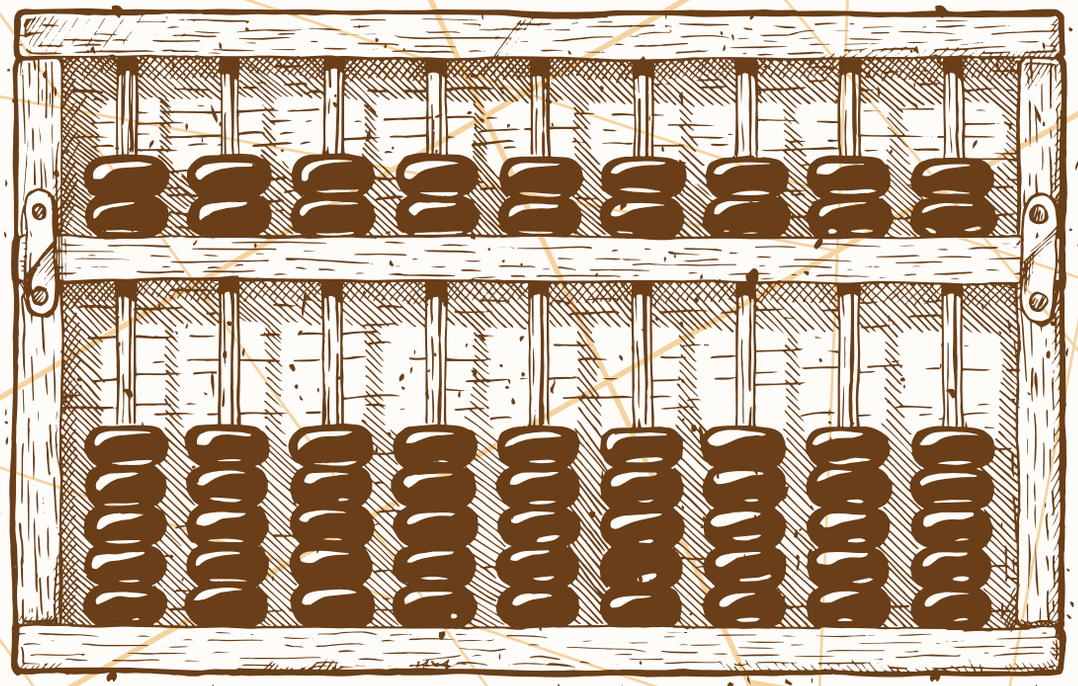
slovenska arbitražna praksa



Stroški arbitražnega postopka

Letnik VI, Številka 1 (marec 2017)

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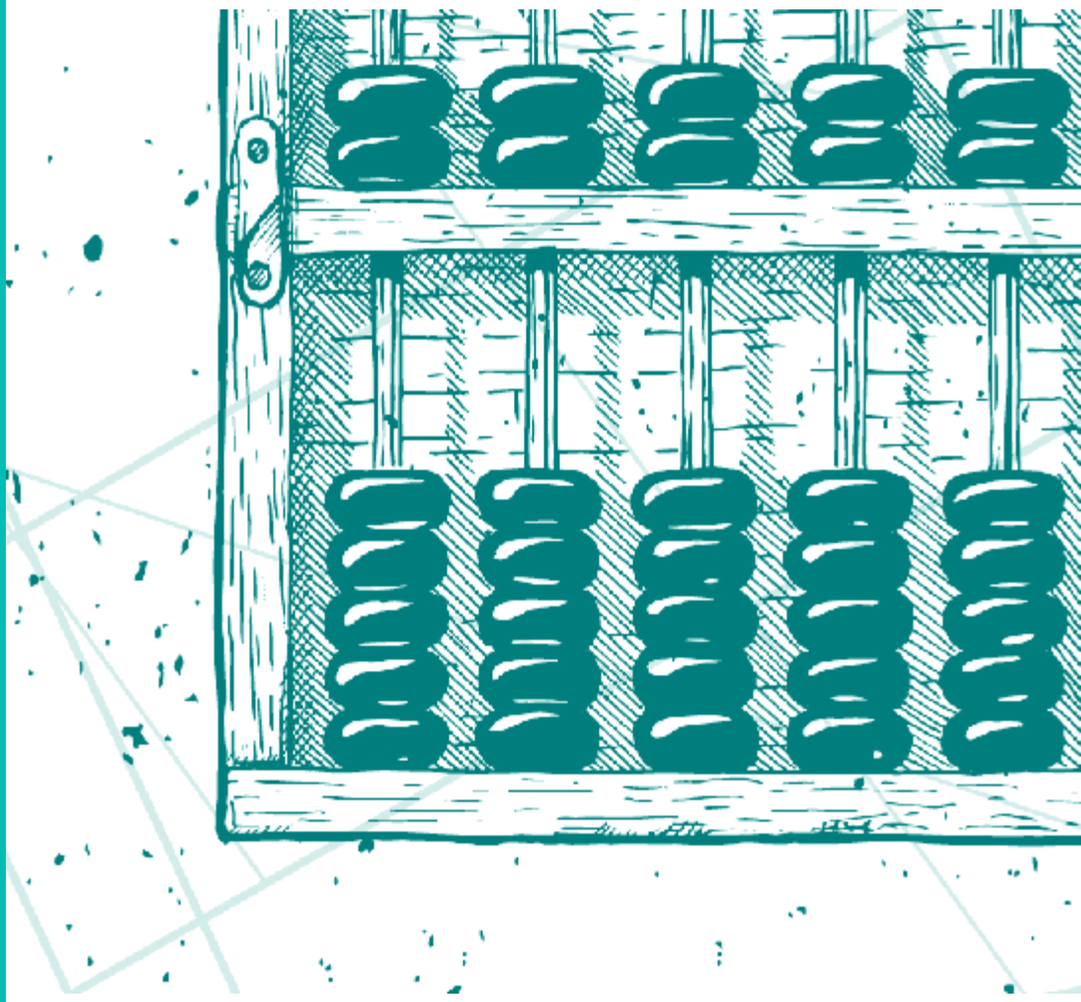

Vsebina

V SREDIŠČU

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slovenska arbitražna praksa

ISSN 2232-6588
Izdajatelj:
Gospodarska zbornica Slovenije,
Stalna arbitraža pri Gospodarski zbornici Slovenije
Odgovorni urednik: prof. dr. Aleš Galič
Strokovni urednik: mag. Marko Djinović
Leto natisa: 2017
Tisk: Present d.o.o.
Fotografija: © Depositphotos/suricoma
Naklada: 300 izvodov
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.
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Arbitražne prvine v civilni pravdi (po noveli ZPP-E)

Vsi, ki se ukvarjamo z reševanjem sporov, smo v marcu le dočakali uveljavitev Zakona o spremembah in dopolnitvah Zakona o pravdnem postopku (novela ZPP-E), ki se (z izjemo treh členov) začne uporabljati 14. septembra 2017. Novela ZPP-E obsega kar 132 členov in v ureditev pravdnega postopka prinaša izčrpen seznam pomembnih novosti kot npr.: načelo skrbnosti strank in njihovega (so)prispevanja k učinkovitosti in pospešitvi postopka; večjo učinkovitost in uporabo modernih komunikacijskih sredstev; uvedbo določb o pristojnosti v korist šibkejših strank; stopničasto tožbo; omejitev možnosti vlaganja pripravljalnih vlog pred narokom; poudarjeno sodelovanje med sodiščem in odvetniki strank pri opredelitvi časovnega in vsebinskega načrta postopka; nadomestitev poravnalnega naroka s pripravljalnim narokom; možnost, da sodišče sodnega izvedenca postavi že pred pravdo; možnost senata, da v gospodarskih sporih odredi strankama omejitev obsega vlog in omejitev časa za navajanje na naroku; celovito ureditev ravnanja s tajnimi podatki in dostopa do teh podatkov; novosti v okviru pritožbe s ciljem povečati število meritornih odločitev višjih sodišč; ukinitev revizije po kriteriju vrednosti spornega predmeta (dovoljena revizija) idr.

Razlog, da v uvodniku te številke obravnavava novelo ZPP-E, so nekatere njene rešitve, namenjene večji učinkovitosti in pospešitvi pravdnega postopka, ki močno spominjajo na arbitražni postopek. Katere arbitražne prvine torej vnaša novela ZPP-E v civilno pravdo?

Natančen bralec (uporabnik) bo »arbitražni duh« začutil na številnih mestih v noveli ZPP-E, začenši z izhodišči, na katerih temelji novela. V zakonodajnem gradivu (EVA 2013-2030-0093, tč. 2.3.1, str. 10) pripravljavci posebej poudarjajo, da se novela (med drugim) naslanja (tudi) na »*rešitve za kakovostno odločanje in pospešitev postopka iz arbitražnega prava*«, sklicujoč se na Ljubljanska arbitražna pravila in ICC Rules of Arbitration.

Najprej velja izpostaviti dopolnjen prvi odstavek 11. člena ZPP, ki ureja načelo skrbnosti strank in njihovega (so)prispevanja k učinkovitosti in pospešitvi postopka. Pred novelo ZPP-E, je omenjena določba naslavljala le sodišče (!) in mu nalagala, da »*[...] si mora prizadevati, da se opravi postopek brez zavlačevanja in s čim manjšimi stroški in onemogočiti vsako zlorabo pravic, ki jih imajo stranke v postopku*«. Stranke in drugi udeleženci v postopku te obveznosti (očitno) niso imele. Kot bi pozabljali, da je spor od strank in ne od sodišča... Novela ZPP-E je v tem pogledu prinesla bistveno spremembo paradigme, saj je naslovnike norme (temeljnega načela) določila širše. Odslej si morajo (poleg sodišča), tudi *stranke in drugi udeleženci* prizadevati, da se postopek opravi brez zavlačevanja in s čim manjšimi stroški. To je vsekakor za pozdraviti. Če je (v Sloveniji) v civilni pravdi dolžnost strank, da prispevajo k

učinkovitosti in pospešitvi postopka novost, je v arbitraži to nekaj povsem običajnega. Ni jasno, ali je pripravljavec dobil navdih za to spremembo v arbitraži, ampak Ljubljanska arbitražna pravila, že od leta 2014 vsebujejo določbo (drugega odstavka 21. člena), po kateri morajo *vsi udeleženci postopka »[r]avnati v dobri veri in storiti vse potrebno, da postopek teče učinkovito in da ne prihaja do nepotrebnih stroškov in zamud.* Če stranka ravna v nasprotju z zavezo iz tega odstavka, lahko senat to upošteva pri razporeditvi stroškov arbitražnega postopka med stranke.«.

V arbitražnih postopkih pred Stalno arbitražo pri GZS načelo skrbnosti strank in njihovega (so)prispevanja k učinkovitosti postopka prihaja do izraza na povsem konkretni ravni.

Tako denimo arbitražni senat v enem od postopkov pred Stalno arbitražo pri GZS (stranke: Slovenija, Hrvaška; pcto. 970.000,00 EUR; jezik postopka: slovenščina) dela priglašenih stroškov ni priznal, saj stranke niso sledile procesnemu dogovoru in so v nasprotju z načelom procesne ekonomije kopičile nepotrebne vloge. Senat obrazloži: »[...] *Glede na razvoj postopka je bila tožeči stranki do prvega naroka potrebna ena vloga (tožba), toženi stranki pa odgovor nanj. Nadalje so se na prvem naroku pred arbitražnim senatom obravnavala le procesna vprašanja, zato gre priznati pooblaščencem odvetnikom le [...]. Po prvem naroku pa je morala vsaka od strank glede na procesni dogovor pripraviti še eno pripravljalno vlogo ter se udeležiti naroka, na katerem je bila obravnava končana. Zato senat obema* [...] *priznava odvetniške stroške v višini dveh vlog* [...] *ter za zastopanje na narokih* [...].«.

V drugem postopku (stranke: Slovenija, Bosna in Hercegovina, pcto. 39.116,92 EUR) senat stranki tudi ni priznal stroškov v celoti, saj njenega ravnanja ni bilo moč označiti kot učinkovitega in v duhu izogibanja nepotrebnih stroškov. Senat je namreč ugotovil: »*[d]a je tožeča stranka pravilno tarifirala zastopniške stroške* [...]*, prav tako so izkazani stroški taks in predujma. Vendar arbitražni senat glede odvetniških stroškov priznava tožeči stranko samo strošek za sestavo tožbe in za prisotnost na obravnavi, ne pa tudi za vlogo dne* [...]*, ki po svoji vsebini predstavlja le pravilno specifikacijo tožbenega zahtevka. To bi morala tožeča stranka storiti že ob vložitvi tožbe in se ji zato honorarja za to vlogo ne more priznati.*«.

Naslednji institut je pripravljalni narok, ki ga sodišče razpiše po prejemu odgovora na tožbo (novi 279.c člen ZPP). Pripravljalni narok smo v našem pravdnem postopku že poznali, tako da gre pravzaprav za »povratnika«. Z vidika arbitraže je pripravljalni narok zanimiv predvsem v povezavi s t.im. »*programom vodenja postopka*«, ki pa je novost v slovenskem pravdnem postopku (novi 279.č člen ZPP). Pripravljalni narok je namreč namenjen *tudi* izdelavi programa vodenja postopka (prvi odstavek novega 279.c člen ZPP). Program vodenja postopka kot ga je uzakonila novela ZPP-E, naj bi vseboval zlasti: (i) pravno podlago, ki jo sodišče šteje za relevantno za odločitev o tožbenem zahtevku glede na podane navedbe strank; (ii) dokazni sklep glede dokazov, ki sta jih stranki že predlagali; in (iii) število ali datume narokov za glavno obravnavo, na katerih bo sodišče izvajalo dokaze, če je to mogoče. Gre za nekakšno hibridno izpeljanko »terms of reference« (določitev delovnega področja/naloge), kot ga poznamo v arbitražnem postopku. Proklamiran cilj zakonodajalca je *uvedba principa upravljanja postopka* (t.im. »*case managmenta*«) v sojenje. Ta princip naj bi zahteval od sodišča, da se skrbno in strokovno pripravi na postopek. Skrbna priprava sodnika na postopek lahko po mnenju pripravljavca prispeva k

temu, da bo postopek za stranke preglednejši in hitreje zaključen (gl. zakonodajno gradivo, EVA 2013-2030-0093, str. 165). Usmeritev je vsekakor pravilna in hvale vredna.

Vendar pa je, kar zadeva časovno načrtovanje postopka in sestavo časovnega poteka glavne obravnave, treba ugotoviti, da *je novi 279.č člen ZPP zamujena priložnost*. V predlogu novele je bila sprva določba bolj ambiciozno zastavljena, saj je predvidevala, da je opredelitev števila ali datumov narokov za glavno obravnavo, na katerih bo sodišče izvajalo dokaze, vselej del programa vodenja postopka. Kasneje v zakonodajnem postopku pa je bila ta obveznost sodišča povsem zrelativizirana z dostavkom, »če je to mogoče«. Relativno lahko je namreč utemeljiti, da glede na »zapletenost zadeve glede pravnih ali dejanskih vprašanj« (drugi odstavek 279.č člena ZPP), ni mogoče vnaprej sestaviti časovnice postopka. To pa ne pomeni nič drugega kot to, da bosta časovno načrtovanje postopka ter sestava časovnega načrta poteka glavne obravnave v praksi verjetno izjema in ne pravilo. Tudi sodniki so samo ljudje in ljudje se držimo svojih navad… Kaže, da so »arbitražnega duha« v tem delu precej obrzdali.

Časovni načrt poteka postopka je nedvomno proizvod moderne arbitražne prakse. Poznajo ga tudi Ljubljanska arbitražna pravila (25. člen). V arbitražni praksi Stalne arbitraže pri GZS ta institut v celoti dosega svoj namen, vendar ne zato, ker je zapisan v pravilih, temveč zato, ker institucionalna arbitraža uporablja mehanizme, ki zagotavljajo delovanje arbitrov po principu upravljanja postopka (t.im. »*case managmenta*«). *Prvič*, Ljubljanska arbitražna pravila vsebujejo 9-mesečni rok (šteto od predaje zadeve senatu), v katerem mora arbitražni senat izdati končno arbitražno odločbo (42. člen). V pospešenem arbitražnem postopku ta rok znaša 6 mesecev (šesti odstavek 48. člena). Roki, ki jih Stalna arbitraža pri GZS zagotavlja strankam so v praksi redno upoštevani. Povprečno trajanje arbitražnih postopkov po 1. januarju 2014 je 264 dni. *Drugič*, časovni načrt poteka postopka (25. člen) *obvezno* vsebuje datum, do katerega bo izdana končna arbitražna odločba, pri čemer mora biti ta datum znotraj 9 oziroma 6-mesečnega roka. In *tretjič*, plačilo arbitrov je določeno v razponu in je v neposredni odvisnosti od njihove učinkovitosti. Sekretariat Stalne arbitraže pri GZS namreč pri določitvi višine plačila za senat upošteva *skrbnost in učinkovitost arbitrov*, obseg opravljenega dela, zapletenost zadeve, *učinkovitost poteka postopka* in *pravočasnost izdaje arbitražne odločbe* (2. člen Dodatka II – Tarifa k Ljubljanskim arbitražnim pravilom in Smernice za arbitre Stalne arbitraže pri GZS). Časovni načrt poteka postopka tako ni le mrtva črka na papirju, temveč se dosledno izvaja v praksi. V enem od novejših postopkov iz leta 2016 (stranke: Slovenija, pcto. 77.765,48 EUR), je denimo Sekretariat Stalne arbitraže pri GZS za arbitra posameznika določil minimalni znesek plačila po tarifi (običajno arbiter prejme mediano), saj se le-ta ni držal časovnega načrta poteka postopka, prav tako pa ga ni modificiral, s čemer je prezrl legitimna pričakovanja strank po časovni predvidljivosti postopka. Iz utemeljitve: »[…] *Sekretariat ugotavlja, da je bila arbitražna odločba izdana znotraj roka iz 42. člena Arbitražnih pravila, a je bil presežen datum izdaje arbitražne odločbe kot je bil določen v časovnem načrtu poteka postopka iz 1. procesnega sklepa z dne* […]. *Upoštevaje zgoraj napisano je Sekretariat določil plačilo za arbitra posameznika v spodnji meji kot jo določa tarifa v razponu pri vrednosti spornega predmeta v konkretni zadevi.*«.

V nekem drugem primeru iz leta 2015 (stranke: Slovenija, pcto. 1.539.312,76 EUR), ko je moralo predsedstvo Stalne arbitraže pri GZS v postopku intervenirati in arbitražnemu senatu podaljšati rok za izdajo arbitražne odločbe, pa je Sekretariat arbitrom določil plačilo v običajni vrednosti (mediana), saj je do podaljšanja roka prišlo iz objektivnih razlogov. Iz obrazložitve: »[...] *Samo dejstvo, da je bil 9-mesečni rok za izdajo končne arbitražne odločbe iz 42. člena Arbitražnih pravil z odločitvijo predsedstva Stalne arbitraže z dne* [...], *na obrazložen predlog arbitražnega senata podaljšan do* [...], *na določitev višine plačila arbitrov ni vplivalo, saj je bil omenjeni rok po presoji Sekretariata podaljšan iz upravičenih razlogov in je postopek potekal brez neutemeljenih zastojev* [...].«

Na dveh primerih iz novele ZPP-E sva pokazala, kako arbitražne prvine na posameznih mestih prehajajo v civilno pravdo. Ta nova smer razvoja kaže na to, da pomen arbitraže v Sloveniji narašča. Dejstvo je, da se pravdni postopek še nikoli doslej ni toliko primerjal z arbitražo. Ne dolgo nazaj je primerjava praviloma potekala v obratni smeri in je bilo govora o »subsidiarni uporabi ZPP v arbitraži«. To obdobje je seveda minilo in danes se sprašujemo:

Kaj lahko iz arbitraže koristnega vzamemo za povečanje učinkovitosti in pospešitev pravdnega postopka?

mag. Marko Djinović
strokovni urednik

prof. dr. Aleš Galič
odgovorni urednik

Debugging the Arbitration Legal Framework in Bosnia and Herzegovina

Nevena Jevremović, LL.M.

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Introduction

A few years ago, arbitration was one of the rarely discussed topics in Bosnia and Herzegovina (BiH). There was virtually no scholarship on the matter, nor has there been any information on arbitration practice. Local firms would seldom deal in arbitration disputes. Today, that is not the case, as arbitration is becoming more important in everyday business and legal practice. However, things are far from ideal.

After Montenegro adopted its law on arbitration in 2015, BiH is the only country in the Ex-Yugoslavia region with an inadequate arbitration framework. Topped with the complexity of its political and legal system, the existing framework and practices seem outdated and unfit to meet the modern needs and standards of the field. There is an urgent need to improve this system. With good reason: a modern arbitration framework will have a positive impact on attracting foreign investors and creating a favorable business climate for both local and cross-border businesses. In the long run, this can have a positive public impact: it will help increase the efficiency of judiciary and contribute to the overall awareness of the benefits on alternative dispute resolution mechanisms in general.

Until the reform is carried out, a good understanding of the overall system will allow us to navigate through it and avoid potential risks. This author's goal is to present the arbitration framework and practice in BiH, with the hope that this will ease some of the burden that both the local and foreign investors face. To overcome some of these obstacles, I propose a way for interested parties to structure their proceedings to avoid potential risks.

National Framework – Applicable Laws, Institutional Arbitration, and Perspectives

Explaining the arbitration framework in Bosnia and Herzegovina is always a challenging task, as it requires a simple presentation of a maze of relevant laws that shape the subject matter. The risk of confusing the reader is present, but the author of this text will attempt to provide some comments and recent trends that might affect the future of arbitration in BiH.

Applicable Laws

Several laws, in conjunction, form the arbitration legal framework of Bosnia and Herzegovina. The starting point of the BiH legal framework is the Civil Procedure Code[1], which classifies arbitration as a "spe-

1 In terms of arbitration, BiH does not have a separate law on arbitration. The main statutory provisions governing arbitration proceedings can be found in the entity and district civil procedure codes i.e. the Code on Civil Procedure of FBiH, the Code on Civil Procedure of RS and

After Montenegro adopted its law on arbitration in 2015, BiH is the only country in the Ex-Yugoslavia region with an inadequate arbitration framework

There is an urgent need to improve this system

The Code regulates arbitration in only nineteen articles

cial procedure", and places it alongside other types of "special procedures" such as expedited procedure in employment disputes, or special procedures concerning small claims. The Code regulates arbitration in only nineteen articles. This very simple framework defines the basic elements, such as arbitrability,[2] the formal validity of an arbitration agreement,[3] constitution of an arbitral tribunal[4] and challenge of an arbitrator,[5] power of the tribunal in the course of the proceedings,[6] the form and legal effects of an arbitral award[7], and the process of annulment.[8] Some of these provisions are in line with internationally accepted standards,[9] while others are not.[10] As an example of the latter, a party may file a motion to the competent court for declaring the arbitration agreement terminated if either: (i) an arbitrator is not appointed in due time, (ii) appointed arbitrators cannot agree on the appointment of chairman, (iii) parties cannot agree on an arbitrator they have to appoint jointly, (iv) the appointed arbitrator cannot, or will not act as arbitrator.[11] The reasons for such regulation are not quite clear, especially in comparison to the solution stipulated in the Model Law. Namely, the Model Law provides that in these types of situations, the court shall take necessary measures, unless the agreement itself provides for another appointing procedure.[12] The Model law does not take a radical stand as to have the agreement terminated merely because the appointment procedure is facing

the Code on Civil Procedure of BD. The information given in the following sections is based on the Civil Procedure Code of FBiH (Civil Procedure Code). Bearing in mind that the provisions governing arbitration are harmonized in all three civil procedure codes, the text below is valid in relation to RS and BD also, unless explicitly stipulated otherwise.

2 The general rule is that a dispute can be subject to arbitration provided that it is a matter which parties can freely dispose of as defined in the general provisions of the Civil Procedure Code. *See* Article 434 of the Civil Procedure Code. The provision may result in lack of legal certainty. As an illustrative example: under the current system of uniform regulation of arbitration and civil litigation, if the law provides for the exclusive jurisdiction of courts, arbitral tribunals would most likely not have jurisdiction. This approach misses out the point that provisions on exclusive jurisdiction only settle territorial jurisdiction among the courts of a certain country, and they do not (or, at least, should not) settle the *arbitrability ratione materiae*. Not only is this solution contrary to the trends in arbitration today, but it also leads to the great lack of legal certainty.

3 Formal validity of an arbitration agreement, on the other hand, is in line with the Article II of the New York Convention (1958) and Article 7 of the UNCITRAL Model Law. Consequently, an arbitration agreement is valid if concluded in written form and signed by both parties. It is also valid if concluded via other means of communication that provide for an evidence in writing of a concluded arbitration agreement. Lastly, an arbitration agreement can be concluded in form of exchange of claims before, provided that the defendant does not challenge its existence.

4 A dispute can be settled by a sole arbitrator or an arbitral panel, in which case number of arbitrators must be an odd number. *See* Civil Procedure Code *supra* note 1, Article 437. Unless otherwise agreed by the parties, the default rule allows for a constitution of a three member panel, where each party appoints one arbitrator and they jointly appoint the president of the tribunal. *See* Civil Procedure Code *supra* note 1, Article 437(2). If the arbitrator is not appointed or not appointed in due time, the party (or the parties) can request the competent court to remedy this by making the necessary appointment. In any case, the party may also request termination of the agreement in such case.

5 This is another situation where the Code makes a reference to the rules of civil litigation. More specifically, a party may challenge an arbitrator due to the same reasons as it may challenge a judge in a civil proceedings. *See* Civil Procedure Code *supra* note 1, Article 442 (1) in conjunction with Article 357. The referenced provision provides an exhaustive lists of situations in which a judge/arbitrators is related to either the parties or the case itself. *See* Civil Procedure Code *supra* note 1, Article 357 (1). The provision also allows for a challenge due to reasons which shed some doubt as to the impartiality of the arbitrator. *See* Civil Procedure Code *supra* note 1, Article 357 (2). Since there is no reported case practice in this regard, the scope of this provision in relation to an arbitration proceeding specifically is not clear. In any case, a party may challenge an arbitrator only if the reason occurred (or the party became aware of it) after the arbitrator has been appointed. Lastly, unless agreed otherwise by the parties, the competent court decides on the challenge. *See* Civil Procedure Code *supra* note 1, Article 442 (2) and (3).

6 If the parties do not agree otherwise, the arbitrators will define the arbitration proceedings. *See* Civil Procedure Code *supra* note 1, Article 443. This is a rather ambiguous provision, as it is not utterly clear what is meant by the 'defining the arbitration proceedings'. In other words, it is not clear does this provision refer to defining the applicable laws and managing the case accordingly. For an analysis on this, *see* Durakovi ć-Morankić D. and Jevremović N., ADR National Report for Bosnia and Herzegovina in the Civil Law Forum for South East Europe collection of papers, Volume 3.

7 The arbitral award produces the same legal effects as a final and binding court judgment. *See* Civil Procedure Code *supra* note 1, Article 449. The parties may, if they wish to do so, agree on an appellate mechanism. In case of an arbitral tribunal, the decision is, in general, made by majority of votes. The award has to be, unless otherwise agreed by the parties, reasoned and, in any case, signed by all members of the tribunal. *See* Civil Procedure Code *supra* note 1, Articles 447 (1) and (2).

8 Party not satisfied with an award can file a claim for setting aside/annulment of the award. The grounds for annulment are of limited scope and include range of procedural irregularities. These grounds are generally consistent with Article 34 of the UNCITRAL Model Law (Model Law). For presentation of recent court decisions, see below.

