arbitrator in any other case related to the dispute, unless the parties otherwise agree.

The place of arbitration before the emergency arbitrator is the same as the place agreed to be the place of arbitration. If the parties did not agree otherwise, the place of arbitration is Podgorica.[57]

Emergency abitrator proceedings is conducted in such way that the emergency arbitrator treats all parties equally, providing the parties reasonable possibility to express their opinion regarding the case, while paying attention to the urgency of the proceeding and circumstances of the case.[58]

Emergency arbitrator renders its decision on the interim measure in the form of an order, which is then delivered to parties and to the Arbitration court.[59]

Interim measure, rendered by the emergency arbitrator, is obligatory for the parties, so they have to enforce it within the deadline determined by the emergency arbitrator. At the substantiated proposal of any party, emergency arbitrator can amend, suspend or revoke the interim measure.

Pursuant to the Rules on arbitration in Montenegro, the interim measure of emergency arbitrator as well as the reasons for instituting it, are not binding for the Tribunal.

The party that filed the request for the emergency arbitrator proceeding bears the costs of the proceedings. If the party does not pay the costs, the proceedings will be suspended.

At the request of any party, the Tribunal decides in the arbitral award on the allocation of costs among the parties in the emergency arbitrator proceeding.[60]

Conclusion

This article provides an overview of key issues in the Montenegrin Law on arbitration. Special emphasis is on the adoption of modifications and amendments to the UNICTRAL Model Law, due to which new provisions have been established in the Arbitration Rules of Montenegro such as interim measures, emergency arbitration, emergency arbitrator and multi-party arbitration.

One of the reasons why UNICTRAL Model Law was applied to the Law on arbitration of Montenegro referres to the fact that this is a contemporary law that caters to the needs of companies and other entities that want to resolve their disputes in an efficient and expedient way.

Adoption of the new Law on arbitration in Montenegro has been considered a matter of the utmost importance viewing the current situation in the world featuring a constant increase in the degree of globalization, expanding the limits of foreign investment, an increase in foreign trade activities and growing influence of multinational companies on the states.

One of the reasons why UNICTRAL Model Law was applied to the Law on arbitration of Montenegro referres to the fact that this is a contemporary law that caters to the needs of companies and other entities that want to resolve their disputes in an efficient and expedient way

53 Bose, R., Meredith, I.: Emergency Arbitration Procedures: A comparative Analysis in: International Arbitration Law Review, Thomson Reuters, UK Limited and Contributors, 5/2012, p. 186-194.

54 Singapore International Arbitration, Centre, SIAC, Schedule, Emergency Arbitrator, 2016.

55 Arbitration rules of the Arbitration court before the Chamber of Commerce of Montenegro, Appendix III, Article 3.

56 Reiner, A. & Aschauer, C. ed.; Rolf, A. S.: Institutional Arbitration, Article-by-Article Commentary, Offprint, Chapter II: ICC Rules, Verlag, C.H. Beck, 2015, p. 145.

57 Arbitration rules of the Arbitration court before the Chamber of Commerce of Montenegro, Appendix III, Article 4.

58 Ibid., Article 5.

59 Ibid., Article 6.

60 Ibid., Article 8.

Asimetričnost arbitražne klavzule kot razlog za (ne)veljavnost dogovora o arbitraži

Tatjana Božič

Tatjana Božič, univ. dipl. pravnica, se je z arbitražo prvič srečala kot tekmovalka, mentorica in arbitrinja na tekmovanju Willem C. Vis ICA Moot. Leta 2011 je z odliko diplomirala na Pravni fakulteti Univerze v Mariboru na temo: Oprostitev odgovornosti po Dunajski konvenciji. Po opravljenem sodniškem pripravništvu in pravniškem državnem izpitu, se je leta 2014 zaposlila na pravnem oddelku svetovalne družbe Deloitte. Trenutno je zaposlena kot višja pravosodna svetovalka na ODT Ljubljana. Prispevek je nastal v času zaposlitve pri prejšnjem delodajalcu.

V pogodbenem pravu je že dalj časa opaziti trend posvečanja posebne pozornosti osnovanju klavzul o reševanju sporov. Gospodarski subjekti so spoznali, da potrebna pozornost in skrbnost pri načrtovanju strategije reševanja sporov vodi do učinkovitejše, hitrejše in predvsem cenejše rešitve. Vsled varčnejših in efektivnejših strategij reševanja sporov je zaznati tudi porast alternativnih oblik reševanja sporov, kjer je načeloma veliko prostora za avtonomijo pogodbenih strank ter posledično tudi za prevlado in izkoriščanje močnejšega položaja ene od pogodbenih strank. Meja med popolno pogodbeno avtonomijo ter ščitenjem šibkejših pravnih subjektov v pravnem prometu je na področju arbitražnega prava zabrisana, praksa arbitražnih institucij in sodišč neenotna, tako med različnimi pravnimi sistemi, kot tudi znotraj pravnih sistemov. V takšno mejno področje umeščamo tudi asimetrične arbitražne klavzule. Že sam izraz pove, da imamo opravka z neravnovesjem obligacij, asimetrijo na račun ene od pogodbenih strank. Razsodniki sporov, podrejenih asimetričnim klavzulam, bodo v nam sorodnih pravnih redih najpogosteje tehtali avtonomijo pogodbenih strank ter skladnost takih klavzul z načelom vestnosti in poštenja pri sklepanju arbitražnih dogovorov in v okviru tega ščitili šibkejšo pogodbeno stranko. Dejstvo je, da je taka zaščita potrebna v primerih neenakovrednih pravnih subjektov, medtem ko je prostora za asimetrijo in pogodbeno svobodo v primerih ekonomsko enakovrednih pravnih subjektov več. V prispevku bom predstavila osnovno pojmovanje asimetričnih arbitražnih klavzul, poskušala jih bom umestiti v naš pravni sistem ter predstavila razvoj arbitražne in sodne prakse na tem področju. Dotaknila se bom odmevnih zadev v zvezi s presojo veljavnosti asimetričnih dogovorov o pristojnosti v arbitraži in pravdi, saj so tudi slednje pomemben indikator trendov pri odločanju v zadevah veljavnosti asimetričnih dogovorov o reševanju sporov.

Enostranska opcijska klavzula o reševanju sporov je klavzula, ki priznava pravico izbire metode reševanja spora zgolj eni pogodbeni stranki, ne pa tudi drugi

Opredelitev asimetričnih dogovorov o pristojnosti za reševanje sporov

Enostranska opcijska klavzula[1] o reševanju sporov je klavzula, ki priznava pravico izbire metode reševanja spora zgolj eni pogodbeni stranki, ne pa tudi drugi. Asimetričnost take opcije se kaže v tem, da jo lahko uveljavlja le ena pogodbena stranka. Enostranske klavzule o reševanju sporov se pojavljajo v dveh oblikah. Enostranska klavzula o pristojnosti sodišča[2] določa, da morajo stranke reševanje sporov načeloma poveriti arbitraži, z opcijo ene ali več pogodbenih strank izbrati pravdo pred sodiščem. Nasprotno, enostranska arbitražna klavzula[3] omejuje pogodbene stranke z določitvijo izključno pristojnega sodišča, vendar hkrati določa opcijo izbire ene ali več strank, da reševanje

1 Unilateral option dispute resolution clause (UODC), v prispevku jo imenujem asimetrična, enostranska klavzula.

2 Unilateral litigation clause (UODC).

3 Unilateral arbitration clause (UAC).

spora poveri arbitraži[4]. Asimetrična porazdelitev pravic in obveznosti v asimetričnih klavzulah o jurisdikciji izvira navadno iz asimetričnega položaja pogodbenih strank. V večini primerov bo pri asimetrični arbitražni klavzuli vztrajala pogodbena stranka z močnejšim pogajalskim izhodiščem, ki ima možnost implementacije lastnih zahtev in pogojev v pogodbeno razmerje (denimo preko splošnih pogojev poslovanja), ne glede na to, da je tak pravni položaj neugoden za drugo pogodbeno stranko[5].

Asimetrične klavzule o reševanju sporov so pogoste v gospodarskih pogodbah, predvsem v pogodbah o financiranju. Za te pogodbe je značilno nesorazmerje prevzetih tveganj v poslovanju, ki se nato odraža v nesorazmerju obligacij v prid pogodbeni stranki, ki prevzema večja tveganja. Razlogi za pogostost asimetričnih arbitražnih klavzul v finančnih pogodbah so tudi internacionalizacija finančnih in bančnih institucij, nekonsistentnost sodniškega odločanja v povezavi z olajšanim izvrševanjem tujih arbitražnih odločb in druge lastnosti arbitražnega postopka, zaradi česar je za te institucije arbitraža vse bolj privlačna[6].

Razlogi za vključitev asimetričnih klavzul v pogodbe so številni, npr. s finančnega vidika predstavljajo določeno varnost upniku, da lahko toži dolžnika pred institucijo, ki jo bo izbral skladno z njegovimi interesi in glede na trenutne okoliščine. Hkrati omogoča upniku fleksibilnost pri tem, da sledi kraju nahajanja dolžnikovega premoženja, in da svoje pravice uveljavlja v kraju ter pred institucijo, kjer v času spora leži dolžnikovo premoženje. Take klavzule upnika ščitijo tudi z gotovostjo, da bo dolžnik lahko tožil njega pred točno dogovorjenim sodiščem, oz. institucijo in mu bo le-ta znana v naprej[7].

4 Van Zelst, Bas, Unilateral Option Arbitration Clauses in the EU: A Comparative Assessment of the Operation of Unilateral Option Arbitration Clauses in the European Context, Journal of International Arbitration, Kluwer Law International, Vol. 33 (2016), issue 4, str. 365-378.

5 Deyan, Dragulev, Unilateral jurisdiction clauses: The Case for Invalidity, Severability or Enforceability, Journal of International Arbitration, Kluwer Law International, Vol. 31 (2014), issue1, str. 19-48.

6 Van Zelst, o.c.

7 Dostopno na: http://www.allenovery.com/publications/en-gb/Pages/The-end-of-the-road-for-one-way-jurisdiction-and-arbitration-clauses-.aspx (15. 10. 2016).