9 See *supra* note 3 on the discussion on formal validity of an arbitration agreement.

10 Similar example is the issuance of interim measures. The section on arbitration is silent as to whether arbitral tribunal may grant interim measures. Filing an interim measure prior to the statement of claim obliges the party to start civil proceedings before the court. A request for an interim measure can also be filed with the statement of claim, or in the course of procedure. There are no guidelines or practical examples as to how this issue would be reconciled with an existing arbitration agreement and a parties' choice to subject their dispute to arbitration. Theoretically, there are no obstacles for applying these rules by analogy to the arbitration proceedings. However, given the overall restrictive regulation, it is more likely that it will be interpreted that the tribunal has no power to grant interim measures, and that this issue is reserved for courts only.

11 *See* Civil Procedure Code *supra* note 1, Article 440.

12 *See* Model Law *supra* note 8, Article 11.

obstacles. The official commentaries of the relevant BiH legislation provide no clarifications as to what the intent of the legislator was for providing this solution. There is also no available practice that can shed some light on the matter.

The Civil Procedure Codes, therefore, do not set out a comprehensive framework. Some of the gaps that exist can be solved with the aid of the two remaining parts of the framework: the Law on Obligations and the Law on Private International Law.

The Law on Obligations is relevant for the substantive validity of an arbitration agreement. In the absence of specific rules on the matter, the general rules of contract law should apply to an arbitration agreement as well. An arbitration agreement would be null and void if it is contrary to the morals and good customs of the society, the constitution of BiH and mandatory laws.[13] The validity of an arbitration agreement can also be challenged if the signing party was not properly authorized to do so.[14]

Such an approach is not uncommon in practice. In a recent decision, Supreme Court of Republika Srpska discussed precisely this issue.[15] The parties, one from Croatia and one from BiH, entered a Sales Agreement and agreed that any dispute arising thereunder would be settled by arbitration before the Croatian Chamber of Commerce and by virtue of relevant Croatian laws. The parties also agreed that the language of the proceedings would be Croatian. The plaintiff's director of marketing and pharmaceutical operations signed the agreement, based on a special proxy. This special authorization was evidenced in the said Sales Agreement. Nonetheless, the defendant disputed such authorization under Article 91 of the Law on Obligations. The lower courts accepted this analysis and ruled in favor of the defendant. The Supreme Court, however, took the opposite approach and ultimately annulled the lower courts' decisions and dismissed the claim. The Supreme Court's reasoning is twofold. First, it found that the defendant did not meet its burden of proof. Since the existence of the proxy was provided in the Sales Agreement, the defendant was obliged to provide evidence that would refute this. By failing to do so, it failed to comply with its burden of proof. Second, having closely analyzed the arbitration agreement, the Court concluded that the agreement was almost entirely favorable for the Plaintiff. It was signed in Zagreb, Croatia, and it provided that the arbitration proceeding would be seated in Croatia, held in Croatian, and decided based on Croatian law. Since the Plaintiff is a Croatian firm, headquartered in Zagreb, the Court concluded that "it does not seem logical that such precise agreement on the dispute resolution mechanism of a potential dispute, which is in all of its elements adjusted to plaintiff, be agreed upon without proper authorization, which would make this clause null and void."

The Civil Procedure Codes, therefore, do not set out a comprehensive framework. Some of the gaps that exist can be solved with the aid of the two remaining parts of the framework: the Law on Obligations and the Law on Private International Law

The Law on Private International Law may aid in determining when an arbitral award is deemed to be an international one. An arbitral award can, therefore, be considered as an international one if, alternatively (i) it was made outside of BiH; or (ii) when the tribunal applied foreign procedural law.[16] It is questionable to what extent this solution is consistent with international trends in arbitration. For example, this approach does not shed any light on whether BiH is a jurisdiction that takes a localized or delocalized approach to arbitration.

This may further cause uncertainty in the application of Article V of the New York Convention. An interesting decision that illustrates the risk is a relatively old decision of the Supreme Court of Republika Srpska.[17] There, the plaintiff, a company with its seat in Republika Srpska, requested setting aside an arbitral award of the Foreign Chamber of Commerce of Yugoslavia[18]. The plaintiff based its request on Article 475 (3) of the Civil Procedure Code, according to which the competent court for setting aside of arbitral awards is the court that would have jurisdiction over the dispute had there been no arbitration clause. The Supreme Court agreed with this reasoning, but it

13 *See e.g.* Article 49 of the Law on Obligations (*Official Gazette of Former Yugoslavia, nos. 29/78, 39/85, 45/89 and 57/89*) (*Official Gazette R. of Bosnia and Herzegovina, nos. 2/92, 13/93 and 13/94*) (*Official Gazette of RS*).

14 *See* Law on Obligations *supra* note 13, Articles 84-96.

15 *See* Decision of the Supreme Court of Republika Srpska no. 71 0 Ps 008649 09 Rev dated June 1, 2011.

16 *See* Article 97 of the Law on Private International Law Rules (*Official Gazette Former Yugoslavia, nos. 43/82 and 72/82) (Official Gazette R. BiH, nos. 2/92, 13/94*).

17 *See* Decision of the Supreme Court of Republika Srpska no. Rev-112/02 dated February 20, 2004.

18 *Id.* The arbitral award in question is the award no. T-43/92 dated 29 May 1998.

dismissed the claim on different grounds. In particular, the plaintiff designated the Foreign Chamber of Commerce as the defendant in the case. The court reasoned that this institution cannot be a party in these proceedings:

> "*[...] a claim for setting aside an arbitral award is constitutive in its nature. [...] if accepted by the court, it forms a new relationship between the parties in the civil proceedings, that were also parties in the arbitration proceedings.[...] Due to such nature of the claim, it is necessary that the plaintiff and the defendant are the same parties from the arbitration proceedings. The claim de facto represents an extraordinary remedy against an arbitral award, and in such proceedings, the defendant cannot be the institution that made the award.*"[19]

Interestingly, the court did not take into account Article V of the New York Convention under which the only courts competent to set aside the award are those in the seat of arbitration. It is not clear from the record whether the seat was in (then) former Yugoslavia or elsewhere. In any case, failure to take into account this provision is an important indication of the need for further building of the capacities and training of judges in BiH, so that they can correctly apply and work within the applicable framework.

More importantly, the Law on Private International Law affects the recognition of foreign arbitral awards. Although BiH is a signatory country to the New York Convention[20], it seems that in practice, courts rely more on the Law on Private International Law and regional agreements. In any case, both acts provide for essentially the same grounds for non-recognition of a foreign arbitral award. The practical implications of this will be discussed in more detail below.

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Institutional arbitration

The leading arbitration institution is the Arbitration Court attached to the Foreign Chamber of Commerce of BiH (Arbitration Court).[21] There is some sporadic information per which the Arbitration Court was established during the post-Second World War period, but at that time, the Arbitration Court's competence covered only domestic disputes. This competence was of limited scope, i.e. it only covered some minor transportation-related disputes. In 2003, the Rules on Organization and Work of the Arbitration Court entered into force (Rules).[22]

By choosing the Arbitration Court, the parties agree upon the application of its Rules.[23] The Arbitration Court administers domestic commercial disputes, i.e. disputes, which involve parties residing in BiH, and international commercial disputes[24] i.e. disputes between a party residing in BiH and a party with foreign residence.[25] Furthermore, the Arbitration Court maintains two lists of arbitrators – one for disputes in which

19 *Id.*

20 The Convention was ratified by the Law on Ratification of the Convention on Recognition and Enforcement of Foreign Arbitral Awards (*Official Gazette SFRJ Treaties, no. 11/81*). Upon dissolution of the Former Yugoslavia, its countries, including BiH, assumed the Convention by form of succession. In particular, the Convention is assumed in BiH in accordance with Article 34 of the Vienna Convention on Succession of States in Respect of Treaties, which BiH signed on 22 July 1993 (*Official Gazette RBiH, no. 25/93*). The Convention entered into force in BiH on 6 March 1992. BiH has made following declarations and a reservation to the application of the New York Convention: (a) This State will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State. (b) With regard to awards made in the territory of non-contracting States, this State will apply the Convention only to the extent to which those States grant reciprocal treatment. BiH also made the following reservation: "This State formulated a reservation with regards to retroactive application of the Convention." For details, *see*: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html [last accessed on December 5, 2016].

21 For more information about the Arbitration court, see*:* http://komorabih.ba/brz-nacin-rjesavanja-privrednih-sporova/. Other commercial arbitrations exist on entity levels and are attached to the entity's chambers of commerce. For details on the Arbitration Court attached to the RS Chamber of Commerce, *see* http://komorars.ba/poslovno-okruzenje/arbitraza/. Its rules are available in both the local languages and English language, the model clause is easily accessible on the website of the respective institution, and the court appears to have competence in both domestic and international disputes. There is no publicly available information on the number of cases that the court administers. The website of the Chamber of Commerce in Federation does not provide for any details. *See* Law on Chambers of Commerce in Federation BiH (*Official Gazette of Federation BiH, nos. 35/98 and 34/03*) for further reference.

22 The Rules are available online, in local languages only. See http://komorabih.ba/wp-content/uploads/2013/04/pravilnik-o-arbitrazi.pdf. The enactment of the Rules coincided with the enactment of the civil procedure code containing statutory provisions on arbitration. It therefore appears, that in 2003 there was an attempt to establish an arbitration framework in BiH.

23 *See* the Rules; *supra* note 22, Article 11. Interestingly, the Rules also provide for the possibility of contracting UNCITRAL Arbitration Rules. See Article 43.

24 *See* the Rules; *supra* note 22, Article 1 on what is considered as commercial dispute. If it is a commercial dispute where the parties are free to dispose with the subject matter of the dispute, that there is not exclusive jurisdiction of the national courts, and that the parties have agreed on the jurisdiction of the Arbitration Court.

25 *See* the Rules; *supra* note 22, Article 2.

both parties have their seat or domicile within BiH, and one for disputes in which at least one of the parties is domiciled or resides in another state.[26] However, the parties are also free to appoint arbitrators who do not appear on these lists, as long as these arbitrators are highly professional individuals with specialized knowledge of law and business relationship.[27] Arbitral awards of the Arbitration Court can be made public only if the parties agree to do so.[28] This institution does not provide for any type of statistics that would allow for better insight and understanding of the type of disputes it administers.

The Arbitration Court is particularly interesting, due to the potential it gives to interested parties. First, its Rules allow the interested parties to agree on the use of UNCITRAL Arbitration Rules as the governing rules for the proceedings. Second, an arbitration before this institution lasts up to 12 months only. Third, the administrative and arbitrators' fees are comparatively small. For example, for a dispute of value up to EUR 25,000 administrative fee and arbitrators' fee is respectively EUR 400,00. Therefore, while the institution can improve its work, the parties still have room to structure their proceedings in a modern, efficient and cost effective way.

Prospective Uses of Arbitration

Discussing the prospective uses of arbitration in other cases typically starts with presenting some of the permanent specialized arbitration institutions that exist on the market. Notably, the most significant ones are the arbitration institutions with the Regulatory Commission for Electricity of FBiH (FERK) and the BiH Commission for Concession.

Specialized arbitration institutions

FERK administers disputes between license holders, or between a license holder and end users in accordance with the FERK Rulebook on Arbitration.[29]

FERK administers disputes between license holders, or between a license holder and end users

The overall goal of this specialized body is to ensure a transparent, fast, efficient and cost effective arbitration proceeding which enables the public to understand the basis of FERK's decision.[30] The Rulebook provides for some interesting rules of the procedure, worthy of further analysis. For example, the Rulebook emphasizes the consensual nature of the arbitration proceedings. Parties must unequivocally agree to settle their disputes in arbitration, while FERK may, if it deems that it would be beneficial for the proceedings, ask the parties to sign a separate arbitration agreement after the filing of the claim and before the hearing.[31] Public interest is an important element of these proceedings. Not only are the hearings public, but FERK, having accepted jurisdiction over the disputes, issues a public notice providing general information about the parties, subject matter of the dispute and raised arguments, as well as date of the hearing.[32] The Rulebook does not provide for any submission of interested third parties, such as non-governmental organizations, which may be a relevant factor for advocating for protection of public interest. There has been one reported case thus far.[33]

Another specialized institution that is of practical importance is the BiH Commission for Concession, which can administer disputes between the concessionaires.[34] There have been no reported cases thus far. Entity laws on concession also provide for arbitration as a mode of dispute resolution between the concessionaire and the concession granting authority.[35] A recent ICSID arbitration initiated by a group

Another specialized institution that is of practical importance is the BiH Commission for Concession, which can administer disputes between the concessionaires

26 *See* the Rules; *supra* note 22, Article 23. For the list of arbitrators for domestic disputes, *see*: http://komorabih.ba/wp-content/uploads/2016/02/Lista_arbitrara_I_n.pdf for international, *see*: http://komorabih.ba/wp-content/uploads/2016/01/Lista_arbitrara_dd.pdf.

27 *See* the Rules; *supra* note 22, Article 24(1) in conjunction with Article 23 (2).

28 *See* the Rules; *supra* note 22, Article 48 (5).

29 FERK administers arbitration proceedings based on Articles 39 and 40 of the FBiH Electricity Act. The Rulebook on Arbitration Proceedings was made in 2005, and has been amended two times, in 2014 and 2016 respectively. All versions of the Rulebook, with accompanying documents, are available on the FERK's website: http://www.ferk.ba/_ba/akti-ferk-a/pravilnici/18556-pravilnici-ferk-a.

30 *See* Section II of the Explanation on Adoption of the Rulebook on Arbitration available at: http://www.ferk.ba/_ba/images/stories/05_09/download/Arbitraza/obrazlozenje_prav_o_arb_bs.pdf [last accessed 5 December 2016].

31 *See* the Rulebook, *supra* note 29, Article 6.

32 *See* the Rulebook, *supra* note 29, Articles 13 and 19.

33 *See* the case no. 05-04-925-13/19/06 dated May 31, 2007, available at: http://www.ferk.ba/_ba/images/stories/05_09/download/presude/2007/0601_presuda_rose_wood_bs.pdf [last accessed on December 5, 2016].

34 *See* Article 17 of the BiH Law on Concession, available at: http://www.koncesijebih.ba/home/index.php?option=com_content&task=view&id=17&Itemid=30 [last accessed December 5, 2016].

35 *See* e.g. Article 63 of the Concession Act of Republika Srpska, available at: http://koncesije-rs.org/dokumenti/zakoni/Zakon%20o%20kon-

of Slovenian investors revolves around a concession granted for construction of a hydropower plant on the river Vrbas in Republika Srpska.[36] This type of investment is rather common in BiH since the country is rich with natural resources and attracts foreign investors.[37] The downside of this type of deal is the lack of responsible governance that results in delays in issuing necessary licenses and other requirements needed for the timely completion of work.[38] One can expect new investment-related cases in the future, filed on similar grounds, which will burden the country's budget even further.

Use of arbitration in employment and consumer disputes

Labor and consumer disputes hold some of the highest potential for the use of arbitration in BiH. More specifically, arbitration is envisaged as a mechanism for both individual and collective labor disputes, and is used in cases of strikes or problems with the employees union in certain cases.[39] Similarly, the use of arbitration is envisaged for consumer disputes as well.[40] More specifically, under the Stabilization and Accession Agreement (SAA), BiH has an obligation to ensure: (i) efficient legal protection of consumers; and that (ii) disputes between consumers and traders concerning contractual obligations stemming from sales or services contracts, both online and offline, in all economic sectors can be can be submitted to an ADR entity.

The role of the courts in relation to arbitration proceedings is generally supportive and supervisory

The majority of available BiH court decisions revolve around assessing the question of jurisdiction of the court when there is an existing arbitration agreement

However, there is no regulation in place in BiH whereby consumer disputes can be resolved anywhere except the courts. It remains to be seen whether there will be a mechanism/platform that will allow the interested parties to use this potential.

The Supportive and Supervisory Role of the Courts

The role of the courts in relation to arbitration proceedings is generally supportive and supervisory. Some might consider the solutions as restrictive, but the relevant provisions in the Civil Procedure Code do not impede the arbitration proceedings, unless the parties request so. The majority of available BiH court decisions revolve around assessing the question of jurisdiction of the court when there is an existing arbitration agreement. Analysis of these decisions shows that the courts uphold the arbitration agreements, and refer parties to arbitration. Some of the most interesting decisions are illustrated below. There is almost no court decision concerning the other powers of the court, such as appointment of an arbitrator if the parties have failed to do so, etc.[41] The situation is slightly better in terms of setting aside and recognizing arbitral awards. These decisions are briefly illustrated below as well.

Supporting Arbitration Proceedings

If parties have agreed to arbitrate their dispute, the court will dismiss any claim related thereto and rule that it does not have jurisdiction to entertain the dispute in question. The analysis of several court decisions indicates that the challenges to an existing arbitration clause between the parties refer to: (i) the scope of the main agreement vs. the scope of the arbitration clause;

cesijama%202013%20Lat.pdf [last accessed on December 5, 2016]. In addition, both the state law and entity laws on concession stipulate that a concession agreement must contain a dispute resolution clause, which includes arbitration as well. See e.g. BiH Concession Act *supra* note 32, Article 26.

36 *Viaduct d.o.o. Portorož, Vladimir Zevnik and Boris Goljevšček v. Bosnia and Herzegovina* (ICSID Case No. ARB/16/36).

37 *See* e.g. Investment Opportunities and Incentives for Investors, presented by the Foreign Investors Council in BiH, available at: http://www.fic.ba/ [last accessed December 5, 2016].

38 *See* e.g. White Book 2015/16 published by the Foreign Investors Council of BiH, available at: http://www.fic.ba/editions [last accessed December 5, 2016].

39 *See* e.g. Articles 74 and 139 FBiH Labor Act (*Official Gazette of Federation of BiH, no. 26/16*).

40 *See* e.g. Articles 101 and 124 of the BiH Consumer Act (*Official Gazette of BiH, no. 25/06*) available at: http://www.mvteo.gov.ba/zakoni/zakoni/default.aspx?id=666&langTag=bs-BA [last accessed on December 5, 2016]. The act stipulates the possibility of use of ADR mechanisms. Ombudsman for Consumer Protection is competent to propose and initiate settlement of consumer disputes through use of ADR mechanism. *See* Article 101 (h) of the Consumer Protection Act. The High Judicial and Prosecutorial Council of Bosnia and Herzegovina advocates for use of ADR mechanisms in order to decrease the number of cases before the courts. This is especially emphasized within HJCP's cooperation with the EU. *See* Meetings, recommendations and conclusions of the Structured dialogue on justice between the EU and Bosnia and Herzegovina available at: http://vsts.pravosudje.ba/ [last accessed on December 5, 2016].

41 In later stages of the proceedings, the national courts can appoint the president of the arbitration tribunal, in case the members of the tribunal cannot reach an agreement on president's appointment. The court also can declare termination of an arbitration agreement, upon a request of one of the party. The situations in which party may resort to this remedy are listed in the Civil Procedure Codes, and include situations such as an arbitrator cannot be appointed in due time, the arbitrators cannot agree on the appointment of the president of the tribunal, challenge of an arbitration, and in case the tribunal cannot reach the necessary majority of votes when passing its decision. There has been no reported court practice in this regard, and it is not possible to assess what is the extent of practical application of these provisions.

(ii) the validity of the arbitration clause; and (iii) scope of the arbitration clause.[42]

An interesting example of this practice is a case where a German company filed a claim against a Bosnian company before the Municipal Court in Sarajevo for the payment of an outstanding debt.[43] The defendant challenged the jurisdiction of the court based on an arbitration clause set forth in the main contract between the parties. In the clause, the Parties agreed on the number of arbitrators, procedure for their appointment and the appointment of the presiding arbitrator. The plaintiff, in its response, disputed the validity of the said clause, arguing that the parties did not explicitly exclude jurisdiction of the court, nor have they stipulated what (if any) would be the binding nature of the arbitration award. In support of this argument, the plaintiff also referred to the attempts made to settle the dispute amicably before the case was brought before the court.

The court analyzed the arbitration clause (i) following the rules of interpretation set forth in Article 99 of the Law on Obligations; and (ii) within the context of the entire agreement between the parties. It found that the Parties agreed to settle their disputes arising out of the main agreement in arbitration and that the present claim arises out of the said agreement. Therefore, by virtue of Article 438 (1) and 2 and Article 434 of the Code on Civil Procedure, the Court found that it does not have jurisdiction to entertain the present case. It dismissed the claim and annulled any procedural actions that had been undertaken.

In another occasion, the Municipal Court in Sarajevo analyzed the effects of, what appears to be, a multi-tier clause.[44] This was a domestic case, where a Bosnian company initiated court proceedings against another Bosnian company for the payment of an outstanding debt arising out of a construction agreement. The defendant challenged the jurisdiction of the Court, invoking the arbitration clause contained in the main agreement. The clause set forth that the Parties will attempt to settle their disputes amicably, and if that fails, the dispute will then be resolved by an arbitration panel.

Although the parties attempted to resolve their dispute amicably, the court found no proof that such a settlement was successful. Since the Parties agreed to subject their disputes to arbitration in such a case, the court ruled that it lacks jurisdiction by virtue of Article 438 of the Civil Procedure Code, and it dismissed the claim. The court also referenced Article 99 of the Law on Obligations, but made no further elaborations in this regard.

An exception to these rather straightforward factual and legal scenarios, is the decision of the District Commercial Court of Bijeljina, where Judge Božana Guzvić, engaged in an extensive analysis of a court's power to decide on the matters of validity of an arbitration agreement, the formal and/or substantive validity of an arbitration agreement, with substantive references to the relevant provisions of the Civil Procedure Codes and the New York Convention.[45]

A Slovenian company initiated court proceedings before the District Commercial Court in Bijeljina against a Bosnian company for payment of an outstanding debt arising out of two agreements for construction of a thermal power plant dated from 1981 and 1988, respectively. The defendant invoked the arbitration clause set forth in the Agreements and thereby challenged the jurisdiction of the court. The plaintiff disputed the validity of the clause and argued that the designated body in the agreement ceased to exist due to the dissolution of the former Yugoslavia. Thus, the plaintiff argued, the arbitration clause is no longer valid and cannot be enforced.

The court engaged in an extensive discussion of its own competences to decide on the validity of the arbitration clause, and the requirements for a valid arbitration

A Slovenian company initiated court proceedings before the District Commercial Court in Bijeljina against a Bosnian company for payment of an outstanding debt arising out of two agreements for construction of a thermal power plant dated from 1981 and 1988, respectively

42 *See* e.g. decisions of the Municipal Court in Sarajevo no. 65 0 PS 197771 11 PS dated May 24, 2012, 65 0 PS 117423 09 PS dated December 10, 2010, 65 0 PS 307722 12 PS dated October 2, 2013 and a decision of the Municipality Court in Mostar, no. 58 0 PS 072593 09 PS.

43 The Municipal Court in Sarajevo dismissed the claim in its decision no. 09 65 PS 014258 03 Ps dated 13 January 2011. On appeal, the Cantonal Court of Sarajevo accepted the reasoning of the appellant and remanded the case for re-trial. On remand, the Municipal Court in Sarajevo dismissed the claim due to lack of jurisdiction pursuant to Article 438 (1) and (2) and Article 434 of the Civil Procedure Code.

44 Municipal Court in Sarajevo, decision no. 65 0 PS 106510 09 PS dated 1 December 2010.

45 District Commercial Court in Bijeljina, no. 59 0 PS 018507 12 PS 3 dated September 17, 2002. On appeal, the High Commercial Court affirmed the decision and dismissed the appeal as unfounded. *See* the High Commercial Court in Banja Luka, decision no. 59 0 Ps 018507 12 Pz 4 dated March 14, 2013.

clause. In both parts, the court relied on the New York Convention. In particular, it deduced from Article II of the said treaty that the court is obliged to refer parties back to arbitration proceeding if it finds that the arbitration agreement is not null void or inoperable. It further analyzed the following requirements for a valid arbitration clause: written form, arbitrability of the dispute, that the dispute arises out of an existing or a future legal relationship between the parties, and that the agreement is not null, void or incapable of being applied.

The court found that the arbitration clause in question meets all of the requirements and is thus valid. Moreover, the court found that the arbitration clause in the agreement refers to an *ad hoc* arbitration, the designated body is not an arbitration institution with its rules of procedure, and that, consequently, the fact that the body ceased to exist has no effect on the validity of the clause itself. Parties are yet to agree on the procedural rules to make the proceedings operable.

Upon the final decision of the court, the plaintiff initiated an investment arbitration before ICSID against BiH.[46] The procedure is ongoing, and the ICSID tribunal is yet to render a final award.[47]

Setting Aside an Arbitral Award

Final recourse against an arbitral award is a request for setting aside an arbitral award. The grounds for such a request in the Civil Procedure Code, are largely similar to Article 34 of Model Law, and refer mostly to procedural irregularities. In one of the recent decisions, the Municipal Court in Sarajevo had a chance to elaborate on these grounds. The case itself, and the reasoning of the court, are important as they send a strong message about the role of the courts in these proceedings.[48]

Final recourse against an arbitral award is a request for setting aside an arbitral award. The grounds for such a request in the Civil Procedure Code, are largely similar to Article 34 of Model Law, and refer mostly to procedural irregularities

The court ruled that the plaintiff's right to a fair trial was violated and therefore it annulled the arbitration award of the Foreign Chamber of Commerce.[49] It accepted the plaintiff's arguments that the arbitration tribunal based its decision, *inter alia*, on a piece of evidence that was not suggested or presented in the arbitration proceedings by either of the parties. Given that the arbitration court based its decision on non-existing evidence, such a decision is contrary to the BiH Constitution and Articles 451 and 6 of the Codes on Civil Procedure.

Some authors have criticized the court for its decision, arguing that it essentially acted as an appellate body.[50] The Plaintiff did raise several arguments concerning the application of the substantive law and errors that the arbitration court made in relation thereto. The court, however, did not discuss any of these allegations, since it found them to be irrelevant in the present case. It did emphasize that it is of no relevance how the arbitrator assessed the evidence presented, as that is not something that either the plaintiff or the defendant can influence. In doing so, the court, indirectly, affirmed the finality of an arbitration decision on the merits, and refrained from discussing the application of substantive law and reviewing the merits of the award. Consequently, the court confirmed that its role in setting aside procedures is to only protect the parties from procedural irregularities.

Recognition and Enforcement

The last instance of the competence of the national courts in BiH revolves around the recognition and enforcement of foreign arbitral decisions. A foreign arbitral award can be recognized in BiH under the New York Convention or under the Law on Private International Law. Once recognized, the decision has legal effects of a domestic court decision and as such is subject to enforcement under the relevant entity laws. The practice of the enforcement processes deserves further analysis here.

An interesting case in this matter is a court decision of the Cantonal court in Tuzla that rejected recognition of an arbitral award of the International Arbitral Tribunal having its seat in Vienna.[51] The subject

46 *Elektrogospodarstvo Slovenije – razvoj in inzeniring d.o.o. v. Bosnia and Herzegovina* (ICSID Case No. ARB/14/13).

47 See Procedural Details of the case at: https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/14/13&tab=PRD [last accessed December 5, 2016].

48 Municipal Court in Sarajevo, decision no. 65 0 406447 14 Ps 3 dated March 18, 2016.

49 *Id.*

50 *See* e.g. Živković P., Bosnia and Herzegovina: Arbitral Awards Reviewed under the Courts' "Magnifying Glass", available at: http://kluwerarbitrationblog.com/2016/05/20/15280/. [Last accessed on December 5, 2016].

51 The Cantonal court decided this issue in 2002 (*see* decision no. R-72/02 dated 4 June 2002). The Supreme Court of Federation of BiH reversed

matter was a lease agreement over a piece of real estate located in BiH. The claimant sought to recover outstanding debt, which arose out of the lease agreement. Having won the arbitration, the Claimant then sought to enforce the arbitral award in BiH. Although the Cantonal Court initially recognized, the Supreme Court remanded the case on appeal, and returned it for a new trial. Although this was essentially a contractual claim, and not one related to the real estate, ultimately the court decided that the matter was not arbitrable. In its reasoning, the court referred to Article V(2)(a) of the Convention and rejected to recognize the given arbitral award as the dispute was not arbitrable under the law of the country in which the recognition and enforcement was sought.