Tipične asimetrične arbitražne klavzule

Obstajajo različne verzije asimetričnih arbitražnih klavzul. Najpogostejša formulacija določa, da je ena od pogodbenih strank omejena pri uveljavljanju zahtevkov pred sodišči določene jurisdikcije, pri čemer ima druga pogodbena stranka opcijo, da jih uveljavlja v arbitraži. Taka klavzula eni od strank omogoča izbiro metode reševanja spora, tj. arbitraža ali pravda, praviloma skladno z lastnimi interesi. Za asimetrično klavzulo je značilno, da ne glede na to katera od strank začne spor pred določeno institucijo, bo lahko beneficiar asimetrične klavzule[8] enostransko uveljavljal svojo pravico, da v sporu odloča arbitraža in tudi ugovarjal pristojnost sodišča, če bi nasprotna stranka začela pravdo. Torej, če je beneficiar klavzule tisti, ki sproži postopek za reševanje spora, bo imel enostransko izbiro, kje ga bo sprožil, v nasprotnem primeru pa bo ugovarjal pristojnosti. Pri vsem tem je nasprotna stranka zavezana ravnati skladno s to izbiro. Praksa je pokazala, da bo beneficiar klavzule v vlogi tožnika, ki zasleduje hitro in učinkovito rešitev spora, izbral arbitražo, ko pa se bo pojavil v vlogi toženca, bo z namenom zavlačevanja in procesnih možnosti, ki le-to omogočajo, izbral sodišče[9].

Primer asimetrične arbitražne klavzule:

»Sodišča Republike Slovenije so izključno pristojna za reševanje sporov iz te pogodbe, pri čemer ima Stranka A pravico, da katerikoli spor v zvezi s to pogodbo predloži v reševanje arbitraži pri Gospodarski zbornici Slovenije po Ljubljanskih arbitražnih pravilih.«

Skladnost s splošnimi načeli sklepanja arbitražnih dogovorov

Med glavnimi prednostmi arbitražnega postopka pred ostalimi postopki reševanja sporov sta pogodbena svoboda strank in s tem povezana procesna fleksibilnost. Zadevne mednarodne konvencije ter nacionalno pravo strankam omogočajo široko avtonomijo tako glede materialnega kot procesnega prava, ki naj se uporabi v arbitražnem postopku v zvezi z njihovimi spori.

8 O beneficiarju asimetrične arbitražne klavzule govorimo, ko govorimo o pogodbeni stranki v prid katere velja asimetrična klavzula, torej tisti, ki ima pravico da izbira metodo reševanja spora.

9 Van Zelst, o.c.

Asimetrične klavzule o reševanju sporov so pogoste v gospodarskih pogodbah, predvsem v pogodbah o financiranju. Za te pogodbe je značilno nesorazmerje prevzetih tveganj v poslovanju, ki se nato odraža v nesorazmerju obligacij v prid pogodbeni stranki, ki prevzema večja tveganja

Pravo daje strankam procesno avtonomijo zato, da jim omogoči da se izognejo tehničnim formalnostim, značilnih za sodne postopke, ter da namesto tega postopek prikrojijo njihovim posamičnim in konkretnim zadevam. Določeni postopki namreč zahtevajo posebna ekspertna znanja za odločanje; hitrost odločanja je nujna, kadar je čas bistvenega pomena; določeni spori zahtevajo mehanizme, prilagojene določenim trgom. Možnost strank, da arbitražni postopek prikrojijo svojim potrebam je torej glavna prednost mednarodne arbitraže, takemu stališču pa pritrjujejo tudi empirične raziskave[10]. Asimetrična struktura arbitražne klavzule je torej odraz pogodbene svobode strank ter omenjene možnosti prikrojevanja arbitražnega postopka. Načelo pogodbene svobode je sicer omejeno z drugimi splošnimi načeli, denimo z načelom vestnosti in poštenja, enakopravnostjo strank, z *ius cogens*, moralo in običaji.

Menim, da je pri presoji veljavnosti dogovora o reševanju sporov z vidika načela vestnosti in poštenja treba upoštevati okoliščine posameznega primera, ter v konkretnem primeru odločitev o neveljavnosti asimetrične klavzule posebej utemeljiti s tehtnimi razlogi, zakaj gre v konkretni zadevi omejevati avtonomijo pogodbenih strank

Načelo vestnosti in poštenja določa, da morajo pri sklepanju obligacijskih razmerij in pri izvrševanju pravic in izpolnjevanju obveznosti, udeleženci obligacijskih razmerij spoštovati načelo vestnosti in poštenja. Čeprav se definicije vestnosti oz. nevestnosti pri sklepanju pogodb razlikujejo, je pojmovanju nevestnosti skupno to, da opredelitev zadeva nepoštene vsebinske določbe v pogodbah in zlorabo močnejšega položaja ene od pogodbenih strank. Vendar v posledici avtonomnosti in ločenosti arbitražne klavzule od temeljnega pogodbenega razmerja, sodišča in tribunali v večini primerov odločijo, da nasprotovanje temeljnega pogodbenega razmerja načelu vestnosti in poštenja ne vpliva na veljavnost arbitražne klavzule. Nevestnost bo podlaga za izpodbijanje arbitražne klavzule le v redkih primerih, npr. nepoštena izbira sedeža arbitraže, kršitev načela nepristranskosti pri določanju načina imenovanja arbitražnega tribunala, enostranskost arbitražnega postopka. Prav tako je lahko izpodbojen sam način, kako je bila arbitražna klavzula izpogajana, denimo pod pritiskom, s prevaro. Glede na navedeno, skladnost določb temeljnega pogodbenega razmerja, npr. določila o kupnini, z načelom vestnosti in poštenja, navadno ne bo vplivala na veljavnost arbitražnega dogovora. Sodišča načeloma tudi niso naklonjena k ugoditvi ugovorov nevestnosti pri sklepanju arbitražnih dogovorov v poslovnih dogovorih. Dejstvo, da je bila arbitražna klavzula vključena v pogodbo kot del splošnih pogojev poslovanja, da je bila vsiljena zaradi močnejšega položaja ene od pogodbenih strank, da je bila sklenjena v tujem jeziku, ne bodo pravna podlaga za izpodbijanje ali neveljavnost arbitražnega dogovora zaradi kršenja načela vestnosti in poštenja. V redkih primerih, v katerih so sodelovali posamezniki ali mali poslovni subjekti, so sodišča odločila, da so očitno enostranski arbitražni postopki neveljavni, saj nasprotujejo načelu vestnosti, tak primer so tudi asimetrične klavzule[11].

Menim, da je pri presoji veljavnosti dogovora o reševanju sporov z vidika načela vestnosti in poštenja treba upoštevati okoliščine posameznega primera, ter v konkretnem primeru odločitev o neveljavnosti asimetrične klavzule posebej utemeljiti s tehtnimi razlogi, zakaj gre v konkretni zadevi omejevati avtonomijo pogodbenih strank. Kot bo pojasnjeno spodaj, bo to načelo v ospredju v potrošniških sporih in v primerih očitno šibkejših pogodbenih strank ter zlorab prevladujočega položaja. V primerih poslovanja gospodarskih subjektov, kjer morajo udeleženci pogodbenih razmerij ravnati kot dobri gospodarstveniki, vedno v dobro družbe, pa je na njih samih, da se skrbno odločijo tudi v zvezi z metodo reševanja sporov in se pričakuje, da tudi razumejo posledice svojih odločitev. Dejstvo je, da je treba razumeti pogodbene stranke, ki v poslovanju prevzemajo velika tveganja, da želijo in tudi morajo skladno z načelom skrbnosti, zavarovati svoje terjatve in zagotoviti učinkovito upravljanje z njimi. S tem menim, da je treba tudi v okviru našega pravnega sistema, asimetrične arbitražne klavzule presoditi kot veljavne, kolikor ne nasprotujejo prisilnim predpisom. Prisilni predpisi veljajo na področju potrošniškega prava, medtem ko v gospodarskem poslovanju velja večja avtonomija in načelo skrbnosti pri poslovanju, ki mora zadostovati, da gospodarski subjekti sprejemajo odločitve in zanje tudi prevzemajo odgovornost.

Sodišča in arbitražne institucije o veljavnosti asimetričnih dogovorov o reševanju sporov

Kontroverza odločanja o veljavnosti enostranskih dogovorov o pristojnosti za reševanje sporov obstaja tako na področju pravde, kot arbitraže. V nadaljevanju predstavljam nekaj odmevnih zadev, ki obravnavajo predmetno problematiko in veljajo za mejnike presojanja veljavnosti in izvršljivosti asimetričnih klavzul o reševanju sporov.

10 Born B., Gary, International arbitration: Law and Practice, 2nd edition,Wolters Kluwer, 2016, str. 12.

11 Born, o.c., str. 82.

26. septembra 2012 je francosko Vrhovno sodišče razveljavilo asimetrično klavzulo o pristojnosti, dogovorjeno v posojilni pogodbi v zadevi *Mme X v Rothschild* (v nadaljevanju: zadeva Rothschild)[12]. Odločitev v tej zadevi je posebej pomembna zaradi dejstva, da je pred njo veljalo, da enostranski dogovori o pristojnosti niso sporni s stališča prava EU. Sodišče se je v obrazložitvi oprlo na člen 23 Uredbe Bruselj I[13], ki je v veljavi v vseh 29 članicah Evropske unije in posledično bi lahko odločitev v zadevi predstavljala pomemben precedens za sodišča držav članic EU. Pri tem velja poudariti, da je predhodna bruseljska konvencija iz leta 1968 v členu 17 določala, da v primeru, ko je dogovor o pristojnosti sklenjen v prid zgolj ene stranke, ima ta stranka pravico sprožiti spor pred katerimkoli sodiščem, ki je pristojno po konvenciji. Ta določba je bila spremenjena z Uredbo Bruselj I, zaradi nejasnosti in negotovosti[14]. V predmetni zadevi je francosko Vrhovno sodišče enostransko klavzulo o dogovoru pristojnosti označilo za potestativno in kot tako izpodbojno na podlagi omenjenega člena Uredbe Bruselj I. Le-ta določa kriterije za veljaven dogovor o pristojnosti, ki so: i) pisna oblika; ii) oblika, ki je v skladu s prakso, ki je ustaljena med strankama; iii) v mednarodni trgovini mora biti dogovor sklenjen v skladu z mednarodnimi trgovskimi običaji, ki so znani strankam ali bi jim morali biti znani in ki so splošno priznani v mednarodni trgovini in redno upoštevani s strani strank pogodb istega tipa v okviru zadevne panoge. V zadevi Rotschild je Mme X (*i.e.* tožnica), francoska državljanka s prebivališčem v Španiji odprla bančni račun v luksemburški banki Edmond de Rothschild Europe preko posredniške finančne družbe, povezane z Rotschildom, s sedežen v Parizu. Ker tožnica ni bila zadovoljna z izkupičkom njenih finančnih naložb, je vložila odškodninsko tožbo zoper Rotschild in njegovega posrednika pred sodiščem v Parizu. Toženca sta ugovarjala pristojnosti pariškega sodišča in se pri tem sklicevala na dogovor o pristojnosti, ki je bil: »*Za reševanje sporov med stranko in banko so izključna pristojna sodišča v Luksemburgu. V primeru, da banka ne sproži spora pred temi sodišči, si pridržuje pravico sprožiti spor pred sodiščem v kraju bivališča stranke ali pred sodišči katerekoli druge jurisdikcije*«[15]. Tako stališče je francosko Vrhovno sodišče ponovilo v sodbi dne 25. marca 2015, v zadevi 13-27.264[16].