The case ended up before the BiH Constitutional Court where the Claimant argued that his right to a fair trial under Article 6 of the European Convention on Human Rights was violated. The Constitutional Court dismissed the case due to lack of *ratione materiae* jurisdiction. This was not, however, the only case where this argument was made.

In another case, appellants claimed that in the process of enforcement of a foreign arbitral award, the lower courts violated their right to a fair trial and their right over property. The case revolved around enforcement of an arbitral award of the Foreign Chamber of Commerce of Former Yugoslavia. The appellants objected to the enforcement on two grounds. First, they argued that the respective award needs to be recognized in a separate proceedings. Second, the award does not meet the requirements for recognition set forth in the BiH Law on Private International Law. The lower courts did not engage in an extensive discussion over these objections, and ultimately decided in favor of the party seeking enforcement.

The Constitutional Court agreed with the appellants. More specifically, it found that the lower courts did not give the appellants an opportunity to present their case and raise objections to the enforcement of a foreign arbitral award. Moreover, the Constitutional Court found that the lower court did not reason their respective decisions, and thereby failed to diligently and carefully assess all the evidence and arguments presented in the case.

This decision is of practical importance as it signals to the lower courts how to deal with similar matters in the future. In other words, even in the process of enforcement, parties may present their claims concerning the recognition of a foreign arbitral award and thereby object even in the enforcement stage. Moreover, the courts must take these arguments into account, and only after carefully analyzing the raised grounds, can they reach a just decision. The case is equally important as it raised the question of whether courts in enforcement proceedings can decide the recognition of foreign arbitral awards. It appears that the Court is of the position that, if the enforcement court upholds the basic rules of the procedure, allows both parties to present their case and provides a reasoned decision, it may decide on recognition of foreign arbitral awards in the enforcement stage as well. The effects of this decision remain to be seen in practice.

Conclusion

Although outdated, the arbitration framework in BiH does enable for arbitration proceedings to be carried out. Parties wishing to do so should ideally construct their proceedings to fill in the gaps or overcome some of the ambiguities present in the existing relevant framework.

First, parties should have an experienced local counsel. Local lawyers have experience in representing parties before the Arbitration Court and before the national courts in arbitration related matters. They can, therefore, ensure that the client's interests are protected. *Second*, for their institutional arbitration, the parties should choose the Arbitration court. This is important since the Rules of this institution allow the parties to agree on the UNCITRAL Arbitration Rules as the governing rules of the proceedings. In this way, the parties ensure that the proceedings will be conducted on basis of the best modern practices. *Third*, the parties should carefully consider their arbitrator. While the lists maintained by the Arbitration court include both local and regional experts, they are not complete. The parties can appoint a person who has the experience

Although outdated, the arbitration framework in BiH does enable for arbitration proceedings to be carried out

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the decision and remanded to the lower court for trial (*see* decision no. Gž-51/02 dated 31 July 2002). The lower court ruled in accordance with the instructions of the Supreme Court (*see* decision no. R-185/02 dated 15 January 2003). On appeal, the Supreme Court affirmed the new decision of the Cantonal Court (*see* decision no. Gž-26/03 dated 19 May 2003). For a presentation of the case in English, *see* ICCA Commercial Arbitration Yearbook 2016.

and knowledge that fits their interests. *Lastly*, the risk of having the national courts interfere with the process is relatively slim. Analysis of court practices shows that courts are supportive of the arbitration processes.

With such an approach, the parties would mitigate the risks to a large extent and have their dispute settled in a cost-effective, timely and efficient manner.

The risk of having the national courts interfere with the process is relatively slim. Analysis of court practices shows that courts are supportive of the arbitration processes

Arbitration and Transparency

Relations between a Private Environment and a Fundamental Requirement

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Prelude

The research ventures into the world of international arbitration, more precisely international commercial arbitration ("ICA") and investor-state arbitration ("ISA"), alternative dispute resolution ("ADR") mechanisms frequently applied by the actors of the global business arena.[1] Such methods exist as alternatives to litigation, and among several other advantageous characteristics (easier enforceability, higher autonomy allowed for the parties),[2] their private and confidential nature[3] stands as a main reason based on which the international business community prefers them to cross-border litigation conducted before domestic courts.

Private parties submitting their existing or future business-related disputes under the jurisdiction of an arbitral tribunal prefer the procedure to be hidden from the eyes of the public. This approach is well founded, taking into consideration the curious press, competitors and authorities[4] on one side and highly valuable business secrets[5] and further information relating to the functioning of a multinational company on the other. In the technology-driven era of the twenty-first century, where companies have to rethink their functioning in order to comply with the requirements set by the networked and digital age[6] and certain aspects of modern corporate governance[7], the role of the protection of sensitive information is even more important.

Private parties submitting their existing or future business-related disputes under the jurisdiction of an arbitral tribunal prefer the procedure to be hidden from the eyes of the public

1 Várady, T., Barcelo, J.J. III, Mehren, A. T. (1999). *International Commercial Arbitration, A Transnational Perspective*. American Casebook Series, West Group. 40-41. Furthermore, *see* in general Nottage, L. (2015). A Weathermap for International Arbitration: Mainly Sunny, Some Cloud, Possible Thunderstorms. *Sidney Law School Legal Studies Research Paper No. 15/62*. (Professor Nottage examines international arbitration from several perspectives. From the observations of Professor Nottage it can be concluded that ICA and ISA are widely-used dispute resolution mechanisms). Furthermore, *see* Xu, D. & Shi, H. (2011). Dilemma of Confidentiality in International Commercial Arbitration. *Frontiers of Law in China, Volume 6, Issue 3*. 404-405.

2 Buys, C. G. (2003). The Tensions Between Confidentiality and Transparency in International Arbitration. *American Review of International Arbitration, Volume 14, No. 121*. 122-123.

3 Expert report of Stephen Bond Esq. in *Esso v. Plowman*. (1995). *Arbitration International, Volume 11, Issue 3*:
„*It became apparent to me very soon after taking up my responsibilities at the ICC that the users of international commercial arbitration, i.e. the companies, governments and individuals who are parties in such cases, place the highest value upon confidentiality as a fundamental characteristic of international commercial arbitration*".

4 Paulsson, J. & Rawding, N. (1995). The Trouble with Confidentiality. *Arbitration International, Volume 11, Issue 3*. 48.

5 Argen, R. D. (2015). Ending Blind Spot Justice, Broadening the Transparency Trend in International Arbitration. *Brooklin Journal of International Law, Vol. 40, Issue 1*. 11.

6 Vermeulen, E. P. M. (2015). Corporate Governance in a Networked Age. *Wake Forest Law Review, 2015 Forthcoming, Lex Research Topics in Corporate Law & Economics Working Paper No. 2015-4, Tilburg Law School Research Paper No. 16/2015*. 1-2.

7 Kecskés, A. (2011). *Corporate Governance (Felelős Társaságirányítás)*. HVG-ORAC. 17-18.

International arbitration is able to secure the protection of sensitive information, as it is one of the fundamental elements of an arbitral process.[8] However, in certain situations, the private and confidential nature of these ADR mechanisms[9] might collide with the need for transparency / the requirement of transparent adjudication[10], an increasing trend in international arbitration. Examining where the balance stands between the private and confidential nature of ICA and ISA and the prevailing transparency trend is a complex issue where several factors come into play[11]. According to Professor Andrea Bianchi:

> „*Transparency epitomizes the prevailing mores in our society and becomes a standard of (political, moral and, occasionally, legal) judgment of people's conduct. In contrast, the opposites of transparency, such as secrecy and confidentiality, have taken on a negative connotation. Although they remain paradigmatic narratives in some areas, overall they are largely considered as manifestations of power, and, often, of its abuse.*"[12]

The areas under discussion are, among others, the extent to which the public is entitled to acquire information in connection with arbitrations conducted between private parties or private parties and state-entities, where the outcome of a case might very well have direct or indirect effects on the everyday lives of citizens,[13] or where large-scale, publicly traded companies participating in an arbitration have to disclose certain information towards their shareholders[14]. Furthermore, the judicial enforcement of arbitral awards is an area where the private and confidential nature of an arbitral process might be damaged, since the content of arbitral awards might be disclosed based on the order of a national court.[15] Such instruments have to be taken into consideration when privacy and confidentiality meet with the requirement of transparency.

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In order get a deeper insight in the topic, the first chapter examines the concepts of privacy, confidentiality and transparency and their relations within certain aspects of international arbitration, furthermore, the 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("UNCITRAL Rules on Transparency") is assessed as well. The second chapter presents the approach shown by certain arbitral institutions via the examination of their arbitration rules. The third chapter draws conclusions based on the previous chapters.

Examination of privacy, confidentiality and transparency in ICA and ISA

Privacy and Confidentiality

Analysis of the concepts and their role

Parties to an arbitral procedure prefer this method to litigation based on several reasons. Studies conducted in the topic indicate that participants favour arbitration mainly because of its higher autonomy allowed for the parties, quicker procedures, lower procedural costs, finality of the award and the possibility to select arbitrators with specialized knowledge in a given area. In addition, privacy and confidentiality are also marked as main advantages and usually appear besides the above-mentioned characteristics.[16] Companies in the twenty-first century (especially in an international, technologically advanced environment) are sensitive about their trade and business secrets, knowhow etc. being disclosed towards the public.[17]

When examining privacy and confidentiality, distinction has to be made between the two concepts. In arbitral procedures, privacy excludes third parties other than the parties to the dispute, their legal

8 Noussia, K. (2010). *Confidentiality in International Commercial Arbitration*. Springer-Verlag Berlin Heidelberg. 1.

9 Weixia, G. (2015). Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration. *University of Hong-Kong Faculty of Law, Research Paper No. 2015/026*. 2-5 (As Professor Weixia describes, within the context of international arbitration, distinction has to be made between the concepts of privacy and confidentiality).

10 LoPucki, L. M. (2009). Court-System Transparency. *Iowa Law Review, Volume 94, Issue 2*. 535-536. Furthermore, *see* Argen supra at page 3.

11 Buys, supra at 134-138.

12 *Quotation*: Bianchi, A. & Peters, A. (2013). *Transparency in International Law*. Cambridge University Press. 2.

13 Brown, A. C. (2001). Presumption Meets Reality, An Exploration of the Confidentiality Obligation in International Commercial Arbitration. *American University International Law Review, Volume 16, Issue 4*. 978-981.

14 Brown, supra at 980.

15 Weixia, supra at 14.

16 Mistelis, L. & Baltag, C. M. (2008). Trends and Challenges in International Arbitration, Two Surveys of In-House Counsel of Major Corporations. *World Arbitration and Mediation Review, Volume 2, Issue 5*. 92-94.

17 Lin, T. C. W. (2012). Executive Trade Secrets. *Notre Dame Law Review, Volume 87, Issue 3*. 913.

counsel, arbitrators, witnesses and administrators (as well as other participants of the procedure having access based on the mutual consent of the parties) from having access to the procedure and the documents produced within, including the award. Confidentiality, on the other hand, entitles the participants to know the content of the award, orders, witness testimonies and further documents produced in the course of the procedure, furthermore, to know about the existence of the arbitration, who the parties, witnesses and the chosen arbitrators are and the matter and nature of the debate.[18] Most importantly, however, confidentiality determines certain restrictions regarding the disclosure of such information. As it was noted in *Esso v. Plowman*,

> *„Privacy is concerned with the right of persons other than the arbitrators, parties and their necessary representatives and witnesses, to attend the arbitration hearing and to know about the arbitration. Confidentiality by contrast, is concerned with... information relating to the content of the proceedings, evidence and documents, addresses, transcripts of the hearings or the award*".[19]

Private environment

The private and confidential nature of arbitration can be derived from the fact that it arises out of a private relationship, an agreement between the parties based on their mutual understanding.[20] However, whether an implicit duty of confidentiality exists or the parties have to set it forth expressly depends on the given jurisdiction (the particular law governing the arbitration). In the *Dolling Baker v. Merrett* case, the implied nature of confidentiality was assessed. According to the English Court of Appeal:

> *„As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must... be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration".*[21]

As technological advancements integrated in the global business environment, preserving privacy in ordinary court procedures became more challenging.[22] In contrast, arbitral procedures are most of the time conducted with the exclusion of the public eye, in a private and confidential manner. Parties have the possibility to evade publicity that an ordinary court procedure would most probably evoke, and which, in certain cases, would have negative effects on them. This approach takes into consideration the power and curiosity of the press and the insight and business advantages competitors would get following a leakage of sensitive information in connection with the internal functioning of a company.[23] A prominent example is the *Aitah v. Ojjeh* case, where the Paris Court of Appeal held that:

> *„[...] the very nature of arbitral proceedings requires that they ensure the highest degree of discretion in the resolution of private disputes, as the two parties had agreed*".

According to the decision of the Paris Court of Appeal, damages had to be paid by the losing party for the breach of confidentiality.[24] It is not uncommon that courts impose financial sanctions based on the breach of confidentiality (let it be a contractual obligation or one arising out of domestic or international regulations).

The starting point, which justifies confidentiality, is the consensus between the parties, the concurrence of their wills embodied by an arbitration agreement governing their private commercial dispute instead of the procedures of an ordinary court.[25] The private manner of concluding the arbitration agreement, in most cases, serves as a sufficient basis for upholding confidentiality,

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The private manner of concluding the arbitration agreement, in most cases, serves as a sufficient basis for upholding confidentiality

18 Noussia, supra at 25-27.

19 Expert report of Dr. Julian D. M. Lew in *Esso v. Plowman*. (1995). *Arbitration International, Volume 11, Issue 3*. 283, 285.

20 Xu & Shi, supra at 408.

21 *Dolling Baker v. Merrett*. Accessible through http://www.uniset.ca/lloydata/css/19901WLR1205.html. Furthermore *see* Brown, supra at 977.

22 Cremades, B. M. (2013). Principle of Confidentiality in Arbitration, A Necessary Crisis. *Journal of Arbitration Studies, Volume 23, Issue 2*. 26, 28-29, 31-33.

23 Rogers, C. A. (2006). Transparency in International Commercial Arbitration. *University of Kansas Law Review, Volume 54, Issue 5*. 1311-1312.

24 Brown, supra at 975-976.

25 Collins, M. (1995). Privacy and Confidentiality in Arbitration Proceedings. *Arbitration International, Volume 11, Issue 3*. 122, 126-129.

since the mutual understanding of the parties concerning the competent tribunal to decide on their matter, and confidentiality arising consequently, is a primary feature distinguishing arbitration from the judicial systems of states.

It is necessary to examine the information that may be subjected to the obligation of confidentiality in arbitral procedures. While doing so, we can distinguish between three main categories: (a) information relating to the existence of the arbitral procedure or the legal dispute, (b) information relating to the details of the procedure (such as documents and/or evidence produced or presented in the course of the process), and (c) information relating to the award itself.[26]

Assessment of certain limitations to privacy and confidentiality

Even though privacy and confidentiality play an important role among the distinctive features of arbitration, there are limitations with regard to the extent these concepts may apply in certain situations

Even though privacy and confidentiality play an important role among the distinctive features of arbitration, there are limitations with regard to the extent these concepts may apply in certain situations. Such limitations can rely on several different factors, however, in most cases they are related to requirements imposed by domestic legislations and international regulations.

a. Public interest

Arbitrations dealing with commercial disputes between private entities are primarily conducted in a confidential manner; however, the situation is different in ISA, where states or state-entities also appear as parties. States and state-entities fall under the scope of public laws, under which transparent functioning is considered a basic requirement, thus arbitrations in which such entities take part are subjected to public access and disclosure.[27] With the adoption of the UNCITRAL Rules on Transparency, this belief was strengthened even more. Legal scholars argue extending the scope of transparency to ICA disputes.[28] Through the conclusion of public contracts, states use public resources, which justifies public interest as a limitation to privacy and confidentiality surrounding the arbitration of investment disputes. The development and expansion of ISA (especially since emerging markets started to enter the global scene) gave rise to tensity between the private and confidential nature, which had long been its fundamental attribute, and a desire towards a more transparent functioning, ensuring public access to arbitral procedures in which the public interest demands.[29] As public access to different aspects of international arbitration is gaining foothold, even though confidentiality is still considered as a momentous attribute, the faith placed in it seems to be slightly weakened. Discussions were raised regarding the private and confidential nature of international arbitration and whether it forms an integral part of the procedure, thus the development of ISA had a clear impact on the whole picture.[30]

As described above, when public acces to arbitral procedures between private parties becomes justified, confidentiality has to step away and make way for the greater good. A prominent example again is the famous *Esso v. Plowman* case, in which the Australian State was involved and matters regarding public utilities were under discussion. The High Court of Australia delivered a conclusion in the case, according to which:

> "*[...] confidentiality could not be deemed a fundamental attribute and the legitimate interest of the public in obtaining information with regard to public authority matters must prevail.*"[31]

The Swedish Supreme Court in the *Bulgarian Foreign Trade Bank Ltd v. A. I. Trade Finance Inc* case followed the approach taken by the High Court of Australia.[32] Furthermore, cases such as the *Ali Shipping*

26 Buys, supra at 124.

27 Calamita, N. J. (2014). Dispute Settlement Transparency in Europe's Evolving Investment Treaty Policy. *Journal of World Investment and Trade, Volume 15, Issue 3-4*. 648-649.

28 Misra, J. & Jordans, R. (2006). Confidentiality in International Arbitration, An Introspection on the Public Interest Exception. *Journal of International Arbitration, Volume 23, Issue 1*. 48.

29 Reith, C. (2015). New UNCITRAL Rules on Transparency 2014, Significant Breakthrough or a Regime Full of Empty Formula. *Yearbook on International Arbitration, Volume 4, pp. 121-148*. 122-124.

30 Gruner, D. M. (2003). Accounting for the Public Interest in International Arbitration, The Need for Procedural and Structural Reform. *Columbia Journal of Transnational Law, Volume 41, Issue 3*. 924-925, 930-931, 956.

31 Cremades, supra at 30. Furthermore *see Esso v. Plowman*. (1995). *Arbitration International, Volume 11, Issue 3*.

32 *See* in general Notes on Bulgarian Foreign Trade Bank Ltd v. A. I. Trade Finance Inc, Supreme Court 27 October 2000. *World Trade and Arbitration Materials, Volume 13, Issue 1*. Furthermore *see* the Swedish Supreme Court judgement. *Case no. 1881-99*. Accessible through http://www.arbitration.sccinstitute.com/Views/Pages/GetFile.ashx?portalId=89&cat=95788&docId=1083535&propId=1578.

Corporation v. Shipyard Trogir, *Associated Electrics and Gas Insurance Ltd (Aegis) v. European Reinsurance Co of Zurich* and *Insurance Co v. Lloyd's Syndicate* also indicated that confidentiality is not untouchable.[33] Additionally, in *Lawrence E. JaffeePension Plan v. Household International, Inc*. and *Urban Box Office Network v. Interfase Manager* (both taking place in the United States) the courts, despite the fact that a confidentiality provision was included in the arbitration clause by the parties, still requested the disclosure of certain documents.[34]

Public access is a limitation to confidentiality, which it may not exceed and go beyond its borders. It becomes second-rate and loses priority compared to the satisfaction of public interest in arbitral procedures, especially applied in the context of investment disputes. States are obliged and regulated by public laws, thus it is obvious that arbitral procedures in which they take part have to be conducted in public, as the state has to ensure that its citizens are provided with sufficient and clear information in connection with issues that might have an impact on their everyday life.[35]

b. Disclosure towards public authorities

Domestic laws may limit the extent of confidentiality, since in certain situations public authorities are entitled to request the disclosure of documents produced in an arbitration. Among others, anti-money laundering laws set forth that a person suspecting that a transaction incorporates or represents elements of a crime has the obligation to disclose such information towards the competent authorities, a principle that also applies in arbitral procedures.[36]

c. Judicial enforcement of arbitral awards

Claims regarding the enforcement (or actions seeking the annulment) of an arbitral award frequently arrive to domestic courts. Therefore, the question arises whether the confidential nature of the arbitral procedure continues to prevail in the course of the judicial procedure[37], which, obviously, will contain information presented during the arbitration and through its mechanisms, certain details will unavoidably appear in the public domain. A prominent case is the *Television New Zealand v. Langley Productions*, where the High Court of New Zealand held that in case a party to an arbitration brings an arbitral award in front of a court and requests the judicial review thereof, the confidentiality previously surrounding the procedure dissolves to a certain extent. According to Robertson J.,

> "*[...] proceedings in this Court are and long have been, prima facie in public. The openness of justice is a central tenet of our system. Proceedings will be open for reporting and scrutiny unless there are exceptional reasons which militate against that*".[38]

Furthermore, as the High Court presented,

> "*[...] the confidentiality which the parties have adopted and embraced with regard to their dispute resolution in arbitration cannot automatically extend to processes for enforcement or challenge in the High Court*".[39]

Thus, the fundamental criteria according to which judicial procedures have to be transparent and open to the public overrides the private and confidential nature of arbitration in situations where an award is brought before a domestic court on the basis of enforcement or annulment.

d. Disclosure obligations of publicly traded companies

Publicly traded companies face stricter regulations with respect to transparent functioning than their counterparts, which do not appear on stock markets. Stricter regulations may also apply in connection with ongoing legal disputes. Naturally, even though they are considered as third persons not being involved in a given arbitral procedure, the shareholders of listed companies have a reasonable amount of interest in the outcome of an arbitration where the company in which they hold a percentage of shares is a participant and the impact the award might have on the company's

States are obliged and regulated by public laws, thus it is obvious that arbitral procedures in which they take part have to be conducted in public, as the state has to ensure that its citizens are provided with sufficient and clear information in connection with issues that might have an impact on their everyday life

33 Noussia, supra at 124.

34 Reuben, R. (2006). Confidentiality in Arbitration, Beyond the Myth. *University of Kansas Law Review, Volume 55, Issue 5*. 1267-1268.

35 Argen, supra at 3-4.

36 Hwang, M. & Chung, K. (2009). Defining the Indefinable, Practical Problems of Confidentiality in Arbitration. *Journal of International Arbitration, Volume 26, Issue 5*. 622.

37 Weixia, supra at 14.

38 Williams, D. (2000) Arbitration and Dispute Resolution. *New Zealand Law Review, Volume 2000, Issue 1*. 62.

39 Hwang & Chung, supra at 621.

functioning is capable of reducing its share value. Therefore, listed companies in most jurisdictions are required to publish in their annual reports certain information in connection with arbitrations in which they are involved, a matter raising further questions regarding the extent to which the details of the process might be revealed in such situations.[40]

Potential risks

However, even though its importance is unquestionable, it would be unwise to treat confidentiality as a sacred, supreme and untouchable element of arbitration. Such approach would be risky, as arbitration (especially on an international level) cannot afford itself to let confidentiality become equivalent with secrecy. The danger that confidentiality might be considered as a tool to hide inappropriately rendered decisions (such as decisions violating the principles of the procedure) would be detrimental with respect to the reliability of arbitrators. Furthermore, as the reasoning is confidential in the majority of situations, there is a chance that arbitral awards will be seen as an unavailable instrument for scrutiny, again undermining the reliability of arbitrators and the process itself.

An additional downside of secrecy surrounding arbitral awards is that it does not contribute to the development of law at its full potential

An additional downside of secrecy surrounding arbitral awards is that it does not contribute to the development of law at its full potential. The reasoning of arbitral awards usually contain high-quality legal opinions from renowned legal scholars and practitioners. Thus, the excessive application of confidentiality with respect to arbitral awards might deprive the legal literature from valuable knowledge. Furthermore, the case law of arbitral institutions can provide great benefits for the judges of ordinary courts.[41] As discussed above, a judicial procedure through which a party to an arbitration might seek the enforcement or annulment of an award reveals certain confidential elements, as the content of the award, though indirectly, but still appears in the public domain *via* the transparent nature of the judicial procedure. That, however, is not viewed as a violation of confidentiality.[42]

40 Weixia, supra at 21-22.

41 Cremades, supra at 33-36.

42 Noussia, supra at 57.

Transparency

Analysis of the concept

The disclosure of arbitral awards, documents and further information relating to the procedure is what embodies transparency in practice. Furthermore, the extent to which non-disputants (*amicus curiae*) are allowed to intervene or participate reflects a certain degree of transparency as well.

The arbitral tribunal of the ICSID, acting in the *Biwater Gauff v. Tanzania* case, stated that the amendments made to the ICSID Arbitration Rules in 2006 highlighted the emergence of an increasing desire towards transparency.[43] Grasping the concept of transparency in legal terminology is difficult; however, most often it is associated with legitimacy, accountability, information and good governance.[44] Furthermore, according to the definition given by the United Nations Economic and Social Commission for Asia and the Pacific („UNESCAP"), which seems to be the most competent among the few definitions for this concept,

> *„Transparency means that decisions taken and their enforcement are done in a manner that follows rules and regulations. It also means that information is freely available and directly accessible to those who will be affected by such decisions and their enforcement. It also means that enough information is provided and that it is provided in easily understandable forms and media".*[45]

It could be valuable to examine whether there is a general obligation for states to ensure transparency in arbitral procedures in which they participate and disclose details of it towards the public. For this purpose, two main instruments have to be noted. Article 19 of the International Covenant on Civil and Political Rights („ICCPR") has to be considered, as its sets forth

43 Knahr, C. & Reinisch, A. (2007). Transparency Versus Confidentiality in International Arbitration, The Biwater Gauff Compromise. *Law and Practice of International Courts and Tribunals, Volume 6, Issue 1*. 97-97, 105. Furthermore *see* in general *Biwater Gauff v. Tanzania.* Case N.o. ARB/05/22. Accessible through: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1589_En&caseId=C67.

44 Bianchi & Peters, supra at 7-8.

45 United Nations Economic and Social Commission for Asia and the Pacific. What is good governance? Accessible through: http://www.unescap.org/sites/default/files/good-governance.pdf.

the freedom of opinion and expression.[46] General Comment No. 34. of the Human Rights Committee declared that under Article 19 of the ICCPR states have the following obligation:

> *„To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information".*[47]

Furthermore, the European Court of Human Rights adopted a decision according to which Article 10 of the European Convention on Human Rights („ECHR"), also dealing with the freedom of expression[48], is violated in case states or state entities do not provide sufficient information to the public regarding matters, which raise public interest.[49] Therefore, the very roots of the transparency requirement can be found in human rights instruments, thus it is necessary for states to ensure the enforcement thereof in order to fulfil their international obligations.

Based on the examination of the definitions given by the ICCPR, the ECHR and the UNESCAP and the opinion of contemporary legal scholars, and with taking into account the importance of the public stakehold (i.e. public interest), especially in ISA, it can be understood why the UNCITRAL Rules on Transparency was a desired instrument for international arbitration. It has been under discussion whether arbitration is suitable for settling investment disputes with extremely large amounts at stake, involving states and state entities controlled by national parliaments.