Arbitražni dogovori sicer niso predmet Uredbe Bruselj I, zato odločitev v zadevi Rothschild ne bi smela bistveno vplivati na odločitve o veljavnosti asimetričnih arbitražnih klavzul. Teoretiki so mnenja, da je treba v primerih asimetričnih arbitražnih klavzul zavzeti pro-arbitražno stališče in preprečiti, da bi se razlogi, zaradi katerih je francosko Vrhovno sodišče odločilo o neveljavnosti asimetrične klavzule pristojnosti, preslikali tudi v zadeve o presoji veljavnosti asimetrične arbitražne klavzule[17].

Teoretiki so mnenja, da je treba v primerih asimetričnih arbitražnih klavzul zavzeti pro-arbitražno stališče in preprečiti, da bi se razlogi, zaradi katerih je francosko Vrhovno sodišče odločilo o neveljavnosti asimetrične klavzule pristojnosti, preslikali tudi v zadeve o presoji veljavnosti asimetrične arbitražne klavzule

Drugačen pristop, a podobno stališče so zavzela ruska sodišča v sporu med rusko telekomunikacijsko družbo (»*RTC*«) in *Sonny Ericsson Mobile Telecommunication Rus LLC* (»*Sonny RUS*«) glede prodaje opreme za mobilne telefone. Pogodba je vsebovala klavzulo o reševanju sporov, na podlagi katere je *Sonny RUS* imel pravico sprožiti arbitražni ali sodni postopek za reševanje sporov, medtem ko je imel *RTC* pravico zgolj do arbitraže. Za razliko od francoskega Vrhovnega sodišča, ki je razveljavilo tako enostransko klavzulo v celoti, je rusko Vrhovno sodišče spremenilo enostransko opcijo v dvostransko in posledično obema pogodbenima strankama omogočilo, da po izbiri sprožita arbitražni ali sodni postopek. Tudi rusko sodišče je bilo mnenja, da tak unilateralen dogovor nasprotuje načelu vestnosti in poštenja in ga skladno s tem prilagodilo, kot opisano[18]. Zanimivo je, da je v starejši zadevi *Red Burn Capital v ZAO Factoring Company* (št. A40-59745/09-63-478) leta 2009, federalno arbitražno sodišče Rusije odločilo, da je enostranska arbitražna klavzula o reševanju sporov

12 Sodba Vrhovnega sodišča Francije, Mme X v Banque Privée Edmond de Rotschild Europe, dostopno na: https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/983_26_24187.html (15. 10. 2016).

13 Uredba Sveta (ES) št. 44/2001 z dne 22. decembra 2000 o pristojnosti in priznavanju ter izvrševanju sodnih odločb v civilnih in gospodarskih zadevah, L 12/1, z dne 16.1.2001.

14 Uredba Bruselj I je bila spremenjena 10. januarja 2015. Člen 25 novelirane Uredbe Bruselj I je prejšnji člen 23 spremenil v tem, da lahko odslej vsaka stranka za pristojno določi sodišče s sedežem v državi članici EU, njen domicil ni več relevanten. Veljavnost klavzul o jurisdikciji pa je predmet izbranega foruma. Slednja sprememba je posledica preprečevanja litispendence po Uredbi Bruselj I, po kateri so sodišča čakala na odločitve o pristojnosti sodišč drugih držav članic, kar je povzročilo t.i. italijanski torpedo, procesno taktiko, v kateri se je z izključnim namenom zavlačevanja, sprožalo spore pred sodišči, ki očitno niso bila pristojna za odločanje v sporu.

15 http://kluwerarbitrationblog.com/2013/07/18/the-french-rothschild-case-a-threat-for-unilateral-dispute-resolution-clauses/ (15. 10. 2016).

16 http://www.whitecase.com/sites/whitecase/files/files/download/publications/alert-asymmetrical-jurisdiction-clauses-where-are-we-heading_1.pdf (15. 10. 2016).

17 http://uk.practicallaw.com/7-535-3743 (15. 10. 2016).

18 Ibidem.

Podobno kot predstavljeno, so asimetričnim klavzulam nenaklonjeni v jurisdikcijah Romunije, Rusije, Poljske, Bolgarije, medtem ko njihovi veljavnosti in izvršljivosti s kančkom dvoma še pritrjujejo na Japonskem, Švedskem, v Združenih državah Amerike, Braziliji, na Kitajskem in v Kazahstanu. Za angleško in ameriško pravo pa velja ustaljena sodna in arbitražna praksa o veljavnost asimetričnih klavzul

veljavna. V tej zadevi je tožnik, *Red Burn Capital*, pred ruskim sodiščem vložil tožbo za poplačilo dolga po kreditni pogodbi. Dogovor o reševanju sporov je za pristojno določal arbitražo LCIA[19], pri čemer je imel *Red Burn Capital* opcijo, da vloži zahtevek tudi pri sodišču, kolikor je ugovarjal arbitraži pred veljavnim imenovanjem arbitrov. Sodišče je odločilo, da je taka klavzula veljavna, pri čemer je poudarilo, da je glede na dejstvo, da je bil *Red Burn Capital* financer razumno, da mu je omogočeno, da izbira med arbitražo ali pravdo pred ruskimi sodišči, saj kot financer nosi tveganje, povezano s kreditiranjem. V prej predstavljeni zadevi *RTC* pa je sodišče nasprotno, neveljavnost enostranske arbitražne klavzule utemeljevalo z neravnovesjem obligacij. Zadeva *RTC* torej predstavlja pomemben premik v ruskem pravu k omejevanju enostranskih oz. neravnovesnih dogovorov o reševanju sporov in je bila v strokovni javnosti kritizirana kot poskus obrambe (t.i. »*power grab*«) suverenosti ruskih sodišč pred tujimi jurisdikcijami.

Za razliko od omenjenih odločb, so asimetrične klavzule o reševanju sporov glede na prakso angleških sodišč veljavne po angleškem pravu (glej odločbe v zadevah *Three Shipping, Mirror case, Mauritius Commercial Bank v. Hestia Holdings Ltd. and another*). Velja namreč, da bi razveljavljanje asimetričnih dogovorov nesprejemljivo poseglo v pogodbeno svobodo in načelo avtonomije. Pri tem pa mora biti namen pogodbenih strank jasen, torej da je njuna volja, da je dogovor o reševanju sporov asimetričen. Podobno prakso in stališča so vzpostavila tudi ameriška sodišča[20].

Čeprav nemško pravo samo po sebi ne odreka veljavnosti asimetričnim arbitražnim klavzulam, zahteva, da so arbitražni dogovori skladni z nemškimi prisilnimi predpisi. Glede splošnih pogojev poslovanja nemško pravo zahteva, da dogovor o arbitraži ne predstavlja nesorazmernega bremena, ki bi bilo neskladno z načelom dobre vere, za eno od pogodbenih strank. Tako je nemško Vrhovno sodišče razveljavilo asimetrično arbitražno klavzulo, vsebovano v splošnih pogojih poslovanja, kot nepošteno. Utemeljitev je bila, da bi stranka, v škodo katere je takšna klavzula dogovorjena, utrpela nepotrebne stroške z uvedbo sodnega postopka, če bi nato nasprotna stranka uveljavila svojo opcijo in sprožila arbitražni postopek[21].

Podobno kot predstavljeno, so asimetričnim klavzulam nenaklonjeni v jurisdikcijah Romunije, Rusije, Poljske, Bolgarije, medtem ko njihovi veljavnosti in izvršljivosti s kančkom dvoma še pritrjujejo na Japonskem, Švedskem, v Združenih državah Amerike, Braziliji, na Kitajskem in v Kazahstanu. Za angleško in ameriško pravo pa velja ustaljena sodna in arbitražna praksa o veljavnost asimetričnih klavzul[22].

Na podlagi predstavljenih zadev je zaključiti, da so prakse različnih jurisdikcij različne. Predvsem institucije kontinentalnih pravnih sistemov se obračajo vstran pogodbeni svobodi in načelu avtonomije, ter vzpostavljajo prakse, po katerih taki dogovori nasprotujejo načelu vestnosti in poštenja, jih razveljavljajo ali pa prilagajajo z namenom vzpostavitve pogodbenega ravnovesja. Ta dihotomija razumevanja asimetričnih dogovorov v praksi sodišč različnih forumov je jasno opozorilo gospodarskim subjektom, da pri načrtovanju strategije reševanja sporov in enostranskemu dogovarjanju upoštevajo različno prakso posameznih jurisdikcij. Dejstvo je, da so klavzule o reševanju sporov predmet presoje nacionalnega in mednarodnega prava, v uporabi države dogovorjenega foruma oz. v državi, kjer se klavzula uveljavi. Kolikor se sodišča soočijo z vprašanjem veljavnosti i) dogovora o arbitraži ali ii) arbitražne odločbe, morajo v postopku priznavanja ali izvršitve arbitražne odločbe uporabiti Newyorško konvencijo o priznavanju in izvršitvi tujih arbitražnih odločb, ki določa da se uporabi pravo, za katerega sta se dogovorili stranki ali pravo države, kjer je bila sprejeta arbitražna odločba. Newyorška konvencija pa ne ureja položaja v fazi uveljavitve arbitražnega dogovora, temveč šele uveljavitve arbitražne odločbe[23].

Varstvo potrošnikov in asimetrične arbitražne klavzule

Direktiva št. 93/13/EGS o nedovoljenih pogojih v potrošniških pogodbah, ki je bila implementirana tudi v slovensko potrošniško pravo, pomembno omejuje asimetrične arbitražne klavzule. Člen 3(1) Direktive

19 London Court of International Arbitration.

20 Ibidem.

21 Van Zelst, o.c.

22 https://www.slaughterandmay.com/media/1999588/unilateral-jurisdiction-clauses-navigating-the-minefield.pdf (15. 10. 2016).

23 Van Zelst, o.c.

določa, da je pogodbeno določilo, ki ni bilo individualno dogovorjeno, nepošteno, v nasprotju z načelom dobre vere in nesorazmerno. Dalje opomba 1(q) k aneksu Direktive pravi, da je izključevanje ali omejevanje potrošnikove pravice uveljavljati pravno sredstvo, še posebej zahteva, da bi moral potrošnik zahtevke uveljavljati izključno v arbitraži, v kateri ne bi veljalo potrošniško pravo, nepošteno v okviru Direktive. Sodišče (SES) je tako leta 2006 v zadevi *Mostaza Claro* odločilo, da je treba Direktivo interpretirati tako, da mora sodišče, ki odloča o veljavnosti arbitražne odločbe presoditi, ali dogovor o arbitraži vsebuje nepoštene pogoje, četudi potrošnik tega ni ugovarjal v arbitražnem postopku, temveč šele v postopku za razveljavitev arbitražne odločbe. Leta 2009 je Sodišče (SEU) v zadevi *Asturcom* odločilo, da mora sodišče države članice EU presoditi po uradni dolžnosti, ali je arbitražna klavzula v potrošniški pogodbi poštena, tudi v postopku uveljavljanja neveljavnosti arbitražne odločbe, kadar je bilo v arbitražnem postopku odločeno v odsotnosti potrošnika. Sodišča držav članic morajo torej v postopku za priznanje in izvršitev arbitražne odločbe v potrošniškem sporu po uradni dolžnosti oceniti veljavnost arbitražnega dogovora, četudi se potrošnik na Direktivo sam ne sklicuje.[24]

Sklep

Vprašanje veljavnosti asimetričnih arbitražnih klavzul se pred slovenskimi sodišči še ni znašlo. Zaradi internacionalizacije poslovanja domačih gospodarskih subjektov in prisotnosti tujih investicij na slovenskem trgu, pa lahko to vprašanje postane zelo relevantno. *De lege lata* slovensko pravo *a priori* ne odreka veljavnosti asimetričnim dogovorom o reševanju sporov. Presojo veljavnosti bo zato sodišče ali arbitražna institucija presojala v okviru splošnih načel civilnega prava in arbitražnega postopka. Menim, da je v domeni pozitivnega prava, da zavaruje pravne subjekte, za katere je v javnem interesu, da se jih zavaruje, kakršen je primer potrošnikov. Kolikor pa pozitivno pravo izrecno ne varuje določene kategorije in predvsem to velja za gospodarske subjekte, so pa ti sami dolžni ravnati skladno z načelom skrbnosti ter sprejeti ustrezne poslovne odločitve, sodišča pa odločanje prepustiti njim in upoštevati avtonomijo pogodbenih strank. Zaradi različnih pristopov posameznih jurisdikcij, je treba poleg pozornosti samemu osnovanju asimetričnega arbitražnega dogovora, pozornost posvetiti tudi izbiri foruma, saj je kot je bilo v tem prispevku predstavljeno, veljavnost asimetričnih klavzul odvisna predvsem od prava, ki se uporabi za odločanje v sporu.

24 Van Zelst, o.c.

Vprašanje veljavnosti asimetričnih arbitražnih klavzul se pred slovenskimi sodišči še ni znašlo

***De lege lata* slovensko pravo *a priori* ne odreka veljavnosti asimetričnim dogovorom o reševanju sporov. Presojo veljavnosti bo zato sodišče ali arbitražna institucija presojala v okviru splošnih načel civilnega prava in arbitražnega postopka**

VRHOVNO SODIŠČE
REPUBLIKE SLOVENIJE

Odločba: VSRS Sklep Cpg 8/2016

- ECLI:SI:VSRS:2016:CPG.8.2016

ECLI:

področja:

- civil law
- commercial law

Oddelek:	Gospodarski oddelek
Datum seje senata:	15.07.2016
Senat:	dr. Mile Dolenc (preds.), Vladimir Balažic (poroč.), Franc Seljak
Področje:	ARBITRAŽNO PRAVO - OBLIGACIJSKO PRAVO
Institut:	priznanje tuje arbitražne odločbe - sposobnost stranke - sklenitev arbitražnega sporazuma - zastopanje - pooblastilo za sklenitev arbitražnega sporazuma - pooblastilo po zaposlitvi
Zveza:	ZArbit člen 42. OZ člen 76, 80. Konvencije o priznavanju in izvrševanju tujih arbitražnih odločb (Newyorška konvencija) člen V.

JEDRO:
V mednarodni pravni teoriji in sodni praksi je zavzeto stališče, da je v okviru presoje zavrnitvenega razloga nesposobnosti stranke za sklenitev arbitražnega sporazuma treba presojati tudi vprašanje pravilnosti zastopanja.

Podpisnica dokumentov ni bila zakonita zastopnica nasprotne udeleženke, temveč (kot tam zaposlena oseba) njena pooblaščenka. Pooblastilo po zaposlitvi zaposlenim, ki opravljajo tako delo, da je z njimi zvezano sklepanje ali izpolnjevanje določenih pogodb, daje pravico skleniti in izpolniti take pogodbe (80. člen OZ), daje torej upravičenja, ki so običajna pri izvrševanju določenih opravil. Ni mogoče šteti, da pooblastilo po zaposlitvi zajema tudi pooblastilo za podreditev sporov iz določene pogodbe arbitraži. Po svojem smislu je namreč pooblastilo po zaposlitvi celo ožje od splošnega pooblastila, ki pooblaščencu dovoljuje sklepanje pravnih poslov, ki spadajo v redno poslovanje (drugi odstavek 76. člena OZ). Tretji odstavek 76. člena OZ pa izrecno določa, da pooblaščenec ne sme brez posebne pooblastitve za vsak posamezen primer skleniti arbitražnega sporazuma. Če to velja v razmerju do pooblaščenca s splošnim pooblastilom, velja še toliko bolj v razmerju do pooblaščenca po zaposlitvi.

IZREK:
I. Pritožbi se ugodi in se sklep sodišča prve stopnje spremeni tako, da se zavrne predlog za priznanje arbitražne odločbe št. 14-662 z dne 10. 1. 2014, ki jo je izdala arbitraža pri The

Grain and Feed Trade Association in s katero je bilo odločeno, da mora nasprotna udeleženka predlagateljici takoj plačati 43.800,00 USD in 25.315,63 USD z obrestnimi obrestmi v trimesečnih intervalih po 4-odstotni obrestni meri od 13. 9. 2012 dalje do plačila in da mora nasprotna udeleženka plačati stroške arbitraže, kot je razvidno iz arbitražni odločbi priloženega obračuna.

II. Vsaka udeleženka nosi svoje stroške pritožbenega postopka.

OBRAZLOŽITEV:
1. Okrožno sodišče v Ljubljani je z izpodbijanim sklepom priznalo pravno veljavnost arbitražne odločbe arbitraže pri The Grain and Feed Trade Association (GAFTA) št. 14-662 z dne 10. 1. 2014, s katero je bilo nasprotni udeleženki naloženo plačilo 43.800 USD in 25.315,63 USD z obrestmi ter plačilo arbitražnih stroškov.

2. Zoper navedeni sklep se pritožuje nasprotna udeleženka iz vseh pritožbenih razlogov. Prvenstveno predlaga njegovo spremembo z zavrnitvijo predloga za priznanje sporne arbitražne odločbe, podrejeno pa njegovo razveljavitev in vrnitev zadeve v ponovno odločanje pred sodišče prve stopnje. Priglaša stroške pritožbenega postopka.

3. Pritožba je bila vročena predlagateljici, ki v odgovoru na pritožbo predlaga njeno zavrnitev in priglaša stroške pritožbenega postopka.

4. Udeleženki postopka sta si po faksu izmenjali podpisana dokumenta št. AHX11-086 in št. AHX11-087, ki sta na koncu vsebovala zapis: »Druge določbe, ki niso v nasprotju z zgoraj navedenim, so v skladu z G.A.F.T.A. 88/24 ali 89/23.« Pogodbi GAFTA 88 in 89 obe vsebujeta arbitražno klavzulo. Na podlagi te klavzule je v sporu med njima odločila arbitraža pri GAFTA, pri čemer je nasprotna udeleženka tako v arbitražnem postopku kot tudi v postopku priznanja arbitražne odločbe nasprotovala pristojnosti arbitraže, ker naj bi arbitražni sporazum ne bil sklenjen. Zatrjevala je, da dokumenta št. AHX11-086 in št. AHX11-087 predstavljata zgolj potrditvi naročil po Pogodbi za izdelke vsakdanje rabe (Pogodba FMCG), sklenjene med udeleženkama, v splošnih pogojih katere je bila dogovorjena pristojnost slovenskih sodišč. To naj bi bilo razvidno tudi iz tega, da ju je za nasprotno udeleženko podpisala oseba, ki ni bila pristojna za sklepanje pogodb (temveč le naročil), kaj šele arbitražnih sporazumov.

5. Sodišče prve stopnje ni ugotovilo obstoja zavrnitvenih razlogov po točki (a) prvega odstavka V. člena Konvencije o priznavanju in izvrševanju tujih arbitražnih odločb (Ur. l. SFRJ - MP 11/81; Newyorška konvencija, v nadaljevanju NYK), ki se uporablja na podlagi drugega odstavka 42. člena Zakona o arbitraži (v nadaljevanju ZArbit). Presodilo je, da dokumenta št. AHX11-086 in št. AHX11-087 predstavljata samostojni pogodbi in da so Pogodba FMCG ter njeni splošni pogoji določali le preostale pogoje, pod katerimi so bile sklenjene pogodbe za vsako posamezno dobavo, pri čemer pa sta udeleženki lahko za posamezen posel dogovorili tudi drugačne pogoje, kar se je zgodilo tudi v konkretnem primeru, ko sta se izrecno sklicevali na pogodbe GAFTA. Čeprav si pogodb GAFTA nista izmenjali, je imela nasprotna udeleženka možnost, da se z njihovo vsebino seznani. Nasprotna udeleženka je bila tudi sposobna skleniti arbitražni sporazum, pri čemer je treba tako sposobnost ločiti od vprašanja pravilnosti zastopanja. Vprašanje obstoja pooblastila podpisnice dokumentov je ocenilo za nerelevantno.

6. Pritožnica vztraja, da arbitražni sporazum ni bil sklenjen. Vprašanja sposobnosti za njegovo

sklenitev ni mogoče ločiti od vprašanja pravilnosti zastopanja. Za sklenitev arbitražnega sporazuma je nujno posebno pooblastilo (tretji odstavek 76. člena OZ), ki ga podpisnica dokumentov ni imela. Nadalje je za razlago spornega določila treba uporabiti razlagalno pravilo iz 82. člena Obligacijskega zakonika (v nadaljevanju OZ) o namenu pogodbenih strank, ki naj bi ne imeli namena izključiti veljavnosti Pogodbe FMCG in njenih splošnih pogojev. Tudi sicer pa bi arbitražna klavzula lahko postala del pogodbe le, če bi se pri pogodbenem sklicevanju na drug dokument izrecno navedlo, da ta vsebuje tudi arbitražno klavzulo. V nasprotnem primeru namreč ni mogoče sklepati, da je obstajala volja tudi za sklenitev arbitražnega sporazuma (načelo avtonomije arbitražnega sporazuma). Izpolnjena ni niti zahteva po pisnosti sporazuma, saj pogodb GAFTA stranki nista podpisali ali si jih izmenjali oziroma posredovali.