It was under discussion whether the principles of the rule of law and division of powers are violated by arbitrations in investment disputes, since matters regarding public resources are assessed within an alternative mechanism where the acting arbitrators are selected from a narrow circle of individuals and the possibility of taking an arbitral award front of a domestic court on the basis of annulment is highly limited.[50] The secrecy surrounding this ADR mechanism was further strengthened by the private and confidential nature discussed above, contributing to the rise of increasing distrust towards it.[51] However, according to Professor Claudia Reith,

> *„What alternative is left? The acceptance of another jurisdiction will hardly be an option for states, the reliance on diplomatic protection is too uncertain for foreign investors and the establishment of an international investment court is still a long way off. Hence, there is nothing left but investor-state arbitration. Despite all the criticism one has to bear in mind that investor-state arbitration ensures individuals a simple and straightforward access to impartial tribunals and therewith guarantees legal protection".*[52]

However, as ISA and ICA share the same roots as far as their evolution goes, it arises as a reasonable question whether it is required to sacrifice fundamental attributes (i.e. privacy and confidentiality) on the altar of transparency in ISA while ICA can remain relatively untouched. Even though it is obvious that they share similarities, there is indeed a bright contrast between the two. The most obvious finding is that while commercial arbitrations arise from disputes having a purely private character (i.e. the legal dispute between private parties arising from their private commercial agreement), investment arbitrations emerge from disputes arising out of activities covered by bi- or multilateral treaties ratified by states or state entities, endowing this method with a public nature.[53] Furthermore, as already discussed above, issues relating to the everyday lives of citizens are in question in such cases (for instance cases dealing with natural gas supply), and ultimately, the public has to pay the cost of the state being on the losing side against a foreign investor. Thus, the subject

However, as ISA and ICA share the same roots as far as their evolution goes, it arises as a reasonable question whether it is required to sacrifice fundamental attributes (i.e. privacy and confidentiality) on the altar of transparency in ISA while ICA can remain relatively untouched

46 Article 19 of the International Covenant on Civil and Political Rights. Accessible through: http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

47 General Comment No. 34. of the Human Rights Committee on Article 19 of the ICCPR. Para. 19. Accessible through: http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf.

48 Article 10 of the European Convention on Human Rights. Accessible through: http://www.echr.coe.int/Documents/Convention_ENG.pdf.

49 European Court of Human Rights. Case No. 37374/05. Paras 26-28, 39. Accessible through: http://home.broadpark.no/~wkeim/files/echr-CASE_OF_TARSASAG_v._HUNGARY.html.

50 Reith, supra at 122.

51 Hafner-Burton, E. M., & Victor, D. G. (2016). Secrecy in International Investment Arbitration, An Empirical Analysis. *Journal of International Dispute Settlement, Volume 7, Issue 1*. 163.

52 *Quotation*: Reith, supra at 123.

53 Connors, P. C. (2009). Investor-State Arbitration. *Suffolk Transnational Law Review, Volume 32, Issue 2*. 506.

and the participants of ISA are the main features distancing it from its commercial twin.[54]

Transparency examined within the context of ISA

International agreements and treaties regulating the relationship of host states and foreign investors set forth, as their main purpose, the determination of certain standards. Such standards have to be applied by host states towards foreign investors and their activities. These concepts are embodied by the „fair and equitable" approach to be shown, including the prohibition of granting unfair advantages to domestic investors and restrictions on the expropriation of foreign investments without fair compensation. Furthermore, an important element of the above-mentioned agreements and treaties is to entitle foreign investors with the right to bring a claim against the host state in an arbitration.[55] Arbitral tribunals acting in ISAs appear in both ad-hoc and institutional forms. One of the most utilized forms of institutional tribunals in investment disputes is the ICSID's tribunal.[56]

Transparency has two sides when it comes to ISA, as it can mean (a) the degree and type of information shared with the public regarding the procedure, and (b) the extent to which the public might participate in a given ISA procedure

The characteristics of ISA (i.e. the procedural rules on which the parties have agreed in the investment agreement or treaty concluded between them) rely largely on techniques developed in ICA.[57] As already discussed above, ICA is a private and confidential procedure, placing obligations relating to these concepts on the parties and other participants with respect to certain aspects of the process, however, in ISA an extensive degree of the public's stakehold is present.[58] Agreements and treaties between states regulating foreign investor-host state relationships determine standard obligations on behalf of the host state, to be directed towards the protection of foreign investment, furthermore, such agreements and treaties establish dispute resolution methods through which the possible violation of these standard obligations can be assessed accordingly. Violations of required standards by host states can materialize in certain negative effects exerted directly or indirectly towards foreign investors. For example, such negative effects can be exerted through a legal act (for example *via* providing benefits to domestic investors acting in the same sector through legal regulations with the intention of creating an unfair competetive advantage). Investment disputes arise as a consequence of public regulations having a real or perceived impact on the foreign investor and its activity.[59]

Transparency has two sides when it comes to ISA, as it can mean (a) the degree and type of information shared with the public regarding the procedure, and (b) the extent to which the public might participate in a given ISA procedure.[60] Transparency, as developed and established by the evolving international agreements and treaties between states relating to foreign investment issues, materializes in the following approaches:

- Disclosure to the public regarding the existence of the investment dispute including the parties' submissions and further documents, and the disclosure of the arbitral award and the reasoning thereof,

- The hearings are open to the public and the public can participate in the procedure via appearing as amicus curiae.[61]

Reasons behind the increased desire towards transparency in ISA

Future or existing investment disputes under international investment agreements have a public characteristic, because they incorporate claims, which are directed towards host state activities exercising their public power. However, as discussed above, investment disputes were traditionaly handled with procedures based on the approach of ICA, where privacy and confidentiality play a massive role, thus the possibility for the public to receive information or to participate in an arbitral process was highly restricted. This constitutes an important factor behind states starting to incorporate elements in their investment agreements and treaties increasing the degree of transparency.[62] In

54 Argen, supra at 2-5.

55 Roberts, A. (2015). Triangular Treaties, The Extent and Limits of Investment Treaty Rights. *Harvard International Law Journal, Volume 56, Issue 2*. 353-355, 381.

56 The ICSID Caseload Statistics. *Issue 2016-1*. Accessible through: https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-1%20(English)%20final.pdf.

57 Calamita, supra at 648.

58 Malatesta, A. & Sali, R. (2013). *The Rise of Transparency in International Commercial Arbitration*. Jurisnet, LLC. 107-108.

59 Bianchi & Peters, supra at 145, 148, 170.

60 Lazo, R. P. (2010). International Arbitration in Times of Change, Fairness and Transparency in Investor-State Disputes. *American Society of International Law Proceedings, Volume 104, pp. 591-596*. 593-594.

61 Argen, supra at 12-14.

62 Calamita, supra at 649-650.

order to confirm the positive effects this trend evoked, increased transparency can have the following advantages:

a. Progression and improvement of state policies in connection with the conclusion of international agreements and treaties

Higher degree of transparency can be an important instrument in the development of states' approach towards the conclusion of inter-state agreements, since future challenges can be tackled easier with knowledge acquired from previous cases. Information relating to previous ISA procedures and the publication of rendered awards are valuable assets for states when it comes to the preparation and drafting of investment treaties. On the other hand, a lower degree of transparency deprives states to include already existing knowledge in their policies.[63]

b. Growing public trust and confidence towards the arbitration of investment disputes

Transparency provides solid grounds for increasing the legitimacy of ADR methods, most importantly ISA, as it has long been standing in the center of criticism based on the lack of transparent functioning and accountability, let it be related to documents produced in the procedure, the reasoning of the award, evidences presented by the parties or the very existence of the dispute. This criticism, however, may not come across as an unlikely surprise, since the procedures of ISA originate from the procedural elements of ICA, where confidentiality and privacy play a substantial role.[64]

c. Strengthening the concept of good governance

Transparency is a main element of the concept of good governance. The outcome of high-profile ISA cases are able to influence the future policies of a given state. If a disadvantageous award sets forth certain obligations on behalf of a state party, the state budget has to ensure that these obligations are fulfilled, thus the public purse suffers a blow after each case being lost. Furthermore, ISAs usually have, as their subject, public matters relating to environmental issues and healthcare. In such large-scale cases touching so sensitive issues, the appropriate monitoring is a desired method to ensure that a state is fulfilling its international obligations while it also protects the well-being of citizens, thus shows the signs of good governance.[65]

d. Compliance with international obligations relating to human rights and business

Transparency is an important instrument in monitoring the activities of multinational companies. The United Nations Guiding Principles in Business and Human Rights („UN Guiding Principles"), adopted in 2011, sets forth obligations on behalf of states and business enterprises, according to which they have the duty and responsibility to protect and respect human rights in their business related activities conducted under domestic or foreign jurisdictions.[66] While making remarks on the UN Guiding Principles, the Special Representative of the Secretary-General pointed out that:

> *„The responsibility to respect human rights requires that business enterprises have in place policies and processes through which they can both know and show that they respect human rights in practice. Showing involves communication, providing a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders, including investors".*[67]

Higher degree of transparency can be an important instrument in the development of states' approach towards the conclusion of inter-state agreements, since future challenges can be tackled easier with knowledge acquired from previous cases

Transparency is an important instrument in monitoring the activities of multinational companies

Transparency provides solid grounds for increasing the legitimacy of ADR methods, most importantly ISA

63 Fernandez, C. G. & Puyana, D. F. (2015). Principles of Transparency and Inclusiveness as Pillars of Global Governance, The BRICS Approach to the United Nations. *BRICS Law Journal, Volume 2, Issue 2*. 15-16; Furthermore *see* Cornel, M. (2010). Balancing Transparency, The Value of Administrative Law and Mathews-Balancing to Investment Treaty Arbitration. *Pepperdine Dispute Resolution Law Journal, Volume 10, Issue 2*. 276, 286.

64 Van Duzer, J. A. (2007). Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation. *McGill Law Journal, Volume 52, Issue 4*. 684-686.

65 Brabandere, E. (2015). Host States' Due Diligence Obligation in International Investment Law. *Syracuse Journal of International Law and Commerce, Volume 42, Issue 2*. 349; Furthermore *see* Calamita, supra at 650; For the in-depth examination of the concept of good governance *see* in general Karpen, U. (2010). Good Governance. *European Journal of Law Reform, Volume 12, Issues 1-2*.

66 *See* in general United Nations Guiding Principles on Business and Human Rights. Accessible through http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

67 Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises. John Ruggie. *Case No. A/HRC/17/31*. Commentary of Article 11. page 13; Accessible through http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf.

e. Sense of safety for foreign investors

Foreign investors benefit from increased transparency, since publicized awards provide valuable information in connection with host states' regulation policies. Publishing arbitral awards in investor-state matters transforms the claim raised by the investor visible and publicly accessible, thus third party investors can get an insight on challenges brought against certain statutory regulations. When assessing whether the investment-related regulations of a host state might be suitable for a particular foreign investor, knowledge acquired from previous arbitrations where host state laws have been challenged provides a great advantage.[68]

Examination of the UNCITRAL Rules on Transparency

Prior to the adoption of the UNCITRAL Rules on Transparency, the procedures developed by the UNCITRAL in its Arbitration Rules lacked the degree of transparency the ICSID or NAFTA procedural rules provide. Since the UNCITRAL Rules on Transparency are applicable to ISAs initiated under the UNCITRAL Arbitration Rules, which are used in a vast amount of commercial arbitrations as well, this deficiency had been remedied.[69]

Three primary topics are discussed in the UNCITRAL Rules on Transparency. The first establishes rules with respect to the publication of documents, the second sets certain standards in connection with amicus curiae submissions, while the third deals with mandatory open hearings

a. Scope of the UNCITRAL Rules on Transparency

> *„The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors concluded on or after 1 April 2014 unless the Parties to the treaty have agreed otherwise".*[70]

As we can see, the UNCITRAL Rules on Transparency are not applicable to BITs concluded prior to its adoption. However, it applies automatically to ISAs initiated under the UNCITRAL Arbitration Rules and arising out of investment disputes based on BITs concluded after April 1, 2014. In case of the mutual understanding of the parties, the UNCITRAL Rules on Transparency may apply to BITs concluded before April 1, 2014 as well.[71] In order to remedy the deficiency of the UNCITRAL Rules on Transparency, according to which it is not applicable to investment treaties concluded before April 1, 2014, the United Nations adopted the *Mauritius Convention* (United Nations Convention on Transparency in Treaty-based Investor-State Arbitration) on December 10, 2014. The *Mauritius Convention* extends the provisions of the UNCITRAL Rules on Transparency to investment treaties concluded before April 1, 2014.[72]

b. Primary topics

Three primary topics are discussed in the UNCITRAL Rules on Transparency. The first establishes rules with respect to the publication of documents, the second sets certain standards in connection with *amicus curiae* submissions, while the third deals with mandatory open hearings.

Article 3 clearly sets forth that certain documents of the arbitral procedure shall be automatically publicised. These documents are the following:

> *„[...] The notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party. A table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves. Any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal".*[73]

However, a different standard applies to expert reports and witness statements, where such documents are

68 Calamita, supra at 652; Furthermore *see* in general Fiezzoni, S. K. (2012). Striking Consistency and Predictability in International Investment Law from the Perspective of Developing Countries. *Frontiers of Law in China, Volume 7, Issue 4*.

69 Levander, S. (2014). Resolving Dynamic Interpretation, An Empirical Analysis of the UNCITRAL Rules on Transparency. *Columbia Journal of Transnational Law, Volume 52, Issue 2*. 521, 523.

70 Article 1, para. 1 of the UNCITRAL Rules on Transparency in Treaty-based Investor-state Arbitration. Accessible through https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf.

71 UNCITRAL Rules on Transparency. Article 1, para. 2.

72 *Mauritius Convention*. Accessible through: https://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf.

73 UNCITRAL Rules on Transparency. Article 3, para. 1.

to be made public only when it is requested from the arbitral tribunal. Any person can make the request to the arbitral tribunal for the disclosure of expert reports and witness statements.[74] Furthermore, Article 2 sets out that certain information relating to the commencement of the procedure has to be disclosed towards the public as well, such as the identity of the disputing parties, the economic sector involved and the treaty under which the claim is being made.[75] Therefore, parties to an ISA concluded under the UNCITRAL Rules on Transparency are not able to hide their dispute from the public, a characteristic to which they have not been accustomed under ICA rules prior to the emergence of the transparency trend.

Articles 4 and 5 of the UNCITRAL Rules on Transparency deal with *amicus curiae* submissions. The situation of *amicus curiae* submissions vary from jurisdiction to jurisdiction. However, as a universal definition, *amicus curiae* are non-disputant third parties (for instance certain NGOs intervening in high-volume ISAs in order to provide knowledge or expertise in a certain matter) granted with the right to participate in a given procedure through *amicus curiae* briefs.[76] Article 4 grants the right to intervene and sets a standard in this regard for non-disputing parties that are not parties to the treaty within the scope of the dispute. Article 5, however, sets different standards for non-disputing parties that are in the same time parties to the treaty.[77] The main difference between the two is that in case of *amicus curiae* that is a party to the treaty, the arbitral tribunal has less discretion when it has to decide whether it allows the third party to enter the arbitration. This approach shows that:

> *„[...] the rights of a party to a treaty are more fundamentally implicated by an arbitration regarding that treaty than the rights of a third-party that is not a party to the treaty".*[78]

Article 6 of the UNCITRAL Rules on Transparency determines certain rules in connection with hearings. As a default rule, it establishes that all hearings shall be held in public, which was uncommon in international arbitration priorly. Furthermore, Article 6 determines the obligation of the tribunal to make logistical arrangements in order to ensure public access to hearings (for instance through video links). However, the tribunal has the discretion to hold the hearings in private in case the protection of confidential information or the integrity of the arbitral process is required.[79] Article 7 sets out the exceptions to transparency, based on which the tribunal, if needed, orders the hearings to be held *in camera*.[80] The Working Group developing the content of the UNCITRAL Rules on Transparency had heavy debates regarding the nature of the hearings, with certain states disagreeing with open hearings as a default rule.[81] However, with the final decision of the Working Group, it is clearly indicated that states are directed towards increased transparency and have understanding of its importance in investment-related disputes.

Examination of the arbitration rules of certain arbitral institutions with regard to privacy, confidentiality and transparency

World Intellectual Property Organization („WIPO")

Among the leading institutions providing ADR services, the WIPO regulates confidentiality in the most detailed and prudent manner. With taking into account the highly sensitive nature of matters and disputes relating to intellectual property, this seems to be a reasonable approach. The following provisions dealing with confidentiality can be found in the WIPO arbitration rules:

Among the leading institutions providing ADR services, the WIPO regulates confidentiality in the most detailed and prudent manner

> *„Except to the extent necessary in connection with a court challenge to the arbitration or an action for enforcement of an award, no information concerning the existence of an arbitration may be unilaterally disclosed by a party to any third party unless it is required to do so by law or by a competent regulatory body, and then only:*
>
> *(i) by disclosing no more than what is legally required; and*

74 UNCITRAL Rules on Transparency. Article 3, para. 2.

75 UNCITRAL Rules on Transparency. Article 2.

76 Levine, E. (2011). Amicus Curiae in International Investment Arbitration, The Implication of an Increase in Third-Party Participation. *Berkeley Journal of International Law, Volume 29, Issue 1*. 200-201.

77 UNCITRAL Rules on Transparency. Articles 4-5.

78 *Quotation*: Levander, supra at 526.

79 UNCITRAL Rules on Transparency. Article 6, paras. 1-3.

80 UNCITRAL Rules on Transparency. Article 7.

81 Levander, supra at 526-527.

(ii) by furnishing to the Tribunal and to the other party, if the disclosure takes place during the arbitration, or to the other party alone, if the disclosure takes place after the termination of the arbitration, details of the disclosure and an explanation of the reason for it.

(b) Notwithstanding paragraph (a), a party may disclose to a third party the names of the parties to the arbitration and the relief requested for the purpose of satisfying any obligation of good faith or candor owed to that third party."[82]

„In addition to any specific measures that may be available under Article 54, any documentary or other evidence given by a party or a witness in the arbitration shall be treated as confidential and, to the extent that such evidence describes information that is not in the public domain, shall not be used or disclosed to any third party by a party whose access to that information arises exclusively as a result of its participation in the arbitration for any purpose without the consent of the parties or order of a court having jurisdiction."[83]

„The award shall be treated as confidential by the parties and may only be disclosed to a third party if and to the extent that:

(i) the parties consent; or

(ii) it falls into the public domain as a result of an action before a national court or other competent authority; or

(iii) it must be disclosed in order to comply with a legal requirement imposed on a party or in order to establish or protect a party's legal rights against a third party."[84]

Singapore International Arbitration Centre („SIAC")

The SIAC has been functioning since 1991, residing in one of the fastest-growing economic areas in the world. The arbitration rules of the SIAC mainly rely on the UNCITRAL Model Law, with Singapore being a party to the New York Convention as well.[85] The SIAC mainly handles cases relating to the energy and construction sector, banking, joint ventures and financial as well as insurance matters.[86] The arbitration rules of the SIAC establish detailed rules in connection with confidentiality:

The arbitration rules of the SIAC mainly rely on the UNCITRAL Model Law, with Singapore being a party to the New York Convention as well

„The parties and the Tribunal shall at all times treat all matters relating to the proceedings and the award as confidential.

A party or any arbitrator shall not, without the prior written consent of all the parties, disclose to a third party any such matter except:

a. for the purpose of making an application to any competent court of any State to enforce or challenge the award;

b. pursuant to the order of or a subpoena issued by a court of competent jurisdiction;

c. for the purpose of pursuing or enforcing a legal right or claim;

d. in compliance with the provision of the laws of any State which are binding on the party making the disclosure;

e. in compliance with the request or requirement of any regulatory body or other authority; or

f. pursuant to an order by the Tribunal on application by a party with proper notice to the other parties."[87]

London Court of International Arbitration („LCIA")

The LCIA was established in 1892, and is among the leading and most utilized arbitral institutions, primarily providing grounds for commercial disputes. With regard to the influences incorporated in the arbitration rules of the LCIA, it primarily follows common

82 WIPO arbitration rules. Article 75. Accessible through http://www.wipo.int/amc/en/arbitration/rules/#conf2.

83 WIPO arbitration rules. Article 76.

84 WIPO arbitration rules. Article 77.

85 Overview of certain regulations governing arbitration in Singapore. Accessible through http://www.siac.org.sg/2014-11-03-13-33-43/why-siac/arbitration-in-singapore.

86 SIAC profile of cases. Accessible through http://siac.org.sg/2014-11-03-13-33-43/facts-figures/profile-of-cases.

87 Rule 35 of the SIAC Rules. Accessible through http://siac.org.sg/our-rules/rules/siac-rules-2013.

law aspects.[88] The LCIA arbitration rules, just like the ICC arbitration rules, contain detailed provisions regarding confidentiality:

> *„The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority. The deliberations of the Arbitral Tribunal shall remain confidential to its members, save as required by any applicable law and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12, 26 and 27. The LCIA does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal."*[89]

International Chamber of Commerce International Court of Arbitration („ICC")

The ICC started its functioning in 1923 and is located in Paris, France. It has a strong international character, dealing mainly with commercial cases.[90]

In Appendix I of the arbitration rules of the ICC a general determination of the private nature of the dispute resolution method can be found:

> *„The work of the Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity. The Court lays down the rules regarding the persons who can attend the meetings of the Court and its Committees and who are entitled to have access to materials related to the work of the Court and its Secretariat."*[91]

However, in its Appendix II, the ICC rules lays down detailed rules on confidentiality:

> *„For the purposes of this Appendix, members of the Court include the President and Vice-Presidents of the Court. The sessions of the Court, whether plenary or those of a Committee of the Court, are open only to its members and to the Secretariat. However, in exceptional circumstances, the President of the Court may invite other persons to attend. Such persons must respect the confidential nature of the work of the Court. The documents submitted to the Court, or drawn up by it or the Secretariat in the course of the Court's proceedings, are communicated only to the members of the Court and to the Secretariat and to persons authorized by the President to attend Court sessions."*[92]

Arbitration Court attached to the Hungarian Chamber of Commerce and Industry („ACH")

The ACH, having its seat in Budapest, stands as the oldest arbitral institution in Hungary. Its jurisdiction covers both domestic and international disputes, with more than 6000 cases dealt with since the mid 1990s.[93]

Article 48 of the ACH arbitration rules establishes a principle regarding the private nature of the procedure, while Article 15 determines the extent of confidentiality:

> *„The confidential nature of the proceedings shall be respected by every person who is involved in it in whatever capacity. Information on the proceedings to third persons can only be given upon agreement of the parties and the conciliator-mediator."*[94]
>
> *„The Arbitration Court may not give any information on pending proceedings and on its decisions rendered, or on the contents thereof.*

In Appendix I of the arbitration rules of the ICC a general determination of the private nature of the dispute resolution method can be found

88 History of the LCIA. Accessible through http://lcia.org/LCIA/history.aspx.

89 Article 30 of the LCIA arbitration rules. Accessible through http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article 30.

90 History of the ICC Court of Arbitration. Accessible through http://www.iccwbo.org/about-icc/history/the-merchants-of-peace/.

91 Appendix I, Article 6 of the ICC arbitration rules. Accessible through http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/.

92 Appendix II, Article 1 of the ICC arbitration rules.

93 Kecskés, L. & Lukács, J. (2012). *Választottbírók Könyve (Book of Arbitrators)*. HVG-ORAC. 231-232.

94 Article 48 of the ACH arbitration rules. Accessible through http://www.mkik.hu/en/magyar-kereskedelmi-es-iparkamara/rules-of-proceedings-2072.

The decision of the Arbitration Court may be published in legal journals or special publications only upon the permission of the President of the Arbitration Court and only in such a way that the interests of the parties will not suffer any harm; furthermore, the names of the parties, their countries of residence, the nature and counter-value of the services rendered, or any one of these particulars can only be included in a publication with the express consent of both parties.

By stipulating the jurisdiction of the Arbitration Court the parties undertake that they shall comply with the provisions of this paragraph both on their part, and get also others to do so."[95]

Association Française d'Arbitrage („AFA")

The AFA, holding a prominent role in French arbitration, was established in 1975 and mainly deals with the resolution of domestic and international commercial disputes.[96] There is a general rule determined with regards to the private and confidential nature of the arbitral procedure under AFA rules:

„The arbitral procedure and the award are confidential."[97]

Swiss Chamber's Arbitration Institution („SCAI")

The SCAI is a relatively new arbitral tribunal, established in 2004; nonetheless, it plays a prominent role in the European region as an often-used dispute resolution platform.[98] In its arbitration, rules the provisions in connection with privacy and confidentiality are clear and detailed:

AAA provides thorough determination of rules concerning confidentiality

„Unless the parties expressly agree in writing to the contrary, the parties undertake to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings not already in the public domain, except and to the extent that a disclosure may be required of a party by a legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a judicial authority. This undertaking also applies to the arbitrators, the tribunal-appointed experts, the secretary of the arbitral tribunal, the members of the board of directors of the Swiss Chambers' Arbitration Institution, the members of the Court and the Secretariat, and the staff of the individual Chambers.

The deliberations of the arbitral tribunal are confidential.

An award or order may be published, whether in its entirety or in the form of excerpts or a summary, only under the following conditions: (a) A request for publication is addressed to the Secretariat; (b) All references to the parties' names are deleted; and Swiss Rules englisch NEU.indd 31 13.06.12 13:20 32 (c) No party objects to such publication within the time-limit fixed for that purpose by the Secretariat."[99]

American Arbitration Association and International Center for Dispute Resolution („AAA")

The AAA was established in the first half of the twentieth century with the amalgamation of two arbitral institutions located in New York. The AAA is one of the prime arbitral institutions in the United States dealing with most of the high-profile cases brought before an arbitral tribunal in the U.S. As we can see below, the AAA provides thorough determination of rules concerning confidentiality:[100]

„Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be

95 Article 15 of the ACH arbitration rules.

96 History of the AFA. Accessible through http://www.afa-arbitrage.com/en/about-afa/who-we-are/.

97 Article 16 of the AFA arbitration rules. Accessible through http://www.afa-arbitrage.com/en/rules/arbitration-rules/.

98 Favre-Bulle, X. (2013). Swiss Rules of International Arbitration (Swiss Rules), From 2004 to the (Light) 2012. Revision. *International Business Law Journal, Volume 2013, Issue 1*. 23-25. Furthermore *see* information relating to the SCAI. Accessible through https://www.swissarbitration.org/About-us.

99 Article 44 of the Swiss Rules of International Arbitration. Accessible through https://www.swissarbitration.org/files/33/Swiss-Rules/SRIA_english_2012.pdf.

100 History of the AAA. Accessible through: https://www.adr.org/aaa/faces/s/about?_afrLoop=135310559441175&_afrWindowMode=0&_afrWindowId=14dbuevmpr_1#%40%3F_afrWindowId%3D14dbuevmpr_1%26_afrLoop%3D135310559441175%26_afrWindowMode%3D0%26_adf.ctrl-state%3D14dbuevmpr_55.

confidential. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or required by applicable law:

(i) Views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute;

(ii) Admissions made by a party or other participant in the course of the mediation proceedings;

(iii) Proposals made or views expressed by the mediator; or

(iv) The fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator."[101]

Hong Kong International Arbitration Centre („HKIAC")

Founded in 1985, the HKIAC stands among the most prominent and often-used arbitral tribunals in the Asia-Pacific region. According to a 2015 survey, it is ranked as the third most preferred institution worldwide with respect to the resolution of commercial disputes; however, ISAs are conducted in significant numbers as well.[102] In its arbitration rules, the HKIAC determines only one provision relating to privacy and confidentiality:

„Subject to the provisions of Section 18 o f the Ordinance and these Rules, no information relating to the arbitration shall be disclosed by any person without the written consent of each and every party to the arbitration."[103]

Cairo Regional Centre for International Commercial Arbitration („CRCICA")

The CRCICA was established in 1979 and is located in Cairo, Egypt. It is an independent non-profit organization, widely used by participants from the African and Asia-Pacific regions. The services provided by CRCICA are both available for the resolution of commercial and investor-state disputes.[104] In its arbitration, rules the CRCICA determines detailed rules concerning privacy and confidentiality, matched only by the WIPO rules presented above:

„Unless otherwise required by law or the parties expressly agree in writing to the contrary, the parties shall keep confidential all awards in their arbitration, together with all materials and all other documents, expert reports, witnesses testimonies in the proceedings and all other procedures produced in the arbitration proceedings.