7. Pritožba je utemeljena.

8. Pritožničine navedbe se v bistvenem nanašajo na vprašanje pritožničine (ne)sposobnosti za sklenitev arbitražnega sporazuma in na vprašanje njegove veljavnosti.

9. V skladu s točko a) prvega odstavka V. člena NYK se sposobnost stranke za sklenitev sporazuma presoja po pravu, ki se uporablja zanjo. V obravnavani zadevi je sporna sposobnost nasprotne udeleženke, ki je slovenska pravna oseba, zato se njena sposobnost presoja po slovenskem pravu.

10. V mednarodni pravni teoriji in sodni praksi je zavzeto stališče, da je v okviru presoje zavrnitvenega razloga nesposobnosti stranke za sklenitev arbitražnega sporazuma treba presojati tudi vprašanje pravilnosti zastopanja.(1) Posledično je napačen zaključek sodišča prve stopnje, da ni relevantno vprašanje, ali je imela podpisnica dokumentov št. AHX11-086 in št. AHX11-087 ustrezno pooblastilo.

11. Sodišče prve stopnje se je pravilno sklicevalo na načelo avtonomije arbitražnega sporazuma, iz katerega izhaja, da se arbitražna klavzula, vsebovana v glavni pogodbi, šteje za neodvisen in samostojen del take pogodbe. Posledično je treba sposobnost stranke in pravilnost zastopanja za sklenitev arbitražnega sporazuma presojati ločeno od njene sposobnosti in pravilnosti zastopanja za sklenitev glavne pogodbe.

12. Podpisnica dokumentov ni bila zakonita zastopnica nasprotne udeleženke, temveč (kot tam zaposlena oseba) njena pooblaščenka. Pooblastilo po zaposlitvi zaposlenim, ki opravljajo tako delo, da je z njimi zvezano sklepanje ali izpolnjevanje določenih pogodb, daje pravico skleniti in izpolniti take pogodbe (80. člen OZ), daje torej upravičenja, ki so običajna pri izvrševanju določenih opravil. Ni mogoče šteti, da pooblastilo po zaposlitvi zajema tudi pooblastilo za podreditev sporov iz določene pogodbe arbitraži. Po svojem smislu je namreč pooblastilo po zaposlitvi celo ožje od splošnega pooblastila, ki pooblaščencu dovoljuje sklepanje pravnih poslov, ki spadajo v redno poslovanje (drugi odstavek 76. člena OZ). Tretji odstavek 76. člena OZ pa izrecno določa, da pooblaščenec ne sme brez posebne pooblastitve za vsak posamezen primer skleniti arbitražnega sporazuma. Če to velja v razmerju do pooblaščenca s splošnim pooblastilom, velja še toliko bolj v razmerju do pooblaščenca po zaposlitvi.

13. Nasprotna udeleženka je v postopku ves čas zatrjevala, da podpisnica ni imela niti pooblastila za sklepanje pogodb, kaj šele arbitražnega sporazuma. Tudi predlagatelj ni navajal, da bi obstajalo posebno pooblastilo za sklenitev arbitražnega sporazuma, temveč da

je bil prepričan, da ima podpisnica pooblastilo po zaposlitvi in da je uporabljala žig nasprotne udeležene. Četudi to lahko zadostuje za sklenitev kupoprodajnih pogodb, pa glede na zgoraj obrazloženo ne zadostuje za sklenitev arbitražnega sporazuma.

14. Ker je podan zavrnitveni razlog nesposobnosti stranke po točki (a) prvega odstavka V. člena NYK, je bilo treba predlog za priznanje arbitražne odločbe že iz tega razloga zavrniti (I. točka izreka). Vrhovno sodišče se zato do ostalih pritožbenih navedb ni opredeljevalo.

Stroški pritožbenega postopka

15. Na podlagi prvega odstavka 35. člena ZNP je Vrhovno sodišče odločilo, da vsaka udeležena nosi svoje stroške pritožbenega postopka (II. točka izreka).

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(1) Glej, na primer, I. S. Anzorena,

The „incapacity“ defence in international arbitration

, v: E. Gaillard in D. di Pietro,

Enforcement of arbitration agreements and international arbitral awards: The New York Convention 1958 in practice

(Cameron May Ltd, 2008).

Sposobnost strank za sklenitev arbitražnega sporazuma in zavrnitveni razlog na podlagi člena V(1)(a) Newyorške konvencije

Neli Okretič

S problematiko sposobnosti strank in njihovega zastopanja pri sklepanju arbitražnih sporazumov se je nedavno ukvarjalo tudi naše Vrhovno sodišče RS, in sicer v postopku priznanja in izvršitve tuje arbitražne odločbe

Sporazum strank, da predložijo arbitraži v reševanje vse ali določene spore, je, ne glede na to, ali je sklenjen kot klavzula v (glavni) pogodbi ali kot ločen sporazum, po naravi pogodba, za katero veljajo vse splošne predpostavke za veljavnost pogodb. Ena izmed predpostavk za veljavno sklenitev pogodbe je tudi sposobnost strank za njeno sklenitev. Vprašanje sposobnosti za sklenitev pogodbe je povezano s – sicer ločenim – vprašanjem o pravilnem zastopanju pri sklepanju pogodb. S problematiko sposobnosti strank in njihovega zastopanja pri sklepanju arbitražnih sporazumov se je nedavno ukvarjalo tudi naše Vrhovno sodišče RS, in sicer v postopku priznanja in izvršitve tuje arbitražne odločbe.[1]

Za priznanje in izvršitev tuje arbitražne odločbe se v skladu z 42. členom Zakona o arbitraži (ZArbit)[2] uporablja Konvencija o priznanju in izvršitvi tujih arbitražnih odločb, sprejeta 10. junija 1958 v New Yorku (Newyorška konvencija)[3]. Newyorška konvencija v členu V vsebuje razloge, na podlagi katerih se lahko predlog stranke za priznanje in izvršitev zavrne, med katerimi je tudi razlog nesposobnosti strank za sklenitev arbitražnega sporazuma (člen V(1)(a) Newyorške konvencije).[4] Niti iz besedila Newyorške konvencije niti iz preparatornih dokumentov k Newyorški konvenciji ne izhaja definicija (ne)sposobnosti stranke, vendar se sposobnost stranke splošno razume kot sposobnost vstopati v pravna razmerja in veljavno sklepati pravne posle v svojem imenu in za svoj račun. V skladu z načelom ločenosti (separabilnosti) glavne pogodbe in arbitražnega sporazuma se vprašanje sposobnosti presoja ločeno – posebej za glavno pogodbo in posebej za arbitražni sporazum.

Oris zadeve

Stranki sta si po faksu izmenjali podpisana dokumenta, ki sta na koncu vsebovala zapis "*Druge določbe, ki niso v nasprotju z zgoraj navedenim, so v skladu z G.A.F.T.A. 88/24 in 89/23*". Ti dve GAFTA pogodbi sta vsebovali arbitražno klavzulo, na podlagi katere je bil začet arbitražni postopek. V sporu med strankama je bila izdana arbitražna odločba arbitraže pri *The Grain and Feed Association* (GAFTA), katero je Okrožno sodišče v Ljubljani priznalo v postopku priznanja tuje arbitražne odločbe. Zoper sklep o priznanju arbitražne odločbe se je pritožila nasprotna udeleženka in, med drugim, zatrjevala, da je na njeni strani pogodbe podpisala oseba, ki ni bila pristojna za sklepanje pogodb, še manj pa za sklepanje arbitražnega sporazuma. Kljub temu, okrožno sodišče ni ugotovilo razlogov, ki bi narekovali zavrnitev priznanja tuje arbitražne odločbe, vprašanje obstoja pooblastila podpisnice dokumentov pa ocenilo za nerelevantno. V pritožbi je nasprotna udeleženka,

1 VS RS Sklep Cpg 8/2016 z dne 15. 7. 2016.

2 Ur. l. RS, št. 45/08.

3 Ur. l. SFRJ, Mednarodne pogodbe, št. 11/81 in Uradni list RS, Mednarodne pogodbe, št. 9/92, 3/93, 9/93, 5/99, 9/08.

4 Glej tudi člen 36(1)(a)(i) UNCITRAL Modelnega zakona.

med drugim, zatrjevala, da arbitražni sporazum med strankama ni bil sklenjen, saj je zanj na podlagi tretjega odstavka člena 76 Obligacijskega zakonika (OZ)[5] potrebno posebno pooblastilo.[6] Vrhovno sodišče, kot drugostopenjski organ v postopku priznanja in izvršitve tuje arbitražne odločbe, je pritožbo sprejelo v obravnavo in navedlo, da se v skladu s členom V(1)(a) Newyorške konvencije sposobnost stranke za sklenitev sporazuma presoja po pravu, ki se uporablja zanjo, torej v obravnavani zadevi po slovenskem pravu, ker gre za slovensko pravno osebo. Sodišče je nadaljevalo, da se v okviru zavrnitvenega razloga nesposobnosti stranke za sklenitev arbitražnega sporazuma presoja tudi vprašanje pravilnosti zastopanja, zato je relevantno vprašanje, ali je imela podpisnica dokumentov tudi ustrezno pooblastilo. Ker podpisnica dokumentov ni bila zakonita zastopnica pravne osebe, vendar njena pooblaščenka, saj je bila pri pravni osebi zaposlena, je šlo torej za primer pooblastila po zaposlitvi. Vrhovno sodišče je presodilo, da ima pooblaščenec po zaposlitvi upravičenja, ki so običajna pri izvrševanju določenih opravil, povezanih z zaposlitvijo, v nabor teh pooblastil pa sklenitev arbitražnega sporazuma ne spada. Štelo je, da je pooblastilo po zaposlitvi po svojem smislu celo ožje od splošnega pooblastila, ki pooblaščencu dovoljuje sklepanje pravnih poslov, ki spadajo v redno poslovanje, in za katerega se za sklenitev arbitražnega sporazuma zahteva posebna pooblastitev, zato ni mogoče šteti, da pooblastilo po zaposlitvi zajema tudi pooblastilo za podreditev sporov iz določene pogodbe arbitraži.[7] Zaradi zgoraj navedenega je predlog za priznanje arbitražne odločbe zavrnilo na podlagi člena V(1)(a) Newyorške konvencije.

Namesto sklepa

Kot za vsako drugo pogodbo, je tudi za arbitražni sporazum sposobnost stranke esencialni pogoj za njegovo sklenitev. V postopku priznanja in izvršitve tuje arbitražne odločbe je v skladu s členom V(1) Newyorške konvencije nesposobnost stranke za sklenitev arbitražnega sporazuma razlog, na podlagi katerega se priznanje in izvršitev tuje arbitražne odločbe zavrne. Za presojo zavrnitvenega razloga nesposobnosti stranke člen V(1)(a) Newyorške konvencije napotuje na pravo, ki se uporablja za stranko.[8] V tem kontekstu nacionalna sodišča za pravne osebe običajno uporabljajo pravo sedeža oziroma inkorporacije pravne osebe – in to tako za vprašanja, povezana z nesposobnostjo stranke, kot tudi veljavnostjo in obsegom pooblastitve.[9] Pri uporabi in razlagi Newyorške konvencije pa se vodilna arbitražna literatura in praksa zavzemata za t.im. "*pro-arbitration*" in "*pro-enforcement*" pristop pri reševanju odprtih vprašanj. Prav tako si nekatera nacionalna sodišča in tudi arbitražni senati v zvezi z vprašanjem pravilnega zastopanja pri sklepanju arbitražnih sporazumov običajno prizadevajo ohraniti arbitražne sporazume v veljavi prek uporabe različnih argumentov in načel (npr. *principles of estoppel, ratification and good faith, the validation principle, ostensible or apparent authority – principle of appearance, mandat apparent*)[10] – in to tudi v primerih, ko domnevni podpisnik arbitražnega sporazuma dejansko ni imel pooblastila, da pravno osebo zaveže z arbitražnim sporazumom po pravu, na podlagi katerega je ta pravna oseba ustanovljena.[11] Tudi nekateri arbitražni senati takšne primere obravnavajo prek načel dobre vere in očitne sposobnosti nastopanja (*apparent authority*) in so mnenja, da so bila ta načela povzdignjena v pravila mednarodne arbitraže in predstavljajo trdno pravno podlago za veljavnost arbitražnih sporazumov oziroma klavzul.[12] Vendar, spet druga nacionalna sodišča in arbitražni

Vrhovno sodišče je presodilo, da ima pooblaščenec po zaposlitvi upravičenja, ki so običajna pri izvrševanju določenih opravil, povezanih z zaposlitvijo, v nabor teh pooblastil pa sklenitev arbitražnega sporazuma ne spada

5 Ur. l. RS, št. 83/01 s spremembami.

6 Iz obrazložitve Sklepa Cpg 8/2016 izhaja, da je nasprotna udeleženka že tekom arbitražnega postopka ugovarjala, da pristojnost arbitraže ni podana, ker naj arbitražni sporazum ne bi bil sklenjen; iz obrazložitve pa ni razvidno, na kakšni podlagi je arbitraža pri GAFTA sprejela pristojnost. Na tem mestu se tudi pojavlja dilema, do kakšne mere lahko sodišče *de novo* presoja odločitev arbitraže o tem vprašanju. Praksa nekaterih nacionalnih sodišč je dostopna na http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=621&opac_view=-1 (19. 11. 2016).

7 Glej 12. točko Sklepa Cpg 8/2016.

8 Za več o tem, glej Born, G., International Commercial Arbitration, Second Edition, Kluwer Law International 2014, str. 625 in naslednje.

9 Born, G., International Commercial Arbitration, Second Edition, Kluwer Law International 2014, str. 627, 631 in 632.

10 Glej npr. Telenor Mobile Comm. AS v. Storm LLC, 524 F.Supp.2d 332, 354 n.10 (S.D.N.Y. 2007); Siderurgica del Orinoco (Sidor), CA v. Linea Naviera de Cabotage, CA, 1999 WL 632870 (S.D.N.Y.); Final Award in ICC Case No. 7047, 13 ASA Bull. 301, 319 (1995); Award in ICC Case No. 4667, in S. Jarvin & Y. Derains (eds.), Collection of ICC Arbitral Awards 1986-90 297, 338 (1994); Interim Award in ICC Case No. 5065, 114 J.D.I. (Clunet) 1039 (1987); Award in Paris Chamber of Arbitration of 8 March 1996, XXII Y.B. Comm. Arb. 28, 29-30 (1997), v: Born, G., International Commercial Arbitration, Second Edition, Kluwer Law International 2014, str. 733-734, op. 563 in 565.

11 Born, G., International Commercial Arbitration, Second Edition, Kluwer Law International 2014, str. 733-734. Za primerjavo glej Award in ICC Case No. 5832, 115 J.D.I. (Clunet) 1198 (1988).

12 Glej Award in ICC Case No. 13954, XXXV Y.B. Comm. Arb. 218, 235 (2010), v Born, G., International Commercial Arbitration, Second Edition, Kluwer Law International 2014, str. 733-734, op. 564.

senati ne sledijo takšni argumentaciji in interpretaciji.[13]

Obstajata dva pristopa pri reševanju vprašanj, povezanih s sposobnostjo strank in njihovega zastopanja pri sklepanju (mednarodnih) arbitražnih sporazumov.

Prvi pristop daje prednost uporabi nacionalnega prava, drugi pa uporablja še pravila, ki se zdijo primerna glede na mednarodno naravo zadeve

Zaključimo lahko, da obstajata dva pristopa pri reševanju vprašanj, povezanih s sposobnostjo strank in njihovega zastopanja pri sklepanju (mednarodnih) arbitražnih sporazumov. Prvi pristop daje prednost uporabi nacionalnega prava, drugi pa uporablja še pravila, ki se zdijo primerna glede na mednarodno naravo zadeve.[14] Slednjemu sledijo predvsem francoska sodišča, ki neposredno uporabljajo načela mednarodnega prava in preko skupnega namena pogodbenih strank (*common intention of the parties*)[15] presojajo vprašanja, povezana s sklepanjem in veljavnostjo mednarodnih arbitražnih sporazumov.[16] Strinjamo se lahko, da (preveč) restriktivne zahteve nacionalnega prava, predvsem, če so v nasprotju s členom II Newyorške konvencije, ne gredo z roko v roki z mednarodnim arbitražnim reševanjem sporov, zato je proaktivni pristop pri razlagi nacionalnih določb zaželen.

13 Award in ICC Case No. 5832, 115 J.D.I. (Clunet) 1198 (1988), v Born, G., International Commercial Arbitration, Second Edition, Kluwer Law International 2014, str. 733-734, op. 565.

14 Glej tudi Savage, J., Gaillard, E. (ed.), Fouchard Gaillard Goldman on International Commercial Arbitration, Kluwer Law International 1999, str. 249 in naslednje.

15 Za več glej Born, G., International Commercial Arbitration, Second Edition, Kluwer Law International 2014, str. 548 in naslednje. Glej tudi sodbo v zadevi Municipalité de Khoms El Mergeb v. Société Dalico, December 20, 1993, Case no. 91-16828.

16 Born, G., International Commercial Arbitration, Second Edition, Kluwer Law International 2014, str. 548-550, 722.

Listine v postopku priznanja in izvršitve tujih arbitražnih odločb

Neli Okretič

Avstrijsko vrhovno sodišče se je v zadevi 3 Ob 208/15g[1] z dne 17. 2. 2016 ukvarjalo z vprašanji, povezanimi z zahtevami na podlagi člena IV Newyorške konvencije o priznanju in izvršitvi tujih arbitražnih odločb.[2] Sodišče je zavzelo relativno strikten pristop glede listin, ki se predložijo v postopku priznanja in izvršitve arbitražne odločbe, vendar je kljub temu sledilo konvencijskemu načelu "*pro enforcement*".

Newyorška konvencija je bila sprejeta z namenom poenostavitve postopkov priznanja in izvršitve tujih arbitražnih odločb. Posledično naj bi bili v državah pogodbenicah pogoji za priznanje in izvršitev tudi bolj ali manj poenoteni. Ne glede na to, da je Newyorška konvencija (skoraj) globalno sprejeta, je v postopkih priznanja in izvršitve, ki potekajo pred nacionalnimi sodišči, koristno vedeti, katere listine šteje sodišče kot potrebne, da se predložijo za namene priznanja in izvršitve tuje arbitražne odločbe. V skladu s členom IV NYK je potrebno v postopku priznanja in izvršitve, poleg zahteve za priznanje in izvršitev, priložiti še (i) po predpisih overjen izvirnik arbitražne odločbe ali njegov prepis (kopijo), ki mora izpolnjevati pogoje za istovetnost, ter (ii) izvirnik arbitražnega sporazuma ali njegov prepis, ki mora izpolnjevati pogoje za istovetnost. Če arbitražna odločba ali arbitražni sporazum nista sestavljena v uradnem jeziku države, v kateri se zahteva priznanje ali izvršitev, mora stranka, ki zahteva priznanje in izvršitev arbitražne odločbe, predložiti še prevod teh dokumentov v jeziku, ki je pri sodišču v uradni rabi. Prevod mora overiti uradni prevajalec ali zapriseženi prevajalec ali diplomatski ali konzularni agent.[3] Nadalje pa Newyorška konvencija ne določa pogojev za potrditev pristnosti (overitev) ali potrditev skladnosti arbitražne odločbe in niti ne določa uporabnega prava za to vprašanje. Iz preparatornih dokumentov k Newyorški konvenciji je razbrati, da je odločitev o tem prepuščena sodiščem v državi, kjer je podana zahteva za priznanje oziroma izvršitev arbitražne odločbe; posledično se rešitve razlikujejo od ene države do druge.

Overjen izvirnik arbitražne odločbe ali njegov prepis

Pogoj iz člena IV(1)(a) NYK, ki v postopku priznanja in izvršitve tuje arbitražne odločbe zahteva predložitev overjenega izvirnika arbitražne odločbe ali njegovega prepisa (kopije), ki mora izpolnjevati pogoje za istovetnost, je avstrijsko vrhovno sodišče razlagalo kot zahtevo, da mora biti overjen podpis arbitra (arbitrov) na arbitražni odločbi. Overitev se lahko opravi v skladu s pravom sedeža arbitražnega postopka (na primer preko notarja) ali pravom države, v kateri se zahteva priznanje in izvršitev arbitražne odločbe (na primer preko konzulata). Sodišče je štelo, da se overitev prav tako lahko opravi s strani pristojne osebe arbitražne institucije, pod okriljem katere se je postopek vodil in v kolikor pravila institucije to izrecno predvidevajo. V takšnem primeru mora biti kopija izvirnika arbitražne odločbe opremljena z uradnim žigom arbitražne institucije in podpisom pristojne osebe, z izrecno navedbo njenega položaja znotraj arbitražne institucije.