The deliberations of the arbitral tribunal are likewise confidential to its members, except what is permitted by the applicable law or rules for the dissenting arbitrator.

The Centre undertakes not to publish any decision or arbitral award or any part of an award that may refer to the identity of any of the parties without the prior written consent of all parties.

Any documents, communications or correspondences submitted by the parties or the arbitrators to the Centre and vice versa, may be destroyed after the period of 6 months as from the date of issuing the award, unless a party requests in writing the retrieval of such documents, or any other documents related to the challenge or the enforcement of the award. In case original copies of documents or contracts were submitted by either of the parties, the concerned party shall request in writing the retrieval of such documents and contracts within one month as from the date of issuing the award. The Centre shall not be liable for any of such documents after the said date."[105]

In its arbitration rules, the HKIAC determines only one provision relating to privacy and confidentiality

101 M-10 'Confidentiality' in the Rules and Mediation Procedures of the AAA. Accessible through: https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased.

102 Description of the HKIAC. Accessible through http://www.hkiac.org/arbitration/why-choose-hkiac.

103 Article 26 of the Domestic Arbitration Rules of the HKIAC. Accessible through http://cn.cietac.org/rules/rule_E.pdf.

104 History of the CRCICA. Accessible through http://crcica.org.eg/history.html.

105 Article 37 of the Arbitration Rules of the CRCICA. Accesible through http://www.crcica.org.eg/English_Rules.pdf.

Vienna International Arbitral Centre („VIAC")

The VIAC, located in Vienna, was founded in 1975 and provides arbitration and mediation services utilized by a significant number of multinationals and other business ventures in the region.[106] The arbitration rules of the VIAC do not establish individual articles for privacy or confidentiality; however, according to Article 30 (2), oral hearings are to be held in private. Further references to such contexts are the following:

The arbitration rules of the CIETAC regulate privacy and confidentiality in a moderate manner

> *„The arbitrators shall perform their mandate independently of the parties and impartially, to the best of their knowledge and ability and shall not be bound to act upon any instruction. They have the duty to keep confidential all information acquired in the course of their duties."*[107]

> *„The members of the Board shall perform their duties to the best of their knowledge and ability and in performing their function are independent and shall not be bound to act upon any instruction. They have the duty to keep confidential all information acquired in the course of their duties."*[108]

> *„The Secretary General and his Deputy shall perform their duties to the best of their knowledge and ability and shall not be bound to act upon any instruction. They have the duty to keep confidential all information acquired in this function."*[109]

> *„The Board and the Secretary General may publish anonymized summaries or extracts of awards in legal journals or the VIAC's own publications, unless a party has objected to publication within 30 days of service of the award."*[110]

Chinese International Economic and Trade Arbitration Centre („CIETAC")

The China Council founded the CIETAC, located in Beijing, in 1956 for the Promotion of International Trade, thus the Chinese government. It is the oldest standing arbitral institution in the Asia-Pacific region dealing mainly with disputes relating to Chinese interests.[111] It is apparent that the CIETAC has a strong relationship with the Chinese government, therefore, from the perspective of non-Chinese participants, the question may arise whether it is safe to solve disputes front of the CIETAC in which a Chinese entity is a party. The arbitration rules of the CIETAC regulate privacy and confidentiality in a moderate manner:

> *„Hearings shall be held in camera. Where both parties request an open hearing, the arbitral tribunal shall make a decision.*
>
> *For cases heard in camera, the parties and their representatives, the arbitrators, the witnesses, the interpreters, the experts consulted by the arbitral tribunal, the appraisers appointed by the arbitral tribunal and other relevant persons shall not disclose to any outsider any substantive or procedural matters relating to the case."*[112]

Beijing International Arbitration Center („BIAC")

The BIAC was established in 1995 and together with the CIETAC represents the leading arbitral institutions in China. The BIAC combines arbitration and mediation services; furthermore, it takes an important role in the promotion and development of ADR mechanisms in China.[113] The BIAC arbitration rules determine detailed rules regarding privacy and confidentiality:

> *„All arbitration hearings shall be conducted in private. If the parties agree on a public hearing, the arbitration hearing may proceed in public, except where the case involves state secrets, any third party's commercial secrets, or any relevant circumstances in which the Arbitral Tribunal considers that a public hearing is inappropriate.*
>
> *Where an arbitration is conducted in private, neither the parties, nor their authorised representatives, nor*

106 History of the VIAC. Accessible through http://www.viac.eu/en/.

107 Article 16 (2) of the VIAC arbitration rules. Accessible through http://www.viac.eu/en/arbitration/arbitration-rules-vienna/93-schiedsverfahren/wiener-regeln/144-new-vienna-rules-2013.

108 Article 2 (4) of the VIAC arbitration rules.

109 Article 4 (4) of the Viac arbitration rules.

110 Article 41 of the VIAC arbitration rules.

111 History of the CIETAC. Accessible through http://www.cietac.org/index.php?m=Page&a=index&id=34&l=en.

112 Article 38 of the CIETAC Arbitration Rules. Accessible through. http://www.cietac.org/index.php?m=Page&a=index&id=106&l=en.

113 History of the BIAC. Accessible through http://www.bjac.org.cn/english/page/gybh/introduce_index.html.

any witnesses, arbitrators, experts consulted by the Arbitral Tribunal and appraisers appointed by the Arbitral Tribunal, nor the staff of the BAC shall disclose to third parties any information concerning the arbitration, whether substantive or procedural."[114]

Court of Arbitration for Sport („CAS")

The CAS was established by the International Olympic Committee in 1984 and is located in Lausanne, Switzerland. In its first era of functioning the CAS was available for settling disputes relating to the Olympic Games only, however, since then its doors opened up for non-Olympic sports as well. The Swiss Federal Tribunal exercises the supervision of the CAS.[115] Despite the strict regulations concerning procedures conducted by the CAS, its arbitration rules do not provide the most thorough determination of privacy and confidentiality. However, the following provision contains basic elements of these concepts and serves sufficient protection for the parties:

„Proceedings under these Procedural Rules are confidential. The parties, the arbitrators and CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings without the permission of CAS. Awards shall not be made public unless all parties agree or the Division President so decides."[116]

Australian Centre for International Commercial Arbitration („ACICA")

The ACICA was founded in 1985 and is located in Sidney as the only international arbitral tribunal in Australia. It is often used in disputes arising in the Asia-Pacific region.[117] The ACICA is the third among the arbitral institutions taken into account in Section III of the present research, which provide a thorough and detailed determination of privacy and confidentiality:

„Unless the parties agree otherwise in writing, all hearings shall take place in private.

The parties, the Arbitral Tribunal and ACICA shall treat as confidential and shall not disclose to a third party without prior written consent from the parties all matters relating to the arbitration (including the existence of the arbitration), the award, materials created for the purpose of the arbitration and documents produced by another party in the proceedings and not in the public domain except:

(a) for the purpose of making an application to any competent court;

(b) for the purpose of making an application to the courts of any State to enforce the award;

(c) pursuant to the order of a court of competent jurisdiction;

(d) if required by the law of any State which is binding on the party making the disclosure; or

(e) if required to do so by any regulatory body.

Any party planning to make disclosure under Article 18.2 must within a reasonable time prior to the intended disclosure notify the Arbitral Tribunal, ACICA and the other parties (if during the arbitration) or ACICA and the other parties (if the disclosure takes place after the conclusion of the arbitration) and furnish details of the disclosure and an explanation of the reason for it.

To the extent that a witness is given access to evidence or other information obtained in the arbitration, the party calling such witness is responsible for the maintenance by the witness of the same degree of confidentiality as that required of the party."[118]

German Institution of Arbitration („DIS")

The DIS, having its seat in Berlin, was founded in the beginning of the twentieth century; however, in 1992 it merged with the German Arbitration Committee in order to provide ADR services for the whole territory

Despite the strict regulations concerning procedures conducted by the CAS, its arbitration rules do not provide the most thorough determination of privacy and confidentiality

114 Article 25 of the BIAC arbitration rules. Accessible through http://www.bjac.org.cn/english/page/zc/guize_en.html.

115 Reilly, L. (2012). An Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes. *Journal of Dispute Resolution, Volume 2012, Issue 1*.79-80.

116 R43 of the Code of Sports-related Arbitration. Accessible through http://www.tas-cas.org/fileadmin/user_upload/Code_2016_final__en_.pdf.

117 History of the ACICA. Accessible through http://acica.org.au/assets/media/Services/2016-ACICA-Services.pdf.

118 Article 18 of the ACICA arbitration rules. Accessible through http://acica.org.au/acica-services/acica-arbitration-rules.

of Germany.[119] The arbitration rules of the DIS provide clear regulations concerning the private and confidential nature of the process:

> *„The parties, the arbitrators and the persons at the DIS Secretariat involved in the administration of the arbitral proceedings shall maintain confidentiality towards all persons regarding the conduct of arbitral proceedings, and in particular regarding the parties involved the witnesses, the experts and other evidentiary materials. Persons acting on behalf of any person involved in the arbitral proceedings shall be obligated to maintain confidentiality.*
>
> *The DIS may publish information on arbitral proceedings in compilations of statistical data, provided such information excludes identification of the persons involved."*[120]
>
> *„The arbitral award may be published only with written permission of the parties and the DIS. Under no circumstances may the publication include the names of the parties, their legal representatives or the arbitrators or any other information specific to the arbitral proceedings."*[121]

Sacrificing portions of privacy and confidentiality in international arbitration for the benefit of transparency seems to be unavoidable in order to increase public trust placed in this ADR mechanism, which is necessary to maintain efficient functioning and the ability to remain a reasonable alternative to litigation

Conclusions

The concepts of privacy and confidentiality are important elements of arbitration. However, the private nature of the process does not necessarily ensure that information presented or documents produced in an arbitration can remain fully confidential in all circumstances. This became especially true in ISA procedures following the adoption of the UNCITRAL Rules on Transparency. When it comes to ICA, however, different jurisdictions have different approaches with regard to the extent of confidentiality applied and whether it functions as an implied concept.[122] The arbitral institutions examined in in this paper approach privacy and confidentiality in a similar manner, since most of them establish thorough procedural rules in connection with these concepts. Without doubt, the arbitration rules of the WIPO are the most detailed concerning the confidential nature of the process.

Despite the transparency trend strengthened further with the adoption of the UNCITRAL Rules on Transparency, ICA procedures can remain relatively confidential, and with the mutual consent of the parties, the extent of confidentiality, thus the private nature of the procedure can be further increased. However, with the transparency trend prevailing in ISA, it is a matter of time before the requirement of increased transparency in arbitral procedures reach ICA as well. Even though the public stakehold in ISA is more apparent than it is in ICA, if we look behind the curtains we can see high-volume cases in ICA as well, ones that would deserve at least the degree of transparency that is required in ISA. Sacrificing portions of privacy and confidentiality in international arbitration for the benefit of transparency seems to be unavoidable in order to increase public trust placed in this ADR mechanism, which is necessary to maintain efficient functioning and the ability to remain a reasonable alternative to litigation.

119 History of the DIS. Accessible through http://www.dis-arb.de/em/57/content/about-the-dis-id46.

120 Sections 43.1 and 43.2 of the DIS arbitration rules. Accessible through http://www.dis-arb.de/de/16/rules/dis-arbitration-rules-98-id10.

121 Section 42 of the DIS arbitration rules.

122 Noussia, supra at 161-162, 165.

The Recoverability of Outcome-Based Fees Related to Dispute Financing in International Arbitration

Does the Essar v Norscot Case Bring Anything New to the Table?[*]

Dr. Patricia Živković

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The waters of the recoverability of outcome-based fees were recently disturbed by a landmark decision of an English High Court ("High Court") in the case *Essar Oilfields Services v Norscot Rig Management PVT Limited* ("*Essar v Norscot* case").[1] The result of the arbitration, as well as, of the High Court's deliberation, was a surprise for the arbitration community in regards to the recoverability of outcome-based fees payable to third party funders ("TPF"). This article is a building block in resuming the predictability regarding the recovery of such fees in international arbitration by identifying and analyzing the main concerns stemming from the *Essar* decisions.

The *Essar v Norscot* decisions (the arbitral award and the High Court's judgement) have introduced a novelty insofar as the tribunal ordered the TPF's *uplift*[2] to be paid the losing party. It is inevitable to understand the importance of both the arbitrator's award and the High Court's decision, which was rendered in the subsequent setting aside proceedings, for they will most certainly shape the approaches of tribunals and courts in the future.

Namely, the discussion in the academic community, but also in international practice has thus far been predominately regarding to the recoverability of costs in cases involving TPFs at two levels. The first level of the discussion involves an issue of whether actual legal fees and other expenses, which were covered by a TPF, are recoverable. The second level deals with the issue of whether the funders' compensation, i.e. uplift, is recoverable. This uplift is composed of the payment contracted by the funder and a funder as a sort of a "price" for the investment made, payable only in a case of success. The method of its calculation can be designed in several ways. For example, it can consist of a multiplier of the capital invested, or of a percentage of proceeds, or as an interest on the investment.[3]

The *incurred legal costs*, which were covered by a funder, were considered recoverable costs under general criteria on costs allocation, although this was

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The *Essar v Norscot* decisions (the arbitral award and the High Court's judgement) have introduced a novelty insofar as the tribunal ordered the TPF's *uplift* to be paid the losing party

* The author would like to thank her colleagues Marko Mećar and Tin Oraić for their contribution to the development of the ideas presented in this article, and to her colleague and friend Yancy Cottrill for his never-ending support of her publications.

1 Essar Oilfields Services v Norscot Rig Management PVT Limited EXHC 2361 (Comm). (2016).

2 The author has established that the term "uplift" is the most appropriate to describe the portion of the fee which is payable upon the funded party's success in the arbitration proceedings. Other terms have been considered, such as a *return* and a *success fee*. However, a *return* could easily be understood as a return of capital invested only, whereas a *success fee* is a specific type of outcome-based fee based on an arrangement according to which a basic (lower) fee is payable in any case, while a success fee is paid only in the case of the success.

3 Jonas von Goeler, *Third-Party Funding in International Arbitration and Its Impact on Procedure*, vol. 35, International Arbitration Law Library (Kluwer Law International, 2016), 386.

subject to discussion as well.[4] On the other hand, the latter type of costs, i.e. *the funder's uplift*, was until recently considered by majority not to be a recoverable element of costs in arbitration.[5] The *Essar v Norscot* case changed the stance on this, and non-surprisingly it received a wide specter of comments on legal blogs and other reporting platforms.[6] This article will introduce an academic analysis of the decision in the case at hand, which aims at the assessment of how many new elements were introduced by this decision in the transnational standard of allocation of costs in international arbitration.

The recoverable part of the TPF's uplift comprised 24 per cent of the total sum awarded to Norscot, and 72 per cent of the costs award

The *Essar v Norscot* case involved Norscot Rig Management PVT Limited ("Norscot"), which was the claimant in the arbitration and was funded by a third party funder, and Essar Oilfields Services ("Essar"), which was the respondent in the arbitration. The costs order, which was subsequently subject to the court review in the setting aside proceedings, was a part of the fifth partial award ("Award"), made on 17 December 2015, and clarified on 3 March 2016.[7] The sole arbitrator ("Arbitrator") found Essar to be liable to Norscot for the total sum of around US$12 million, including US$4 million for the costs, out of which £1.94 million (cca. US$ 2,915,650, according to the exchange rate at the date of the Award) was paid for the uplift calculated per the arrangement concluded between Norscot and its funder.[8] In other words, the recoverable part of the TPF's uplift comprised 24 per cent of the total sum awarded to Norscot, and 72 per cent of the costs award.

The Arbitrator in the *Essar v Norscot* case held that he was entitled to make such an allocation within his broad discretion, under the combined effect of the provisions of the English Arbitration Act 1996 ("1996 EAA") and the ICC Rules, which were applicable arbitration rules in the case.[9] This was challenged by Essar in the setting aside proceedings on the grounds provided in section 68 of the 1996 EAA. Section 68 provides for a possibility for a party to challenge an award on the ground of serious irregularity affecting the tribunal, the proceedings, or the award. In this particular case, the serious irregularity allegedly consisted of the Arbitrator's excess of its powers, as per section 68(2)(b) of the 1996 EAA. This involved multiple points of a discussion for the English Court, which will be elaborated on in this article.

4 Ibid., 35:397.

5 Ibid., 35:387.

6 Maximilian Szymanski, 'Recovery of Third Party Funding Ordered by ICC Tribunal and Confirmed by the English High Court – An Under-Theorised Area of the Law', *Kluwer Arbitration Blog*, 8 October 2016, http://kluwerarbitrationblog.com/2016/10/08/recovery-of-third-party-funding-ordered-by-icc-tribunal-and-confirmed-by-the-english-high-court-an-under-theorised-area-of-the-law/; Angela Milner and Emma Brown, 'The Recoverability of Third Party Funding in Arbitration', *Global Arbitration News – Baker Mckenzie*, 24 October 2016, https://globalarbitrationnews.com/the-recoverability-of-third-party-funding-in-arbitration/; Jeremy Glover, 'Recovery of Third-Party Funding Costs in Arbitration', *Fenwick Elliot Newsletters*, accessed 30 January 2017, http://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/recovery-third-party-funding-costs-arbitration; Mark Hilton, Jamie Curle, and James Carter, 'English High Court Allows Recovery of Third Party Funding Costs in ICC Arbitration Proceedings', *DLA Piper Publications*, 22 September 2016, https://www.dlapiper.com/en/uk/insights/publications/2016/09/english-court-allows-recovery/; Ben Knowles, 'Landmark Decision on Third-Party Funding in Arbitration: Essar v Norscot', *Clyde & Co Insight*, accessed 30 January 2017, http://www.clydeco.com/insight/article/essar-v-norscot; Nick Peacock, Vanessa Naish, and Hannah Ambrose, 'English Court Upholds Arbitrator's Decision to Award Claimant the Costs of Third Party Funding', *Herbert Smith Freehills Dispute Resolution – Arbitration Notes*, 3 October 2016, http://hsfnotes.com/arbitration/2016/10/03/english-court-upholds-arbitrators-decision-to-award-claimant-the-costs-of-third-party-funding/; 'Costs of Third-Party Funding Awarded in Arbitration', *Allen & Overy Litigation and Dispute Resolution Review*, 19 October 2016, http://www.allenovery.com/publications/en-gb/Pages/Costs-of-third-party-funding-awarded-in-arbitration.aspx.

7 Essar Oilfields Services v Norscot Rig Management PVT Limited EXHC 2361 (Comm). paragraph 1.

8 Ibid., para. 1, 2, and 5. The calculation of the amount in US$ was made in accordance with the conversion rate available at the OANDA as of 17 December 2015.

9 The Arbitrator specifically referred to sections 59(1) and 63 (3) of the 1996 EAA, and to article 31 of the (1998) ICC Rules, as the basis of his decision. *See* in Essar Oilfields Services v Norscot Rig Management PVT Limited [2016] EXHC 2361 (Comm), paras. 36-39.
Section 59(1) of the 1996 EAA states that "*References in this Part to the costs of the arbitration are to— (a) the arbitrators' fees and expenses, (b) the fees and expenses of any arbitral institution concerned, and (c) the legal or other costs of the parties.*" Section 63(3) of the 1996 EAA states that "*[t]he tribunal may determine by award the recoverable costs of the arbitration on such basis as it thinks fit. If it does so, it shall specify— (a) the basis on which it has acted, and (b) the items of recoverable costs and the amount referable to each.*"
Article 31 of the (1998) ICC Rules: "*1. The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitral proceedings, as well as the fees and expenses of any experts appointed by the Arbitral Tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.*
2. The Court may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case. Decisions on costs other than those fixed by the Court may be taken by the Arbitral Tribunal at any time during the proceedings.
3. The final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties."

The High Court dealt with the issue of the arbitrator's power to decide whether to include the TPF's uplift into "other costs" under the applicable rules was indeed exercised in the excess of his powers, or was it a question of erroneous or correct application of law.[10] It also dealt with an issue related to the question of whether the arbitrator's construction of TPF's as "other costs" was correct or not.[11]

This article will be structured in a way to cover these two legal issues pertaining to the *Essar v Norscot* case, but also to build upon them and to address the recoverability of outcome-based fees in general. In that line, the first part of the article will investigate whether in the *Essar v Norscot* case, the Arbitrator was deciding in the excess of his powers. The second part of the article will deal with the characterization of outcome-based fees and, in particular, of a TPF's uplift and attorneys' contingency fees, as *costs* in arbitration. The Arbitrator in the *Essar v Norscot* case characterized the TPF's uplift as "other costs" under the ICC Rules, but it is worth and important to explore whether this aligns with the international arbitral practice, or whether they should be reconsidered and qualified differently, e.g., as damages. In the third part of the article, it will be discussed whether the Arbitrator applied the standard of allocation of costs in accordance with the international arbitral practice, in order to see what novelty (if any) this Award brings to the arbitration field. Finally, the last part of the article takes the ruling in the *Essar v Norscot* case a step further by posing the question, whether in the next similar case, outcome-based fees can be recovered, if not as costs, then as damages under national substantive law.

The Arbitrator's Mandate Issue: The Scope of the Tribunal's Power to Decide on Outcome-Based Fees

In the *Essar v Norscot* case, the Arbitrator characterized the uplift payable to the funder as "other costs" under the applicable ICC Rules and ordered Norscot to cover these costs. Norscot challenged the Award by claiming that the Arbitrator acted in the excess of his powers. This part of the article deals with the issue of whether the arbitrator's power to decide on the inclusion of the third party funder's uplift into "other costs" was within his powers, or was it the correct application of law. The latter, of course, not being reviewable by a national court in most cases.

The tribunal's power to allocate the costs is provided in most national arbitration laws.[12] When deciding whether the arbitrator's power to allocate costs included the allocation of TPF's uplift, the English High Court in the *Essar v Norscot* case explained that, "it all depends in every case on what in substance power at issue really is".[13] In the words of the court,

> *"[...] if one characterised the relevant power as being the power to order that one side pays the other side's costs of obtaining litigation funding, or conversely, the power to order by way of costs such sums which do not include the costs of litigation funding, one could say as a matter of language that he was exercising a power that he did not have. But, if that was the correct approach, one could re-describe many, if not all, errors of law in that way."*[14]

When deciding whether the arbitrator's power to allocate costs included the allocation of TPF's uplift, the English High Court in the *Essar v Norscot* case explained that, "it all depends in every case on what in substance power at issue really is"

Hence, in order not to open the door to such practice, which would be "wholly unrealistic and artificial," the High Court marked the power to award costs, including the costs of obtaining funding, as the relevant power, and consequently it considered that the Arbitrator acted within the limits of his authority.[15]

In order to understand the accuracy of the High Court's conclusion, a few words should be said about the power to award fees in international arbitration in general. It is considered that such power is an inherent aspect of the tribunal's authority, even when it is not explicitly provided for.[16] For example, in England and Wales, the 1996 EAA states in Section 61 that "[t]he tribunal *may* make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties" (emphasis added). However, in *Re Becker, Shillan & Co and Barry Bros*, the Court, under

10 Essar Oilfields Services v Norscot Rig Management PVT Limited EXHC 2361 (Comm). Paragraph 7(2).

11 Ibid., para. 7(5).

12 For example, Section 1057(1) of the German Code of Civil Procedure, Section 42 of the Swedish Arbitration Act, section 63(3) of the 1996 EAA, Section 609(1) of the Austrian Code of Civil Procedure, Article 35(1) of the Croatian Arbitration Act.

13 Essar Oilfields Services v Norscot Rig Management PVT Limited EXHC 2361 (Comm). Paragraph 43.

14 Ibid., para. 42.

15 Ibid., paras 42, 47.

16 Gary Born, *International Arbitration: Law and Practice*, 2012, 176.

the 1950 EAA, considered that the arbitrator does not have discretion to choose whether to deal with the costs in the award or not but "he must exercise his discretion upon them."[17] Similarly, in *Casata Limited v General Distributors Limited*, the Supreme Court of New Zealand concluded that,

> *"[t]here is nothing in the legislative history of the new [author's note: New Zealand Arbitration] Act to indicate any intention to depart from the pre-existing position that costs are always in issue where not excluded by agreement of the parties and that the arbitrator has an obligation to fix and determine them, even if they have not been raised as an issue before publication (sic) of an award" (emphasis added)."*[18]

For example, *In re General Security National Insurance Co.*, the court confirmed that the power to allocate legal fees was inherent to the arbitrator's mandate, even when no specific institutional or *ad hoc* rules are agreed upon

In a very similar manner, the Singapore International Arbitration Act does not expressly provide for the tribunal's power to allocate the costs – either procedural or party costs. Scholars have, however, concluded that "the Singapore legislature and courts have considered it a trite point and have implicitly presumed a power to award costs."[19]

Nevertheless, it is important to distinguish the allocation of procedural costs (tribunal's fees and expenses, the costs of experts appointed by the tribunal, and institutional fees) and party costs (legal fees and other costs) in this regard, and especially to investigate whether party costs fall under the same power to allocate. The Austrian Code of Civil Procedure, the German Code of Civil Procedure, the 1996 EAA and the Swedish Arbitration Act, for example, make no difference between the power to allocate procedural costs and the power to allocate party costs, including legal fees.[20]

Still, the power to allocate party costs, and especially legal fees, was widely discussed in doctrine and practice. This was a particularly hot issue in the United States, the home jurisdiction of the American Rule – the allocation standard under which each of the parties in the proceedings bears its own costs, especially when it comes to attorney fees. However, even in that jurisdiction, arbitral tribunals successfully retained their discretion as to this issue, and they have freely awarded such fees.

For example, *In re General Security National Insurance Co.*, the court confirmed that the power to allocate legal fees was inherent to the arbitrator's mandate, even when no specific institutional or *ad hoc* rules are agreed upon.[21] The parties in that case provided for a place of arbitration in New York, and for New York law as an applicable law. New York's arbitration statute provided for arbitrator's fees to be allocated in the last award but not for the allocation of legal fees. The Court, however, held that New York's arbitration statute did not govern the proceedings.[22] Consequently, the tribunal was free to award such fees. In a similar matter, the Second Circuit went even further in *Reliastar Life v EMC* by reversing a decision to vacate an award and confirming that the tribunal has an inherent power to award attorney's and arbitrator's fees if they are incurred due to the other party's failure to arbitrate in good faith, even if the parties agreed to exclude such a power.[23]

Whereas the power to award costs, including both procedural and party costs, is considered to be inherent to an arbitrator's mandate, it still remains to be answered whether this power includes the power to award outcome-based fees. According to the Arbitrator and the High Court in the *Essar v Norscot* case, this is a matter of the tribunal's discretion. To support this conclusion, a part of the Award was cited by the High Court, in which the Arbitrators stated that,

> *"[...] the combined effect of the provisions in the Act [author's note: 1996 EAA] and the rules [author's note: ICC Rules] give it a wide discretion as to what costs it can Award to the winning party. The discretion*

17 Colin Ong and Michael O'Reilly, *Costs in International Arbitration*, 1st edition (Singapore: LexisNexis, 2013), 27.

18 Casata Limited v General Distributors Limited, No. SC 26/2005 [2006] NZSC 8 (The Supreme Court of New Zealand 15 March 2006).

19 Ong and O'Reilly, *Costs in International Arbitration*, 23.

20 Section 1057(1) of the German Code of Civil Procedure, Section 42 of the Swedish Arbitration Act, section 59(1) of the 1996 EAA, Section 609(1) of the Austrian Code of Civil Procedure.

21 In re General Security National Insurance Co. 2011 U.S. Dist. LEXIS 49518 (S.D.N.Y.) (29 April 2011).

22 "Marc J. Goldstein Litigation & Arbitration Chambers" Arbitral Award of Legal Fees Upheld Despite no Specific Grant of Power in the Arbitration Clause," accessed January 30, 2017, http://arbblog.lexmarc.us/2011/05/arbitral-award-of-legal-fees-upheld-despite-no-specific-grant-of-power-in-the-arbitration-clause/.