Pogoj iz člena IV(1)(a) NYK, ki v postopku priznanja in izvršitve tuje arbitražne odločbe zahteva predložitev overjenega izvirnika arbitražne odločbe ali njegovega prepisa (kopije), ki mora izpolnjevati pogoje za istovetnost, je avstrijsko vrhovno sodišče razlagalo kot zahtevo, da mora biti overjen podpis arbitra (arbitrov) na arbitražni odločbi

Sodišče je štelo, da se overitev prav tako lahko opravi s strani pristojne osebe arbitražne institucije, pod okriljem katere se je postopek vodil in v kolikor pravila institucije to izrecno predvidevajo

1 Odločba je dostopna na: https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20160217_OGH0002_0030OB00208_15G0000_000&ResultFunctionToken=2c7e47f4-f043-46cc-9562-0e6b53754051&Position=1&Gericht=&Rechtssatznummer=&Rechtssatz=new&Fundstelle=&AenderungenSeit=Undefined&SucheNachRechtssatz=True&SucheNachText=True&GZ=&VonDatum=15.02.2016&BisDatum=20.02.2016&Norm=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte= (26. 11. 2016).

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

3 Drugi odstavek člena IV Newyorške konvencije.

Sodno zapriseženi prevajalci

V kolikor arbitražna odločba ali arbitražni sporazum nista v jeziku, ki je v uradni rabi pri sodišču, pred katerim se zahteva priznanje ali razglasitev izvršljivosti, je stranka dolžna priskrbeti overjen prevod arbitražne odločbe in arbitražnega sporazuma s strani uradnega ali zapriseženega prevajalca ali diplomatskega oziroma konzularnega agenta (člen IV(2) Newyorške konvencije). Po presoji avstrijskega vrhovnega sodišča je tem pogojem zadoščeno, če je prevod pripravljen s strani uradnega ali zapriseženega prevajalca, ki je zaprisežen ali pri sodišču države sedeža arbitražnega postopka (v državi, v kateri je bila arbitražna odločba izdana) ali pri sodišču, pred katerim se postopek priznanja in razglasitve izvršljivosti vodi. Že na podlagi prejšnje sodne prakse avstrijskega vrhovnega sodišča je prevod, pripravljen s strani prevajalca, ki je zaprisežen pri sodišču v tretji državi, prav tako sprejemljiv, vendar mora biti v takšnem primeru predložen še dokaz o sodni prisegi – overjen akt sodišča. V konkretnem primeru se je sodišče izreklo, da predložitev akta sodišča o prisegi in izpisek iz uradnega registra sodnih tolmačev zadoščata za takšen dokaz.

Sklepno

Namen Newyorške konvencije je (bil) preko enostavnega in hitrega postopka priznanja in izvršitve tujih arbitražnih odločb dodatno prispevati k promociji arbitražnega reševanja sporov. Vsekakor pa formalnih okvirjev, ki jih postavlja konvencija, ni mogoče prestopiti. Odločitev avstrijskega vrhovnega sodišča kaže, da se do določenih pogojev, ki jih vsebuje Newyorška konvencija, vseeno lahko pristopi z določeno mero pragmatizma. Sodišče je štelo, da se za namene preverjanja skladnosti kopije arbitražne odločbe lahko uporabi tudi pravila, ki so dogovorjena med strankama, torej arbitražna pravila, katerim sta se stranki podredili, ko sta spor predložili v reševanje določeni arbitražni instituciji. Če takšna arbitražna pravila predvidevajo potrjevanje skladnosti arbitražne odločbe, to zadošča tudi v postopku priznanja in izvršitve tuje arbitražne odločbe po določbah Newyorške konvencije. S tem namenom tudi Ljubljanska arbitražna pravila[4] v členu 41(5) določajo, da sekretariat na vseh izvodih arbitražne odločbe potrdi, da gre za arbitražno odločbo, ki je bila izdana na podlagi teh pravil. Smotrno bi bilo, da tudi ostala nacionalna sodišča pri presoji pogojev po členu IV Newyorške konvencije sledijo interpretaciji avstrijskega vrhovnega sodišča.

Sodišče je štelo, da se za namene preverjanja skladnosti kopije arbitražne odločbe lahko uporabi tudi pravila, ki so dogovorjena med strankama, torej arbitražna pravila, katerim sta se stranki podredili, ko sta spor predložili v reševanje določeni arbitražni instituciji

4 Arbitražna pravila Stalne arbitraže pri Gospodarski zbornici Slovenije. Dostopna na: http://www.sloarbitration.eu/Arbitrazna-pravila-SI.

Prenova *UNCITRAL Notes on Organizing Arbitral Proceedings*

Neli Okretič

Komisija Združenih narodov za mednarodno trgovinsko pravo (UNCITRAL) je 7. julija 2016 na 49. zasedanju sprejela prenovljena "pojasnila" k organizaciji arbitražnih postopkov (*2016 UNCITRAL Notes on Organizing Arbitral Proceedings*), ki nadomeščajo UNCITRAL Notes iz leta 1996.[1] UNCITRAL Notes nimajo zavezujoče narave, ampak služijo kot pripomoček pri reševanju procesnih vprašanj, povezanih z arbitražo.

UNCITRAL Notes nudijo pojasnila, komentarje in smernice o vprašanjih, med drugim, glede jezika postopka, zaupnosti, transparentnosti, zbiranju dokaznega gradiva, sedeža arbitraže, ... in so pripravljene s posebnim ozirom na mednarodno arbitražno reševanje sporov, ne glede na to, ali gre za *ad hoc* ali institucionalno arbitražo. Napredek in razvoj arbitražnega prava v zadnjih dvajsetih letih pa sta narekovala sprejem prenovljenih UNCITRAL Notes, zato je Komisija Združenih narodov podelila mandat delovni skupini za arbitražo in konciliacijo (*Working Group II*), da pripravi osnutek besedila.

Prenovljeno besedilo UNCITRAL Notes povzema najboljše prakse, ki so se izoblikovale v zadnjih dvajsetih letih. Zaradi vse večje naklonjenosti do sklepanja poravnav tudi med arbitražnim postopkom je v prenovljenih UNCITRAL Notes zaznati pristop, ki spodbuja sklepanje poravnav in nudi tudi nekoliko bolj odprt pristop do predlogov in sodelovanja samih arbitrov oziroma arbitražnega senata pri njihovem sklepanju. Pri pripravi besedila, se je delovna skupina posebej ukvarjala tudi z vlogo t.im. administrativnih pomočnikov arbitrov (*administrative secretary*). Glede na besedilo iz leta 1996, na podlagi katerega je bila vloga administrativnih pomočnikov omejena na opravila, ki ne predstavljajo strokovnih nalog, kot jih imajo arbitri, je bilo pri pripravi prenovljenih Notes predstavljeno, da si arbitražni senati včasih želijo, da bi administrativni pomočnik imel tudi bolj vsebinske naloge (na primer pomoč pri raziskovanju pravnih vprašanj itd.). Vendar prenovljena pravila še vedno ohranjajo funkcijo administrativnih pomočnikov kot administrativno, z izjemo v določenih (specialnih) primerih, kjer ti lahko bolj vsebinsko sodelujejo z arbitražnim senatom pri odločanju, pri čemer ne gre spregledati zahtev po transparentnosti.

Nadalje prenovljeno besedilo vsebuje tudi nekaj novosti. Gre za tematike, ki jih prejšnje UNCITRAL Notes niso vključevale in ki so bile v zadnjih letih predmet obsežnih razprav v arbitražni skupnosti. Tako prenovljeno besedilo vsebuje tudi pojasnila glede pridružitve tretjih oseb v arbitražnem postopku (*joinder*), združitve postopkov (*consolidation*) in ne nazadnje tudi stroškov postopka (*allocation of costs* , *recoverability of in-house costs*).

UNCITRAL Notes nudijo pojasnila, komentarje in smernice o vprašanjih, med drugim, glede jezika postopka, zaupnosti, transparentnosti, zbiranju dokaznega gradiva, sedeža arbitraže, ... in so pripravljene s posebnim ozirom na mednarodno arbitražno reševanje sporov, ne glede na to, ali gre za ad hoc ali institucionalno arbitražo

1 Dostopno na http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-2016-e.pdf.

Joint UNCITRAL-LAC Conference on Dispute Settlement

4. april 2017

Stalna arbitraža pri GZS

www.sloarbitration.eu

Vabimo vas

na mednarodno konferenco o reševanju sporov – Joint UNCITRAL-LAC Conference on Dispute Settlement, ki jo organizirata Stalna arbitraža pri GZS in UNCITRAL. Konferenca bo potekala v torek 4. aprila 2017 v prostorih Gospodarske zbornice Slovenije.

Na dogodku bomo gostili ugledne strokovnjake s področja reševanja sporov in povezali udeležence iz vsega sveta; arbitre, odvetnike, pravnike iz gospodarstva, mednarodno usmerjene podjetnike ter predstavnike državnih institucij.

Poudarki konference:

- učinkovita organizacija arbitražnega postopka,
- regionalni vidiki mednarodne arbitraže (pregled/prikaz arbitražnih okolij v regiji),
- transparentnost v mednarodni arbitraži,
- prihodnost investicijske arbitraže

Več informacij, program in registracija na: http://www.sloarbitration.eu

Dan po konferenci (5. aprila 2017) bo potekalo mednarodno arbitražno tekmovanje Ljubljana Willem C. Vis Pre-Moot.

Veselimo se srečanja z vami.

United Nations
UNCITRAL

Stalna arbitraža
pri Gospodarski
zbornici Slovenije

The Ljubljana Willem C. Vis Pre-Moot

5 April 2017

The Ljubljana Arbitration Centre

Dear Friends and Colleagues,

The Ljubljana **Willem C. Vis Pre-Moot** will take place on Wednesday, **5 April 2017** at the at the office building of the Slovenian Chamber of Commerce and Industry (Dimičeva 13, Ljubljana, Slovenia).

The Pre-Moot is conveniently taking place only a couple of days before the 24th Vis Moot in Vienna and, as Ljubljana is just a couple of hours train ride from Vienna, this is a great possibility for one last practice before the Vienna Moot.