23 Reliastar Life Ins. Co. v EMC Nat'l Life Co., No. 07–0828–c (564 F.3d 81 (2nd Cir. 2009) 9 April 2009).

includes the power to include in 'other costs' the cost of litigation funding."[24]

The High Court agreed, and it rejected Essar's contention that the relevant provisions of the 1996 EAA "*must be construed by reference to what a court would or could allow by way of costs in litigation under the* [Civil Procedure Rules]".[25] The court explicitly stated that "*litigation funding costs fall within the arbitrator's general costs discretion*", and emphasized that the discretion "*should not be confined by some legal straightjacket imposed by reason of what a court might or might not be permitted to order*".[26] This seems to be in accordance with the prevailing arbitration practice, which bestows discretion on arbitrators and does not easily allow impositions in the exercise of their discretion regarding costs to be done.

However, whereas the arbitrators' discretion as to the allocation of costs should remain intact by national rules designated for proceedings in national courts, it still might be restrained with public policy rules either of the country of the seat or the country of enforcement of an arbitral award. In this context and in the relation to TPF, two doctrines need to be taken into account – the doctrines of maintenance and champerty – and their application and impact on arbitration.[27]

The doctrine of maintenance refers to the funding or providing of financial assistance to a holder of a claim when the funder holds no connection or motive recognized by the law for the pursuit of the claim.[28] The doctrine of champerty takes it one step further by adding that this funder has a direct financial interest in the outcome of the claim.[29] For a long time, these doctrines have been an obstacle for obtaining funding from persons *other than the parties to a dispute*. Namely, the historic origin of these doctrines shows that they outlawed this type of funding on the grounds of preventing doubtful and fraudulent claims being submitted under auspices of wealthier and more influential persons.[30] However, their application in arbitration has been a matter of discussions and has always been questionable, at least.[31] Today, the tendency is to completely exclude or at least limit their application in arbitration.[32]

In that line, the Arbitrator in *Essar v Norscot* concluded that "[a]rguments based on maintenance and champerty are outdated and can be safely ignored."[33] This is not far away from recent trends in arbitration world, given that at least two jurisdictions – Hong Kong and Singapore – are actively and expressly working on legalization and regulation of third party funding, among other means, by quashing the impact of the doctrines of maintenance and champerty in arbitration as well. In 2015, Hong Kong established a Law Reform Commission which was and still is in charge of conducting an in-depth analysis of TPF in arbitration, and which has, thus far, issued two reports on this matter.[34] This work culminated in proposed legislative amendments that would abolish the application of the doctrines of maintenance and champerty (both as crimes and civil torts) to arbitration.[35] In Singapore, on 10 January 2017, the Parliament passed the Civil Law (Amendment) Bill 38/2016, which abolished the common law tort of champerty and maintenance in arbitration.[36]

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24 Essar Oilfields Services v Norscot Rig Management PVT Limited EXHC 2361 (Comm). Paragraph 31.

25 Ibid., para. 49.

26 Ibid., para. 68.

27 von Goeler, *Third-Party Funding in International Arbitration and Its Impact on Procedure*, 35:405.

28 James Clanchy, 'Third Party Funding in Arbitration: Breaking down Barriers and Building Bridges', *Croatian Arbitration Yearbook* 23 (2016): 64; Lisa Bench Nieuwveld and Victoria Shannon, *Third-Party Funding in International Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2012), 15.

29 Clanchy, 'Third Party Funding in Arbitration: Breaking down Barriers and Building Bridges', 64; Nieuwveld and Shannon, *Third-Party Funding in International Arbitration*, 15.

30 Jern-Fei Ng, 'The Role of the Doctrines of Champerty and Maintenance in Arbitration', *Mondaq*, 12 July 2010, 1, http://www.mondaq.com/x/103272/Arbitration+Dispute+Resolution/The+Role+of+the+Doctrines+of+Champerty+and+Maintenance+in+Arbitration.

31 von Goeler, *Third-Party Funding in International Arbitration and Its Impact on Procedure*, 35:405–6.

32 Ng, 'The Role of the Doctrines of Champerty and Maintenance in Arbitration', 4.

33 Essar Oilfields Services v Norscot Rig Management PVT Limited EXHC 2361 (Comm). Paragraph 31.

34 Clanchy, 'Third Party Funding in Arbitration: Breaking down Barriers and Building Bridges', 56; Sapna Jhangiani and Rupert Coldwell, 'Third-Party Funding for International Arbitration in Singapore and Hong Kong – A Race to the Top?', 30 November 2016, http://kluwerarbitrationblog.com/2016/11/30/third-party-funding-for-international-arbitration-in-singapore-and-hong-kong-a-race-to-the-top/.

35 Jhangiani and Coldwell, 'Third-Party Funding for International Arbitration in Singapore and Hong Kong – A Race to the Top?'

36 'Singapore Passes Bill Allowing Third Party Funding in Arbitration', *Harbour Litigation Funding News*, n.d., https://harbourlitigationfunding.com/singapore-legislation-tabled-permit-third-party-funding-arbitration/; 'Singapore to Permit Third Party Funding of Inter-

Hence, it can be concluded that the arbitrator's power to allocate costs encompasses the power to allocate outcome-based fees, including TPF's uplift, and that this is not precluded by public policy reasons. The next question, in the words of the High Court, is "*[w]hether and, if so, how the arbitrator exercises that [power] in any particular case.*"[37] This issue is addressed on two levels: firstly, when should (or could) outcome-based fees be characterized as costs, and secondly, when should they be recovered. These two levels of a discussion are explored in turn.

The Characterization Issue: Third Party Funder's Uplift as Costs

The Arbitrator in *Essar v Norscot* characterized the TPF's uplift as "other costs" and consequently found them recoverable under the applicable law and rules

The Arbitrator in *Essar v Norscot* characterized the TPF's uplift as "other costs" and consequently found them recoverable under the applicable law and rules. The English High Court agreed with such a characterization, under a so-called *functional approach*. This approach consisted of posing a question of whether the TPF's uplift was related to the arbitration and was it for the purpose of it, i.e. was it incurred in order to bring or defend the claim in question. Under the light of this approach, the court stated the following:

> *"Certainly, where a party to an arbitration is funding it by obtaining specific litigation funding which is now available in a variety of forms, so as to enable him to specifically enforce his legal rights, it is very hard to see how that is excluded for all purposes from the expression 'other costs'."*[38]

This statement is groundbreaking as it clearly sets the TPF's uplift within the meaning of "other costs" and, consequently, makes it recoverable. It also puts some possible limitations as to the applicability of this decision in the future cases

This statement is groundbreaking as it clearly sets the TPF's uplift within the meaning of "other costs" and, consequently, makes it recoverable. It also puts some possible limitations as to the applicability of this decision in the future cases. Namely, by stating that a TPF needs to be obtained "*so as to enable [the party] to specifically enforce his legal rights*", the court is introducing an element of access to justice, or to use the terminology of costs standard, the court requires the incurred costs to be *necessary*. Consequently, it is questionable whether a TPF's uplift would be recoverable in all scenarios. A particularly interesting one is when these fees are incurred for cash management purposes and not by an impecunious party, which would otherwise be deprived of access to justice.

Notwithstanding this plausible limitation as to the characterization of the TPF's uplift as "other costs," the arbitration community was not convinced. It is claimed that the TPF's uplift is not to be considered *costs*, but rather *damages*, or neither of these categories. Authors and practitioners state that the TPF's uplift is an entrepreneurial risk, stemming from the bargain achieved between a third party, i.e. the funder, and a party to arbitration, and consequently it cannot be considered to be *costs* of the arbitration.[39] Moreover, due to the privy of contract between the funder and the funded party, these fees are not foreseeable for the other party to the arbitration. In addition, since the paying party had no chance to influence the bargain, it should not be responsible for the costs of it. Finally, it can be stated that the uplift, in any case, cannot be qualified as a necessity of a funded party.[40]

The discussion on the characterization of legal fees incurred in cases where TPF was used should be led with awareness of a distinction between the costs, which were covered by a TPF, and the uplift payable to the TPF. Regarding the former, the discussion focused on the issue of whether such fees, claimed as costs, were (directly) *incurred* by the funded party, as they are covered by a TPF.[41] Since these fees are not the topic of this article, it will only be briefly mentioned that these legal fees are considered recoverable, but only if it can be established that the funded party incurred the liability for such fees.[42] On the other hand, the recoverability of a TPF's uplift still deserves a detailed analysis.

national Arbitration', *Latham & Watkins LLP Dispute Resolution*, 12 January 2017, http://www.latham.london/2017/01/singapore-to-permit-third-party-funding-of-international-arbitration/.

37 Essar Oilfields Services v Norscot Rig Management PVT Limited EXHC 2361 (Comm). Paragraph 68.

38 Ibid., para. 54.

39 'Draft Report on Security for Costs and Costs', ICCA-QMUL Task Force on Third Party Funding in International Arbitration, 1 November 2015, 10; Duarte Gorjão Henriques, 'The Essar v. Norscot Case: A Final Argument for the "Full-Disclosure-Wingers" of TPF in International Arbitration', *Kluwer Arbitration Blog*, 15 October 2016, http://kluwerarbitrationblog.com/2016/10/15/the-essar-v-norscot-case-a-final-argument-for-the-full-disclosure-wingers-of-tpf-in-international-arbitration/.

40 Henriques, 'The Essar v. Norscot Case: A Final Argument for the "Full-Disclosure-Wingers" of TPF in International Arbitration'.

41 von Goeler, *Third-Party Funding in International Arbitration and Its Impact on Procedure*, 35:378–87.

42 Ibid.

The definitions of the costs of arbitration as provided in applicable arbitration rules are the place to start with such an analysis. For example, Article 37(1) of the ICC Rules defines party costs as "the reasonable legal and other costs *incurred* by the parties *for the arbitration*" (emphasis added). Similarly, Section 35.1 of the DIS Rules provide that the tribunal may also allocate the "costs *incurred* by the parties and which were *necessary* for the *proper pursuit of their claim or defence*" (emphasis added). Hence, in order to qualify a certain expenditure as *costs* under these rules, it should be *incurred* by a party, and *necessary* or incurred *for* the arbitration. Other institutional rules may be less restrictive in defining the costs of the arbitration, by excluding one or both of these considerations.[43]

In case of a reimbursement of a TPF's uplift, the discussion is not so much focused on whether such expenditures were *incurred* by a funded party, as it is on the issue of whether they were *related* to the arbitration proceedings. Hence, the English High Court was correct in considering this issue under the functional approach, consisting of posing a question of whether the TPF's uplift was related to the arbitration and was it for the purpose of it, i.e. was it incurred in order to bring or defend the claim in question. The Costs Subcommittee of the ICCA-Queen Mary Task Force on Third Party Funding ("Subcommittee"), for example, in its Draft Report on Security for Costs and Costs found this uplift *not to be appropriate* for allocation, especially due to the lack of a linkage to arbitration proceedings. The Subcommittee stated the following:

> *"It is not appropriate for tribunals to award funding costs (such as a conditional fee, ATE-premium, or litigation funder's return), as they are not procedural costs incurred for the purpose of an arbitration. The success portion payable to a third-party funder results from a trade-off between the funded party and the funder, where the funder assumes the cost and risk of financing the proceedings and receives a reward if the case is won. This agreement is not linked to the arbitration proceeding as such. The reasonable legal fees incurred by a funded party should remain recoverable".*[44]

Hence, whereas the Subcommittee found a lack of linkage of TPF's uplift to the arbitration, in the *Essar v Norscot* case, both the Arbitrator and the High Court identified the relation between the TPF's uplift and the proceedings at hand.

In order to support his opinion in this regard, the Arbitrator cited the ICC Report on Decisions on Costs from 2015.[45] He cited the following paragraph, which reports on the allocation success fees and uplifts:

> *"[...] funding arrangements are rarely limited solely to the costs of the arbitration. Usually, the third-party funder will require payment of an uplift or success fee in exchange for accepting the risk of funding the claim, which is in effect the cost of capital. As a tribunal only needs to satisfy itself that a cost was incurred specifically to pursue the arbitration, has been paid or is payable, and was reasonable, it is feasible that in certain circumstances the cost of capital, e.g. bank borrowing specifically for the costs of the arbitration or loss of use of the funds, may be recoverable."*

It is interesting to note that in the *Essar v Norscot* decision, as well as in subsequent discussions within the arbitration community, there is seemingly little said on the correlation of a TPF's uplift and contingency fees charged by attorneys. Namely, TPF's uplift can be considered to be of the same nature as contingency fees, or at least to fall under the same umbrella term of so-called outcome-based fees.[46]

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43 For example, Rule 37 of the SIAC Rules: "The Tribunal shall have the authority to order in its Award that all or a part of the legal or other costs of a party be paid by another party." (no requirement for costs to be *incurred* by the party and/or *for arbitration*); Article 44 of the SCC Rules: "Unless otherwise agreed by the parties, the Arbitral Tribunal may in the final award upon the request of a party, order one party to pay any reasonable costs incurred by another party, including costs for legal representation, having regard to the outcome of the case and other relevant circumstances." (no requirement for costs to be incurred *for arbitration*); Article 38(e) of the Swiss Rules: "The costs for legal representation and assistance, if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable" (no requirements to be *incurred* by the party and/or *for arbitration*). This, of course, does not mean that these rules necessarily would lead to a different characterization of expenditures as costs than those, which contain these requirements, but the discussion on characterization of TPF-related fees as costs would probably be easier to defend in these cases.

44 'Draft Report on Security for Costs and Costs', 10.

45 ICC Commission on Arbitration and ADR, 'ICC Commission Report: Decisions on Costs in International Arbitration', ICC Dispute Resolution Bulletin, Issue 2, 2015, http://www.iccwbo.org/Data/Policies/2015/Decisions-on-Costs-in-International-Arbitration/.

46 Nieuwveld and Shannon, *Third-Party Funding in International Arbitration*, 8.

Both attorney's fees and TPF's uplift are contingent on the success of the case. The main difference pointed out is that the funder is an *outside* entity, unlike attorney, and that it "*falls somewhere between an attorney and an insurance company in terms of ownership and control over the dispute*."[47] This distinction may be invoked as another ground against the recoverability of TPF's profit; however, its importance is more observed in the context of the need for the regulation of professional and ethical rules than regarding the characterization of these fees as costs.[48] Also, the distinction between these two types of outcome-based fees is becoming even more blurry when the practice of TPFs investing in law firms is taken into account.[49] Funders have already started to invest in and founding their own law firms.[50] By taking this step, they can be marked as an *inside* entity. Hence, the parallel between their fees and attorneys' contingency fees is more feasible as well.

A discussion was raised by the *Essar v Norscot* Award in regards to the standard applicable to the allocation of costs since the TPF's uplift was awarded on a so-called *indemnity* basis

This is important to note because whereas the arbitration practice is still rather *poor* in relation to the recoverability of TPF's uplift, there is much already said in relation to attorney's contingency fees. Due to the similarities between the TPF's uplift and attorneys' contingency fees, it seems plausible that the answer regarding the characterization lies somewhere within the international arbitration practice in relation to the latter. The reimbursement of these fees is controversial not only in arbitration but also in civil litigation; although the trend regarding their availability and recoverability has changed within the past decade or so.[51] Still, this explains why it was difficult to reach an international consensus.

Today, national courts are keener to the idea of shifting such fees than they were before and they regularly enforce arbitral awards doing exactly this.[52] It is not entirely clear why should any other type of outcome-based fees be treated any differently, including a TPF's uplift. It is, however, completely different issue, under which standard are such costs to be awarded. This is discussed in the next part of the article.

The Applicable Standard Issue: Transnational Standards as to the Allocation of Costs in Arbitration and Its Application to Outcome-Based Fees

A discussion was raised by the *Essar v Norscot* Award in regards to the standard applicable to the allocation of costs since the TPF's uplift was awarded on a so-called *indemnity* basis. Two observations will be made in this regard. Firstly, a perspective will be offered here under which it will be discovered that the indemnity basis is not a novelty within the standard of allocation in international arbitration, but it is intertwined with it. Indemnity basis, as well as the consideration of parties' behavior in relation to the arbitration, has already been recognized by arbitral tribunals as relevant factors for the allocation of the costs of the arbitration. Hence, this approach, even when it comes to outcome-based fees, is not a novel event.

Secondly, one should be constantly aware that the allocation of costs is a multi-tier decision-making process. Once the tribunal has (1) identified the *costs* and (2)

47 Ibid.

48 Ibid.

49 Ibid., 9; See in: Victoria Shannon, 'Reshaping Third-Party Funding', *Tulane Law Review (Forthcoming)* 91 (23 October 2016): 61, https://ssrn.com/abstract=2649515 or http://dx.doi.org/10.2139/ssrn.2649515.

50 Shannon, 'Reshaping Third-Party Funding', 61.

51 Agreements on contingency fees are a hallmark of the US legal system, and under these agreements the fees of a counsel are payable as a percentage of the recovered amount under the claim, and only in the case of the success in the proceedings. See: James R. Maxeiner, 'The American "Rule": Assuring the Lion His Share', in *Cost and Fee Allocation in Civil Procedure*, ed. Mathias Reimann, Ius Gentium: Comparative Perspectives on Law and Justice 11 (Springer Netherlands, 2012), 297, http://link.springer.com/chapter/10.1007/978-94-007-2263-7_26. In Germany, for example, outcome-based fees are allowed on a limited basis since 2006, after the Federal Constitutional Court found that a ban on contingency fees is unconstitutional as it prevents claimants from exercising their right of access to justice, when they are able to agree only on outcome-based fees. See: Burkhard Hess and Rudolf Huebner, 'Cost and Fee Allocation in German Civil Procedure', in *Cost and Fee Allocation in Civil Procedure*, ed. Mathias Reimann, Ius Gentium: Comparative Perspectives on Law and Justice 11 (Springer Netherlands, 2012), 156, http://link.springer.com/chapter/10.1007/978-94-007-2263-7_11. Contingency fees are also allowed in England and Wales since 2013. See: 'Contingency Fees in England after April 2013 | Lexology', accessed 27 October 2015, http://www.lexology.com/library/detail.aspx?g=f053e1a5-6992-4ef0-a9d8-9bef404a85e6. It would be wrong, however, to say that no outcome-based fees are allowed in other European countries. Most of the jurisdictions allow contingency-like fees, i.e. so–called success fees, which are divided on a basic fee paid in any case and a premium in a case of success. See: Ian Meredith and Sarah Aspinall, "Do Alternative Fee Arrangements Have a Place in International Arbitration?," *Arbitration* 72, no. 1 (2006): 22; Similarly in: Waincymer, *Procedure and Evidence in International Arbitration*, 1241; Cremades and Mazuranic, "Costs in Arbitration," 195.

52 For example, Swedish courts have enforced awards in which decision on costs contained success fees, if they were found to be reasonable. See: Meredith and Aspinall, 'Do Alternative Fee Arrangements Have a Place in International Arbitration?', 26; For an example from the US practice see: Johnson Controls, Incorporated v. Edman Controls, Incorporated, XXXVIII Yearbook Commercial Arbitration 514 (United States Court of Appeals, Seventh Circuit). (2013).

the standard/rule under which it will decide upon the allocation, it will turn to (3) deciding on the *exact amount* of costs to be recovered. The test of reasonability is the leading test for the determination of the *exact amount* to be recovered by a party in arbitration. It will, therefore, be analyzed how outcome-based fees are assessed under the reasonability test, and whether the Arbitrator departed from this approach in *Essar v Norscot*.

Indemnity Basis for the Allocation of Outcome-Based Fees in International Commercial Arbitration

The commentators who dealt with the *Essar v Norscot* case focused on the *indemnity* basis for the allocation of outcome-based fees in that case. The same basis was referred to by the Arbitrator in the context of the Rule 44.3 of the Civil Procedure Rules ("CPR").[53] Nevertheless, the stance accepted in this article is that the use of the term "indemnity basis" might be somewhat misleading and redundant because in international arbitration this is already covered by the prevailing standard on the allocation of costs.

In order to fully understand how the prevailing standard on the allocation of costs encompasses indemnity basis as invoked in the *Essar v Norscot* case, one needs to look at what was taken into account by the Arbitrator and how that aligns with the international arbitration practice.

The English court stressed that the Arbitrator made "various observations [...] as to the conduct of Essar".[54] The Arbitrator noted the following:

- "Essar had set out to cripple Norscot financially by resolutely refusing to make payment and it had flouted its agreement to pay the crew wages";
- "[Essar] created a vicious circle by which their withholding of funds meant that the crew could not be paid, and Essar would not pay Norscot because of the lack of proof of payment";
- "Essar had withheld payment to the suppliers and paid only after being ordering by the tribunal to do so some three years later";
- "[Essar] intended to exert and did, in fact, exert commercial pressure on Norscot before and throughout the arbitral process and it was a David and Goliath battle, and such conduct forced Norscot's managing director to re-mortgage his home for the best part of $1 million";
- "Essar made and persisted in unjustifiable personal attacks and allegations of fraud and dishonesty against Norscot's Mr. Tollefsen, a professional rig manager, and Mr. Sharma".[55]

The conduct, which is mentioned here, consists of bad faith pre-arbitration conduct, which led to the dispute and of procedural conduct during the proceedings. This consideration alone does not bring anything new to the field of the allocation of costs in international arbitration. As far as the arbitrator has discretion to set the standard of allocation, all these circumstances can be taken into account, without any special reference made to the indemnity basis. The international arbitral practice developed a prevailing standard on the allocation, which should be considered of transnational nature, and which supersedes all other standards, national or international.

Although the regulation of allocation of costs was left to national legislators and arbitration institutions, arbitral practice has developed a harmonized approach – the moderated "costs follow the event" rule.[56] A recent study shows that out of 53 international awards in 15 of them (i.e. 28%) the arbitrator(s) decided that each party shall bear its own procedural costs, while in 25 (i.e. 47%) cases arbitrator(s) left each party to bear its own legal costs, i.e. attorney fees.[57] However, it is not known from this study whether the arbitrators applied the American Rule initially, or they decided not to shift the fees after considering the circumstances of the case. If the latter is correct, then the "costs follow the event" rule was applied. Eventually, the arbitrators

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53 Essar Oilfields Services v Norscot Rig Management PVT Limited EXHC 2361 (Comm). Paragraph 18.

54 Ibid., para. 21.

55 Ibid.

56 Ong and O'Reilly, *Costs in International Arbitration*, 20.

57 Christopher Koch, 'Is There a Default Principle of Cost Allocation in International Arbitration?', *Journal of International Arbitration* 31, no. 4 (81/01 2014): 496.

found no "event" to be "followed". According to another study, conducted by the author, out of 18 international awards, only in five did the arbitrators decide not to shift any costs, although they acknowledged their authority to do so.

Several conclusions follow from this short analysis. Firstly, there is no dichotomy of the rules on allocation in arbitration. Secondly, the prevailing approach, which is applicable under the arbitration rules, is the "costs follow the event" rule, but never in its strict form. Thirdly, this approach is modified as the "event" is no longer only the outcome of the case, as other circumstances are also taken into account. Therefore, one may say that the "event" is no longer subject only to the determination of a "winner" and a "loser" in the case.

The notion of the "event" includes procedural and pre-arbitration behavior of parties. Some tribunals take into account not only the success of the parties on the merits, but also their respective success in procedural matters

The notion of the "event" includes procedural and pre-arbitration behavior of parties. Some tribunals take into account not only the success of the parties on the merits, but also their respective success in procedural matters.[58] Whether a respondent failed to comply or not with the tribunal's order during the proceedings is another factor taken into account.[59]

The allocation of costs which is based on the rationality of procedural steps is now promoted as a means that can yield time and cost-efficiency of arbitration proceedings

It also needs to be mentioned that the IBA 2013 Guidelines on Party Representation in International Arbitration ("IBA 2013 Guidelines") provide in Guideline 26(c) that:

> *"[i]f the Arbitral Tribunal, after giving the Parties notice and a reasonable opportunity to be heard, finds that a Party Representative has committed Misconduct, the Arbitral Tribunal, as appropriate, may [...] consider the Party Representative's Misconduct in apportioning the costs of the arbitration, indicating, if appropriate, how and in what amount the Party Representative's Misconduct leads the Tribunal to a different apportionment of costs."*

The ICC Techniques for Controlling Time and Costs in Arbitration ("ICC Techniques") talk about the same by expressly predicting a possibility to use the allocation of costs as a useful tool to encourage efficient behavior and discourage unreasonable behavior. The ICC Techniques state:

> *"the arbitral tribunal has discretion to award costs in such a manner as it considers appropriate. It is expressly stated that, in making its decisions on costs, the tribunal may take into consideration the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner."*[60]

Both the IBA 2013 Guidelines and the ICC Techniques refer to the same conduct in this regard. They cover unreasonable and bad faith conduct, delays, and dilatory tactics, such as those named in the ICC Techniques: excessive document requests, excessive legal argument, excessive cross-examination, dilatory tactics, exaggerated claims, failure to comply with procedural orders, unjustified interim applications, and unjustified failure to comply with the procedural calendar.[61]

The allocation of costs which is based on the rationality of procedural steps is now promoted as a means that can yield time and cost-efficiency of arbitration proceedings. Such promotion and achievement of efficiency of arbitration is possibly due to the flexibility and wide discretion that still remain the main features of an arbitration process. As a side effect of such flexibility, there is intensified lack of predictability for stakeholders in arbitration, most importantly for the parties to an arbitration agreement. The predictability of an outcome of such decision-making and legal certainty might, however, on certain occasions, outweigh such advantages. Therefore, in order to optimize the use of arbitration as a dispute resolution mechanism, these two need to be balanced against each other. This means that any new law, arbitration rules, guideline, or arbitral decision that modifies or expands or directs the use of flexibility when deciding on the allocation of costs needs to have its counterpart in steps taken in a way to make such decisions more predictable for the parties in arbitration.

In conclusion, right after the outcome of the case, the second most important circumstance taken into account by arbitral tribunals when allocating costs is the procedural behavior of the parties. Insomuch, the Award rendered in the *Essar v Norscot* case does not

58 Consortium member (Italy) v. Consortium leader (Netherlands), Final Award, ICC Case No. 14630.

59 Final Award, ICC Case No. 13730.

60 'Report on Techniques for Controlling Time and Costs in Arbitration' (ICC Arbitration Commision, 2007), 15.

61 Ugo Draetta, *Counsel as Client's First Enemy in Arbitration?* (Juris Publishing, Inc., 2014), 122–23.

stand out from this standard at all. The Award is certainly an example of a broad consideration of a party's conduct, but as such, it does not fall outside of the applicable standard on costs in international arbitration. Taking Essar's conduct into account when deciding on the allocation of the costs of the arbitration, the Arbitrator acted fully within his discretional power.

Still, as mentioned above, the allocation of costs is a multi-tier decision-making process. Once the tribunal characterizes the costs, and it decides on the standard of allocation, it will turn to the question of what is the *exact amount* of the costs to be recovered, as discussed under in the next section.

The Recoverability of Outcome-Based Fees under the Test of Reasonability

The determination of the reasonability of TPF's uplift in *Essar v Norscot* is not visible from the excerpts of the Award cited by the High Court. Still, it is not usually a transparent analysis in other awards either. This test is an ultimate expression of arbitrators' discretion in the cost matters. This section will present a short overview of the reasonability test and the application to the outcome-based fees, in particular in relation to attorney's fees.

The ICC Report on Decisions on Costs stated that the test of reasonability is an important "check and balance" tool, which serves to protect "against unfair or unequal treatment of the parties in respect of costs, or improper windfalls to third-party funders".[62] It continues by stating that:

> *"[t]ribunals have from time to time dealt with this when assessing the reasonableness of costs in general, sometimes including the success fee in the allocation of costs and sometimes not, depending on their view of the case as a whole."*[63]

The standard of the reasonableness almost exclusively refers to the party costs.[64] The reason is simple: unlike procedural costs, party costs are not fixed in advance, and even if they are, they are communicated only between the party and its counsel, and not to the other party. Hence, one cannot presume any consent to the amount in question.

Swedish courts have enforced the awards in which decision on costs contained success fees, if found to be reasonable.[65] A similar situation was presented in an English case *Protect Projects v Al-Kharafi* in 2005, before the new regulation was passed. The arbitrator, when deciding on costs, took into consideration the fees incurred on the basis of success fee arrangement. He allowed, however, the reimbursement only of the fee he found reasonable, without any uplifts. The losing party challenged the award claiming "substantial injustice" under Section 68(2d) of EAA. It claimed that the agreement on success fees was not enforceable under English law and, therefore, it was not supposed to reimburse any of these fees. The court disagreed. It stated in its decision:

> *"Kharafi must have anticipated, if it lost, that at least such costs would have been recoverable from it. To be deprived of an unexpected and unearned bonus is not readily seen as a substantial injustice. Any unenforceability of the claims for costs derives from the regulations as they apply to success fees, yet no success fees were awarded. It could reasonably be thought that the stringent all or nothing consequences of the English law applicable to CFAs could work injustice."*

In other words, only a *reasonable* amount of the success fees is being reimbursed (and no uplifts) in this case. This leads us to the second controversy regarding outcome-based fees – can such fees ever be fully reimbursed?

Since contingency fees are a hallmark of the U.S. legal system, it does not come as a surprise that there they are not against public policy. However, it is surprising that a U.S. court allowed the *full* shifting of such fees in the case of *Johnson Controls, Inc. v Edman Controls, Inc.*, as long as the shifting is done based on a contract, and not provided by the statute. Namely, in that case, the Seventh Circuit confirmed the lower court's decision not to vacate the award in which the arbitrator

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62 'Report on Techniques for Controlling Time and Costs in Arbitration', 15.

63 Ibid.

64 Article 44 of the SCC Rules; Article 37(4) of the ICC Rules; similarly, Article 34 of the ICDR Rules; Article 38(e) of the Swiss Rules.

65 Meredith and Aspinall, 'Do Alternative Fee Arrangements Have a Place in International Arbitration?', 26.

shifted the contingency fees in their entirety, amounting to 33.3 per cent of the sum awarded.[66]

When addressing the reasonability of the contingency fees, the court distinguished between the fees, which are shifted on the basis of a statutory rule and those, as it happens in arbitration, which are shifted based on the parties' contract. According to the Seventh Circuit court,

> *"[t]here is less need to police the reasonableness of fees shifted pursuant to a contract because the parties to a contract expressly consent to and define the terms of the fee shifting. If the parties do not want to pay an opposing party's contingent fee, they are free to write an agreement under which the prevailing party will be obliged only to pay fees calculated in accordance with the lodestar method. [...] We see no reason to curtail parties' ability to define the terms of their fee arrangements with lawyers. This is quite different from a statutory obligation to pay the opponent's fees, where the party responsible for the fees does not consent to the arrangement and has no say in determining how fees will be calculated."*[67]

The message of the Seventh Circuit is clear – contingency fees are fully reimbursable in international arbitration, and if the opposing party wants to prevent the allocation of such fees, it needs to insist on such a rule during negotiations.

The reasoning of the U.S. court is fair to a certain extent. The decision does mention, however, that this type of fees was *common* in commercial arbitration at the seat. With the recent development of third party funding industry, one could state that the funder's uplifts are also becoming common or at least less surprising. Disclosure rules, which are gaining more and more importance, will definitely contribute to this matter as well, because once TPF is disclosed, the opposing party can predict the possibility to be held liable for at least a part of TPF's uplift more easily. The Seventh Circuit showed that one could not simply deny their reimbursement of outcome-based fees based on the fact that they were not accepted or expected by the opposing party, as no attorney fee ever is, since it depends on the agreement between a counsel and a client.

The 2015 ICC Report on Costs acknowledged several circumstances which can be considered under the reasonableness test: the rates number and level of fee-earners, the specialist knowledge of team members, the amount spent at different phases of the arbitration proceedings, and the disparity (if any) between the parties' costs.[68] Tribunals often judge the reasonableness of party costs in relation to the necessity of a procedural action for which they were charged.

This short analysis shows that the test of reasonability has already been applied to the determination of a recoverable amount of outcome-based fees. Although its application is not detectable from the available chunks of the Award, the *Essar v Norscot* case should not be considered an exception to this practice. However, a finding of the recoverability of a TPF's uplift in its entirety, i.e. the full amount, is to that extent an exception. The next part of the article continues on this topic under assumption that only part or no part at all of the TPF's uplift was awarded in this case. It is interesting to consider whether such expenditures could then be claimed as damages under *national* substantive law.

Taking it a Step Further in the Essar v Norscot Case: The Recoverability of Outcome-Based Fees as Damages under National Substantive Law

In international arbitration, unless the parties would agree to, no tribunal is bound by the tariffs of any jurisdiction. The measurement for recoverable costs is a quite broad term of reasonableness, as elaborated above. This allows tribunals to award the legal fees with much lower recoverability gap between the fee actually charged and the amount recovered from the other party. The issue still might be, in a case when outcome-based fees are not awarded, or they are only partially awarded, can the party claim them alternatively (or initially) as damages? In those cases, a cost claim would not be formed under the transnational substantive standard on allocation, but under the provisions of national law on damages.

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66 Johnson Controls, Incorporated v. Edman Controls, Incorporated, XXXVIII Yearbook Commercial Arbitration 514 (United States Court of Appeals, Seventh Circuit 2013).

67 Ibid.

68 'ICC Arbitration and ADR Commission Report - Decisions on Costs in International Arbitration', *ICC Dispute Resolution Bulletin*, no. 2 (2015): 12.

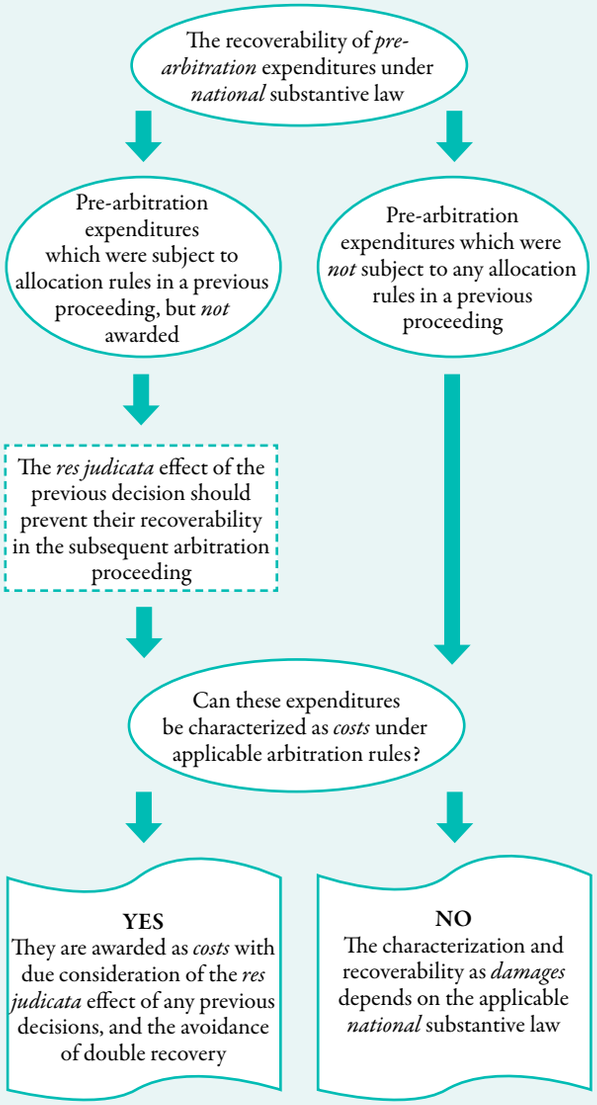
In Germany, a party may claim costs incurred before or during litigation, either in a special procedure *or* as damages claim based on one of the relevant tort or contract law provisions.[69] A similar system for a costs claims is adopted in Switzerland, but only if the Cantonal laws on civil procedure do not deal with the reimbursement of pre-trial attorney fees.[70] Even in the U.S., the jurisdiction in which attorney fees, as a rule, are not shifted, a majority of the states have held that attorney fees may be sought as an element of damages in tort action for malicious civil prosecution.[71]

It may be concluded that a claim for costs under national substantive law is not entirely unusual, but it is far from being a rule. Moreover, sometimes it may be sought parallel with the claim for costs based on procedural laws. The possibility for such cost claims based on *national* substantive law will depend from jurisdiction to jurisdiction. In any case, these issues might be less doubtful for national courts, while they are still troublesome for arbitral tribunals, which do not have *lex fori*.

A small caveat needs to be made at this point – the recoverability of costs as *damages* in international arbitration will logically arise only as an issue if these expenditures were not initially qualified as recoverable *costs*. In other words, it may be claimed that these expenditures do not fall within the meaning of *costs*, especially if they are incurred *before* the proceedings. For example, these may be expenditures incurred *before the proceedings* due to the breach of arbitration agreement by submitting the claim to a national court. Another example is when these expenditures are incurred in litigation related to an underlying agreement which took place *before the arbitration*, e.g., in the process of granting interim measures. In this group of expenditures, one can distinguish those, which were subject to allocation in litigation, and those, which were not. In any case, it is questionable whether expenditures, including outcome-based fees, incurred *before* arbitration proceedings in which their allocation is sought, can be qualified as costs under arbitration rules.

It is possible to make two submissions as to the allocation of these expenditures in international arbitration under national substantive law. If they are qualified as *costs*, but a tribunal does not award them as such, then a party needs to prove that costs are recoverable under national substantive law as *damages* in addition to the general rules on allocation. If they are not qualified as *costs*, these expenditures ought to be treated as "pure" *damages claim*, with due consideration given to their relation with a cost claim in order to avoid double recovery.

Thus far, the above said issues and a streamline of how they should be properly treated and with which consideration can be presented in the following diagram:



69 Markus Jäger, *Reimbursement for Attorney's Fees: A Comparative Study of the Laws of Switzerland, Germany, France, England, and the United States of America; International Arbitration Rules and the United Nations Conventions on Contracts for the International Sale of Goods (CISG)*, International Commerce and Arbitration, v. 4 (The Hague, The Netherlands: Eleven International Pub, 2010), 148.

70 Jäger, *Reimbursement for Attorney's Fees*, 149.

71 John W. Wade, 'Frivolous Litigation: On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions', *14 Hofstra L. Rev. 433*, Spring 1986, 443.

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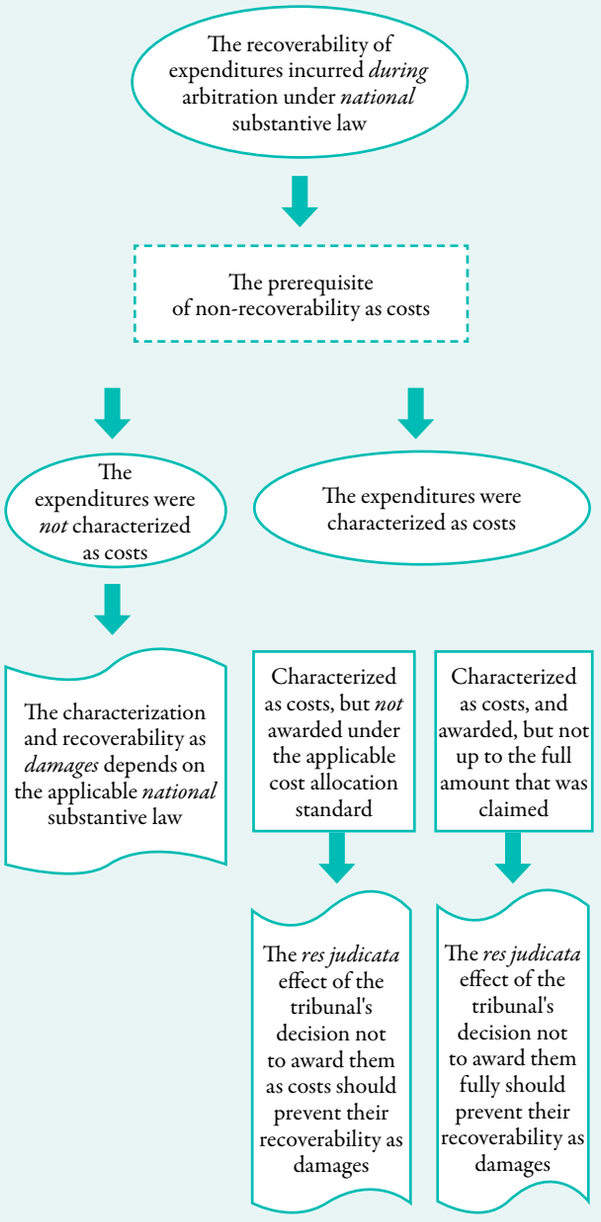
The diagram sets the main considerations and concerns in regards to the recoverability of *pre-arbitration* expenditures, which include outcome-based fees. As one can see, there are two main concerns. Firstly, the issue is whether these fees were subject to any allocation in the prior proceedings. In that regard one should give due attention to the *res judicata* effect that a prior court's or tribunal's decision should have on the latter proceedings. Namely, even though this effect is rarely regulated, the request for compensation of any fees should be considered exhausted once a forum rendered decision upon such a request, notwithstanding whether it reimbursed them or not. If such a forum decided not to reimburse any such expenditures as *costs*, it is advisable not to reconsider them both as damages or costs in the latter proceedings either. The reason is simple, the first forum exercised the power to allocate them, and this should have a binding effect. The re-characterization of these expenditures as damages should not alter such effect. However, this will depend on the applicable laws and arbitration rules. On another side of the coin, the same effect should have a former forum's decision in which these amounts were reimbursed. It should not be allowed to request them again, as that would lead to double recovery.

Another group of expenditures that should be considered in this section are expenditures incurred *during* arbitration and their recoverability as damages under *national* substantive law. An example of such expenditures that can qualify as *costs*, but are often not fully recovered, are in fact outcome-based fees. Therefore, a party may be interested in recovering the non-reimbursed part of these fees as *damages*. Some authors argued that non-recoverability under the general rules on allocation of costs in arbitration should be a condition to seek the costs under national substantive law, while others are of opinion that costs should be recoverable under national substantive law without any prior condition.[72]

Some authors argued that non-recoverability under the general rules on allocation of costs in arbitration should be a condition to seek the costs under national substantive law, while others are of opinion that costs should be recoverable under national substantive law without any prior condition

With or without this prerequisite, there are again some considerations and concerns which need to be given attention when discussing the issue of the recoverability of expenditures incurred *during* arbitration as *damages* under national substantive law. Firstly, it needs to be observed whether the tribunal in the arbitration proceedings in which such expenditures were incurred, characterized them as *costs* at all, which will depend on applicable arbitration rules and arbitration law, as discussed above. If not, such expenditures have a good chance as being recovered as *damages*, which will depend on applicable *national* substantive law. On the other hand, if they are characterized as *costs*, but not (fully) awarded, there are several reasons why they should be found non-recoverable as *damages* as well. Here is diagram of the mentioned considerations and concerns:



72 Waincymer, *Procedure and Evidence in International Arbitration*, 1195.

In all the mentioned scenarios, the issue will be what *national* substantive law to apply to such a damages claim: the substantive law of the seat, the substantive law applicable to the arbitration agreement, or the substantive law applicable to the underlying contractual obligations. It is only the law applicable to the arbitration agreement that could be found applicable to such costs claims, if they are allowed at all. The reason is simple: the damages claimed are a consequence of an arbitration procedure, and not of, e.g., the breach of an underlying contract.

However, the recoverability should only be plausible in cases where these expenditures were not characterized as *costs*, while in the opposite scenario a double-track recovery should fail due to the *res judicata* effect of the tribunal's decision in which these amounts were not at all, or at least not fully, recovered. This effect is backed with several underlying aspects of cost claims: the principle of full indemnification does not apply to the allocation of costs, the wide discretion of the tribunal goes much broader that court's authority in litigation, and certain specificities of costs claims speak against the possibility of filing such a claim at all.

Costs claims are of both procedural and substantive nature. It is argued that international standards for allocation of costs in international arbitration are of substantive nature, while the power to allocate the costs is procedural.[73] For that reason and due to their compensatory nature, the costs claims are a special type of *procedural damages* already. However, due to the test of reasonableness in international arbitration, costs claims, as shown above, do not lead to *full* indemnification of attorney fees, as *damages* claims do.

The partial indemnification protects the right of access to justice. Otherwise, if party was expected to cover *all* the costs of its opponent, this might deter its will to file a claim in the first place.[74] Since partial indemnification is inherent to cost allocation, it would be unfair to let a party submit a claim for full indemnification in another claim for damages based on *national* substantive laws. In that sense, the recoverability of those expenditures, which were not recovered in the first place, seems not to be in accordance with the basic principles behind the allocation of cost rules.

Such forbearance of the circumvention of the rules on allocation of costs is supported also by wide discretion given to arbitral tribunals when deciding on the allocation. Besides the outcome of the case, arbitral tribunals take many other circumstances into account, which are both of procedural and substantive nature. Moreover, tribunals are not bound by tariffs or rates and for that reason the recoverability is more flexible in international arbitration. This allows the parties to bring before the tribunal, when deciding on the allocation based on procedural law, all the circumstances which would be relevant for claiming the costs as damages under national substantive laws. Any invocation of these circumstances afterwards would mean that a mere re-characterization of a legal basis of a claim can supersede the substance of the claim, which is neither procedurally efficient nor it guarantees legal certainty. Some authors support such a possibility as long as there is no double recovery under these claims.[75] Still, it is difficult to see how a party would meet the threshold for awarding damages when it failed with its claim under much less stringent standard – the standard for allocation of costs.

Finally, attorney fees are *accessory* to the main claim for damages and as such, they cannot be themselves considered as damages.[76] Even if they are considered to be damages, there is the lack of causality for the same reason – they are a product of procedural acts and the party's will to hire a lawyer and not of the breach.[77] One might argue that in some legal systems these two grounds could be combined as long as there is a need for relief, i.e. "additional costs"[78] can be sought on different circumstances than those based on which the costs are usually allocated. Perhaps such a combination should be available in international arbitration as well.

Costs claims are of both procedural and substantive nature. It is argued that international standards for allocation of costs in international arbitration are of substantive nature, while the power to allocate the costs is procedural

73 Waincymer, *Procedure and Evidence in International Arbitration*, 1194–95.

74 Christopher J. S Hodges, Stefan Vogenauer, and Magdalena Tulibacka, *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Oxford; Portland, Or.: Hart Pub., 2010), 424.

75 Waincymer, *Procedure and Evidence in International Arbitration*, 1195.

76 Hodges, Vogenauer, and Tulibacka, *The Costs and Funding of Civil Litigation*, 220; Jäger, *Reimbursement for Attorney's Fees*, 149.

77 Hodges, Vogenauer, and Tulibacka, *The Costs and Funding of Civil Litigation*, 220.

78 Ilse Samoy and Vincent Sagaert, '"Everything Costs Its Own Cost, and One of Our Best Virtues Is a Just Desire To Pay It." An Analysis of Belgian Law', in *Cost and Fee Allocation in Civil Procedure*, ed. Mathias Reimann, Ius Gentium: Comparative Perspectives on Law and Justice 11 (Springer Netherlands, 2012), 83, http://link.springer.com/chapter/10.1007/978-94-007-2263-7_4.

The Essar v Norscot case will have an impact on the TPF industry, especially in relation to disclosure rules

One can expect now, when these uplifts can be found recoverable, that the parties will require more transparency and information on funding arrangements in each arbitration

The Essar v Norscot case is an example of the application of broad discretion of tribunals in relation to the allocation and recoverability of costs in international arbitration

However, as stated before, due to wide discretion of arbitrators when rendering decisions on costs, no such "additional costs" could actually be incurred, and parties should be encouraged to raise all such *damages-related* circumstances before the tribunal in the procedure related to the allocation. This is also a command of the transnational nature of these arbitral decisions, which should not be influenced by the peculiarities of several legal systems that allow such costs claims based on substantive national law.

Concluding Remarks on the Impact of the Essar v Norscot Decision on the Change of Policy

The article offered a more in-depth analysis of the standards related to the Essar v Norscot decisions. There are several concluding remarks, which can be taken from it. Firstly, the Essar v Norscot case is an example of the application of broad discretion of tribunals in relation to the allocation and recoverability of costs in international arbitration. At the same time, premises adopted by the Arbitrator, such as the necessity of TPF in this concrete case and the contribution by the opposing party to such a necessity, are posing limitation as to its impact on the future decisions.

Still, it is difficult to argue that the Arbitrator did not act within its authority. His decision to recover the full uplift was within his power to decide on which costs to allocate, under which standard, and in which amount. The Essar v Norscot decision falls well under the prevailing transnational allocation standard in international arbitration. The recoverability of TPF's uplift seems also to go along with the ever-growing trend of the availability of TPF. Namely, since countries are now keen to reduce public policy issues, which were outlawing or restricting the use of TPF, this new development of the recoverability of TPF's uplift comes at the right time. Namely, since decisions on costs are of substantive nature, they are by default in most cases not reviewable by a national court. At the same time, even if we allow a limited scrutiny based on public policy, these reasons will not suffice anymore because the general trend of reducing these public policy issues regarding TPF. Hence, to limit the recoverability of these fees, each country will need to regulate the matter directly in their arbitration law. It is left to be seen whether this will be done at all.

The Essar v Norscot case will have an impact on the TPF industry, especially in relation to disclosure rules. One can expect now, when these uplifts can be found recoverable, that the parties will require more transparency and information on funding arrangements in each arbitration.

The article also took the decision in the Essar v Norscot case a step further and warned the readers about another non-explored area of the recoverability of costs in international arbitration – the recoverability of costs as damages under *national* substantive law. Whereas the author believes that such recoverability should not become available even in the existing system of rules, arguments may well go in another direction. For that reason, it is important to raise awareness of this possibility and to regulate it properly and timely. Costs have always been an ancillary claim, but the amounts they reach today and the issues related to their recoverability develop satellite arbitrations and litigations dealing with cost claims. Proper anticipation and regulation of these issues, including their recoverability under national substantive laws, can make cost claims ancillary claims again, thus avoid incurring – paradoxically – more costs.

Ločena arbitražna odločba o povrnitvi plačanega dela predujma*

mag. Marko Djinović

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Arbitražna pravila Stalne arbitraže pri GZS (Ljubljanska arbitražna pravila) v tretjem odstavku 47. člena določajo, da mora vsaka stranka plačati polovico predujma. Če ena stranka ne plača svojega dela predujma, sekretariat pozove nasprotno stranko, da plača tudi ta del. V tem primeru lahko senat na predlog stranke, ki je plačala celoten predujem, izda ločeno arbitražno odločbo o tem, da ji nasprotna stranka povrne tisti del predujma, ki bi ga morala vplačati sama[1] (četrti odstavek 47. člena).

Pravna narava obveznosti plačila predujma v enakih delih

Pravilo, da morajo stranke plačati predujem za kritje stroškov arbitraže *v enakih delih*, je treba razlikovati od pravil o razporeditvi stroškov arbitražnega postopka med stranke.[2] Medtem, ko je razporeditev stroškov v izhodišču odvisna od uspeha strank v arbitražnem postopku in je v diskreciji arbitražnega senata[3], je pravilo o plačilu predujma *samostojna obveznost strank*, ki je neodvisna ob končnega rezultata arbitražnega postopka.[4] Gre za pravilo v razmerju *med strankami postopka* in ne v razmerju strank do arbitražnega senata oziroma institucije. V tem smislu moramo razumeti tudi možnost, da arbitražni senat na zahtevo stranke, ki opravi plačilo dela predujma namesto druge stranke, izda ločeno arbitražno odločbo, s katero drugi stranki naloži povrnitev plačanega dela predujma:

Pravilo, da morajo stranke plačati predujem za kritje stroškov arbitraže *v enakih delih*, je treba razlikovati od pravil o razporeditvi stroškov arbitražnega postopka med stranke

* Za pomoč pri nastanku prispevka, nasvete in konceptualne pripombe, se zahvaljujem kolegu Nejcu Lahnetu iz sekretariata Stalne arbitraže pri GZS.

1 Pravilo, da morata tožeča in tožena stranka plačati vsaka polovico predujma ter možnost izdaje ločene arbitražne odločbe o povrnitvi plačanega dela predujma, sodita med bistvene novosti, ki so jih v arbitražni postopek vnesla Ljubljanska arbitražna pravila z uveljavitvijo leta 2014. Gl. Galič, A.: Nova Ljubljanska arbitražna pravila, Odvetnik, št. 65 (april 2014), str. 30.

2 Primerjaj tretji odstavek 47. člena s petim odstavkom 45. člena in 46. členom Ljubljanskih arbitražnih pravil. Stranke in njihovi pooblaščenci pogosto zamenjujejo ta dva pravna instituta, kar je razvidno tudi iz povzetka navedb tožene stranke (tč. VI, stran 4) v ločeni arbitražni odločbi Stalne arbitraže pri GZS, SA 5.6-x/2015 z dne 4. 4. 2016, ki je v anonimizirani obliki objavljena v nadaljevanju: »[...] *Tožena stranka je v odgovoru na predlog z dne 22.3.2016 predlagala zavrnitev predloga tožeče stranke.* ***Zavzela je stališče, da se naj o zahtevanem plačilu XY EUR odloči s končno arbitražno odločbo po načelu uspeha v pravdi*** *(46. člen Pravil).*« (poudaril M. D.).

3 Razporeditev stroškov (angl. *allocation of costs*) je v arbitražni teoriji in praksi uveljavljen termin, s katerim označujemo odločitev arbitražnega senata (v arbitražni odločbi ali ločenem sklepu) o tem, katera stranka in v kakšni višini je dolžna povrniti nasprotni stranki stroške postopka, vključno s stroški zastopanja in nagradami arbitrov, ter nositi lastne stroške. Pripomniti je, da arbitražni zakoni večinoma zgolj pooblaščajo senat, da na zahtevo strank odloči o razporeditvi stroškov arbitražnega postopka in določajo osnovno izhodišče za njihovo razporeditev. Sicer pa puščajo strankam avtonomijo pri oblikovanju postopka, vključno z vprašanjem razporeditve stroškov, senatom pa ustrezno polje diskrecije pri odločanju. Primerjaj 39. člen Zakona o arbitraži (Ur. l. RS, št. 45/08 s spremembami; ZArbit), ki v odsotnosti drugačnega dogovora strank, senat pooblašča, da odloči, katera stranka in v kakšni višini je dolžna povrniti nasprotni stranki stroške postopka, vključno s stroški zastopanja in nagradami arbitrov, ter nositi lastne stroške. Pri tem pušča senatom široko diskrecijo, ob upoštevanju okoliščin primera in izida postopka (načelo uspeha strank v postopku).

4 Rohner, T., Lazopoulos, M.: Respondent's Refusal to Pay its Share of the Advance on Costs, v: ASA Bulletin 29, št. 3, 2011, str. 560.