Participating in the Ljubljana Pre-moot will help you to elaborate your arguments, evaluate your team's performance and do some final tweaks before the main competition in Vienna. You will argue against new teams and plead before arbitrators who have experience in real life arbitration. Participation at the Pre-Moot is free of charge but the participants are requested to make their own accommodation arrangements. The Ljubljana Arbitration Centre has negotiated preferred rates for the participants at the Ljubljana hotels.

The Pre-Moot will be preceded by the Joint UNCITRAL-LAC Joint Conference on Dispute Settlement, which will take place at the same venue on Tuesday, 4 April 2017, with renowned speakers and participants from around the world.

Please send your registration for the Ljubljana Willem C. Vis Pre-Moot to: arbitraza.lj@gzs.si.

We are looking forward to welcoming you in Ljubljana.

WHEN: Wednesday, 5 April 2017

WHERE: Slovenian Chamber of Commerce and Industry, Dimičeva 13, Ljubljana, Slovenia

HOW TO GET FROM LJUBLJANA TO VIENNA: As Ljubljana is fairly close to Vienna, the easiest way is to travel by train.

More information can be found at: **http://www.sloarbitration.eu/en/**

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

3rd Sarajevo Arbitration Day "Chasing efficiency in International Arbitration – Lessons for BiH"

16 February 2017

The Ljubljana Arbitration Centre

Source:
associationarbitri.com

The Ljubljana Arbitration Centre cordially invites you to the 3rd Sarajevo Arbitration Day hosted by the Association ARBITRI. This is now a traditional project of the Association, which aims to promote arbitration among the business and legal community in BiH and provide a platform for networking between local and international practitioners in the field.

With the topic, Chasing efficiency in International Arbitration – Lessons for BiH, the 3rd Sarajevo Arbitration Day will be dedicated to one of the most important current issues in the realm of international arbitration. Bosnia and Herzegovina, as a new, developing, arbitration forum, faces the need to adequately adjust to a developed and sophisticated global arbitration system. This conference is a step toward preparing practitioners, arbitrators and other interested parties for the necessary changes.

In three panels, the speakers will tap into this interesting question, by discussing the efficiency of and efficiency in arbitration. This will be followed by a round-table focused on discussing what lessons BiH can take, and how the efficiency can be improved in this jurisdiction. The discussion will end with a keynote speaker address by Professor Christoph Schreuer, from Zeiler.partners.

The Association ARBITRI is also hosting the first panel on Unconscious Bias, organized in cooperation with ArbitralWomen. This is the first event of this type in Bosnia and Herzegovina which aims to start the discussion on the position and role of woman in the realm of dispute resolution.

Working languages of the conference are English and BCS. Simultaneous interpretation will be available. Participation at the Conference is free of charge.

Mr. Peter Rižnik, senior legal counsel at the Ljubljana Arbitration Centre will hold a lecture on the topic "Efficiency in Proceedings under LAC Rules of Arbitration."

The Ljubljana Arbitration Centre is proud to be among the sposors of the 3rd Sarajevo Arbitration Day.

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

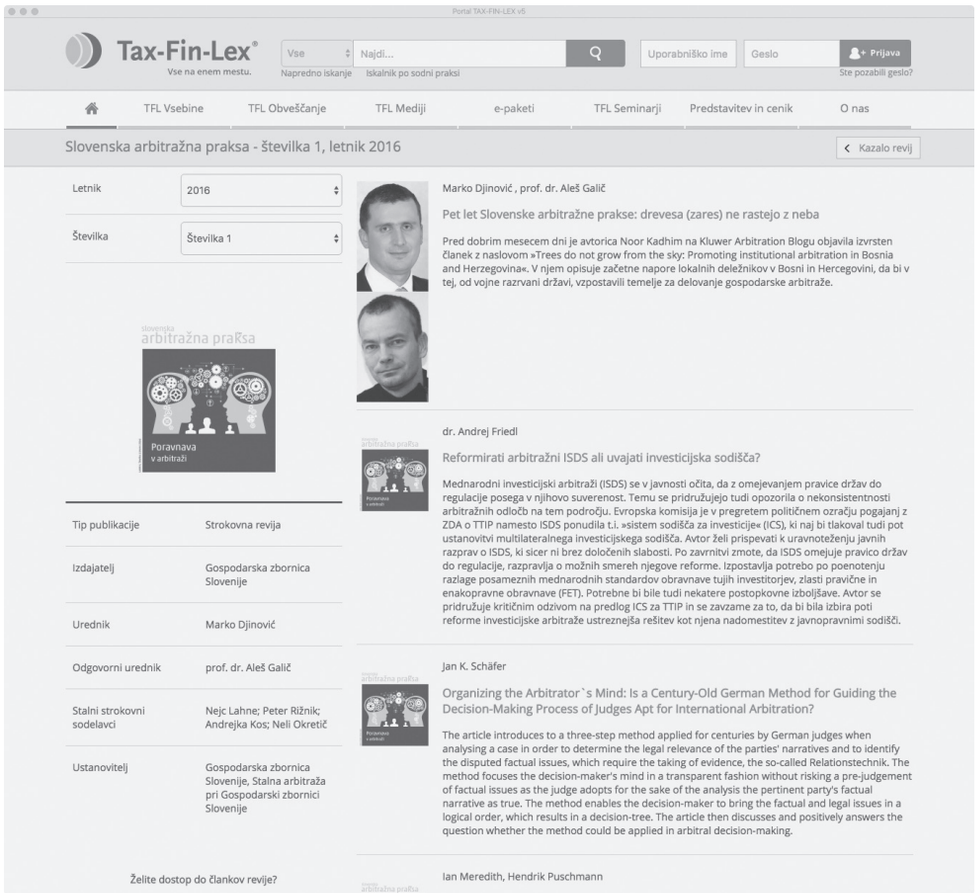
Uredništvo

Spoštovani naročniki revije Slovenska arbitražna praksa,

z veseljem vas obveščamo, da imate z letošnjim letom, poleg tiskanih izvodov revije tudi ekskluzivno pravico dostopa do vseh (tudi najaktualnejših) številk revije v digitalni obliki, na portalu Tax-Fin-Lex.

Revija, ki je namenjena gospodarstvenikom, odvetnikom, pravnikom iz gospodarstva, arbitrom, sodnikom ter vsem, ki se pri svojem delu ali študiju srečujejo z arbitražo, je v elektronski obliki brezplačno dostopna naročnikom tiskane revije, naročniki portala Tax-Fin-Lex pa bodo lahko prebirali vsebino z zamikom dveh številk – vendar s celotnim arhivom revije.

Želimo vam prijetno branje, tudi v digitalni obliki!



Več na:
www.tax-fin-lex.si

Navodila avtorjem za pripravo prispevkov

Uredništvo

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

Kaj objavljamo

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

Dolžina prispevka

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

Recenzija

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

Povzetek

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

Kratka predstavitev avtorjev

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

Opombe pod črto

Literatura se navaja z opombami pod črto.

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

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

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

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

Naslov uredništva

Stalna arbitraža pri Gospodarski zbornici Slovenije
Slovenska arbitražna praksa
Dimičeva 13
1504 Ljubljana
Elektronski naslov: arbitraznapraksa@gzs.si

Guidelines for contributors

Editorial Board

Slovenska arbitražna praksa (Slovenian Arbitration Review) is a specialized journal dealing with all aspects of arbitration. It is intended for counsels, in-house lawyers, arbitrators, judges and all those interested in arbitration through their work or studies.

What do we publish?

We publish articles in Slovenian, English, German, French, Croatian and Serbian, which have not yet been published or sent for publication to another journal. The author is responsible for any breach of copyright. If the article has been published before, sent for publication to another journal or presented at a conference the author has to notify the editor about this fact and the reasons for a new publication. Further, in such cases the author has to present an agreement of the original publisher for the new publication.

Article length

Submitted articles should contain between 15.000 and 30.000 characters (including spaces). Deviations may be considered in exceptional cases.

Abstract

All articles should be submitted together with a short abstract of maximum 1.200 characters (including spaces). The abstract should briefly define the topic of the article and sum up the results and findings. The abstract should not contain general findings

Short presentation of the author

The authors should submit a brief presentation of their professional and academic references. This presentation should not exceed 600 characters (including spaces). When the article is submitted in co-authorship, a presentation of each author is to be submitted.

Review

The submitted articles are reviewed anonymously. The comments and remarks of the reviewer are to be included in the article by the author.

Citation mode

References should be made in footnotes.

a) books:
Surname, initial letter of the name.: Title (in case of multiple issues also a reference to the number of the issue), Publisher, place of publication, year, page.
E.g.: Ude, L.: Arbitražno pravo, GV Založba, Ljubljana. 2004, p. 1.

b) collection of articles:
the title of the collection or the publication, the surname and the initial letter of the first name and any reviewers should be added.

c) Journal article:
The title of the journal, the year, the volume number and the cited page number should be added.
E.g.: Galič, A.: Ustavne procesne garancije u arbitražnom postupku, v: Pravo u gospodarstvu, Zagreb, št. 2/2000, str. 241-260.

d) Webpages:
The webpage should be referred to with the complete URL and the date of last access.
E.g.: http://sloarbitration.eu/sl/slovenska-arbitraznapraksa (5. 11. 2012).

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na revijo Slovenska arbitražna praksa

slovenska arbitražna praksa

Naročam revijo Slovenska arbitražna praksa

ime in priimek

*podjetje ali organizacija

naslov

poštna številka kraj

telefon

e-pošta

DA / NE

*matična številka plačnika ID za DDV davčni zavezanec

datum podpis

*žig

** Izpolnijo samo pravne osebe.*

Revija izhaja trikrat na leto (marec, junij, november).

Cena letne naročnine:
80,00 EUR z vključenim DDV.
Poštnina za pošiljanje v tujino se zaračuna posebej.

Izpolnjeno naročilnico ali njeno kopijo nam pošljite na naslov:
Stalna arbitraža pri GZS
Dimičeva 13
1504 Ljubljana
ali po faksu na številko 01 5898 400.

Revijo lahko naročite tudi preko spletne naročilnice:
www.sloarbitration.eu

Za več informacij:
Urška Bukovec (arbitraznapraksa@gzs.si)
telefon: 01 58 98 180

Smernice za arbitre

Stalna arbitraža pri GZS je izdala Smernice za arbitre z namenom, da arbitrom služijo kot praktični pripomoček in vir informacij za vodenje postopkov po Ljubljanskih arbitražnih pravilih.

Smernice vsebujejo informacije, ki so tako opomnik senatu za uspešno vodenje arbitražnih postopkov, kakor tudi prikaz prakse predsedstva in sekretariata pri določanju stroškov arbitraže in sprejemanju drugih odločitev v postopkih.

www.sloarbitration.eu/Smernice-za-arbitre

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