»3. Tožeča in tožena stranka morata plačati vsaka polovico predujma, razen če so določeni ločeni predujmi. […]

4. Če katera od strank v roku, ki ga določi sekretariat, ne plača zahtevanega predujma, sekretariat k plačilu pozove nasprotno stranko in ji določi rok za plačilo. Če tudi nasprotna stranka ne opravi plačila v skladu s pozivom, lahko sekretariat delno ali v celoti ustavi postopek. Če ena od strank opravi plačilo namesto druge stranke, lahko senat na njeno zahtevo izda ločeno arbitražno odločbo, s katero drugi stranki naloži povrnitev plačanega dela predujma.«

Smisel regresnega zahtevka, ki ga ima pogodbi zvesta stranka (za povrnitev namesto druge stranke plačanega dela predujma), je v vzpostavitvi ekonomskega ravnovesja pri financiranju arbitražnega postopka

Ljubljanska arbitražna pravila sodijo v krog institucionalnih arbitražnih pravil, ki arbitražnemu senatu (na podlagi volje strank) dajejo izrecno pooblastilo za izdajo *ločene arbitražne odločbe o povrnitvi plačanega dela predujma*.[5]

Ločena arbitražna odločba je dokončna, za stranke zavezujoča in primerna za izvršitev

Kadar se stranke v arbitražnem sporazumu dogovorijo za uporabo Arbitražnih pravil Stalne arbitraže pri GZS, dogovorjena arbitražna pravila tvorijo sestavni del arbitražnega sporazuma. Vsaka od strank tako sprejme obveznost, da bo plačala polovico predujma za kritje stroškov arbitraže (tretji odstavek 47. člena) in vnaprej soglaša z možnostjo, da bo proti njej v primeru neplačila zahtevanega predujma izdana ločena arbitražna odločba v smislu četrtega odstavka 47. člena Ljubljanskih arbitražnih pravil[6]. Morebitna kršitev plačilne obveznosti (objektivno dejstvo neplačila dela predujma v roku, ki ga je postavil sekretariat) tako predstavlja kršitev arbitražnega sporazuma[7] (materialno-pravno vprašanje).

Zahtevek za povrnitev plačanega dela predujma

Smisel regresnega zahtevka, ki ga ima pogodbi zvesta stranka (za povrnitev namesto druge stranke plačanega dela predujma), je v vzpostavitvi ekonomskega ravnovesja pri financiranju arbitražnega postopka, zato mora arbitražni senat o njem praviloma odločiti *takoj*, ko je zahtevek podan in ne šele s končno arbitražno odločbo.[8] Stranki, ki je namesto druge plačala del predujma in s tem zagotovila nemoten tek arbitražnega postopka[9], je namreč s plačilom nastala škoda, ki je posledica neplačila nasprotne stranke (kršitev pogodbene obveznosti),[10] zato ima pravico od arbitražnega senata zahtevati naj nasprotni stranki *z ločeno arbitražno odločbo* naloži povrnitev plačanega dela predujma.[11]

Ločena arbitražna odločba je dokončna, za stranke zavezujoča in primerna za izvršitev. Pri odločbi o povrnitvi plačanega dela predujma gre za končno arbitražno odločbo o samostojnem in od vsebine arbitražnega

5 Primerjaj tudi četrti odstavek 42. člena Arbitražnih pravil Mednarodnega arbitražnega centra na Dunaju (VIAC) in peti odstavek 51. člena Arbitražnih pravil Stockholmskega arbitražnega centra (SCC).

6 Namen predujma je v financiranju arbitražnega postopka do izdaje končne arbitražne odločbe in v zagotovitvi plačila nastalih stroškov arbitrov in arbitražne institucije. Glej Bühler, M.: Non-payment of the advance on costs by the respondent party – is there really a remedy?, v: ASA Bulletin 24, št. 2, 2006, str. 291.
Znesek predujma določi sekretariat v vsakem primeru posebej in ustreza predvideni višini stroškov arbitraže, kot izhaja iz tarife (plačilo za arbitražni senat in administrativni stroški) in ocene drugih stroškov (stroški arbitražnega senata in Stalne arbitraže). Glej prvi in drugi odstavek 47. člena Ljubljanskih arbitražnih pravil ter Dodatek II (Tarifa) k Ljubljanskim arbitražnim pravilom.

7 Neplačilo dela predujma ni le kršitev pogodbene obveznosti stranke, ampak ga (odvisno od okoliščin) lahko označimo tudi za ravnanje, ki je v nasprotju z dobro vero (primerjaj drugi odstavek 21. člena Ljubljanskih arbitražnih pravil). Glej tudi Rohner, T., Lazopoulos, M., navedeno delo (2011), str. 555. Primerjaj tudi odločitev švicarskega zveznega sodišča 4A.444/2009 z dne 11. 2. 2010, dostopna na: <http://www.swissarbitrationdecisions.com/sites/default/files/11%20fevrier%202010%204A%20444%202009.pdf> (10. 3. 2017).

8 Glej Rohner, T., Lazopoulos, M., navedeno delo (2011), str. 557.

9 Plačilo celotnega predujma za kritje stroškov arbitraže je pogoj za to, da sekretariat preda zadevo v reševanje arbitražnemu senatu. Primerjaj 20. člen Ljubljanskih arbitražnih pravil.

10 Glej Waincymer, J.: Procedure and Evidence in International Arbitration. Wolters Kluwer, 2012, str. 1196.

11 Kljub sicer jasni obveznosti strank, da s predujmom vnaprej pokrijejo stroške arbitraže v enakih delih, pa lahko arbitražni senat, upoštevaje okoliščine primera, izjemoma tudi zavrne zahtevek za povrnitev plačanega dela predujma. O razlogih za zavrnitev glej npr. Walters, G.: SCC Practice: Separate Awards for Advance on Costs, 1 January 2007-31 December 2011. str. 4–5, dostopno na: <http://www.sccinstitute.com/media/56067/separate-award-on-advance-on-costs_gretta-walters.pdf > (10. 3. 2017). Analiza (ločenih) odločb SCC pokaže, da določene izjemne okoliščine vendarle lahko predstavljajo podlago za zavrnitev zahtevka za povrnitev plačanega dela predujma, in sicer: (i) utemeljen ugovor pristojnosti arbitraže, (ii) plačilna nesposobnost stranke, (iii) pozno uveljavljanje zahtevka za povrnitev plačanega dela predujma, s strani plačnika. Komentatorji poudarjajo, da gre v omenjenih položajih za izjeme, ki jih je treba razlagati utesnjujoče. Praksa SCC pokaže tudi, da arbitražni senati praviloma ugodijo zahtevi za povrnitev plačanega dela predujma in da je zato na nasprotni stranki (težavno) breme dokazovanja, da obstajajo okoliščine, ki predstavljajo podlago za zavrnitev zahtevka.
Restriktivno stališče do navedb o slabem premoženjskem položaju tožene stranke zavzema tudi arbiter posameznik v predstavljeni ločeni arbitražni odločbi Stalne arbitraže pri GZS, SA 5.6-x/2015 z dne 4. 4. 2016 (tč. VIII, stran 5): »[…] *Premoženjskega položaja ene ali druge stranke ni ocenil kot odločilnega za odločitev. Glede tega je* ***tožena stranka ostala zgolj pri pavšalni navedbi in ni konkretneje obrazložila svojega premoženjskega stanja. Nenazadnje je imela tožena stranka že ob prejemu poziva na plačilo zneska XY EUR možnost, da bi s primerno pojasnilno vlogo pozvala tožečo stranko naj začasno nosi vse avansirane stroške (predujem) za kritje stroškov arbitraže. Te možnosti ni izkoristila.***« (poudaril M. D.). Arbitrova argumentacija (sicer ne izrecno) seže tudi na področje dobre vere.

postopka ločenem vprašanju, zato ni procesnih ovir za izvršitev odločbe v skladu z Zakonom o arbitraži[12] in Newyorško konvencijo o priznanju in izvršitvi tujih arbitražnih odločb.[13]

Sklep

Možnost, da arbitražni senat na zahtevo stranke, ki opravi plačilo dela predujma namesto druge stranke, izda ločeno arbitražno odločbo, s katero drugi stranki naloži povrnitev plačanega dela predujma (četrti odstavek 47. člena Ljubljanskih arbitražnih pravil), sodi med bistvene novosti, ki so jih 1. januarja 2014 v arbitražni postopek vnesla Ljubljanska arbitražna pravila.

Aprila 2016, je bila v postopku (gradbenem sporu), ki se je vodil v skladu z Ljubljanskimi arbitražnimi pravili (po arbitru posamezniku), prvič izdana ločena arbitražna odločba o povrnitvi plačanega dela predujma. Ločena arbitražna odločba, ki jo objavljamo v nadaljevanju, je bila izdana v manj kot enem mesecu, odkar je tožeča stranka podala zahtevo za njeno izdajo[14].

Čeprav je institut ločene arbitražne odločbe iz četrtega odstavka 47. člena Ljubljanskih arbitražnih pravil še relativno mlad, pa utegne biti učinkovito orodje za stranko, ki je primorana namesto druge plačati del predujma za kritje stroškov arbitraže.

Aprila 2016, je bila v postopku (gradbenem sporu), ki se je vodil v skladu z Ljubljanskimi arbitražnimi pravili (po arbitru posamezniku), prvič izdana ločena arbitražna odločba o povrnitvi plačanega dela predujma

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12 Ur. l. RS, št. 45/08; ZArbit.

13 Ur. l. SFRJ, MP, št. 11/81.

14 Tožeča stranka je podala zahtevo 16. 3. 2016, ločena arbitražna odločba pa je bila izdana 4. 4. 2016.

ARBITRAŽNI POSTOPEK SA 5.6-x/2015

v skladu z

ARBITRAŽNIMI PRAVILI STALNE ARBITRAŽE
PRI GOSPODARSKI ZBORNICI SLOVENIJE

med:

tožeča stranka:

proti

tožena stranka:

zaradi plačila XY EUR s pp.

LOČENA ARBITRAŽNA ODLOČBA

(47. člen Arbitražnih pravil Stalne arbitraže pri Gospodarski zbornici Slovenije)

arbitražni senat: (arbiter posameznik)

VSEBINA:

I. O SPORU

Tožeča stranka je pri naslovni arbitraži skladno z Arbitražnimi pravili Stalne arbitraže pri Gospodarski zbornici Slovenije (*v nadaljevanju: »Pravila«*) vložila (*dne 16.11. in 25.11.2015*) zahtevo za arbitražo in zatem še dne 21.03.2016 še tožbo zoper XY s katero zahteva za opravljena gradbena dela plačilo *XY* EUR s pp.

Tožena stranka je dne 30.12.2015 odgovorila na zahtevo za arbitražo, dne 22.03.2016 pa je vložila tudi odgovor na tožbo.

II. PRISTOJNOST ARBITRAŽE

Poslovno razmerje pravdnih strank temelji na »Pogodbi o izvedbi del št. 212/2013« z dne 15.03.2013 s katero sta se pravdni stranki (*tožena stranka kot naročnik in tožeča stranka kot izvajalec*) dogovorili o obnovitvenih delih na ... tožene stranke.

V tč. 10 citirane pogodbe sta se pravdni stranki dogovorili, da se bo morebitni spor reševal pri naslovni arbitraži v Ljubljani. Sklenili sta veljavno arbitražno klavzulo (*arbitražni sporazum*), ki vsebuje vse glavne elemente takšnega dogovora tako v smislu Pravil, kot tudi 10. člena Zakona o arbitraži (*ZArbit Ur. l. RS št. 45/2008*).

V zahtevi za arbitražo je tožeča stranka predlagala, da spor rešuje arbiter posameznik, tožena stranka pa se je s takšnim predlogom strinjala. To izhaja tudi iz dosedanjih procesnih dejanj obeh pravdnih strank.

Pristojnost naslovne arbitraže je s tem podana, saj tudi ni zaznati nobenih okoliščin ali zadržkov, ki bi govorili nasprotno.

III. SEDEŽ ARBITRAŽE

Glede na Pravila naslovne arbitraže, pa tudi iz vlog obeh pravdnih strank je razvidno, da je sedež arbitraže določen v Ljubljani, kar pa ne izključuje možnosti, da se določena procesna dejanja opravijo tudi v drugem kraju.

IV. ARBITER – POSAMEZNIK

Obe pravdni stranki sta soglasni, da se spor rešuje pred arbitrom – posameznikom, ki sta ga tudi soglasno imenovali. Arbiter je imenovanje sprejel, saj ne vidi glede tega nobenih zadržkov. Pravdnih strank tudi ne pozna. Imenovani arbiter ima zato mandat, da odloči o sporu. Ima pa tudi mandat, da skladno s Pravili med postopkom odloča tudi o drugih vprašanjih, torej tudi o t.i. separatnem plačilu predujma za kritje stroškov arbitraže.

V. ZAHTEVEK TOŽEČE STRANKE ZA IZDAJO LOČENE ARBITRAŽNE ODLOČBE

Skladno s 47. členom Pravil je sekretariat arbitraže določil znesek, ki ga morata pravdni stranki plačati kot predujem za kritje stroškov arbitraže (*poziv strankam z dne 30.12.2015*). Vsaki stranki je bilo naloženo, da plača ½ zneska predujma, ki je bil določen v skupnem znesku *XY* EUR.

Tožeča stranka je svojo obveznost plačila naloženega dela predujma (*XY EUR*) pravočasno in v celoti izpolnila (*14.1.2016*).

Z istim pozivom (*30.12.2015*) je bilo toženi stranki naloženo plačilo predujma v višini *XY* EUR. Ker tožena stranka zahtevanega predujma ni plačala, je sekretariat arbitraže pozval nasprotno stranko, t.j. tožečo stranko, da namesto tožene stranke plača zahtevani predujem, ki predstavlja procesno predpostavko za vodenje arbitražnega postopka. Temu pozivu je tožeča stranka v celoti sledila, torej je plačala tudi tisti del predujma za kritje stroškov arbitraže, ki je odpadel na toženo stranko (člen 47, četrti odstavek Pravil). Plačilo je opravila dne 5.02.2016.

Z vlogo z dne 16.03.2016 je tožeča stranka zahtevala, da se naj o znesku *XY* EUR, kolikor je iz naslova predujma plačala namesto tožene stranke, odloči z ločeno arbitražno odločbo. Sklicevala se je na člen 47, odstavek četrti Pravil. Ta določa, da če ena od strank opravi plačilo namesto druge stranke, lahko senat ali arbiter posameznik izda ločeno arbitražno odločbo, s katero drugi stranki naloži povrnitev plačanega dela predujma.

VI. STALIŠČE TOŽENE STRANKE DO ZAHTEVE TOŽEČE STRANKE

Tožena stranka je v odgovoru na predlog z dne 22.3.2016 predlagala zavrnitev predloga tožeče stranke. Zavzela je stališče, da se naj o zahtevanem plačilu *XY* EUR odloči s končno arbitražno odločbo po načelu uspeha v pravdi (*46. člen Pravil*). Hkrati je mnenja, da je tožeča stranka premoženjsko močnejša kot je sama. Plačilo zahtevanega zneska bi zanjo ... pomenilo znatno težavo, ki bi lahko ogrozila zmožnost preživljanja nje same in njene družine. Konkretnih podatkov o tem odgovor tožene stranke ne vsebuje.

VII. RAZLOGI ZA IZDAJO LOČENE ARBITRAŽNE ODLOČBE

Arbiter posameznik ugotavljam na podlagi podatkov spisa, da je zahtevek tožeče stranke za separatno plačilo *XY* EUR s formalno pravnega vidika popoln.

Povrnitev takšnega zneska še preden se odloči o glavni stvari namreč omogoča 47. člen Pravil. Zahtevek je utemeljen tudi v materialno-pravnem smislu, saj ista Pravila omogočajo, da tista stranka, ki je namesto druge plačala predujem za kritje stroškov arbitraže, prejme odločitev o povrnitvi takšnih stroškov še pred izdajo končne arbitražne odločbe.

Vendar imata arbitražni senat ali arbiter posameznik diskrecijsko pravico, da takšnemu zahtevku sledita, ali pa tudi ne, glede na vse relevantne okoliščine primera. Ni nobenega procesnega dvoma, da se o takšnem zahtevku odloči z ločeno arbitražno odločbo.

VII. VSEBINA IN RAZLOGI ODLOČITVE ARBITRA POSAMEZNIKA

Arbiter posameznik je pri svoji odločitvi upošteval vse relevantne razloge ter navedbe obeh strank za odločitev *pro ali contra* postavljenega predloga. Premoženjskega položaja ene ali druge stranke ni ocenil kot odločilnega za odločitev. Glede tega je tožena stranka ostala zgolj pri pavšalni navedbi in ni konkretneje obrazložila svojega premoženjskega stanja. Nenazadnje je imela tožena stranka že ob prejemu poziva na plačilo zneska *XY* EUR možnost, da bi s primerno pojasnilno vlogo pozvala tožečo stranko naj začasno nosi vse avansirane stroške (*predujem*) za kritje stroškov arbitraže. Te možnosti ni izkoristila.

Drugi vidik, ki ga v takšnih primerih ne gre spregledati, je predvideni čas trajanja postopka. Vse kaže, da se bo lahko postopek končal v roku kot je ta opredeljen v časovnem načrtu poteka arbitražnega postopka, ki ga je arbiter posameznik pripravil dne 22.02.2016. Kljub temu izdaje arbitražne odločbe ne gre pričakovati pred septembrom ali oktobrom 2016, kar aktualizira izdajo ločene arbitražne odločbe.

Odločilen razlog za ugoditev predlogu tožeče stranke pa se vidi v naslednjih dejstvih.

Pravdni stranki sta glede reševanja sporov iz njunega razmerja sklenili arbitražni dogovor o pristojnosti Stalne arbitraže Gospodarski zbornici Slovenije. S tem sta obe pogodbeno soglašali, da bo arbitraža odločala skladno s Pravili, ter da bosta spoštovali kar jima bo v okviru Pravil naloženo. Uporabljena Pravila urejujejo tudi način in obseg plačila s strani sekretariata arbitraže odmerjenega predujma za stroške arbitražnega postopka. Temeljno pravilo je, da obe stranki nosita takšne stroške začasno vsaka v enakem delu (*47.* člen Pravil). S sklenitvijo arbitražnega dogovora je vsaka stranka soglašala z možnostjo, da bo proti njej v primeru neplačila zahtevanega predujma izdana končna arbitražna odločba v smislu 47. člena, četrti odstavek Pravil. Po tem se ugotavlja, da stranki tudi nista sklenili dodatnega dogovora s katerim bi izključili uporabnost predmetne določbe Pravil. Takšno možnost imajo stranke vedno na razpolago, saj se avtonomno dogovarjajo za postopek. Uporaba Pravil je zgolj možnost, ki jo stranki lahko tudi izključita, a tega v danem primeru nista storili.

Upoštevajoč vse okoliščine primera, zlasti pa dejstvo, da sta pravdni stranki s podpisom arbitražnega sporazuma pristali tudi na uporabo Pravil, je odločitev arbitra posameznika, da se predlog tožeče stranke za izdajo končne arbitražne odločbe ugodi. Tožena stranka ni spoštovala svoje dolžnosti, da plača svoj del predujma za stroške arbitražnega postopka. Pri tem je bila povsem pasivna in ni posredovala vsaj pojasnila zakaj ne more plačati svojega dela predujma. Ker je njen del zatem po pozivu sekretariata arbitraže plačala tožeča stranka, ima slednja pravico da še pred izdajo dokončne odločbe zahteva izdajo t.i. separatne odločbe (*ločene arbitražne odločbe*). Plačilo svojega dela predujma za stroške arbitražnega postopka je samostojna obligacija vsake stranke, nastale skladno s citiranimi Pravili. Za del predujma, ki ga je plačala tožeča stranka namesto tožene, pa je v korist prve nastal regresni zahtevek.

Ker je tožeča stranka plačala namesto tožene stranke njen del predujma v višini *XY* EUR in to dne 05.02.2016, se ji s to odločbo priznava ta znesek kot terjatev do tožene stranke. Od tega dneva dalje tečejo tudi na znesek *XY* EUR zakonske zamudne obresti.

Ta terjatev je samostojna in od dokončne odločbe ločena terjatev. S tem je tožeča stranka izgubila pravico, da znesek *XY* EUR s pp uveljavlja kot del svojih pravdnih stroškov, vezano na dokončno arbitražno odločbo. Kot del svojih pravdnih stroškov bo lahko uveljavljala enak znesek, plačan kot njen del predujma. Hkrati ima tožena stranka pravico, da znesek *XY* EUR uveljavlja kot del svojih pravdnih stroškov v zvezi z izdajo dokončne arbitražne odločbe.

Glede stroškov, vezanih na izdajo ločene arbitražne odločbe se ni posebej odločalo in je odločitev pridržana za končno arbitražno odločbo.

IX. IZREK LOČENE ARBITRAŽNE ODLOČBE

Arbiter posameznik v zvezi s predlogom tožeče stranke za povrnitev zneska predujma za stroške arbitražnega postopka v znesku *XY* EUR, ki jih je plačala namesto tožene stranke izdaja naslednjo

ločeno arbitražno odločbo:

Tožena stranka je dolžna plačati tožeči stranki znesek XY EUR z zakonskimi zamudnimi obrestmi od 05.02.2016 dalje do plačila in pod izvršbo.

O stroških, vezanih na izdajo ločene arbitražne odločbe bo odločeno z odločbo o glavni stvari.

V Ljubljani, dne 04. aprila 2016

(arbiter posameznik)

_____

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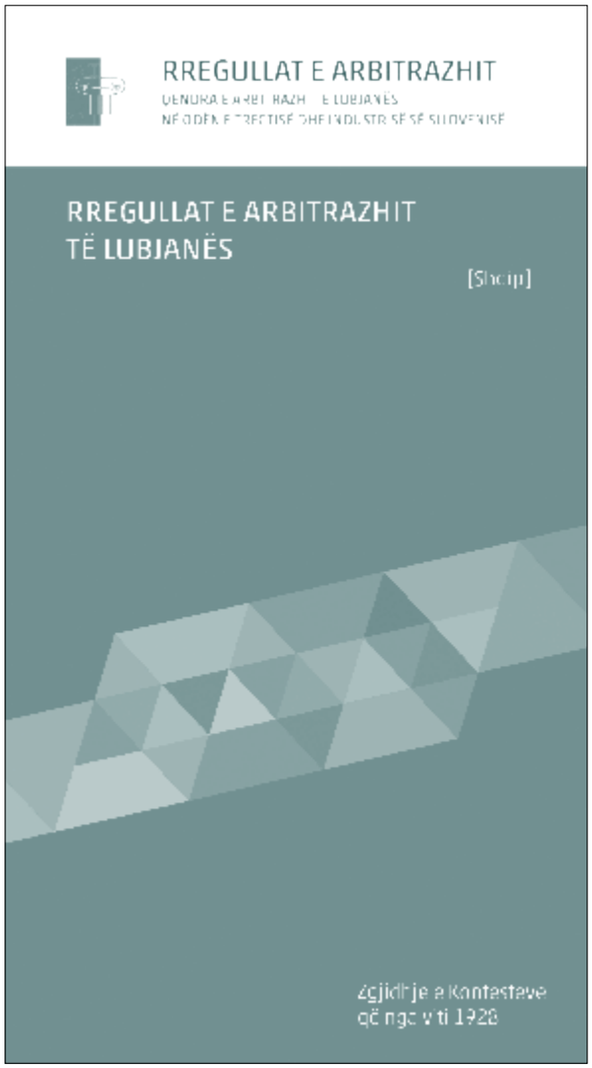

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Save the date: 15-18 April 2018

24th International Council for Commercial Arbitration (ICCA) Congress

Ljubljana Arbitration Centre

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ICCA is pleased to to invite you to the 24th ICCA Congress, to be held in Sydney, Australia from 15-18 April 2018. The theme for the 24th Congress is Evolution and Adaptation: The Future of International Arbitration. Under this heading, issues such as the legitimacy of law-making processes, adaptation in the face of substantive and practical challenges, involvement of public bodies and public interests in arbitration, and the challenges and opportunities of modernity will be addressed.

The theme for the 2018 Congress has been chosen to highlight arbitration as a "living" organism which has proven adaptable in the past to new substantive and practical challenges, and that today – under attack from various quarters – will need to demonstrate its adaptability again. Under this theme, a range of programmes will be developed to address the evolving needs of users (both commercial and investor-State), the impact of the rapidly changing face of technology on the practice of arbitration, the expectations of the public, and the convergence or divergence of legal traditions and cultures.

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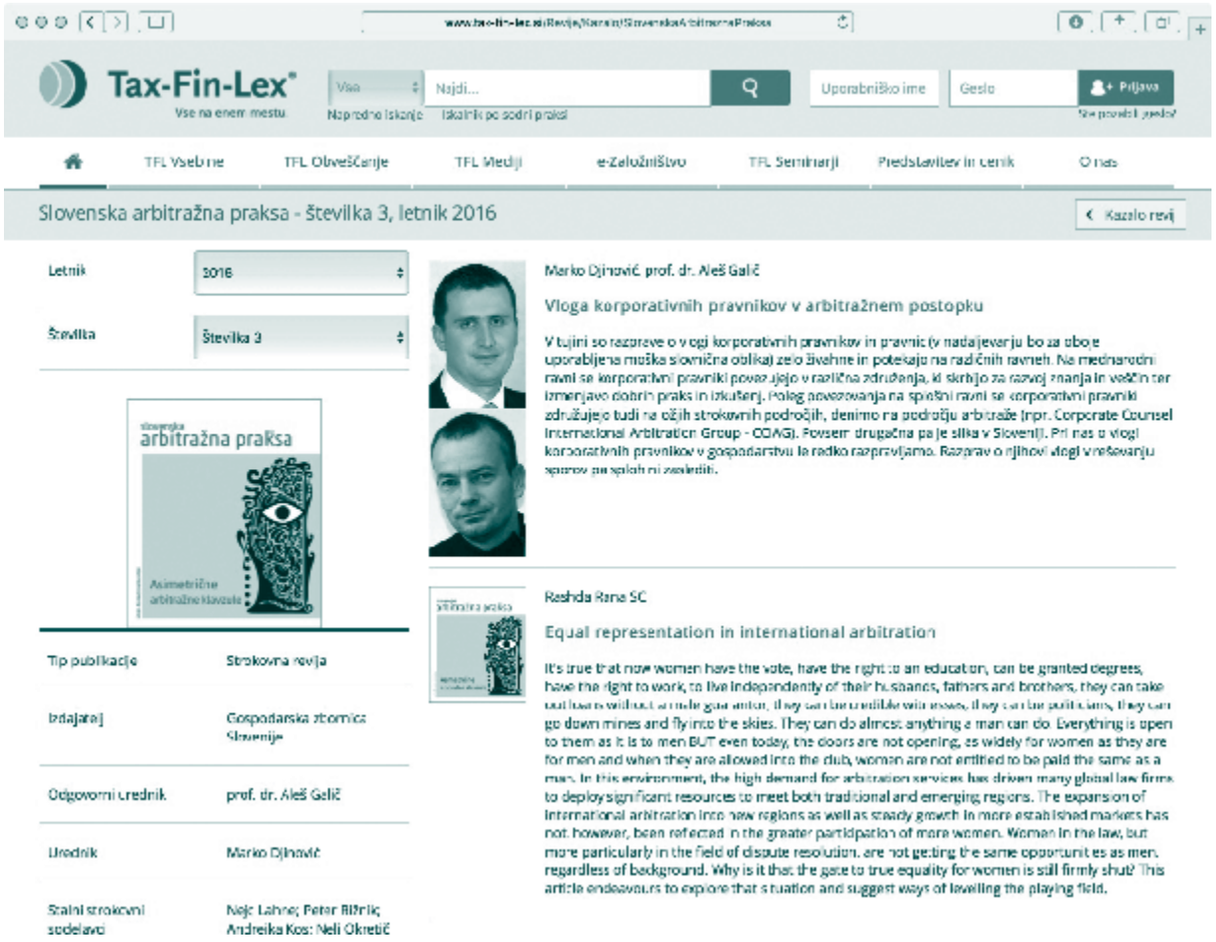

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Navodila avtorjem za pripravo prispevkov

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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.

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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.

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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.

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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

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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.

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